Title

“Discarding That, Adopting This” 去彼取此: The Northern Wei and Stories of Chinese Legal History

Author

Friedman, Daniel Butler

Publication Date

2023

Peer reviewed|Thesis/dissertation

“Discarding That, Adopting This” 去彼取此:
The Northern Wei and Stories of Chinese Legal History

By

Daniel Butler Friedman

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

History

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Michael Nylan, Chair
Professor Mark Csikszentmihalyi
Professor Rebecca McLennan

Fall 2023

Abstract

"Discarding That, Adopting This" 去彼取此:
The Northern Wei and Stories of Chinese Legal History

by

Daniel Butler Friedman

Doctor of Philosophy in History

University of California, Berkeley

Professor Michael Nylan, Chair

Whether they know it or not, many views of Chinese legal history continue to rely on the idea that Chinese law became thoroughly Confucian thousands of years ago and has since resisted all efforts to adjust that underlying philosophy. This "Confucianization" hypothesis represents a consequential misunderstanding: in the US, it adds fuel both to increasingly dangerous Sino-American hostilities and anti-Asian violence, while in China it underpins the government's ethno-nationalist expansionism in Tibet, Xinjiang, and Hong Kong. This dissertation begins by examining the historical roots and some of the present-day effects of this view.

A key assertion of the Confucianization hypothesis is that Chinese law was never significantly influenced by any of the "non-Chinese" groups who governed the territory administered today by the People's Republic of China. In fact, supporters of this idea claim, Chinese culture in general and law in particular was so attractive to these outside groups that they adopted it almost wholesale. A prime example offered as evidence of this picture of largely untroubled cultural homogeneity is the Northern Wei 北魏 (386-535), a dynasty founded by a formerly nomadic group which conquered and then ruled China for a century and a half. In a speech several years ago, Chinese President Xi Jinping 習近平 singled out the Northern Wei and its adoption of Chinese practices as proof of the unique power and worth of Chinese culture.

I challenge such claims by examining two major texts relating to Northern Wei law: the administrative and legal treatises in the *History of Wei* 魏書, a government-sponsored history written in the sixth century by Wei Shou 魏收 (506-572). Many of the most reductionist views of Chinese legal history draw on these texts, while many of the scholars focusing on the ethnic and cultural complexity of Northern Wei (contra the Confucianization hypothesis) have turned away from the *History of Wei*, leaving it primarily to those with the most polemical ends. I argue that these texts actually reflect a diversity of theory and practice far beyond what is generally recognized, and that the origins of important features of imperial Chinese law and administration can be found in the synthesis of approaches these treatises record. By focusing on that diversity, this dissertation hopes to revive interest in works that offer the potential to further complicate some of the simplistic but still-influential attitudes to both the Northern Wei and to Chinese history as a whole.

To Michael, for unfailing generosity, wisdom, and support. To Liz and Alan, for making this all seem easy. To Lila, for keeping the rest of the world in view. To David, whose fault this is and to Sheela, whose problem it became and without whom, nothing. *Contra mundum*.

TABLE OF CONTENTS

Introduction

Our mental worlds, out of which we dream and then build our physical ones, are in large part founded on how we conceive of our relationship to the past. We are preservers or innovators, shaking free of our parents' restrictions, carrying on their legacies, or some mix of the two. These worlds are foundational to civilizational as well as personal identities: America cast off the shackles of Old World tyranny and still embodies the promise of its founding; America has only intensified the racist hatred it inherited from Europe; America sometimes succeeds and sometimes fails to live up to the egalitarian ideals of its Revolution.

This past against which we understand ourselves and our communities is often imaginary, and the more ancient the history, the more powerful it is as a symbol, because it fades into a few hazy details that everyone knows and which can be easily repurposed for metaphorical use. Also, there aren't many people who know anything substantial about it, so you can't be challenged when you talk nonsense about it. Many people know some things about the American founding, but not much, for example, about Ancient Rome beyond the short swords and shorter skirts. Then the amateur enthusiast who has listened to a few podcasts can claim to speak with an authority grounded in the most foundational images of their culture and that of their hearers. For example, a recent *Washington Post* article argued that American men frequently think about the Roman Empire, much to the bemusement of the women in their lives. The interviewees stressed that their interest derived from what they perceived to be to Rome's foundational role in contemporary American culture.

> "So many things in our lives today were influenced by the Roman Empire," he explained in a post. "Language, food, philosophy, architecture, war, entertainment, sports, mythology, culture. … I don't actively focus on the Roman Empire but the connection always pops into my head as I go about my daily life."[1]

Those who make these invocations are often broadly indifferent to how the ideas they cite were constructed, generally viewing the past as an easily knowable collection of uncontested facts. In the same *Post* article, one historian explained that,

> "Since at least the 19th century, she said, historians have tended to view ancient Rome through the prism of politics and warfare, in part as a result of their reliance on "elite, masculine" sources.
>
> "That has informed popular culture," she said. "And yet — it's then missing out on so much."[2]

This dissertation concerns one small part of Chinese legal history, which is one of the most consequentially imagined pasts against which the "modern West" has measured itself, without concerning itself overly much with what the sources actually say. It's not new (since Edward Said) to observe that "the West" and "modernity" are constructed through these imagined oppositions. The role of Chinese law in those constructions is somewhat newer. But

[1] Leo Sands, "How Often Do Men Think about Ancient Rome? Quite Frequently, It Seems.," *Washington Post*, September 15, 2023, https://www.washingtonpost.com/lifestyle/2023/09/14/roman-empire-trend-men-tiktok/.
[2] Sands.

stories about *premodern* Chinese law—as well as about the works that describe and analyze it—and the role they have played in shaping contemporary American and Chinese self-conceptions haven't attracted much attention.

It would likely surprise many to learn that the law of the Northern Wei 北魏 (386-535)—a dynasty founded by former Mongolian nomads, the Tuoba 拓拔 clan of the Xianbei 鮮卑 people who ruled the North China Plain from the fourth through the sixth centuries—plays a major role in contemporary understandings of Chinese legal culture. In a 2019 speech, Chinese President Xi Jinping 習近平 argued that, "The reason that Chinese culture is so endlessly brilliant, so extensive and profound, lies in its all-embracing and tolerant characteristics." His second example for this extraordinary feature of "Chinese culture" was "the Sinicizing reforms of Emperor Xiaowen of the Northern Wei." These reforms were largely legal and administrative reorganizations that many scholars in both China and the West argue marked the foreign Northern Wei's definitive adoption of a tradition of Chinese law going back to the early empires in the last few centuries BCE and beyond; because many (if not most) also view that tradition as in some sense "Confucian," this phenomenon is referred to almost interchangeably as "Confucianization" or "Sinicization." Through this and similar processes, Xi claimed, "Each group's culture enhances the beauty of the others and Chinese culture is endlessly renewed. This is the root of our great culture's self-confidence today."[3] Xi's speech was a dramatic but by no means idiosyncratic illustration of the current Chinese government's view of this period of history. "Contemporary Chinese state propaganda tends to highlight a cultural reform of ethnic integration beginning in 493 AD under Emperor Xiaowen," write the authors of an in-depth study of medieval Chinese bureaucracy. "This so-called 'sinicization' narrative focuses on the Tuoba rulers adopting Han Chinese clothing, language, and surnames, as well as relocating the central government to Luoyang, the capital of former Chinese dynasties such as the Later Han and Western Jin empires."[4]

How we imagine the past constrains and directs how we imagine the future. In northwestern China today, the government is engaged in a massive campaign to forcibly assimilate millions of members of the Uyghur minority group, justified in part by its vision of Chinese history. In November 2019, the *New York Times* published some pages from a cache of documents related to the Chinese Communist Party's policies on members of the Uyghur ethnic group and the region of Xinjiang.[5] The documents, now referred to as the "Xinjiang Papers,"

---

[3] General Secretary Xi Jinping's Speech at the 2019 National Unity and Progress Commendation Conference 习近平总书记在 2019 年全国民族团结进步表彰大会上的讲话. Li Cui 李翠, "Beiwei Xiaowen Di Hanhua Gaige: Ge Minzu Wenhua Hujian Rongtong de Jingcai Pianzhang 北魏孝文帝汉化改革：各民族文化互鉴融通的精彩篇章 [The Sincization Reforms of the Northern Wei Emperor Xiaowen: An Excellent Chapter of the Mutual Learning and Intermixing of Each Ethnic Group]," 中国共产党新闻网 [Chinese Communist Party News Web], July 19, 2021, http://cpc.people.com.cn/n1/2021/0719/c437562-32162232.html.

[4] Joy Chen, Erik H. Wang, and Xiaoming Zhang, "Leviathan's Offer: State-Building with Elite Compensation in Early Medieval China," *SSRN Electronic Journal*, 2021, 67, https://doi.org/10.2139/ssrn.3893130.

[5] The paper never released most of the material, which it received from an anonymous Chinese official. In September 2021, the same documents were also transmitted anonymously to the London-based Uyghur Tribunal. Dr Adrian Zenz, "The Xinjiang Papers: An Introduction," *The Uyghur Tribunal*, February 10, 2022, 2, https://uyghurtribunal.com/wp-content/uploads/2021/11/The-Xinjiang-Papers-An-Introduction-1.pdf. The Uyghur Tribunal is an "independent tribunal" (i.e., not associated with the government) chaired by the lawyer who prosecuted Slobodan Milosevic. "UK Tribunal to Hear Witnesses on China Genocide Accusations," AP News, February 4, 2021, https://apnews.com/article/race-and-ethnicity-london-china-slobodan-milosevic-dce87ecaa1500434bbc098725dfc5f1b.

include speeches by Xi Jinping marked "top secret," "denoting material that if leaked 'will cause particularly serious damage to the security and interests of the country.'"[6] "This appears to be the first-ever instance that material with 'top secret' statements made by a Chinese head of state have leaked into the public domain."[7] One such speech explains that China's greatness lies in its ability to absorb foreign cultures over millennia while retaining its core Han identity.

> "The formation of the big family… is based on plurality and unity" and its "multi-ethnic unification"… was consolidated during the Qin-Han period (221-206 BCE) through "historical processes of contact, communication, and fusion," with "Central Plains Han" as the primary "formative ethnic group."[8]

This, again, is the "Sinicization"[9] theory, holding that China's culture, defined by the practices and ideas of its ethnically Han majority, has for at least several thousand years constituted the core civilization in the territory now governed by the Chinese Communist Party, sometimes absorbing minor elements from outside groups but never losing its central virtues. By far the most common result was that those outside groups naturally became somewhat or entirely "Chinese," attracted by the manifest superiority of Han ways of living and thinking. To hear Xi Jinping tell it, thousands of years of Chinese history have been leading up to the present condition of Chinese society: a large, happy "family" dominated by the ethnic Han majority and its superior culture with sufficient dashes of ethnic minorities to both spice up the country and to justify certain projects of territorial expansion, all benevolently supervised by the Chinese Communist Party.

The CCP's projects in Xinjiang are an effort to take the Sinicization theory that drives such views of the past and put them into practice as forward-looking policies: if minority peoples naturally assimilated themselves to Han culture throughout Chinese history, surely they can be made to do so today. That belief has resulted in a massive effort to control the lives and attitudes of China's large northwestern population, during which the CCP has detained at least a million Uyghurs in camps, "subjected to invasive surveillance, sexual violence, child-separation, and psychological trauma. Nearly 10 million Uyghurs and Kazakhs outside the camps navigate networks of checkpoints, interpersonal monitoring, hi-tech surveillance, and forced labour."[10] These attempts to bring about big changes in the way so many people think and behave also have major impacts on the government trying to effect those changes, requiring more active institutions more directly managed by central authorities.[11] The result of all this control is a fundamental shift in the nature of the contemporary Chinese state, made possible by new surveillance technologies: "Xi has shifted the PRC's institutional framework from what was

---

[6] Zenz, "The Xinjiang Papers," 2. Although American readers may find the idea of top secret presidential speeches strange, David Tobin (one of the first scholars to analyze the documents) explains that, "It is standard practice in PRC state-media (e.g., Xinhua, CCTV, etc) to report on key speeches by referencing documents and key quotes without releasing the documents," although "[t]hese types of materials are widely disseminated and studied by cadres at all levels of the PRC government." David Tobin, "The 'Xinjiang Papers': How Xi Jinping Commands Policy in the People's Republic of China" (University of Sheffield, School of East Asian Studies, May 19, 2022), 7–8, https://www.sheffield.ac.uk/seas/news/xinjiang-papers-how-xi-jinping-commands-policy-peoples-republic-china.
[7] Zenz, "The Xinjiang Papers," 2.
[8] Tobin, "The 'Xinjiang Papers,'" 21–22.
[9] Or some variation on this word, like "Sinicisation," "Sinification," or even "Chinese-ification."
[10] Tobin, "The 'Xinjiang Papers,'" 5.
[11] Tobin, 60.

considered a bureaucratic-authoritarian state, tolerating no alternative sources of political authority or organisation, to a more personalised totalitarian state, with alternative identities and thought on history and culture treated as existential national security threats."[12] This change has major implications both for China and for other governments seeking to maintain relations with a country whose leader is increasingly bent on leveraging his authority to carry out programs incompatible with most contemporary notions of human rights. "Xi Jinping personally commands state terror that intends to commit genocide and uses diplomacy and economic interpenetration to achieve that goal, as well as preventing any opposition at home and abroad."[13]

Though many would explicitly reject both the Han-supremacist approach to Chinese history and the contemporary actions that approach is used to justify, large numbers of scholars writing in both Chinese and English have nevertheless accepted what amounts to the same story about Chinese legal culture: that it is a continuous tradition, generally identified as "Confucian," beginning in the Western Han 西漢 (202 BCE-9 CE) and cemented in the Tang 唐 (618-907), with the Northern Wei functioning to merely connect the early and medieval empires by either completely adopting "Confucian" practice or simply leaving no mark on the conventions they transmitted. (In Chapter 1, I describe the formation, nature, and consequences of this story.) This narrative has been applied to many periods of Chinese history, but I believe it is particularly crucial to study the ways in which the information we have about the law of the Northern Wei demonstrates the hollowness of its core thesis, which obscures both the much greater complexity of legal ideas at various moments in the Chinese past and the contributions of non-Han actors to those ideas. When the Northern Wei are misrepresented as either wholesale adopters of "Confucian" law or as absent from the Chinese legal tradition, such distortions not only warp our understandings of history but are also used by Chinese thinkers (as in President Xi's speech) to make powerful statements about China's role in the world today and to justify the Chinese Communist Party's expansionist vision in Xinjiang and Southeast Asia. On the Western side, a view of Chinese legal culture as continuous and ethnically homogenous encourages an ignorant and generalized suspicion of not only the actions of the CCP but anyone who is perceived as ethnically tied to that tradition. My aim in this dissertation is thus to highlight some of the ways in which the major text on Northern Wei law—the legal treatise in the *History of Wei* 魏書 刑罰志—challenges the reigning paradigms of "Confucianization" and "Sinicization," in the hopes that such challenges may help to limit the most harmful uses of Chinese legal history in contemporary political domains.

"Confucianization"

One of the major corollaries to the theory of Sinicization is that of "Confucianization," which is more or less the same idea but with an emphasis on the supposedly "Confucian" moral qualities of Han civilization, which (this view claims) proved irresistible to the non-Han peoples who encountered them. Increasingly, Xi Jinping and the CCP are associating this "endlessly brilliant" culture with the world's most famous "Chinese" person: the 6th-century BCE philosopher Confucius. The CCP often celebrates the ancient sage, identifying themselves as the inheritors of the tradition he had the greatest hand in making glorious. Internationally, the most dramatic demonstration of the newly close association between the CCP and Confucius is the

[12] Tobin, 62.
[13] Tobin, 63.

Confucius Institutes, the centers (often attached to universities) whose mission is to teach Chinese language and culture and outside of China, but more ostentatious displays are happening domestically. "As part of the opening ceremony of the 2008 Summer Olympic Games in Beijing, a worldwide audience listened as the words of Confucius were read by a legion of performers parading as the 3,000 disciples of the Master."[14]

> In the wake of China's economic growth by the end of the twentieth century, Confucius was requisitioned by Communist leadership as an approachable posterchild for increased cultural and economic expansion abroad… 2010 saw a proliferation of socio-political uses/celebrations of Confucius, including (to name just a few examples) the monumental Confucian Canon project, the founding of the Institute for Confucius Studies at Peking (Beijing) University, and the creation of the Confucius Peace Prize.[15]

This phenomenon is equally reflected in scholarly endeavors as in governmental ones. As a recent study of the academic work that supports and advances CCP claims about premodern Chinese history demonstrates, "Confucianism" receives the most laudatory attention.[16] Given how the government uses history, that scholarship matters a great deal: the Xinjiang Papers revealed that Confucius and the philosophical tradition with which he is associated are likewise an important rhetorical ammunition for the government, as Xi "deploys ideas from classical Chinese texts linked to party-state theory to assert the superior Chinese-ness of his approach, distinguished from practices deemed Western."[17]

The "Confucianization" theory is especially forcefully applied to legal history. The CCP today claims a kind of democratic legitimacy based on the ostensibly "people-centered thought" at the heart of its governing philosophy. As the study cited above explains, Chinese academics writing about "Confucianization" now frequently emphasize this aspect Chinese legal culture. The "reappearance in contemporary political life" of this supposedly traditional view, "proves, for some authors, that [China's 'excellent traditional culture'] represents a lineage of society-oriented political theory and practice which runs uninterrupted from ancient rulers all the way up to the current communist leaders."[18] A paradigmatic example of the crucial role a "Confucianized" legal system is seen as playing in Chinese civilization can be found in the work of Zhang Jinfan, a prolific, much-cited, and influential[19] historian of Chinese law working in China, who identifies "Confucianism" as one of the core features of "Chinese legal civilization" in his recent historical overview of the topic.

---

[14] Kevin Michael DeLapp, ed., *Portraits of Confucius: The Reception of Confucianism from 1560 to 1960* (London; New York: Bloomsbury Academic, 2022), 871.
[15] DeLapp, 876–77.
[16] Aleksandra Kubat, "Morality as Legitimacy under Xi Jinping: The Political Functionality of Traditional Culture for the Chinese Communist Party," *Journal of Current Chinese Affairs* 47, no. 3 (December 1, 2018): 56, https://doi.org/10.1177/186810261804700303.
[17] Tobin, "The 'Xinjiang Papers,'" 34.
[18] Kubat, "Morality as Legitimacy under Xi Jinping," 56.
[19] See, for example, this article devoted to praising Zhang's contributions to the field of Chinese legal history. Gu Yuan 顾元, "Zhang Jinfan: Xin Zhongguo Falü Shixue de Zhuyao Kaichuang Zhe He Dianji Ren 张晋藩教授: 新中国法律史学的主要开创者和奠基人 [Professor Zhang Jinfan: Principal Founder and Pioneer of New Chinese Legal History]," *Zhongguo Dizhi Daxue Xuebao* 中国地质大学学报：社会科学版 4, no. 1 (2004): 1–6.

> The economic pattern of agrarianism, the political system of despotism, the social structure of family-centered patriarchy, the stable blood and geographical relation- ships, the unified and multi-ethnic national composition and the Confucianism-dominated ideology in ancient China have constituted a unique national condition which has further determined the main feature of Chinese legal civilization.[20]

As Zhang's work (and that of many other Chinese legal historians) makes clear, a critical component of the legitimacy of the current government is the unbroken Han-centric legal tradition that conveys the "Confucian" values of premodern China into the present day. By failing to recognize the significant and lasting changes non-Han groups made to Chinese legal and administrative ideas, "Confucianization" has become as much an ethnic claim as it is a cultural one, i.e., that the Han Chinese population of the North China Plain are the only ones who created and perpetuated the real Chinese legal tradition. In its modern form, this argument essentially erases groups like the Northern Wei, a dynasty founded by former nomads from present-day Mongolia that ruled the central northern region of today's People's Republic of China from 386 to 535 and whose laws and institutions (studied in this dissertation) had major impacts on subsequent Chinese law. But many scholars today, under the influence of the Sinicization and Confucianization hypotheses, claim that they were simply absorbed inexorably into Han Chinese cultural practices due to the latter's evident superiority. Zhang Jinfan writes that,

> During the more than one and a half centuries of ruling by Northern Wei Dynasty, after absorbing the advanced legal culture of the Han nationality… the policy of overall Chinesization [sic] was introduced … all doubtful cases were judged according to Confucian classics, which not only sped up the process of the feudalization and confucianization of laws, but also indicated the direction of the development of the legal system of the Northern Dynasty and fostered the progress of the entire society.[21]

Zhang claims that the Northern Wei were merely copying and transmitting the laws of the earlier Han-dominated societies that previously occupied the territory they had conquered. Similar views appear in the English-language survey-style works on Chinese legal history available in American law libraries,[22] as well as in the numerous law review articles that cite Zhang Jinfan's work. In the view of these authors, the Northern Wei and their inheritors are remarkable primarily for their continuation and development of pre-existing Chinese legal ideas, serving as a conduit between the Eastern Han and the Sui and Tang.

In this view, Chinese law has never been significantly influenced by any non-Han group, a view that contributes to the erasure of the historical role of non-Han peoples in the formation of "Chinese" culture and lends itself to easy appropriation by a government committed to imposing draconian regimes of forced assimilation on ethnic outsiders through increasingly authoritarian state bureaucracies.

---

[20] Jinfan Zhang, *The History of Chinese Legal Civilization: Ancient China—From About 21st Century B.C. to 1840 A.D.* (Singapore: Springer Nature, 2020), v.
[21] Zhang, 408–9.
[22] John W. Head and Yanping Wang, *Law Codes in Dynastic China: A Synopsis of Chinese Legal History in the Thirty Centuries from Zhou to Qing* (Durham, N.C: Carolina Academic Press, 2005). He Qinhua 何勤华, *An Outline History of Legal Science in China*, trans. Fu Junwei et al. (Wolters Kluwer, 2016).

Western Views

That Chinese politicians, seeing themselves as combatants in an existential global econo-cultural competition, and PRC scholars who increasingly have good cause to fear retribution if they stray from the party line should leverage their own history for propagandistic purposes is perhaps unsurprising. "Whatever qualms historians may have about the term 'Confucianism,'" writes the historian of Chinese law Taisu Zhang, "it is, and will probably continue to be, a central concept in modern Chinese political discourse, constantly being redefined and attached to any number of social and political causes."[23] More strikingly, *American* politicians and scholars tell the same story about the present-day relevance of ancient Chinese culture, which they mostly call "Confucian." As Senator Marco Rubio said in 2018 (characterizing the Chinese position): "Our greatness comes from strong leaders. And they took that Confucian heritage, combined it with the strong Communist party, and what they've argued is we need a strong government to govern our society."[24] Rubio is hardly alone in fixating on the continuing importance of ancient Chinese ideas for today's world. Jing Tsu, a professor of modern Chinese literature and culture at Yale, "complains that she is often asked by people in Washington to explain ancient Chinese ideas such as Sun Tzu's The Art of War." She asks, "Would you explain American politics with reference to Socrates? Of course not. So why would you think of China as being frozen in time?"[25] Zhang writes that these ideas "continue to have surprising traction with Western intellectuals, many of whom have yet to advance substantively beyond the Weber and Wittfogel stereotypes of 'Confucianism' as either fundamentally 'irrational' or 'despotic.'"[26] Li Chen, another historian of Chinese law, seconds Zhang's view: while "this framework has come under severe criticism… its influence remains strong among some academics and hardly diminished among the general public."[27] In a 2016 article, the eminent historian of late imperial Chinese law, Philip C.C. Huang, warned of the dangers this kind of thinking:

> a persistent conceptual frame that sharply juxtaposes the West and China into an either/or binary, such that the dominant themes have been either the superiority of the West, with China as its opposite "other" or, in the most recent generation, the reverse, of a China equivalent to, superior to, or just like the West, still according to the West's standards and still in an either/or binary framework.[28]

Just as in China, the claim that Chinese law is "Confucian" is everywhere in Western scholarship, and most people who make it wouldn't consider it in the least controversial. In his

---

[23] Taisu Zhang, *The Laws and Economics of Confucianism: Kinship and Property in Pre-Industrial China and England*, Cambridge Studies in Economics, Choice, and Society (Cambridge [UK] ; New York: Cambridge University Press, 2019), 265.
[24] "Transcript: An Interview with Marco Rubio," *The Economist*, accessed November 21, 2023, https://www.economist.com/democracy-in-america/2018/05/14/transcript-an-interview-with-marco-rubio.
[25] Yuan Yang, "Jing Tsu: 'The Days of Armchair Scholarship Are over If You're Studying China,'" *Financial Times*, February 10, 2023.
[26] Zhang, *The Laws and Economics of Confucianism*, 265.
[27] Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, & Transcultural Politics*, Studies of the Weatherhead East Asian Institute, Columbia University (New York: Columbia University Press, 2016), 5.
[28] Philip C. C. Huang, "Our Sense of Problem: Rethinking China Studies in the United States," *Modern China* 42, no. 2 (March 1, 2016): 117, https://doi.org/10.1177/0097700415622952.

famous and extraordinarily influential work *The Clash of Civilizations*, Samuel Huntington divides the world into several competing social and legal regimes, of which one is "Confucian": "All scholars recognize the existence of either a single distinct Chinese civilization dating back at least to 1500 B.C. and perhaps to a thousand years earlier, or of two Chinese civilizations one succeeding the other in the early centuries of the Christian epoch."[29] (Although Huntington says he wants to use the term "Sinic" instead, the book continues to call Asian societies "Confucian.") The view is particularly pronounced in the American legal scholarship published in the student-edited law reviews that constitute the primary forum in which legal academics air their ideas. Over 100 law review articles published in 2022 alone reference Confucian ideas, and nearly 1,500 such articles have appeared in law reviews over the last five years. To take one typical example among hundreds, a 2022 article on corporate social responsibility asserts that what one must understand when engaging with companies in China today is this: "Most scholars today agree that Confucian philosophy, though its popularity has ebbed and flowed throughout Chinese history, was never abandoned by the Chinese people."[30] Though they talk about those ideas in somewhat different ways, almost all the pieces that I have reviewed make the same mistaken assumptions: "Confucius"/"Confucianism" explains or gives rise to most of what matters in Chinese law, and the "Confucian" core of Chinese legal culture hasn't really changed in thousands of years, which explains the features of its contemporary law that are at best exotic and at worst despotic.

As in China, there are immense dangers to these poorly understood histories, though of a different kind: the CCP relies on its idea of Chinese "Confucian" law to bolster its oppressive policies in place like Xinjiang, while American lawmakers use the same view to partly justify their hostility towards China. As William Alford, a preeminent legal academic who has written extensively about Chinese legal history, puts it in his critique of Roberto Unger's over-simplified use of Chinese history in his legal theory—a use he argues typifies the approach of many American legal academics—such academic disparagement can have disastrous real-world impacts.

> By presuming that the integrity of Chinese civilization is inconsequential and easily violable to serve our ends, he leaves the impression that this civilization is less deserving of scrutiny than those of the West and that we need not consider it with particular care as we seek either to understand or to transform the world. Sadly, modem history is all too replete with the consequences of this type of approach to China and other non-Western civilizations.[31]

As a primary example of such consequences, Alford cites the Vietnam War, an analogy that looks increasingly apt in the context of Sino-American relations today. In an interview with the podcast *On the Media*, Les Gelb (the compiler of the Pentagon Papers) confirmed Alford's sense that ignorance of Asian culture generally was a major factor in the bloodshed of the 1970s:

---

[29] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon&Schuster hardcover ed (New York: Simon & Schuster, 2011).
[30] Yongmin Bian and Xiaobao Liu, "Corporate Social Responsibility with Chinese Characteristics: A Rivalry of Western CSR?," *US-China Law Review* 19 (2022): 169.
[31] William P. Alford, "The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past," *Texas Law Review* 64 (1986 1985): 972.

> You know, we get involved in these wars and we don't know a damn thing about those countries, the culture, the history, the politics, people on top and even down below. And, my heavens, these are not wars like World War II and World War I, where you have battalions fighting battalions. These are wars that depend on knowledge of who the people are, what the culture is like. And we jumped into them without knowing. That's the damned essential message of the Pentagon Papers.[32]

Gelb observed that the damage of this kind of ignorance continued long after the end of the Vietnam War: "because we'd never learned that darn lesson about believing our way into these wars, we went into Afghanistan and we went into Iraq." (Violence is also apt to spill over from the international to the interpersonal, as the recent spate of anti-Asian violence attests: the killer of six Asian women in Atlanta-area massage parlors in 2021, for example, attended a church at which the pastor preached sermons highlighting China's unchristian nature, saying, "Confucius will not take anyone to heaven."[33]) As Mae Ngai wrote recently in the *New York Times* about the Biden administration's efforts to deescalate tensions with China, "While lowering the temperature is welcome, it is not enough. The administration should stop seeing trade with China solely through the prism of national security. As long as that linkage persists, Chinese and other Asian Americans will continue to be on the receiving end of racist harassment, violence and discrimination."[34]

Second, as these kinds of attacks demonstrate, claims about Confucius and "Confucianism" are ultimately just as much ethnic as philosophical: part of the way you know someone is "Chinese" is that they subscribe to "Confucian" culture. Moreover, the damage of this ethnic/cultural confusion is not limited to violence perpetrated by the relatively powerless and mentally ill. Prevailing beliefs about Chinese legal culture are part of the same essentialist attitude toward Chinese culture in general that has, for example, caused the US Department of Justice to investigate and arrest people it perceives as "Chinese" based on a very expansive and cultural notion of Chineseness.[35] As Margaret Lewis has shown, the way the DOJ picked its China-related targets was for years infected by the belief that culture is at the root of what it means to be Chinese and that anyone who shares that culture (however minimally) is thereby worthy of suspicion. The disappearance of this specific policy seems to have little effect on the suspicion Lewis describes.[36]

Third, Americans cannot understand their own legal culture without understanding how Chinese law has been represented in America. The doctrine of plenary power in immigration

---

[32] "What the Press and 'The Post' Missed | On the Media," WNYC Studios, accessed November 21, 2023, https://www.wnycstudios.org/podcasts/otm/segments/what-post-missed-episode.

[33] "Christ's Return - Part 2 - 2 Peter 3:1-18 - Milton Community Church (Podcast)," Listen Notes, August 16, 2020, https://www.listennotes.com/podcasts/milton-community/christs-return-part-2-2-ixP1GLQz-09/. Lucas Kwong, "The Yellow Peril's Second Coming," *The Revealer* (blog), June 3, 2021, https://therevealer.org/the-yellow-perils-second-coming/.

[34] Mae Ngai, "Opinion | Ron DeSantis 'Banned China From Buying Land in the State of Florida.' How Did We Get Here?," *The New York Times*, December 11, 2023, sec. Opinion, https://www.nytimes.com/2023/12/11/opinion/chinese-people-property-sale.html.

[35] Margaret K. Lewis, "Criminalizing China," *The Journal of Criminal Law and Criminology (1973-)* 111, no. 1 (2021): 191.

[36] Leo Yu, "From Criminalizing China to Criminalizing the Chinese," SSRN Scholarly Paper (Rochester, NY, 2023), https://papers.ssrn.com/abstract=4250525.

law;[37] America's extensive and powerful immigration bureaucracy;[38] the hardening of racial categories in American jurisprudence;[39] and the system of biometric surveillance necessary to enforce these things[40] all stem at least in part from the late 19th-century desire to exclude Chinese people, based on the fear that their "Confucian" legal culture was incompatible with America's.

Because these views were formed as part of the Enlightenment-era project to explain what was special about "the West," often through the use of negative examples like China, to contest them accomplishes multiple objectives: 1) it enriches our understanding of Chinese history; 2) it clears away some of the Orientalist fog obscuring the motives of the present Chinese government; and 3) it challenges some of the most fundamental definitions ("modern," "Western") according to which our own society operates. We lose a great deal when we unthinkingly repeat these constructed narratives. The most obvious loss is scholarly. One of the great values of historical study is that it expands our imaginations, showing us ways people might live, think, and interact whose difference from contemporary conventions can make realize that almost everything we do is a choice of one kind or another, a choice that often could be made differently. When we so incautiously project our blinkered social and cultural visions backwards, we both lose our sense of the fascinating complexities of periods of Chinese law that are treated simply as links in an unbroken ethnic and cultural chain *and* cut ourselves off from the new ways of approaching current and future problems those complexities might inspire. The second loss is of greater practical concern: a simplistic view of China's past tied to a simplistic vision of its present makes a world in which China plays an increasingly dominant and aggressive role far more dangerous. It is my hope that a clearer understanding of how one important facet of Western impressions of China came to be, combined with a detailed study of one of the periods those impressions overlook, can help ameliorate some of these harms.

Sources and Approach

This dissertation largely concerns one of the periods of Chinese legal history singled out by Xi Jinping as demonstrating the powerful capacity of ethnic Han culture to absorb foreign influences and people through its obvious superiority. In his 2019 speech, the Chinese president referred to "the Sinicizing reforms of Emperor Xiaowen of the Northern Wei." In scholarship on the history of Chinese law, the Northern Wei period, which intervened between the two much more famous Eastern Han (25-220) and Tang (618-907) dynasties, is generally treated in one of two ways: 1) overlooked almost entirely; 2) viewed as the paradigmatic example of Han cultural superiority, as local Han bureaucrats convinced their foreign rulers to adopt "Chinese" / "Confucian" laws and institutions. According to this latter view, the Northern Wei thus constitute a vital link in the chain of the ostensibly continuous Chinese legal tradition, providing a vehicle for the transmission of Eastern Han laws and legal philosophies to the early Tang, whose famous code became the model for every subsequent Chinese dynasty until the 20th century, as well as for governments in other countries (like Japan, Korea, and Vietnam).

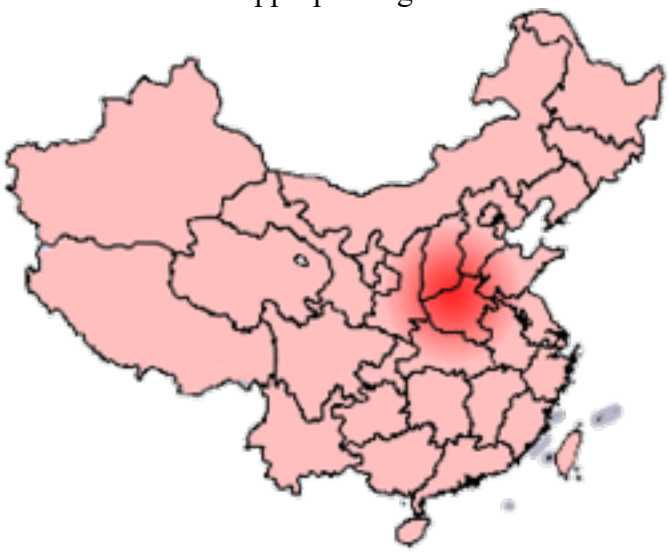
---

[37] Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge, Mass.: Harvard University Press, 2013).
[38] Erika Lee, *At America's Gates: Chinese Immigration during the Exclusion Era, 1882 - 1943* (Chapel Hill, NC: Univ. of North Carolina Press, 2003).
[39] Mae M. Ngai, "The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924," in *Race, Law and Society* (Routledge, 2007).
[40] Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Harvard University Press, 2009).

Crucially, the Northern Wei is rarely, if ever, seen as contributing anything to the tradition that passed through their hands. Against this prevailing consensus, my dissertation instead argues that the Northern Wei in fact significantly changed the institutional and legal models they encountered, introducing major new methods of bureaucratic organization and criminal justice that had profound and lasting impacts on "Chinese" law.

The Northern Wei

The rulers of the Northern Wei were members of the Tuoba 拓拔 clan of the Xianbei 鮮卑 (or Särbi), a nomadic group with roots in present-day Mongolia whose modes of living (according to archeological evidence) had long been quite different from those of the Central Plains (an area in and around modern-day Henan province in the People's Republic of China, shown below[41]), since as far back as the twelfth century BCE.[42] The Xianbei are a challenging subject for historians, since they left no records in their own language, "only scattered transcriptions of a few of their words and names into Chinese, in texts including the traditional history of Northern Wei" (i.e., the *History of Wei*).[43] Much of Xianbei history has thus had to be reconstructed from Chinese-language materials, written either by empires often inclined to view them as suspicious and threatening outsiders or by the Xianbei themselves after conquering the Central Plains and appropriating Chinese forms of language and historiography, on which they relied to cement their claim to rulership.



Nevertheless, a combination of textual and archeological material has enabled some insights into the pre-dynastic Tuoba, who likely came "from the thickly forested lands of the eastern foothills of the northern Khingan mountains, in what is now the far northeastern corner of China's Inner Mongolia."[44] They began migrating southward (i.e., towards the Central Plains) after the weakening of the Xiongnu—another group seen as threatening northern foreigners by the

[41] "Zhongyuan," in *Wikipedia*, July 24, 2023, https://en.wikipedia.org/w/index.php?title=Zhongyuan&oldid=1166879725.
[42] Charles Holcombe, "The Xianbei in Chinese History," *Early Medieval China* 2013, no. 19 (December 2013): 5, https://doi.org/10.1179/1529910413Z.0000000006. This ancient distinction has long served as an important basis for theories about ethnic identity and the assimilative power of Chinese culture, "since the Xianbei identity eventually merged into the general Chinese population and disappeared, moreover, contributing to a new Chinese synthesis." Holcombe, 2.
[43] "One of these names was 'Tuoba' itself, the modern Mandarin pronunciation of a contemporary Chinese transcription of an Altaic name rendered alphabetically as 'Tabgač' on the eighth-century Turkic Orkhon inscriptions." Scott Pearce, "Northern Wei," in *The Cambridge History of China: Volume 2: The Six Dynasties, 220–589*, ed. Albert E. Dien and Keith N. Knapp, vol. 2, The Cambridge History of China (Cambridge: Cambridge University Press, 2019), 155, https://www.cambridge.org/core/books/cambridge-history-of-china/northern-wei/44687DABD9B387BEB77442A1559AB8FD.
[44] Pearce, 156.

historians of the Central Plains—under the pressure of Eastern Han attacks in the first century CE.[45] Throughout the second and third centuries CE, the Tuoba participated in several alliances and conflicts with other groups to the north of the Central Plains, and "as the chieftainships began to become hereditary, group names and identities also became more stable."[46] However, in the third century, these groups seem to have been organized much more according to land than to culture or ethnicity: identities ''such as Xiongnu, Qiang, and Xianbei reflect neither ethnic, nor material, nor linguistic affinities, but represent shifting alliances of a political nature possibly with a territorial component.''[47]

The Tuoba eventually secured official recognition from Chinese emperors: in the early fourth century CE, Tuoba Yilu 拓跋猗盧 (r. 310-316) was given the title "Lord of Dai" 代公 and then "King of Dai" 代王 by the Western Jin 西晉 (265-316).[48] The Tuoba's closer connection with Chinese regimes both brought them further south and encouraged them to develop some Chinese-influenced modes of governance and legal administration.[49] In 386, Tuoba Gui 拓拔珪 abandoned the Dai name and established his new state of Wei; he was later recognized as Emperor Daowu 道武帝 (r. 386-409). "He thus at one and the same time advertised his interest in greater involvement in the Chinese territories—the original Wei had been one of the seven major powers of China's Warring States period (475–221 BCE)—while distancing himself from his in-laws."[50] Nevertheless, Tuoba Gui's choice of capital indicated that he wasn't necessarily ready to fully adopt Central Plains modes of social and governmental organization. Instead of taking over a preexisting city, "he decided to transport over 100,000 Later Yan officials, artisans, and peasants north to populate a brand new capital at Pingcheng (Datong, northern Shanxi)—an area more familiar to the Tuoba, but to the [Central Plains] literati a mere frontier outpost."[51] About a century later, the Emperor Xiaowen 孝文帝 (r. 471-499) moved the capital to Luoyang, a longstanding seat of Central Plains culture, and instituted the Taihe reforms of the mid-490s. Both moves have been considered attempts to more fully adopt "Chinese" culture and practices, though I argue here that this view obscures a great deal of the reality.

Wei Shou

In the *History of Wei*, its author, Wei Shou 魏收 (506-572), describes a period of profound changes. The Northern Wei, the focus of his history, is seen as the first so-called "conquest dynasty," a period during which the Central Plains were ruled by a group originating outside that area. In addition, the Northern Wei also saw the integration of Buddhism in Central Plains state and society, as well as the first beginnings of what might be called an ethnic consciousness among both the inhabitants of the Central Plains and those who governed them

[45] After this migration, Chinese sources like the *Records of the Three Kingdoms* 三國志 record that former Xiongnu began calling themselves Xianbei. Holcombe, "The Xianbei in Chinese History," 7.
[46] Holcombe, 8.
[47] Nicola Di Cosmo, "Han Frontiers: Toward an Integrated View," *Journal of the American Oriental Society* 129, no. 2 (2009): 207.
[48] Pearce, "Northern Wei," 157–58.
[49] Pearce, 158.
[50] Pearce, 159.
[51] Shao-Yun Yang, "Becoming Zhongguo, Becoming Han: Tracing and Reconceptualizing Ethnicity in Ancient North China, 770 BC-AD 581" (Masters, National University of Singapore, 2007), 65.

(though this consciousness was far less stable and definitive than many modern authors typically assume). In addition to portraying historical tumult, Wei Shou lived through his fair share himself: he was born during the last years of the Northern Wei, fled its capital for that of the newly established Eastern Wei, and wrote his history under the command of the emperor of the Northern Qi, the short-lived government that overthrew the equally brief Eastern Wei. (He died just five years before the Northern Qi was itself overthrown by the Northern Zhou, which was then shortly destroyed by the Sui.)

The circumstances of Wei Shou's life, the role of the historian he inhabited, and even much of the framing of his *History of Wei* provide ample reasons to believe that the history he wrote must have been infected by a propagandistic mission to praise the Northern Wei, including by emphasizing their ethnic and cultural ties to the inhabitants of the Central Plains. Significant criticisms have thus dogged the *History of Wei* and its author since the work's appearance in the sixth century. Endymion Wilkinson writes that the work was "much criticized by [the famous critic] Liu Zhiji and others who resented Wei Shou's support of the legitimate succession through Eastern Wei and Northern Qi (under which Wei Shou served) rather than through the southern dynasties." Writing in 1989, Jennifer Holmgren explained that Liu Zhiji's criticisms of Wei Shou and his work (among other factors) as biased and incomplete largely deterred both Chinese and Western academics from studying the Wei era at all, beginning with Wei Shou's contemporaries and those who wrote about history in the dynasties following his.[52] These indications have been viewed by some scholars as proof of the untrustworthiness of Wei Shou's accounts and by others of the powerful unity and desirability of Chinese culture. Nevertheless, Wilkinson writes, it is "now considered one of the best of the early standard histories."[53] This is in partly due to the greater distance between contemporary scholars and the medieval regional antipathies that drove many of the attacks on Wei Shou, and partly due to the fact that it's the best documentation of its period we have, representing "the earliest and most complete available record of the Northern Wei dynasty, as all of the earlier or closely contemporaneous such histories have either been lost or… directly derived from the" *History of Wei*.[54] However, I will argue that the criticisms Holmgren detailed in the late 1980s, criticisms she traced back to the sixth century, still inform many contemporary scholarly views of the *History of Wei* in ways that prevent us from seeing some of the value and interest that its texts can still provide. A closer look at the text's contents shows that Wei Shou was painting a far more complex picture that likely reflected a complex world.

Official Histories and Treatises

As explained at greater length in Chapter 2, the dissertation is largely based on translations and studies of significant but underappreciated sections of the so-called "official history" concerning the Northern Wei. Official histories were produced by single authors or committees throughout Chinese history, beginning with the Western Han 西漢 (202 BCE-9 CE) and ending with the Qing 清 (1644-1911). They generally covered the events, people, and ideas

[52] Jennifer Holmgren, "Northern Wei as a Conquest Dynasty: Current Perceptions; Past Scholarship," *Papers on Far Eastern History* 40 (1989): 3.
[53] Endymion Porter Wilkinson, *Chinese History: A New Manual*, Fiftieth anniversary edition. Enlarged sixth edition (Cambridge, Massachusetts: Harvard University Asia Center, 2022), 818.
[54] Kenneth Klein, "*Wei Shu* 魏書," in *Early Medieval Chinese Texts: A Bibliographical Guide*, ed. Cynthia Louise Chennault et al., China Research Monograph 71 (Berkeley, CA: Institute of East Asian Studies, 2015), 368.

of the preceding dynasty and were usually written with the official sanction and oversight of the imperial court. For hundreds of years, much of what we have known about the theory and practice of the law of premodern China was from the treatises or essays 志 of the official histories 正史, long works sanctioned by imperial courts detailing significant occurrences of previous dynasties. "Treatises were compiled for 18 of the 25 *Histories* (often by specialists) on matters of concern to the imperial government."[55] Part of what makes this whole genre so beguiling to historians is that, "The data in the treatises is summarized from primary sources that are no longer extant."[56]

The first official history treatise devoted exclusively to law was written by the Eastern Han 東漢 (25-220) historian Ban Gu 班固 (32-92) in his *History of Han* 漢書 and is still—according to Endymion Wilkinson, author of the gold-standard reference work *Chinese History: A New Manual*—"the basic source on Han law."[57] Since the Eastern Han, the vast majority of official histories have had "Treatises on Law and Punishment." This treatise and the many subsequent versions it inspired—"Of the 18 *Histories* that contain treatises, 13 have… treatises on penal law"[58]—have long provided scholars the basic story of the inception and development of Chinese law. According to Etienne Balazs, this is partly to do with their form, which provides us with pre-selected documents and events, illustrating those moments and concepts considered most historically illuminating or administratively useful.[59] As Zhang Jinfan puts it, "The Treatises on Law and Punishment are in essence a time-honored genre of legal historical monographs containing both the general and dynastic history both of legal systems and of legal thought."[60] The next treatise on law to appear after the *History of Han* was in the *History of Wei*.

These thematically organized essays have always been simultaneously alluring and problematic, in part because they frequently smooth over contested issues in order to present a more coherent narrative. For example, the first administrative treatise (which served as a model for Wei Shou's own) even "occasionally show[s] only tenuous links with reality," and attempts "to freeze essentially fluid subject-matter in static, somewhat impracticable terms."[61] As Étienne Balazs (the author of what remains some of the best work on particular treatises) explained, this freezing was an intentional effort to make the treatises more accessible to their intended audience: other administrators. "History," Balazs claimed, "was written by officials for

---

[55] Wilkinson, *Chinese History*, 703.
[56] Wilkinson, 703.
[57] Wilkinson, 330. Endymion Wilkinson, *Chinese History: A New Manual* (Cambridge, MA: Harvard University Asia Center, 2012), 330.
[58] Wilkinson, 704. Wilkinson, *Chinese History*, 704.
[59] Etienne Balazs, *Chinese Civilization and Bureaucracy: Variations on a Theme* (Yale University Press, 1967), 142.
[60] Zhang Jinfan 张普藩, "Zhongguo Fazhi Shixue Fazhan Licheng de Fansi He Qiwang 中国法制史学发展历程的反思和期望 [Reflections on and Hope for the Process of Historical Development of the Historical Study of Chinese Law]," *US-China Law Review* 美中法律评论 3, no. 1 (2006): 1. It's worth noting that many scholars don't agree with Balazs about the preeminent importance (or even the appeal) of the treatises, at least where law is concerned. Wilkinson points out that the legal essays seem to occupy a relatively minor position in the official histories. Wilkinson, *Chinese History*, 703. Even Hulsewé, who devoted so much effort to studying the Eastern Han legal treatise, felt that it yielded far less than he had hoped. "One might have expected," he wrote, that it "would have been a mine of information; in actual fact [it is] rather disappointing." Anthony François Paulus Hulsewé, *Remnants of Han Law* (Brill Archive, 1955), 11.
[61] B. J. Mansvelt Beck, *The Treatises of Later Han: Their Author, Sources, Contents and Place in Chinese Historiography* (Brill, 1990), 226.

officials."[62] As a result, the treatises naturally (though inadvertently) became some of the most-consulted sources not just for the administrators whose governmental activities they were meant to support but also for much later historians—for whom their convenience represented an irresistible draw—trying to understand the worlds in which those administrators and their predecessors lived. Because the treatises are simultaneously "rich in data" and often "devoid of stories and judgements," "historians have a tendency to draw from them uncritically." But a critical eye is vital to the proper use of these sources.

> It is Étienne Balazs who first reminded us that our historiographical sources are also the products of historiography, arguing that they were written 'by officials for officials... conceived as being guides to administrative practice'… Peeling back further layers of the onion, B. J. Mansvelt Beck's monograph-length study of the Later Han treatises reveals how we are now effectively writing histories from histories written from other histories borrowed from another history…[63]

These sources have been particularly subject to warping influences, beginning with their own authors and continuing to our most recent efforts to study them. For example, as Chapter 1 discusses, scholars like Balazs produced lengthy and detailed works on treatises in the mid-twentieth century, but interest (and funding) for such approaches dried up. Some reasons were natural: in the area of legal history, excavations began turning up actual legal documents from thousands of years ago, which seemed to promise a more direct access to the legal practice of the era than the high-level digests of the treatises. Others were more political: the Rockefeller Foundation, which had funded studies like Balazs' wanted simpler, more essentializing stories with which to frame America's Cold War competition with China and turned its money elsewhere.

That didn't mean, however, that people stopped using the treatises. As Balazs wrote, they are still some of the most convenient summaries of early history, and lots of authors wanted to try to reconcile the newly excavated manuscripts with the official histories. But the lack of institutional support (among other factors) contributed to an academic environment in which the study of works like the treatises I examine here was no longer nearly as highly valued, leaving it open to works of less careful or more polemical scholarship. I hope that this dissertation demonstrates the value of taking a renewed look at these texts.

Dissertation Outline

In Chapter 1, I trace the construction of the idea of "Confucian" Chinese law by both Western and Chinese thinkers. Descriptions of the unchanging nature Chinese law—invented over hundreds of years to suit particular debates—continue to fuel Western Sinophobia on the one hand and Chinese ethno-nationalism on the other. The Northern Wei is an important part of the story of legal "Confucianization," which misses out that dynasty's important "non-Chinese" contributions to "Chinese" law. Chapter 2 acknowledges that there are reasons to be suspicious that Wei Shou's work fully captures the complexity of the era he recorded, but argues that

[62] Balazs, *Chinese Civilization and Bureaucracy*, 135.
[63] Daniel Patrick Morgan, Damien Chaussende, and Karine Chemla, eds., *Monographs in Tang Official Historiography: Perspectives from the Technical Treatises of the History of Sui (Sui Shu)* (Springer Nature, 2019), 5.

scholarly views of the *History of Wei* miss a great deal of the heterogeneity his history in fact contains: Wei Shou's writing gets less attention than it should from those scholars doing the most interesting work on the Northern Wei, because it is seen as doing more to "Sinicize" the Tuoba rulers than I think is fair. Chapter 3 argues that the "Treatise on Administration and Lineages" 官氏志 from the *History of Wei* reflects much more cultural and practical multiplicity than is allowed by proponents of the Sinicization thesis (who often cite it). This study allows us to understand the extent to which Northern Wei ideas of legal administration and theory were embedded in the Chinese legal tradition, an extent far greater than is generally recognized. Chapter 4 is a study of the *History of Wei* "Treatise on Punishments" 刑罰志 (a translation follows as an appendix), arguing that this text shows both how much the Northern Wei deviated from the Chinese legal ideologies they encountered and how much they influenced them. I conclude by arguing that the static and homogenous conceptions of Chinese legal culture have played an important role in the most influential conceptions the 19th and 20th centuries, and that work that shows the multi-cultural/ethnic complexity of major moments in Chinese legal history thus challenges paradigms (such as "Western modernity") on which our society still relies.

Terminology: Chinese, Han, Central Plains

One of the central terminological difficulties of this project also provides a window into some of the most interesting questions it raises. The most common Chinese-language term for "Sinicization" is *Hanhua* 漢化, to become Han. This term conflates at least two components of the purported Sinicization process: the cultural and the ethnic. The word *Han* is closely associated with the dominant ethnic group living within the borders of the present-day country of China, but can also refer to language—*Hanyu* 漢語, meaning either modern Mandarin or simply Chinese in general—and is associated with a variety of cultural practices. Its use in historical scholarship about China presents a problem, because it can encourage both authors and readers to project the culture and ethnic boundaries of contemporary China backwards into contexts in which these categories obfuscate more than they illuminate. As Mark Elliott writes, "the historical usage of the term *Han* is highly unstable, and even in the contemporary world the term can be slippery."

> Sometimes it is used synonymously with "Chinese," sometimes not; people who might be considered Han in some contexts might not be in others—they might call themselves *Tangren*, for instance, as is very common among Cantonese speakers still today; and there is a long and lively debate over who the "true" Han people are and where they came from. In short, it is hard to escape the conclusion that *Han* is just one of many untidy terms that encumber the world we live in.[64]

Used incautiously, it may appear to concede the central argument of the most nationalist views of Chinese history, which imagine an essentially unchanging ethnic and cultural Han core stretching back five thousand years.

[64] Mark Elliott, "*Hushuo*: The Northern Other and the Naming of the Han Chinese," in *Critical Han Studies*, ed. Thomas Mullaney et al. (Univ of California Press, 2012), 173–74.

> One may be inclined to frame a response in terms of the enduring qualities or customs believed to define the Hua—a kind of cultural core of "Chineseness"—and the close connection seen to obtain between it, a geographic core (what is often called "China proper" or in older Chinese documents *neidi*, the "inner lands"), and a demographic core made up of the people who have historically inhabited China proper, that is, the group typically referred to as *Han*. But this response raises further uncertainties as to these various core notions: What set of beliefs, values, or practices makes Chinese culture "Chinese"? Where precisely do its geographic sources lie? And who, exactly, are the Han?[65]

As Elliott explains, contemporary scholarly understandings of "ethnicity" see it as something constructed and negotiated, always in flux in response to changing conditions. It is "a form of discourse arising from the social organization and political assertion of culture or descent-based difference, actual or perceived. This represents a fundamental rejection of the traditional idea that ethnicity is an immanent, immutable, 'primordial' condition; the new interpretation views ethnicity, like class and gender, as historically contingent."[66] This contingency was particularly on display during the Northern Wei, whose conquest of the Central Plains may well have inspired the need for greater ethnic self-definition on the part of the Han. In addition, it was often unclear from the texts of this period, whether "ethnicity" should be thought of in terms of genetic lineage, territory, or culture. In the latter two views, the Xianbei might adopt a Central Plains identity simply by ruling the right land or adopting the right ways of living. It seems likely, too, that Wei Shou reflected his sense of these ethnic groupings in various ways: sometimes using them to obscure differences between the Northern Wei and the Han for the purposes of shoring up the former's legitimacy, sometimes using them to exaggerate differences between those living in the Central Plains (i.e., both Xianbei and Han) and "barbarians" living further south.

Yang Shao-yun and Mark Elliot thus emphasize that some of the most foundational concepts of Chinese nationhood—concepts underlying the broadest claims of Chinese ethnic and cultural continuity—owe their origins not to the early empires but to the medieval period of disunion and foreign rulership to which the Northern Wei belongs. One area of particular focus is the idea and name of the Han ethnicity. There's some evidence to suggest that the fact of political and military control over the Central Plains by a group seen as foreign to it spurred the beginnings of an ethnic consciousness among the region's inhabitants, a consciousness that would eventually be denoted by the term *Han*. Before the fourth century, it meant only people living during the Han dynasty, "with no reference to culture, descent, language, or anything we might understand as indicating ethnic identity. Historians are mostly in agreement on this point: Han originated in the Han period but as a political identifier, not an ethnonym."[67]

In any case, no matter how widespread the usage was in Northern Wei times, Wei Shou didn't use it at all, favoring other labels.[68] The terms Yun identifies as those Wei Shou frequently uses to designate groups of people (*zhongyuan* 中原, *zhongzhou* 中州, *zhongtu* 中土, *huaxia* 華

[65] Elliott, 173.
[66] Mark C. Elliott, *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China* (Stanford University Press, 2001), 16.
[67] Elliott, "*Hushuo*," 180.
[68] Yang, "Becoming Zhongguo, Becoming Han," 84–85.

夏, and *zhuhua* 諸華) are largely territorial, suggests that Wei Shou may have been more interested in land than in genetics. As Charles Holcombe explains,

> Shao-yun Yang has argued… that those same Xianbei may have nonetheless also identified themselves in a broader sense as Hua (Chinese), and as people of *Zhongguo*, defined in terms of civilization and geography rather than narrow ethnicity. Satō Masaru 佐藤賢 speculates that the Tuoba Xianbei-ruled Northern Wei dynasty may have understood *Zhongguo* to include both the Central Plains of modern north China, which the Xianbei sometimes referred to as "Southern Xia" 南夏, and also the Xianbei homeland zone somewhat farther north, which they may have implicitly regarded as "Northern Xia" 北夏.[69]

This finding is consistent with Liu Puning's study of Northern Wei governmental legitimacy, which suggests that Wei Shou employed a mix of ethnic, territorial, and cultural conceptions of group identity in order to enhance the Tuoba's claim to legitimate rule.

> The Tuoba rulers could understood that history could be manipulated to justify their rulership, and they thus commissioned a series of historians to compile decorated historiography, a practice which was completed by Wei Shou, who insists on the Northern Wei dynasty's legitimate status and provides a "restored" image in the *Weishu* [*History of Wei*]. In that image, the Southern Dynasties are "barbarian" because they occupy "barbarous" territory, and both their population and their rulers are "barbaric" people, whereas the Tuoba Wei are "Han Chinese" because their rulers fully adopted Chinese culture and are the direct descendants of Han Chinese ancient ancestors.[70]

All this suggests a far messier and evolving approach to ethnic, cultural, and territorial legitimacy than is generally recognized by scholars writing about Wei Shou and his *History*, which often cast it in simple "ethnic Xianbei versus ethnic Han" terms.

Scholars sensitive to this messiness react to it in different ways. David Felt and Andrew Chittick argue that we should mostly stop using words like "China" and "Chinese" to discuss the Central Plains under the rule of outside groups like the Tuoba. Charles Holcombe suggests that Felt and Chittick may go somewhat too far in challenging the view of the Chinese nation as a stable construct with an ancient provenance, a view Holcombe also criticizes. He claims that, while it was constantly in flux, there was nevertheless some core set of Chinese ideas and practices that foreign rulers could reference and influence. Mark Abramson agrees with Elliot that it's useful to apply an ethnic lens to historical analysis as "the most efficient way to understand the coherence of particular groupings of peoples across a wide range of social, cultural, economic, and political behaviors," with the caveat that it must be "done properly to avoid distorting historical reality."[71] Abramson's conclusion, after undertaking one of the few studies of ethnic consciousness in the medieval era, is that

---

[69] Charles Holcombe, "Chinese Identity During the Age of Division, Sui, and Tang," *Journal of Chinese History* 4, no. 1 (January 2020): 42, https://doi.org/10.1017/jch.2019.37.

[70] Puning Liu, *China's Northern Wei Dynasty, 386-535: The Struggle for Legitimacy*, Asian States and Empires 19 (London: Routledge, 2021), 60–61.

[71] Marc S. Abramson, *Ethnic Identity in Tang China* (Philadelphia, Pa.: University of Pennsylvania Press, 2011), 2.

> The Tang sources contain a plethora of terms relating to ethnicity but also an overarching (though not universal) dichotomy between two semantic categories that I shall, for the moment, designate using the two most representative, and likely most common, terms: *hua* and *fan*.[72]

My intention isn't to decide between the different terms and conceptions of these historians—Was it *hua* and *fan*? *Hu* and *Han*? *Han* and *fan*? Was the dividing line genetic lineage or cultural expression?—but instead to highlight the view they all share: that medieval inhabitants of the Central Plains had some sense of a categorical division between insiders and outsiders, and that that division was constantly being blurred by political, cultural, and physical mixing. My own tentative approach here will be to refer to the people and ideas that are often called "Han" or "Chinese" by a territorial rather than an ethnic or cultural designation, identifying them as Central Plains inhabitants or practices. I will use "Han" to refer to either the Western or Eastern Han dynasties or their people, and some of the sources I quote will use it in an ethnic sense to mean what I would call "Central Plains inhabitants." In addition, in Chapter 1, I will use "China" and "Chinese" both because I am discussing more recent history and because the Western observers with whose views I am largely concerned thought of the country and its history in those terms.

[72] Abramson, 2.

Chapter 1: Getting to "Confucianization"[73]

One of the greatest barriers to understanding the law of the Northern Wei, particularly when working from materials from the official histories, are the theories of Sinicization and Confucianization (often treated interchangeably) that underlie so much of the writing about the period. As the Introduction explains, these theories view the Northern Wei as either an irrelevant deviation on the road to the full flowering of Chinese, Confucian law under the Tang or as proof of the power of the Confucian legal tradition, which is supposed to have fully absorbed any Tuoba elements by the Northern Wei's end. Neither perspective inspires a great deal of interest in studying the non-Chinese law of such an era, since it's either a dead end or an inferior product. For those who might nevertheless be interested, it's hard to see exactly how to proceed, since a great deal of the information we have about that law comes from the official histories, which are supposed to have been subject to especially onerous pressure to represent a Chinese point of view. In this chapter, I examine some of the ways the Sinicization/Confucianization idea became so prevalent, in the hopes that a clearer understanding of the particular historical contingencies that produced and supported it will help weaken its hold on contemporary thought about Chinese legal history in general and about Northern Wei law in particular.

How did we end up in a situation in which both Chinese *and* Americans are telling the same simplistic story about Chinese legal culture to mean different things and for completely different reasons? In brief, today's widespread acceptance of the idea of Chinese law as an unchanging "Confucian" core of an ethnic Han culture has many of its roots in the earliest Western observations of China: 17th-century Jesuit missionaries extolled Confucius as a secular sage whose rational and humane spirit was still evident in the China of their experience, seeking an indigenous canvas on which to overlay the Christianity they hoped to import. This image of a civilization infused since time immemorial with humanist wisdom found purchase among Enlightenment thinkers who needed a counterpoint to the religious monarchies they were challenging. Revolutionary Americans like Benjamin Franklin and James Madison looked to a legal culture they defined as Confucian in order to set themselves apart from tyrannical Europe. But as soon as both Europe and America came into significant military and economic competition with China, they began to seek foils to set off their own excellence rather than models on which to draw. Confucius was thus recast as a representative of China's original sin: the slavish devotion to norms of familial propriety under despotic regimes of outlandishly cruel punishments that had stunted the nation's cultural and technological development. This portrayal naturally highlighted corresponding European and American achievements, ostensibly grounded in their own longstanding culture of rational individualism. These ideas then served as a useful repository on which late imperial and Republican Chinese authors, in need of civilizational explanations for the weakness and failure of the late imperial system, readily drew. At each stage, each group of thinkers described a transhistorical Confucianism (though its supposed characteristics varied by era), an essence woven inextricably into Chinese attitudes and modes of life that remained unaltered from century to century, dynasty to dynasty. Today, scholarly and popular authors make many different specific mistakes about Chinese legal culture, but they almost all depend (whether they know it or not) on the same big story about the history of Chinese law: namely, that Chinese law began to be "Confucianized" in the early imperial

[73] A version of this chapter will be appearing in the *University of Pennsylvania Journal of International Law* in 2024.

period—specifically the Western Han (202 BCE-9 CE)—and became completely "Confucian" in the medieval period, especially the Tang (618-907) dynasty. This is completely incorrect in the early imperial era and largely so in the medieval.

A few scholars *have* noted these ahistorical representations of "Confucianism" in histories of Chinese law. Randall Peerenboom, for example, takes to task practitioners of comparative law for failing to recognize the double standard to which they hold "Asian" legal systems.

> When we look at our own system in the United States for example, we do not realize the impact of culture. Rather, we take our particular property regimes, our conceptions of who counts as a citizen, or our treatment of criminals as natural. However, when Westerners compare their legal systems to other systems found in Asia, Africa, Latin America, and Islamic countries, the latter often seem to have too much culture.[74]

In the case of China, he notes, Confucianism is the culture the country is said to have too much of. "Confucianism and various 'Chinese' cultural traits have been blamed for holding back modernity, in particular the realization of democracy, rule of law, human rights, and capitalism (at least until recently, when suddenly Confucianism became not an obstacle to, but a major cause of the economic success of the 'Asian Tigers')."[75] Others have explored the shifting nature of Western views of Chinese law[76] and of Confucius.[77] But what has not been observed in any detail is the role of "Confucianism" in the Western construction of narratives about Chinese legal culture that continue to be repeated today. In America, the claim has been around a long time and is deeply, literally embedded into our law and history.

It's crucial to note that much of the best work on Chinese legal culture has now abandoned the Confucian frame, but it has largely done so quietly, without explicitly challenging previous paradigms.[78] This change has ceded ground to those who are less careful or more ideological, whose continued expositions of "Confucian" Chinese law still dominate journalistic and scholarly representations. These authors do not necessarily share the political goals of those who created the stories on which they rely, and it is certainly not my intention to accuse everyone writing about "Confucianism" of purposefully advancing narratives that serve the

---

[74] Randall Peerenboom, "The X-Files: Past and Present Portrayals of China's Alien Legal System," *Washington University Global Studies Law Review* 2 (2003): 42.

[75] Peerenboom, 42. As Chaihark Hahm puts it,

> A paper that deals with law, culture, and Confucianism is perhaps doomed to be a collection of vague and general platitudes. This is because all three of these terms are notoriously plagued with definitional problems. Legal theorists continue to disagree about the nature and scope of the concept of law, while anthropologists and sociologists constantly argue about the utility of the concept of culture. Similarly, philosophers, historians, journalists, politicians—indeed almost anyone with a voice—seem to have different ideas about what Confucianism means. One of the main reasons for such disagreements, in my opinion, is an all-too-human tendency to want neat and simple categories that can encompass, represent, and take the place of the messy and intractable realities of life.

Chaihark Hahm, "Law, Culture, and the Politics of Confucianism," *Columbia Journal of Asian Law* 16 (2003 2002): 254.

[76] Ruskola, *Legal Orientalism*.

[77] Michael Nylan and Thomas Wilson, *Lives of Confucius: Civilization's Greatest Sage Through the Ages* (Crown, 2010).

[78] Some authors on Chinese legal history *have* made this challenge. I encourage interested readers to explore the work of Matthew Sommer, Jedidiah Kroncke, Teemu Ruskola, Zhang Zhaoyang, and Glenn Tiffert.

interests of their governments. I am also not saying that it's always wrong to describe certain ideas as "Confucian," but that such uses must always be carefully defined and historically contextualized.[79]

The main argument of this chapter is this: the conviction that "Confucianism" has been the most important source of Chinese law for millennia—a conviction which is frequently treated as neutral fact in America and China—was actually constructed to play different roles in different historical arguments, and should thus be regarded with a great deal of mistrust. The point of scholarship is to help us make sense of a complex and often dangerous world, but in a great deal of writing on Chinese law, "Confucianism is simply assumed to be what is doing the explanatory work, when other alternatives seem just as likely."[80] It is only by understanding both the development of this concept of Chinese law *and* the history it purports to describe that we can see that it is just as wrong to talk about Han dynasty law and contemporary Chinese law as unified by "Confucianism" as it is to, for example, discuss ancient Roman Christianity and American evangelical Protestant Christianity today as if they're the same thing. It's possible (even necessary) to talk about "Christians" and "Christianity" in both ancient Rome and the United States today but no serious scholar would suggest that those words mean the same thing at both times and in both places, or even that everyone at any one time would have agreed on their meaning.[81] In both cases, the pre-modern and modern periods may share certain images, language, or ideals, but there is clearly much more which divides them than unites them. At a time when we all need greater clarity about China's motivations, scholarship that obscures the true features of a culture and country as complex as any other promotes stereotypes designed to support jingoism and nationalism, and elevates the risk of violence against governments and people.

Pre-Modern China

Because a key element of the argument that Chinese law is and always has been "Confucian" is that the law became "Confucianized" in the Western Han and early Tang periods, I explain here that this label is either completely inaccurate or erases enormous historical complexities in Chinese legal history.

Western Han

Pre-imperial China (before the late 3rd century BCE), the so-called "Warring States" period, was divided into a fluctuating number of polities engaged in frequent and bloody conflict. In 221 BCE, one of those states (Qin), finally conquered its remaining competitors and established the first unified empire. Its rule was short lived, and in 202 BCE, after the war that followed its collapse, the Western Han dynasty was established. A story that has become commonplace in writing about pre-modern China is that Qin was a militaristic state and thus

[79] For an example of an author who makes compelling use of a Confucian frame to capture significant features of late imperial Chinese law while simultaneously critiquing the ahistorical "Confucianism" that appears in much Western scholarship, see Zhang, *The Laws and Economics of Confucianism*.
[80] Peerenboom, "The X-Files," 92.
[81] Among many works that trace the historical development of Christian ideas and observe that the same cultural or religious terms may refer to completely different objects, see much of the writing of Bart Ehrman, or Jaroslav Pelikan, *Jesus Through the Centuries: His Place in the History of Culture* (Yale University Press, 1999).

governed by a harsh philosophy called "Legalism," in which everyone was treated equally and subjected to extreme penalties for violating the law. This harshness, the story goes, was part of what both led to Qin's collapse and motivated the Western Han's "Confucianization" of the law, in which harsh punishments were abolished and defendants were treated differently according to their social status or their familial relationships. Ever since, according to this theory, Chinese law has been defined by a mix of "Legalist" and "Confucian" principles—associated with law (*fa* 法 in Chinese) and ritual (*li* 禮), respectively—with "Confucianism" in the predominant position.[82] It's common for authors to repeat the claim that the "Legalist-Confucian" synthesis was one of the principal bases of the continuity of Chinese law and the political stability that it engendered.[83] "Confucianism," in this view, held that rulers should lead by virtuous example, thereby promoting respectful or obedient relationships between family members, analogizing the family and the state.[84] It also rejected the harsh punishments of Legalism because it viewed them as inferior tools of governance compared with more humane persuasive techniques: "The Confucianists hold that moral influence is fundamental, and punishment is supplementary."[85] "Confucianism" thus achieved powerful political expression during the Western Han, it's argued, by defining itself against the excessive "Legalist" cruelties of the Qin.

Sinological scholarship has demonstrated, however, there was no such Western Han "Confucian" takeover. Michael Loewe, the doyen of English-language Han dynasty studies, demonstrates that "a view of Han China in terms of the 'Victory of Confucianism,' that came into existence during the last decades of Western Han can only be subject to question."[86] As evidence, Loewe explains that Western Han authors didn't seem especially interested in Confucius himself, rarely citing or alluding to him.[87] Even when the works attributed to him began attracting imperial attention, he wasn't the subject of the kind of expressions of official reverence accorded to other important figures: sacrifices to him "seem to have been by no means regular or frequent in Western Han times."[88] Moreover, the concern with hierarchy and familial relationships that contemporary authors (especially those writing about the effects of "Confucianism" on Chinese law) attribute to Confucius and his followers was just as evident in other pre-imperial settings. The emphasis on elite rulership supported by talented, self-cultivated men and the notion of orders of nobility conferring social status—both ideas associated with early imperial "Confucianism" in contemporary scholarship—were common Warring States views, and were in fact most closely associated with the Qin laws and administrative practices that the Western Han "Confucians" were supposedly rejecting.[89] Not even the preoccupation with ritual (*li*) that many scholars of Chinese law treat as ironclad proof of "Confucianism" is

---

[82] See, e.g., Paul A. Barresi, "The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: Toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics," *Pace Environmental Law Review* 30 (2013 2012), https://heinonline.org/HOL/Page?handle=hein.journals/penv30&id=1181&div=&collection=.

[83] See, e.g., John W. Head, "Feeling the Stones When Crossing the River: The Rule of Law in China," *Santa Clara Journal of International Law* 7 (2010 2009): 43.

[84] Head, 39.

[85] Tao Wang, "The Temporality of Law in Traditional China and Its Contemporary Implications," *Loyola University Chicago International Law Review* 18 (2022): 144.

[86] Michael Loewe, "'Confucian' Values and Practices in Han China," *T'oung Pao* 98, no. 1–3 (January 1, 2012): 29, https://doi.org/10.1163/156853212X629884.

[87] Loewe, 6.

[88] Loewe, 6.

[89] Loewe, 12.

especially evident in Western Han works.[90] As for the law itself, Western Han statutes, which began to be archeologically excavated in the 1970s, show "a nearly comprehensive continuation of Qin legal norms and procedures into the early Han, with only minor modifications and innovations."[91] There was no radical change from the legal or social ideology of the Qin, whose laws continued to be used by Western Han administrators, who saw no conflict between their values and those expressed in the legislation of the preceding dynasty.

Perhaps most damaging to the "Legalist-Confucian" synthesis hypothesis, there's no indication that Western Han thinkers would have classified themselves as adherents of these ideologies, or even members of any identifiable philosophical schools at all. In addition to the fact that no group of authors professed all the beliefs that later scholars say have always typified "Confucianism," Western Han scholars didn't identify themselves as "Confucian" or "Legalist." As several of the most prominent scholars of early China have argued, it's likely that there were no coherent self-identifying philosophical schools of any kind in pre- and early imperial China.[92] While some pre-Han authors compared the ideas of particular thinkers—even lumping them together on the basis of those ideas—these groupings were subject to change and focused always on the individual "persuader" rather than on any internally consistent ideology captured in certain writings.[93] Therefore, "It would be rash to see these elements as yet forming an established, let alone an approved or orthodox, system of values, modes, or thought or behavior that molded public or private conduct," i.e., a unified "Confucianism."[94] There was also no unified Legalist school against which a coherent "Confucianism" was opposed to produce the dialectic that many scholars claim defines the Chinese legal tradition.[95] Even its most basic term—the *fa* 法 (today translated as "law") of *fajia* ("Legalism")—is used quite differently in different texts of the so-called "Legalist canon." Some of those uses even encompass precisely the kind of moral language that many scholars today would identify as "Confucian," and thus, it's claimed, definitionally opposed to the Legalism in whose most important works it actually appears. It is difficult to see how a "school" supposedly defined largely by its adherence to a particular idea can be considered coherent when its foundational texts express such significant disagreement over the basic meaning of that idea. This is not merely a terminological question that might be resolved by calling each group by some other name. Supposed "Confucians" advocated for ostensibly "Legalist" ideas, and vice versa. This state of affairs appears baffling, until one realizes that it is only the attempt to impose categories on an intellectual environment that would not have recognized their premises that gives rise to this confusion. The problem is us, not them.[96]

---

[90] Loewe, 14–15.

[91] Anthony J. Barbieri-Low and Robin D. S. Yates, *Law, State, and Society in Early Imperial China (2 Vols): A Study with Critical Edition and Translation of the Legal Texts from Zhangjiashan Tomb No. 247* (Brill, 2015), 220. This section also builds on work in Michael Nylan and Michael Loewe, *China's Early Empires: A Re-Appraisal* (Cambridge University Press, 2010).

[92] Mark Csikszentmihalyi and Michael Nylan, "Constructing Lineages and Inventing Traditions through Exemplary Figures in Early China," *T'oung Pao* 89, no. 1/3 (2003): 68–69. Kidder Smith, "Sima Tan and the Invention of Daoism, 'Legalism,' et Cetera," *The Journal of Asian Studies* 62, no. 1 (February 2003): 151, https://doi.org/10.2307/3096138.

[93] Csikszentmihalyi and Nylan, "Constructing Lineages and Inventing Traditions," 62–63.

[94] Loewe, "'Confucian' Values and Practices in Han China," 15.

[95] Paul R. Goldin, "Persistent Misconceptions About Chinese 'Legalism,'" *Journal of Chinese Philosophy* 38, no. 1 (2011): 88–104, https://doi.org/10.1111/j.1540-6253.2010.01629.x.

[96] This isn't to say that contemporary scholars are wrong in all the details. As Loewe points out, there are elements of *later* law and society that might be identified as "Confucian," and the genesis of some of those elements can be

Early Tang

The 400-year period between the dissolution of the Eastern Han in 220 CE and the founding of the Tang dynasty in 618 CE was characterized by massive social upheaval which often expressed itself in armed resistance to the government, and combating those rebellions provided opportunities for ambitious generals to develop independent power bases. Rulers of tiny states were in constant competition for authority and land both with their rival states and with their own subjects. The northern portion of the former Han empire was fragmented into many small, unstable states dominated by non-Han groups. This "Sixteen Kingdoms" period—during which "on average, a kingdom lasted for thirty-one years"[97]—extended to the 386 establishment of the Northern Wei, a dynasty of former nomads from present-day northeastern Mongolia lasting two centuries, until the founding of the Sui in 581 and then the Tang in 618. The Tang code was the earliest example of extensive codification in Chinese legal history, and that code was enormously influential, serving as the model for nearly 1,500 years of subsequent Chinese law, as well as for legal reforms in Japan and elsewhere. Moreover, this code used major terms drawn from early and pre-imperial law to characterize its own approaches, reinforcing the claims of Tang legislators to simply be carrying on ideas that had initially been articulated by China's oldest and most famous rulers.[98]

In many scholarly accounts today, the Tang are seen as having either restored or perfected the unified culture of the early empires, often represented by "Confucianism." While there was no neat continuity from early imperial "Confucian" institutions—which, as the previous section explains, did not exist—there is some sense in calling certain features of Tang law and administration "Confucian." Even Michael Loewe, so staunch in rejecting the label for the Western Han, acknowledges that, "A number of elements may properly be taken to be integral parts of the approved way of life and training that may be termed 'Confucian' for Tang… times."[99] Specifically, "By Tang times there were examples of sophisticated institutions

---

seen as early as the *Eastern* Han (25-220 CE), though that's still several centuries after what most modern writing claims. But there is no blanket philosophical label that can be applied to the law of the early empires that either accords with the way in which thinkers of the period would have seen themselves or which serves as a useful analytical tool for illuminating otherwise invisible features of the era. The only function of such a blunt instrument is to make claims about the modern world. As John Head (cited above as an example of the "Legalist-Confucian" synthesis view) writes:

> Despite the fact that Chinese dynastic law does seem to meet the "rule of law" standards in these several aspects, its failure to meet the other two standards - those regarding applicability to the government and comprehensiveness of coverage - is fatal. I would conclude from this very abbreviated review that dynastic China was not governed by the "rule of law" as defined above. Head, "Feeling the Stones When Crossing the River," 47.

Head is interested in this "failure" of imperial Chinese law because of what it reveals, he argues, about the current approach of the Chinese Communist Party: "the urge of the CPC in modern China to exercise firm control over the country's people, and over the state apparatus in its entirety, reflects an ages-old approach that dominates Chinese dynastic legal history." A view of early imperial China that actually takes account of its complexity doesn't lend itself so easily to such sweeping comparisons.

[97] Harold Miles Tanner, *China: A History* (Hackett Publishing, 2009), 340.

[98] Medieval Chinese thinkers and contemporary scholars alike have accepted this Tang-era claim, and "this narrative [of Chinese legal development] always finds its happy ending with the reformed scale of penalties included in the Tang Code." Timothy Brook, Jérôme Bourgon, and Gregory Blue, *Death by a Thousand Cuts* (Cambridge, Mass: Harvard University Press, 2008), 83.

[99] Loewe, "'Confucian' Values and Practices in Han China," 4.

of imperial administration on which a government could call; a systematic means of training officials was being evolved that would make possible a more intensive form of government than hitherto."[100] The Tang government seems to have been interested in promoting ideas explicitly called "Confucian"—veneration of Confucius himself and the texts associated with him; worship of Heaven as the source of human life and political authority; promotion of ancestral, familial, and political hierarchies justified through references to Confucius; promotion of ritual (*li*)—and it controlled a powerful and unified state apparatus that allowed it to spread those ideas. Many scholars therefore argue that the process of "Confucianization" they see as originating in the Western Han culminated in the establishment of the Tang dynasty in the seventh century.[101]

The general view is that this Tang-era completion of the process of "Confucianization" was the means by which the nascently "Confucian" Han law was firmly cemented into the Chinese legal tradition, and thus continues to exert influence over contemporary Chinese law. The "Confucianization" of Western Han law, writes Tao Wang, was "the way in which Han Dynasty connected past, present, and future in its legal system." He describes the standard view of the harsh Qin law (*fa*) leavened by the gentleness of "Confucian" ritual (*li*): the Western Han "Confucians" "introduced the past's *li* into the present's law so as to make right the statute's rigidness and improve the state governance for the future," and as a result, "the judicial practice of [deciding cases according to the Confucian classics] was in operation until the formulation of the Code of Tang Dynasty (618-907 A.D.), which comprehensively absorbed the Confucian classics into its articles. [Thus,] Han law transcended present, past, and future."[102]

> The connection of the past, present, and future formed in Confucianized law was conducive for imperial China's sustained existence for over two thousand years as an ideologically stable society, in which the Confucian ideology was coupled with the imperial political structure of a single unitary authority. The diachronic coupling of *li* and law over the whole imperial period of China defined for scholar-officials the purpose of their judicial duties, which was not arbitrary punishment but moral persuasion.[103]

Such arguments are almost invariably linked to claims about the present state of Chinese law: Wang points to the new People's Republic of China Civil Code as an example of a return to "Confucianism" offset by the "Legalist" authoritarianism of other CCP moves.[104] In other words, according to this view, the "Confucianization" of Chinese law—incorporating ritual (*li*), eliminating harsh punishments, paying attention to familial relationships—began in the early imperial Western Han, was cemented in the medieval Tang, and to this day has never ceased to serve as the foundation of Chinese legal thought.

But just like the other actors telling stories about "Confucianism" described in the subsequent sections, the Tang government was strongly motivated to call what they were doing "Confucian," whether or not it really was. The Tang had just managed to exert control over a long-fractured territory harboring many competing ethnic and cultural interests, and they needed a figure and a language that would allow them to assert that a unified civilization now reigned. One of the best places to look was the repository of earlier Chinese figures, from which they

---

[100] Loewe, 24.
[101] Chü T'ung-tsu, *Law and Society in Traditional China* (Mouton, 1961), 280.
[102] Wang, "The Temporality of Law in Traditional China and Its Contemporary Implications," 161.
[103] Wang, 161.
[104] Wang, 170–71.

selected Confucius.[105] When we call Tang law "Confucian," we are thus partly accepting the millennia-old propaganda of a fledgling court desperate to exercise power in a rapidly shifting and bloody world. Many scholars of Chinese law are happy to take that self-presentation at face value. For example, Zhang Jinfan writes that,

> During the more than one and a half centuries of ruling by Northern Wei Dynasty, after absorbing the advanced legal culture of the Han nationality… the policy of overall Chinesization [*sic*] was introduced … all doubtful cases were judged according to Confucian classics, which not only sped up the process of the feudalization and confucianization [*sic*] of laws, but also indicated the direction of the development of the legal system of the Northern Dynasty and fostered the progress of the entire society.[106]

Zhang claims that the Northern Wei were merely copying and transmitting the laws of the earlier Han-dominated societies that previously occupied the territory they had conquered. Similar views appear in the English-language survey-style works on Chinese legal history available in American law libraries,[107] as well as in the numerous law review articles that cite Zhang Jinfan's work. In the view of these authors, the Northern Wei and their inheritors are remarkable primarily for their continuation and development of pre-existing Chinese legal ideas, serving as a conduit between the Eastern Han and the Sui and Tang.

As subsequent chapters will show, there was a great deal of complexity this messaging was trying paper over, and some of the most significant features of Tang law were neither "Confucian" nor even "Chinese." Tang laws and the bureaucratic institutions charged with administering them were based substantially on those of the Northern Wei—former Mongolian nomads, as explained in the Introduction—and many of their theories and practices that the Tang adopted looked very different from those of the early imperial era that the medieval government claimed to be emulating. The unwillingness of scholars to acknowledge this history has major consequences for the world today. By failing to recognize the significant and lasting changes non-Han groups made to Chinese legal and administrative ideas, "Confucianization" has become as much an ethnic claim as it is a cultural one, i.e., that the Han Chinese population of the North China Plain are the only ones who created and perpetuated the real Chinese legal tradition. In its modern form, this claim's adherents argue that groups like the Northern Wei were absorbed inexorably into Han Chinese cultural practices due to the latter's evident superiority (a process referred to as Sinicization or Sinification).

Constructing Legal "Confucianization"

So if these stories about the "Confucianization" of Chinese law in the Western Han and Tang era are wrong, how did they become so powerfully entrenched, even in the face of 50 years of books and articles demonstrating their inaccuracy? The reason is that they were carefully and intentionally constructed over hundreds of years to serve pressing contemporary needs.

---

[105] Loewe, "'Confucian' Values and Practices in Han China," 23..
[106] Zhang, *The History of Chinese Legal Civilization*, 408–9.
[107] Head and Wang, *Law Codes in Dynastic China*. He Qinhua 何勤华, *An Outline History of Legal Science in China*.

Missionaries

The first and most foundational story about Confucius for today's legal scholars—that he is the representative of the most important and enduring parts of Chinese culture—was told by 16th- and 17th-century European Christian missionaries, who needed a way to make their ideas comprehensible in China. These missionaries (mostly Jesuits) were some of the earliest and most knowledgeable cultural and intellectual intermediaries between China and the West. "Before the Enlightenment, knowledge about China had come mainly through the Jesuits, and their concern had been mainly to find in China (and in Confucianism) elements that were compatible with Christianity, for it was their hope that China could be converted to Christianity peaceably."[108]

The Jesuits' attachment to Confucius was in some sense a tactical ploy in furtherance of their mission of conversion. "As soon as they arrived in China, the Jesuits used (just like everywhere else) an approach which consisted in first of all obtaining a solid foothold in the language and customs of the targeted population."[109] Knowing that the Christian ideals they hoped to communicate would be more easily received coming from those who spoke in terms familiar to their interlocutors, these missionaries set about mastering the classical language and references employed by the high-level government bureaucrats who had all been extensively trained in literature and philosophy. But the Jesuit approach to conversion wasn't just the (comparatively) simple matter of learning how to speak to Chinese intellectuals in ways they would find appealing, or at least comprehensible. The missionaries also had to demonstrate that there was fertile soil in which Christian beliefs could take root, that Chinese presuppositions were compatible with what they had to offer.

So, for example, in 1588, Michele Ruggieri (1543-1607) began translating the *Four Books* 四書, four works associated with Confucius and his students that had been compiled by the major Song dynasty scholar Zhu Xi 朱熹 (1130-1200) and had attained a canonical status by the late Ming (when Ruggieri and his Jesuit colleagues were active in China). "Five years later, Matteo Ricci finished a paraphrased version of it, which he used as a manual to learn Chinese (both classical and vernacular), so that new missionary recruits could converse on an equal basis with their Chinese scholar 'peers.'"[110] But the text also served the missionaries' ends of demonstrating Chinese compatibility: "The translations used the terminology and themes typical of Renaissance theology and moral philosophy, in which the Jesuits had been educated."[111] These kinds of works laid the foundation for the Jesuit claim that the Chinese tradition contained a "primordial or natural theology or philosophy"[112] that was consonant with the essential spirit of Christianity and that that theology could be expressed in terms with which early modern Christians could engage.

This process of accommodation was played out for a global audience, as the various lenses through which the Jesuits needed to view what they perceived as Chinese ideas were fulsomely transmitted back to their European points of origin. In addition to making translations of important texts available to other aspiring missionaries and European scholars, Ruggieri and

[108] Huang, "Our Sense of Problem," 139.
[109] Anne Cheng, "Morality and Religiousness: The Original Formulation," *Journal of Chinese Philosophy* 41, no. 5 (March 3, 2014): 588, https://doi.org/10.1163/15406253-04105006.
[110] Cheng, 589.
[111] Cheng, 589–90. See also D. E. Mungello, *Curious Land: Jesuit Accommodation and the Origins of Sinology* (University of Hawaii Press, 1988).
[112] Cheng, "Morality and Religiousness," 589.

his compeers were writing long and detailed accounts of their impressions of Chinese thought and society that became very influential among their literate Western consumers. One missionary and his work had a particularly potent effect on views of Confucius outside China: Matteo Ricci (1552-1610), who published *About Christian Expeditions to China* (1582–1610), "a voluminous work of five books, the first of which deals entirely with his observations of China and the Chinese."[113] "Ever since this relation of Ricci's at the very beginning of the seventeenth century, 'China' has been treated synonymously with the teachings and legacy of Confucius."[114]

Who was the Confucius of Ricci's accounts? Ricci made him out to be a kind of secular saint. The texts attributed to him made moral pronouncements similar to those found in Greek and Christian sources: "'Overcome yourself to return to the spirit of the rites' (*ke ji fu li* 克己復禮) and 'Do not unto others what you would not have them do unto you' (*ji suo bu yu wu shi yu ren* 己所不欲勿施 於人)."[115] This made him very attractive to Jesuit accommodationists, who could use such familiar-sounding attitudes to argue that Confucius was channeling the same divine spirit as their own venerated prophets. However, they did not understand him as a religious figure. "As Ricci pointed out in his *About Christian Expeditions to China*, the Chinese did indeed venerate Confucius 'but, however, as a mortal and not as they worship a God,' pointing out that 'they do not consider him as having a divine nature and do not pray to him to obtain anything.'"[116] But while the missionaries were very interested in Confucius, they didn't believe that it was his ideas on which the laws they observed were based. For example, Pierre-Joseph-André Roubaud (1731-1791), whose "opinion of Confucius was typical," saw him as "a philosopher of sublime reason, a 'legislator of the world' and the author of not only the 'true code of humanity' but also a political system of unequalled beauty based on the chief principles of a rational morality." Nevertheless, they didn't believe that his ideas had ever really served as the basis of the state's laws. "Roubaud wrote that those principles had never been put into practice as the authentic guide of governments and the conduct of subjects, which was regulated not by virtue and honour but by the stick and the inflexible application of a pitiless, oppressive law."

> It followed that the prerogative of public morality was not devotion, deference and the public spirit but rather dishonesty, the propensity to deceive and "friponnerie". "Voilà un peuple de scélérats, & un Gouvernement de barbares", he concluded, thus voiding any representation of China as a society held up by judicious institutions and well-established laws. According to a vision once again recalling Montesquieu, the law constituted the pure promulgation of imperial power and the will to rule.[117]

For many Jesuits, Chinese law was driven by the will of an autocrat whom some saw as enlightened and some as despotic. His actions might be restrained by Confucian morality, but a Confucian program as such was never implemented at a governmental level. Nevertheless, the

---

[113] Cheng, 590.
[114] Cheng, 590.
[115] Cheng, 591.
[116] Cheng, 591.
[117] Guido Abbattista, "Chinese Law and Justice: George Thomas Staunton (1781-1859) and the European Discourses on China in the Eighteenth and Nineteenth Centuries," in *Law, Justice and Codification in Qing China: European and Chinese Perspectives: Essays in History and Comparative Law*, ed. Guido Abbattista (Trieste: EUT Edizioni Università di Trieste, 2017), 45.

people themselves might, like the emperor, consult their sense of Confucian morality (perhaps more than the formal law itself) when making decisions.

> According to this vision, what regulated daily life was not so much the law in the strict sense – with all the procedures punctuating its formulation, approval and application – as it was the habit and stability of customs that both mirrored the internalization of an indisputable rule consecrated by tradition and ensured correspondence between pervasive norms and social behaviour.[118]

It was this vision that (for Westerners) first cemented Confucius as the central figure through which Chinese culture was best understood, a view that almost inevitably produced both historical and cultural reductionism: if everything in contemporary China could be explained by reference to an ancient thinker—as the Jesuits were understood by many to be saying, though they themselves were often considerably more sophisticated in their portrayals—the culture must consist of a core essence that has largely resisted change over millennia. "Ever since [these Jesuit writings] at the very beginning of the seventeenth century, 'China' has been treated synonymously with the teachings and legacy of Confucius…[119] The teachings and canonical texts which were associated with him coincided with the idea of 'China' as an essentialized entity. Traces of this way of identifying them are still to be found nowadays, three centuries later, in the form of deeply enrooted preconceived ideas."[120]

Early Enlightenment

Once "Confucius" had come to stand in for China, he became a useful symbol for European Enlightenment thinkers in search of a contrasting example with which to criticize their own societies. Early in the Enlightenment, Jesuit ideas about China in general and Confucius in particular circulated widely, thanks in part to the support of powerful patrons. "*Confucius Sinarum Philosophus, sive Scientia Sinensis latine exposita* (Confucius, Philosopher of the Chinese, or Chinese Wisdom Expounded in Latin)," the work of Philippe Couplet (1623-1693) was "printed by order of the King of France Louis XIV (reigned 1643–1715)."[121] As they spread, these ideas were no longer limited to the specific accommodationist projects of the missionaries seeking an intellectual and moral foundation for their proselytizing. Instead, their descriptions of China were coming to occupy a major place in the way Europeans conceived of the world and humanity in general, and could thus serve as important ammunition in Enlightenment-era arguments.

> Whereas one century earlier, Ricci and his generation had been pioneers in the acculturation of the Jesuits in China, Couplet and his team now gathered the fruit of their work to present it to the European market, thus managing to include the Jesuits' China in the intellectual, scientific and religious debates of the Enlightenment period.[122]

---

[118] Abbattista, 46.
[119] Cheng, "Morality and Religiousness," 590.
[120] Cheng, 595.
[121] Cheng, 593.
[122] Cheng, 593.

China's usefulness as a foil in scholarly discourse created a great hunger for information about the country that Jesuit writings were uniquely positioned to satisfy.

> The *CSP* was almost immediately a great success all over Enlightenment Europe: a summarized version of one hundred pages appeared in French the following year, in 1668, with the title *La Morale de Confucius, Philosophe de la Chine*. It was itself then translated into English in 1691 as *The Morals of Confucius, a Chinese Philosopher*. These editions in vernacular languages were hugely successful, and were published in numerous reprints, including leather-bound "pocket-sized" ones.

It is something of a historical irony that, while the Jesuits' project of bridging China and European ideas to make Christianity more appealing to potential Chinese converts didn't result in waves of new adherents in Asia, it *did* convert many Europeans to an interest in (and then a passion for) China and its culture. "The Jesuits were less successful in converting the Chinese to Christianity than they were in converting European elites to an out-and-out Sinomania, which all over Europe affected philosophers, scholars, and even monarchs."[123]

The image of Confucius that early Enlightenment thinkers adopted was one that fit neatly into the outlines of debates already underway.

> The *CSP*, the magnum opus of the Jesuits' strategy of accommodation, thus established Confucius' centrality not as a religious founder, but rather as a rationalist "ethnic philosopher," who was the guarantor of an ideal politico-moral order, and to whom the Chinese dedicated a purely "civil" cult.[124]

As Cheng puts it, "they invented a 'philosophical Confucius' which they compared favorably with other 'ethnic philosophers,' Plato and Aristotle in particular."[125] This depiction of Confucius allowed authors like Voltaire, who wanted to elevate the status of human reason and attack the influence of religion on thought and society, to claim that Chinese history demonstrated the feasibility of a purely secular morality. "For him, the Confucian religion had the extraordinary merit of fulfilling the functions reasonably expected of a religion (i.e., making people believe in a transcendental form of justice that ultimately punishes evil and rewards good) while at the same time being free of fanaticism and superstition."[126] This Confucius thus became for Sinophilic Enlightenment thinkers a moral and philosophical figure in whose ideas personal virtue predominated over rules. Indeed, true followers of Confucius should need no laws, guided as they ostensibly are by orientations towards compassion and harmony. "Confucius and Chinese literati thus became the incarnation of an ideal of sophistication and integrity, and the emperors of China (in reality, Manchu and somewhat authoritarian), models of well-reasoned classicism and enlightened despotism, readily brandished against monarchical arbitrariness and religious fanaticism, which Voltaire considered as being 'infamous.'"[127]

Unlike the early Jesuit missionaries, however, Voltaire *did* believe that Confucius' philosophical principles were put into practice in the law. He based this view in part on the

---

[123] Cheng, 595.
[124] Cheng, 594.
[125] Cheng, 595.
[126] Cheng, 596.
[127] Cheng, 596.

writings of late 17th and early 18th-century missionaries like Louis Lecomte (1655-1728), who praised the Chinese laws in an influential work on the country, emphasizing the justice and effectiveness of its rewards and punishments.[128] A few decades later, another influential Jesuit, Jean-Baptiste Du Halde (1674-1743), echoed Lecomte's sentiments "in favorably reviewing the Chinese legal system for its graded system of punishments, which he judged especially effective both in deterring crime generally and in preventing the most serious crimes."[129] Du Halde's assessment was championed by "sinophiles" who pointed to his representation of humane Chinese rulers, such as the Kangxi emperor who "condemned the use of torture as contrary to Confucian ideals of good governance."[130]

Echoing both the accommodationist missionaries and Du Halde, "Voltaire praised both the efficacy of the laws in China, which ensured the reward of virtue, the people's well-being and the protection of property, and China's humane and simple religion, which was free of intolerance and superstition."[131] The "Philosopher" entry of his *Philosophical Dictionary* expresses this complex mix of views:

> By what fatality, perhaps shameful for western nations, is it necessary to go to the extreme east to find a simple sage, without ostentation, without imposture, who taught men to live happily 600 years before our common era, at a time when the entire north knew nothing of the alphabet, and the Greeks had hardly begun to distinguish themselves by wisdom? This sage was Confucius, who, alone among the ancient legislators, never sought to deceive mankind. What finer rules of conduct have ever been given on earth?[132]

His ideas were affirmed by François Quesnay, who explained to his contemporaries that "the moral philosophy of Confucius is the law of" China, adding that:

> The emperor of China is a despot, but in what sense is he given this name? It seems to me that fairly generally in Europe, we have unfavorable ideas about that empire. I have noticed, on the contrary… that its constitution is founded on wise and irrevocable laws which the emperor causes to be observed and which he himself observes strictly.[133]

For Voltaire and other Enlightenment sinophiles, Confucius was sage, moralist, and legislator whose wisdom lived on in the administration of the laws of contemporary China, a wisdom that demonstrated both the past and present inferiority of their own moral and legal culture, furnishing these thinkers with ammunition for intellectual battles against religious and monarchist Europeans.

<u>Later Enlightenment and Beyond</u>

---

[128] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 161.
[129] Brook, Bourgon, and Blue, 162.
[130] Brook, Bourgon, and Blue, 162.
[131] Paul Bailey, "Voltaire and Confucius: French Attitudes towards China in the Early Twentieth Century," *History of European Ideas* 14, no. 6 (November 1, 1992): 820, https://doi.org/10.1016/0191-6599(92)90168-C.
[132] "The Project Gutenberg eBook of Voltaire's Philosophical Dictionary," accessed November 25, 2023, https://www.gutenberg.org/files/18569/18569-h/18569-h.htm.
[133] François Quesnay, "Despotisme de la Chine, par François Quesnay (1767)," *Institut Coppet* (blog), accessed November 25, 2023, https://www.institutcoppet.org/despotisme-de-chine-francois-quesnay-1767/.

But while "Confucius" and the legal tradition he was now seen as representing could be used to attack European institutions, he could just as easily be employed by Europeans who wanted to demonstrate not the failings but the superiority of their own ways of doing things. Voltaire's view of Chinese "Confucian" law, though shared by some, was far from the only one, and it was ultimately displaced by a far more hostile characterization. "The unfortunate habit of imagining 'the Enlightenment' as homogeneous has too often tended to obscure the intense controversies of that period, one of which was Europe's heated mid-eighteenth-century debate on Confucian government."[134] Du Halde's work, for example, which had significantly shaped positive appraisals of Chinese law, was susceptible to very different interpretations. In his 1748 *De l'Esprit des lois*, Montesquieu (1689-1755 CE) wrote that the writings of Du Halde and other Jesuits demonstrated China's despotic character, pointing both to their claims that the fear of punishment was responsible for the maintenance of social order and harmony and to their descriptions of aristocrats being punished without regard to their status. Montesquieu, a "champion of the French nobility as a check on Bourbon power,"[135] thus concluded that the Chinese government ruled despotically, and therefore illegitimately.

It was, however, Montesquieu's vision that would win out, as the Jesuits' power collapsed during the late 18th century[136] and colonialism's economic imperatives replaced the evangelical impulses of the missionaries who had previously defined China to the West. China's harsh punishments—seen before as efficient means of social regulation, mitigated by sympathetic emperors—were recast as fatal civilizational defects in need of Western-led reform.

> Throughout the nineteenth century, cruel and degrading forms of treatment were regarded as characteristic of uncivilized and semicivilized societies. Bringing such practices to an end was celebrated by colonial governments as a strong historical justification for colonial rule and, more broadly, as a major argument for bringing societies under their political jurisdiction into line with Western notions of civilization.[137]

More broadly, as Enlightenment thinkers increasingly cast their own thinking about ideal societies and legitimate governments in terms of republican governance and individual liberties, China served as a useful foil against which to define their own aspirations.[138] Cornelius De Pauw (1739-1799 CE) was responsible for some of the most influential anti-Chinese works.

> Following Montesquieu in thinking Chinese society was governed principally by custom rather than law, De Pauw went further by branding China an unmitigated Oriental despotism in which the entire population was essentially enslaved… Depicting Chinese people as generally imbued with a "servile fear" that was the logical result of their institutions, he treated even their famed industriousness as an expression of a dread of torture and penal mutilation.[139]

---

[134] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 164–65.
[135] Brook, Bourgon, and Blue, 164.
[136] *See, e.g.,* Part VII (Anti-Jesuitism, Enlightenment, and the Suppression) of Ines G. Županov, ed., *The Oxford Handbook of the Jesuits* (Oxford University Press, 2017), https://doi.org/10.1093/oxfordhb/9780190639631.001.0001.
[137] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 154.
[138] Brook, Bourgon, and Blue, 167.
[139] Brook, Bourgon, and Blue, 167.

By the late 18th century, Europeans had largely adopted Montesquieu's description of Chinese (or Oriental) despotism (based on his reading of Du Halde[140]).

This was also a fight about money as much as it was about philosophies of ideal social orders. Views of "Confucius" and law became increasingly negative as colonialism's economic imperatives replaced the evangelical impulses of the missionaries who had previously defined China to the West. Europeans were buying more and more from China, but the reverse wasn't true, and European economies (especially Britain's) were being drained of silver, spurring ever greater efforts to tap the large potential Chinese market more effectively. Moreover, many European countries were acquiring (or hoping to acquire) pieces of land in and around China, from which they could launch ever more extensive trading operations. These operations led both to greater hostility between European and Chinese governments, who resented the encroachment, and much more frequent contact between European merchants and Chinese authorities. With increasing regularity, this contact resulted in the punishment (including execution) of European traders, whose cases were then widely reported in Western media eager to support the expansionist economic and territorial projects of their governments by demonstrating China's unworthiness as a partner. China's harsh punishments—seen before as efficient means of social regulation, mitigated by sympathetic emperors—were recast as fatal civilizational defects in need of Western-led reform.[141]

As Europeans became more hostile to China in both philosophical and economic terms, some began to embed the country into their universal theories of social and intellectual development, largely in denigrating ways. The Enlightenment, it seemed, had achieved its ends: many European thinkers believed that their scientific rationality grounded in the Greek tradition had overthrown the superstitious religiosity that had benighted their continent. As such, they had no need, as Voltaire had done, to look to China for philosophical or moral models. Europeans had demonstrated their superiority through reason and it was now *their* tradition that should serve as the standard against which every other should be judged. "Philosophy was one of the areas which would most strongly determine and reaffirm European identity (and then supremacy)."[142]

> Whereas for Enlightenment philosophers China was a noteworthy argument in their fight against the influence of religion, the new "history of philosophy" genre, published for the use of university professors and students which flourished in Germany and France at the start of the nineteenth century, tended on the contrary to define philosophy as being something strictly European, judging nonphilosophical anything which came from outside of the no longer Christian, but Greek, tradition.[143]

The shift was so profound that Immanuel Kant (1724-1804) could say in a lecture in 1756 that, "In his writings, their Master Confucius teaches nothing else but a moral doctrine for the attention of princes," and, "the concept of virtue and morality has never sunk into Chinese minds."[144] Where China's ancient accomplishments in rationality had been lauded by early Enlightenment figures, their successors instead recast Chinese thought as "primitive religion,"

[140] Cheng, "Morality and Religiousness," 598.
[141] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 154.
[142] Cheng, "Morality and Religiousness," 600.
[143] Cheng, 601.
[144] Cheng, 601.

exactly the kind of ignorant superstition from which European philosophy was trying to free mankind.[145] "While the 'invented' European discourse of Confucianism had served as a medium for early Jesuit missionaries and their Sinophile readers like Leibniz to synthesize or accommodate Christian-Chinese differences before the mid-eighteenth century, Oriental despotism became an influential analytical framework by which European commentators differentiated China as well as other Asian countries from their own by the end of the century."[146]

This conception of China was taken up by Georg Wilhelm Friedrich Hegel (1770-1831), with enormous consequences, given Hegel's influence on Western philosophy. Hegel was completely dismissive of "the East," in which he included most of the world. "There are two types of philosophy," he wrote, "1. Greek philosophy; 2. Germanic philosophy… everything oriental must therefore be excluded from the history of philosophy."[147] Though Hegel later somewhat moderated his views, due to contact with some of the earliest European professional sinologists,[148] his most negative characterizations of China and its prototypical intellectual—as well as the Eurocentric views of society, history, and race[149] they supported—continue to resonate in Western approaches to China today. In promoting Europe, Hegel felt the need to attack "the Orient": "The exclusion of Egypt and Asia from the history of philosophy had to be defended also rhetorically by knocking down old opinions about the antiquity and sophistication of Oriental knowledge. One had to undermine the reputations of the great civilizations of the East." To accomplish this task, he disputed Enlightenment-era praise for Confucius.

> Hegel suggested that Chinese civilization was not as old or advanced as had been thought. He was aware of the great fame of Confucius, of his "good, competent moral teachings," but he told his students not to expect profound philosophical insights from the Chinese sage. Europeans really had nothing to gain from Confucius's teachings. Cicero's *De officiis* was a better alternative ("perhaps better for us than all the works of Confucius"). Hegel related what (nameless) "competent judges" had concluded about Confucius: that his reputation would have been better preserved *had he not been translated*. A book of sermons is better than the "completely ordinary" and "circuitous" ethics of Confucius.[150]

Hegel's critique was particularly pointed where law was concerned, contrasting Western and Oriental commitments to what would later be characterized as "rule of law," which he thought was completely lacking in Asia.

> The noble-mindedness that accompanies rights and morality, respected by all and valid for all, is something other. The noble-mindedness of the Oriental is merely an accident of his particular character and not morality or law. It happens to be, however, the cause of the "consummate independence" of Oriental subjectivity, which lacks permanence and determinateness. Objectivity or lawfulness does not pertain here. Whereas in the West we

[145] Cheng, 602.
[146] Chen, *Chinese Law in Imperial Eyes*, 115.
[147] Cheng, "Morality and Religiousness," 602.
[148] Cheng, 604–5.
[149] Peter K. J. Park, *Africa, Asia, and the History of Philosophy: Racism in the Formation of the Philosophical Canon, 1780-1830* (SUNY Press, 2013), 129–30.
[150] Park, 127.

> find justice and morality, in the East we find only the natural order—"no conscience, no ethics." In the natural order, however, the highest noble-mindedness is of the same level as "blind arbitrariness."[151]

In addition, Hegel's historical theory meant that it was impossible for these Chinese attitudes to have developed, because he believed that China had peaked thousands of years ago before settling into unchanging stasis.

> With the Empire of China History has to begin, for it is the oldest, as far as history gives us any information; and its *principle* has such substantiality, that for the empire in question it is at once the oldest and the newest. Early do we see China advancing to the condition in which it is found at this day; for as the contrast between objective existence and subjective freedom of movement in it, is still wanting, every change is excluded, and the fixedness of a character which recurs perpetually, takes the place of what we should call the truly historical.[152]

Although Hegel's views about world philosophy in general and China in particular were disputed by his contemporaries, some of whom assigned much more important roles to Asia and Egypt in their philosophical histories,[153] it was Hegel's approach that was most influential among the social theorists whose work would shape Western ideas of Chinese law.

> Hegel's statement of China's extraordinary stability is no doubt extreme, yet it has many historical variations. In Marx's scathing metaphor, China "vegetates in the teeth of time," while Max Weber saw in Confucianism a religion that worshipped the status quo and thus radically impeded China's passage into modernity. And in *The Order of Things* Foucault too characterizes Chinese culture—located "at the other extremity of the earth we inhabit"—as one that is "entirely devoted to the ordering of space."[154]

These views had serious consequences when they were employed to support colonial and other exploitative arrangements that European nations foisted on China.

> Together with De Pauw's opinions previously absorbed into the German philosophical tradition, Mill's Benthamite judgments resurfaced in Hegel's influential judgment that China's use of corporal punishment proved that the Chinese had to be "regarded as in a state of nonage," an opinion that would be used later in the century to justify imposing upon China extraterritoriality and other concessions that favored the "mature" Western states.[155]

Hegel's view of Chinese legal history was thus instrumental in laying the groundwork for the philosophical justifications of European imperial projects in China.

---

[151] Park, 124–25.
[152] Ruskola, *Legal Orientalism*, 43.
[153] Park, *Africa, Asia, and the History of Philosophy*, 130–31.
[154] Ruskola, *Legal Orientalism*, 43.
[155] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 177.

One of his intellectual heirs linked Hegel's view of China's inertia more firmly to the figure of Confucius himself: Max Weber, the 19th-century German sociologist, whose views of Chinese history, according to Jack Barbalet, were likewise heavily influenced by the 19th-century context of European imperial expansionism, as European nations sought to reverse their trade imbalances with China and grow their Pacific territorial holdings ever more aggressively, inflicting a series of humiliating military defeats on China.[156] Seeking an explanation for China's failure to live up to the advanced state of Western technology and society, Weber identified as one of the central culprits Confucianism and its effect on the development of Chinese legal theory and practice.

> Weber picks out certain traits peculiar to classical Chinese religious and political culture to make the case that even a highly developed civilization like China's could not match the institutional and legal achievements that culminated in the modern liberal democratic states that emerged in the west after the sixteenth century. Weber linked the particularism of Confucian ideology, which remained rooted in family and local custom, to the despotic nature of the Chinese patrimonial state.[157] In his view, Chinese ruling elites did not legitimate their authority by formal laws or universal moral standards but "discharged business in thoroughly patriarchal fashion."[158]

In other words, because the dominant norms governing social interaction and relations of authority derived from family-oriented Confucian philosophical principles rather than state-created statutes, rulers were free to make whatever laws they wanted, and they did so in unsystematic and unrestrained fashion in pursuit of private ends. Neither law nor any principles underlying law, therefore, played any role in the government's theoretical or practical right to rule its people. Another way of putting it is "that 'rational-legal' authority, rooted in the legalistic organization and coordination of state action, supplied an enormous amount of political legitimacy for modern states. Under this view, modernization is, to a large extent, the process of *accepting law as political reason*, or even of substituting law for reason."[159] Matthew Sommer writes that Weber

> tested his theory about the rise of capitalism through a comparative analysis of two other civilizations where capitalism had not developed, namely, China and India. Unlike

---

[156] Jack Barbalet, "Max Weber and China: Imperial Scholarship, Its Background and Findings," in *Sino-German Encounters and Entanglements: Transnational Politics and Culture, 1890–1950*, ed. Joanne Miyang Cho, Palgrave Series in Asian German Studies (Cham: Springer International Publishing, 2021), 133, https://doi.org/10.1007/978-3-030-73391-9_6.

[157] "The term 'patrimonialism' broadly typologizes a polity wherein the political sphere is under the leadership of one royal house (organized as a court) that has attained a degree of autonomy vis-à-vis other social sectors. This moderately autonomous political sphere is in many ways still beholden to traditional values as a source of legitimating ideology. Weber viewed patrimonial domination as an extension and development from an earlier system of political-kinship control exercised by the extended patriarchal household (loosely characterized by common residence and commensality." Andrew Eisenberg, "Weberian Patrimonialism and Imperial Chinese History," *Theory and Society* 27, no. 1 (1998): 83.

[158] Turner Karen, ed., *Meiguo xuezhe lun zhongguo falü chuantong* 美国学者论中国法律传统 *[American Scholars Talking about the Tradition of Chinese Law]* (Qinghua daxue chubanshe youxian gongsi *清华大学出版社有限公司*, 2004), 24.

[159] Yiqin Fu, Yiqing Xu, and Taisu Zhang, "Does Legality Produce Political Legitimacy? An Experimental Approach," SSRN Scholarly Paper (Rochester, NY, November 18, 2021), https://doi.org/10.2139/ssrn.3966711.

> Europe, Weber argued, Chinese society was dominated by kinship (in India the problem was caste), which discouraged the development of individual rights, free contract, and the concept of the corporate person; domination by kinship inhibited the development of law, which Weber defined as formal rules enforced by autonomous authorities. The Chinese "patrimonial state" suppressed the development of autonomous corporations that might have threatened it politically, thereby further inhibiting the development of modern law.[160]

Neither law nor any principles underlying law, therefore, played any role in the government's theoretical or practical right to rule its people. After Weber, therefore, one major strand of Western thought held that Chinese law, hampered by Confucian "particularism," was inherently incapable of developing, or even living up to, the enlightened principles of "modern" legal systems. These views had serious consequences when they were employed to support colonial and other exploitative arrangements that European nations foisted on China.[161] For Hegel's followers, the primitive and static qualities of Chinese law justified the imposition of European will.

All these approaches were united in the works of Karl Wittfogel (1896-1988), who needed a way to justify the West in the political and ideological conflict of the Cold War, and whose views remain extraordinarily influential in accounts of Chinese legal culture. According to Wittfogel's theory of "hydraulic despotism," the fact that governments in pre-imperial China had to develop complicated water control projects led to an eventual concentration of power in the hands of the emperor who, needing to legitimize that concentration, turned to patriarchal "Confucianism," styling himself the father of a nation-family whose tyrannical rule could be justified by ancient precepts. This despotism, he claimed, persisted into the 20th-century China he was describing and explained both the fact and the justice of European superiority.

Wittfogel is a striking example of how contemporary geopolitical concerns have shaped the presentation of Chinese legal and political history to downplay the details of specific eras gleaned through painstaking examination of individual sources, favoring instead broad overviews that minimize or ignore the role of non-Han actors like the Northern Wei. While Wittfogel was working in China, his aim was to translate a huge amount of the material from the official histories, and he focused much of his early efforts on the records of the Liao 大遼 (916-1125), a non-Han dynasty that ruled the northeast of the territory of the present-day PRC.[162] Based on his analysis of the Liao materials, he reached conclusions similar to those I discuss in this thesis about the syncretic nature of Northern Wei practices: "Cultural exchanges between the Liao conquerors and the native Chinese were common," he explained, "while close contact also propagated new customs, for example the creation of the herd-owning agriculturalist, which were

---

[160] Matthew Sommer, "The Field of Qing Legal History," in *A Scholarly Review of Chinese Studies in North America*, ed. Haihui Zhang et al., Asia Past & Present: New Research from AAS (Association for Asian Studies, Inc., 2013), 114, https://www.asianstudies.org/wp-content/uploads/A_Scholarly_Review_ePDF.pdf#page=122.
[161] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 177.
[162] Matthew Linton, "The Transformation of Cain: Karl August Wittfogel's American Acculturation and the Cold War, 1934-1963" (Masters, Brandeis University, 2011), 31–32, https://s3.amazonaws.com/na-st01.ext.exlibrisgroup.com/01BRAND_INST/storage/alma/5A/D5/D3/1A/D6/08/1E/1D/87/D4/1F/30/CD/6B/AD/54/Wittfogel%20Final%20Draft.pdf?response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Date=20231119T200148Z&X-Amz-SignedHeaders=host&X-Amz-Expires=119&X-Amz-Credential=AKIAJN6NPMNGJALPPWAQ%2F20231119%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Signature=a1b58a436f10d71b5d12da3a712a538a3f6f3506ab623e6e68adc4b0412d24a3.

a combination of Liao and Chinese traditions."[163] Yet his reaction to the situation in late 1930s Europe (particularly the Nazi-Soviet pact) led him to far greater skepticism of Marxist ideology,[164] a skepticism confirmed by the 1949 Communist takeover of China.[165] These political developments combined with the development of nuclear weapons and rising Soviet-American tensions "elevated Wittfogel's fear that a third world war was imminent. His fear was reflected in his scholarship, which showed an increasing willingness during the 1950s and 1960s to eschew a balanced, objective position regarding the Soviet Union and China in favor of dogmatic anti-Communism."[166]

This manifested in his analysis of the "conquest dynasties," including both the Liao and the Northern Wei. He pushed back against the common understanding that "the Chinese had always absorbed their conquerors"[167] by arguing that groups like the Tuoba always maintained separate military, social, and governance structures that persisted until the collapse of the dynasties they ruled; only then would they become part of the Chinese nation. This analysis, which he repeated in his most influential work, *Oriental Despotism*, was motivated far more by what he perceived as pressing political concerns rather than historical ones. Wittfogel rejected the notion of absorption because he saw it as an argument used to allay fears about the Communist takeover: if China had always absorbed conquerors, the same fate would befall the CCP; if not (as Wittfogel contended), the Communists were there to stay and needed to be actively fought. In order to make this claim, Wittfogel had to posit the separate existence of "China" and its "conquerors," and he did so in terms that reified all the stereotypes of the eternally Confucian China, untouched at its core by any outside influences like the Northern Wei.

> Virtually all great Chinese ideas on the "Way" (tao), on society, government, human relations, warfare, and historiography, crystallized during the classical period of the territorial states and at the beginning of the imperial period. The establishment of the examination system and the psychologically slanted reformulation of Confucianism followed the reunification of the empire, the transfer of the economic center to the Yangtze Valley, and the building of an artificial Nile, the Grand Canal. Other significant changes occurred during later periods of imperial China in the field of the drama and the popular novel; but they were partly due to a new influence, the complete subjugation of China by two "barbarian" conquest dynasties. And none of them shook the Confucian foundation of Chinese thought.[168]

As other sinologists noted at the time of his most influential publications, Wittfogel's invocation of "hoary stereotypes" of Oriental despotism had "an understandable appeal in the present cold

---

[163] Linton, 40. In fact, "herd-owning agriculturalists" long predated the Liao. Katherine Brunson, Brian Lander, and Mindi Schneider, "Cattle and People in China From the Neolithic to the Present," in *Cattle and People: Interdisciplinary Approaches to an Ancient Relationship*, ed. Catarina Ginja and Elizabeth Wright (Lockwood Press, 2022), 281–301.
[164] Linton, "The Transformation of Cain," 33.
[165] Linton, 46.
[166] Linton, 48.
[167] Karl A. Wittfogel, "Chinese Society: An Historical Survey," *The Journal of Asian Studies* 16, no. 3 (May 1957): 352–53, https://doi.org/10.2307/2941230.
[168] Karl August Wittfogel, *Oriental Despotism: A Comparative Study of Total Power*, 1st Vintage Books ed (New York: Vintage Books, 1981), 421–22.

war situation."[169] That appeal was felt especially strongly by American institutions like the Rockefeller Foundation, which had initially funded Étienne Balazs's period-specific studies of major texts[170] (the kind also favored by Wittfogel in the 1930s), but came to find them "focused on too distant a period of Chinese history"[171] in light of the urgency of the incipient conflict which was motivating Wittfogel in the 1950s. Rockefeller funding turned away from "the heavy tomes of European sinology during the 1950s and 1960s"[172] in favor of works like *Oriental Despotism*, whose introduction acknowledges that, "For a number of years the Rockefeller Foundation supported the over-all project of which this study is an integral part."[173] These works, purported to reveal "social configurations and trajectories of political development,"[174] deep and eternal truths about China that seemed to offer America more (or at least more accessible) help in understanding its new rival than the complicated and detail-heavy studies they replaced. With the help of this support, Wittfogel marshalled all the theories of the European thinkers who called Chinese law always and forever "Confucian" to explain its primitive and static nature, thereby justifying the political and military conquests of their governments, forging out of them a more effective ideological weapon for use in the Sino-Western conflict of his own time.

Our scholarship today remains bound by these war-born ideologies: "Today, despite the arguments made by such Western scholars as Voltaire that [the] Chinese constitution was the best in the world, the dominant view of Chinese law remains largely the same as that of Montesquieu, Marx, and Wittfogel. Scholars in both China and America argue that China has only the rule *by* law or the rule *by* men and the concept of the rule *of* law is alien to China."[175] Put another way, many academics in both China and the West "have yet to advance substantively beyond the Weber and Wittfogel stereotypes of 'Confucianism' as either fundamentally 'irrational' or 'despotic.'"[176] The power of these stereotypes persists in part because the battles that gave rise to them are always about to recur, so we still need a way of explaining why *we* are better than *them*.

America

American views about Confucius and law traced a similar trajectory from admiration to denigration, seeking first ideals to aspire to and then—as America's global influence and self-confidence grew, bringing it into greater competition with China—negative examples with which to demonstrate its own superiority. The first American stories about Confucius were told to offer cultural and legal models to a nascent country eager to distinguish itself from Europe. Many influential early Americans inherited Voltaire's very positive views of a Confucian-identified

[169] E. G. Pulleyblank, "Karl A. Wittfogel, Oriental Despotism (Book Review)," *Journal of the Economic and Social History of the Orient* 1, no. 3 (October 1, 1958): 348.
[170] H. T. Zurndorfer, "Not Bound to China: Etienne Balazs, Fernand Braudel and the Politics of the Study of Chinese History in Post-War France," *Past & Present* 185, no. 1 (November 1, 2004): 192, https://doi.org/10.1093/past/185.1.189.
[171] Christian De Pee, "Cycles of Cathay: Sinology, Philology, and Histories of the Song Dynasty (960–1279) in the United States" 2 (2012): 42–43.
[172] Pee, 45–47.
[173] Wittfogel, *Oriental Despotism*, iv.
[174] Pee, "Cycles of Cathay," 45–47.
[175] Qiang Fang, "The Spirit of the Rule of Law in China," *Education about Asia* 13, no. 1 (2008): 36.
[176] Zhang, *The Laws and Economics of Confucianism*, 265.

Chinese law, even looking to it for inspiration for the new society they sought to create. For example,

> One way in which Benjamin Franklin sought to disseminate the political vision of the Chinese sage was by printing a set of essays entitled "The Morals of Confucius" in *The Pennsylvania Gazette,* with approving references to China's restrained judicial administration and discouragement of needless litigation. Even more remarkably, on the eve of the American Revolution Franklin reportedly wished to ask the Emperor of China for permission to use his "code of laws" as a model for the new republic.[177]

As Jedidiah Kroncke has pointed out, the fact that late-18th-century America wasn't engaged in colonial projects in China meant that people like Franklin were far less incentivized than European thinkers to cast China in negative terms. "Without the need to justify a colonial foreign policy, Americans were more strongly influenced by the direct representations of China present in Jesuit writings than the broad denigrations of Sinophobic writers."[178] The image of Confucius as a secular moralist that appeared in those writings was very attractive to men who both saw themselves as the inheritors of Enlightenment rationality and wished to distinguish themselves from European prejudices, and Confucius and the culture with which he was identified was lauded by figures like Thomas Paine, Jedidiah Morse, John Adams, and Benjamin Rush.[179]

> Confucianism had a natural appeal in the intellectual milieu of the Founders, so full of natural law drawn from a long ago and unreconstructed golden age. Thomas Paine spoke in glowing terms of Confucius, whom he lauded in his classic *The Age of Reason* as a great ethical teacher whose influence was threatened by European commerce. Influential educator Jedidiah Morse compared Confucius favorably with Socrates, as did a number of post-Revolutionary magazine commentaries. John Adams and Benjamin Rush engaged Confucian texts in their own readings, and even religious leaders of the era were often open to Chinese writings on moral virtue.[180]

Kroncke also points out that these Americans were encountering not only the "philosophical China" or "philosophical Confucius" described by Anne Cheng.[181] Instead, their admiration was based too on "the study of China's specific legal and political institutions."

> In America, the most popular Jesuit writing of the era was Père Du Halde's *The General History of China*, which included descriptions of Chinese law as well as its civil service examination system, methods of national taxation, and procedures for centralized resource management. A range of other Founding era thinkers and politicians called upon the young nation to learn from Chinese law given its reputation for reasoned impartiality. To wit, Charles Thomson, secretary of the Continental Congress, urged Americans in 1771 to learn from China in both science and law. The first volume of the American

[177] Ruskola, *Legal Orientalism*, 44.
[178] Jedidiah Joseph Kroncke, *The Futility of Law and Development: China and the Dangers of Exporting American Law* (New York, NY: Oxford University Press, 2016), 23.
[179] Kroncke, 23.
[180] Kroncke, 23.
[181] Cheng, "Morality and Religiousness," 595–97.

> Philosophical Society in 1785 idealized Chinese governance, and the influential New Hampshire Magazine followed suit in 1793. Early American diplomat Arthur Lee sought a delegation to China to express to the emperor the sentiment that Americans were "desirous of adopting the wisdom of his Government, and thereby wishing to have his code of laws."[182]

While "no particular institution or law was ever transplanted from China *in toto*," in part because "there was still very little specificity to the knowledge about Chinese law possessed by the Founders," there was nevertheless a great deal of interest in Chinese legal ideas in early America, legal ideas strongly and positively identified with the figure of Confucius.[183]

This early desire for emulation didn't last: Chinese roadblocks to free trade were a major catalyst of American antipathy toward Chinese legal and governmental institutions. As in 17th- and early 18th-century Europe, most late 18th-century Americans initially saw China as a distant ideal, a place that could be learned about and even copied but that had little practical effect on their daily lives. But as the newly formed United States sought to establish an economic base for its political independence, it too discovered that trading with China could be difficult, and "direct U.S. involvement with China" engendered "a continuous cross-cultural process of interaction against which Western social, economic, and political values were constantly measured and contrasted." China's government restricted both the goods Western traders could purchase and the area within which they could conduct business—an area the government required remain subject to Chinese law—engendering a great deal of resentment.[184] The "Confucian" laws that had seemed so appealing to America's constitutional theorists were deeply resented by the merchants who actually experienced them, merchants who then complained of their treatment in the strongest and most culturally essentializing terms: The "despotism" which began with the "Confucian" emperor was seen by these men as an "impure source whence the black stream of vice flows to infect the whole nation."[185] As always, the characteristics of Chinese civilization served a nation in search of its own self-definition: as Americans were coming to understand themselves as a free-spirited, entrepreneurial people, they looked increasingly to China to tell them how not to be: "Slavish behavior, attributed to any outside limits imposed upon one's freedom in the liberal marketplace, was automatically thought to be a sign of despotism."[186] As a result, the frustrations of American merchants in China contributed to the development of a laissez-faire attitude among American thinkers who had previously been inclined to welcome governmental economic intervention.[187] In other words, increased contact with contemporary China exacerbated American hostility to the culture they had identified as Confucian—a culture upon which they had heaped praise when it seemed confined to the ends of the earth or the

---

[182] Kroncke, *The Futility of Law and Development*, 24.
[183] Kroncke, 25.
[184] John Kuo Wei Tchen, *New York Before Chinatown: Orientalism and the Shaping of American Culture, 1776-1882* (JHU Press, 2001), 38.
[185] Tchen, 38.
[186] Tchen, 38.
[187] "Contact with the realities of Chinese society, economic policy, and politics had soured the Jeffersonian and Franklinesque admiration for China, but the passionate coveting of refined Chinese things continued unabated. American traders were unable to understand and accept Chinese differences or suspend their ethnocentric judgments. Their notions of a proper universal human being were defined by behavioral norms that disdained the cultural differences they encountered. And as these exemplars of the rising US culture distanced themselves from these foreign "others," so too they differentiated themselves from the not so distant Anglo-American republican heritage of a strong governmental hand regulating economic activity." Tchen, 40.

ancient past—and that hostility rebounded, producing an even firmer American commitment to economic deregulation.

Moreover, although the United States "ultimately rejected the idea of territorial imperialism in China"[188]—maintaining the same resistance to colonialism in Asia that allowed its founders to embrace Chinese philosophical and institutional principles (at least theoretically)—it nevertheless sought an unequal arrangement in its dealings with the country that helped spur this degradation in American attitudes to Chinese law. As American merchants sought to live and do business in China, they increasingly sought exemption from the control of the Chinese state they had come to hate. Though unsuccessful at first, the American government was eventually able to force concessions from the Chinese in the late 19th century, and "this exemption from local law became established as the right of extraterritorial jurisdiction."[189] Extraterritoriality required the same philosophical justifications of Chinese inferiority as European colonialism, and the "Confucianism" that had been so appealing to the founders could now serve as evidence of China's failure to modernize. Although the country "was organized functionally in the form of a centralized bureaucratic state and could thus hardly be dismissed as a grouping of tribal savages, yet rhetorically its sovereignty was structured in the moral terms of Confucianism," i.e., a primitive, family-oriented value society that was out of place in the modern world. "To European international lawyers, this signaled a paradigmatically Oriental confusion of the logics of politics and kinship," and China was thus "located uneasily somewhere between civilized and savage, fully sovereign and colonizable. Extraterritorial jurisdiction in turn became the chief institutional expression of that status."[190] American lawyers echoed these critiques as they sought to justify their own extensive regime of extraterritoriality.

In 1879 Senator James Blaine (1830-1893) of Maine declaimed: "We have this day to choose whether we will have for the Pacific coast the civilization of Christ or the civilization of Confucius."[191] Senator Blaine's associations with Confucius were considerably less lofty than those rendered in marble and paint by MacNeil, Weinman, and their fellow artists. He inveighed in vivid and specific detail about the evils that Chinese immigrants brough to American shores, evils which derived from their outlandish and reprehensible "Confucian"[192] socialization.

> Treat them like Christians, my friend says; and yet I believe the Christian testimony from the Pacific coast is that the conversion of the Chinese on that basis is a fearful failure; that the demoralization of the white is much more rapid by reason of the contact than the salvation of the Chinese race… There was not, as we understand it, in all the one hundred and twenty thousand Chinese… the relation of family… You cannot work a man who must have beef and bread, and would prefer beer, alongside of a man who can live on rice. It cannot be done. In all such conflicts and in all such struggles the result is not to bring up the man who lives on rice to the beef and bread standard, but it is to bring down

[188] Ruskola, *Legal Orientalism*, 113.
[189] Ruskola, 119.
[190] Ruskola, 119.
[191] Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (Univ of North Carolina Press, 2000), 137.
[192] Because the central claim of this chapter is that there is no such thing as a transhistorical "Confucianism" that meant the same thing at all moments of Chinese law, the word will always appear in quotation marks, as will "Confucius" when I am discussing later constructions rather than the person himself.

> the beef and bread man to the rice standard. [Manifestations of applause in the galleries.][193]

In Blaine's telling, Chinese representatives of the "civilization of Confucius" were biologically and culturally totally alien to Christian Americans, whose morals and livelihoods they threatened by their mere presence on the same soil. Neither his views nor his desire to shield America from the effects of this dangerous foreign creed were unusual. As the *New York Times* wrote in 1876, "Let us have an act of Congress against Confucianism."[194] To those who feared the influence of Confucius's adherents, the answer was obvious: keep them out. Thanks to the advocacy of Blaine and many other politicians and journalists, in the 1870s, Congress began passing a series of laws, designed to drastically curtail the immigration of Chinese people into the United States.[195]

The vision shared by Blaine and his supporters of unassimilable "Confucian" Chinese hordes overwhelming a defenseless America—a vision motivated by the 19th-century American need to justify its culture, its treatment of Chinese in China, and its fear of cheap Chinese labor in the United States—found its way into American law first through the Congressional enactments barring Chinese immigration and naturalization, then through the court decisions upholding them. Speaking in support of the 1882 Chinese Exclusion Act, Senator John Miller of California explained that for "forty centuries or more," the Chinese "people have endured without change."[196] According to Lucy Salyer,

> Restrictionists warned that if allowed to remain, Chinese with their distinctive character and traditions would endanger American civilization. They portrayed a Chinese character ill-suited to the American system of self-government and free labor. An imperial, despotic government had always ruled China, restrictionists argued, and as a consequence had created a people "utterly unfit for and incapable of free or self-government."[197]

To supporters of the Act, it was "self-evident that Congress's exclusion of the Chinese from immigration was not based on 'color' but cultural disqualification for citizenship. That is, the Chinese were so radically unlegal that they were simply not capable of the kind of self-governance that was required by America's 'republican form of Government.'"[198] Beginning in 1884, the Court started deciding cases arising under the Chinese exclusion laws, almost always in favor of the government,[199] because, like Senator Blaine, the Justices also believed that Chinese people were civilizationally opposed to Americans. In the first such case, the Court echoed both Blaine's fears of an America consumed by Chinese invasion and his language of the Christian civilization they were obliged to defend from such assaults.

---

[193] *Chinese Immigration*, 45th Cong. 1302-1303 (1879) (statement of Senator Blaine).
[194] "Foo-Che-Pang," *The New York Times*, June 8, 1876.
[195] The Page Act, Pub. L. 43–141, 18 Stat. 477, Chap. 141 (1875), the Chinese Exclusion Act, Pub. L. 47–126, 22 Stat. 58, Chap. 126 (1882), the Geary Act, Pub. L. 52-60, 27 Stat. 25 (1893).
[196] Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Univ of North Carolina Press, 1995), 16.
[197] Salyer, 16.
[198] Ruskola, *Legal Orientalism*, 45–46.
[199] Chew Heong v. United States, 112 U.S. 536 (1884); Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Lem Moon Sing v. United States 158 U.S. 538 (1895); United States v. Ju Toy 198 U.S. 253 (1905).

> Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between the two countries, the certainty, at no distant day, that, from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.[200]

The opinion described Chinese in America as completely unassimilated, especially in matters of law, ideas about which they had brought with them and continued to adhere to.

> They have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the laws and customs which they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country. They have their own tribunals to which they voluntarily submit, and seek to live in a manner similar to that of China. They do not and will not assimilate with our people; and their dying wish is that their bodies may be taken to China for burial.[201]

How rooted this anti-Chinese sentiment became in Supreme Court jurisprudence is reflected in Justice John Harlan's dissent in *Plessy v. Ferguson*, in which—even while inveighing against racist discrimination against African Americans—he acknowledged the logic of discriminating against Chinese people: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[202] By the 1920s, this sentiment was sufficiently widespread throughout the federal judiciary that one US District Court judge in Washington State could write that:

> The yellow or brown racial color is the hallmark of Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship.[203]

In 1924, the Johnson-Reed immigration act ushered in America's most restrictive legal and administrative immigration regime, instituting a quota system based on the country's population according to the 1890 census, i.e., after the passage of the Chinese exclusion laws. The law clearly echoed the Court's views on race and assimilability.[204]

---

[200] Chew Heong v. United States, 112 U.S. 536, 569 (1884).
[201] Chew Heong v. United States, 112 U.S. 536, 566-567 (1884).
[202] Plessy v. Ferguson, 163 U.S. 537 (1896).
[203] Ruskola, *Legal Orientalism*, 45. Quoting Terrace v. Thompson, 274 F. 841 (1921).
[204] Ngai, "The Architecture of Race in American Immigration Law," 87–88.

As numerous authors have pointed out, this fear of an immutable Chinese civilization stemming in large part from late 19th-century American stories about "Confucian" legal culture drove major changes in American law and society. Teemu Ruskola writes that the desire to keep "lawless" Chinese people out of the United States resulted in enormously significant increases in domestic American lawlessness. So eager were judges to exclude Chinese warped by millennia of despotism that they contributed to the development of a more despotic American president with a largely unchecked "plenary power" over immigration.[205] Along similar lines, Lucy Salyer and Erika Lee have shown that the systems designed to keep these legally and culturally unassimilable people out of the country gave rise to the modern system of American immigration controls and the legal theories that underlie them. Lee argues that "the consequences of exclusion extended far beyond the confines of [the Chinese] community and ushered in a completely new era in U.S. history."

Beginning in 1882, the United States stopped being a nation of immigrants that welcomed foreigners without restrictions, borders, or gates. Instead, it became a new type of nation, a gatekeeping nation. For the first time in its history, the United States began to exert federal control over immigrants at its gates and within its borders, thereby setting standards, by race, class, and gender, for who was to be welcomed into the country. Immigration patterns, immigrant communities, and racial identities and categories were significantly affected. In the process, the very definition of what it meant to be an ''American'' became even more exclusionary.[206]

This cultural shift was given dramatic effect in law and bureaucracy: "The doctrines established primarily in Chinese litigation before 1905 the extraconstitutional status of aliens, the characterization of deportation as a civil proceeding, the plenary congressional power over immigration policy, and judicial deference to administrative findings."[207] The xenophobic anxieties over a people whose ostensibly static "Confucian" legal culture that contributed to America's newly exclusionary sense of itself in the late 19th century, as well as the bureaucratic machinery and legal doctrine that allowed Congress to act on those anxieties, are still operative in America's more recent efforts to exclude Muslims, Mexicans, and those from "shithole countries."[208]

And yet there is an apparent mystery to late-19th- and early 20th-century American attitudes towards "Confucian" Chinese law. Representations of Confucius are all over American courthouses: as early as 1899, he began appearing in courts all over the country, from New York to Baltimore to Minneapolis.[209] Given the history just described, it may surprise some to learn that the US Supreme Court building features images of the Chinese thinker Confucius, not once but twice: carved into the exterior and painted onto the courtroom wall. Though the Supreme Court didn't adopt the exclusionists' language about "Confucianism," it adopted pretty much everything else, upholding their laws in a series of starkly racist decisions beginning in the 1880s. Nevertheless, around the back of the Supreme Court (facing away from the Capitol) is the East Pediment, which "visitors often miss,"[210] installed when the building was constructed in 1935. The pediment displays thirteen ancient legislators, of which the central figure is Moses,

---

[205] Ruskola, *Legal Orientalism*, 145–48, 229–32.
[206] Lee, *At America's Gates*, 6–7.
[207] Salyer, *Laws Harsh as Tigers*, 118.
[208] Erika Lee, *America for Americans: A History of Xenophobia in the United States* (Basic Books, 2019).
[209] Eric L Hutton, "On Ritual and Legislation," *European Journal for Philosophy of Religion* 13, no. 2 (June 30, 2021): 1n2, https://doi.org/10.24204/ejpr.2021.3333.
[210] The East Pediment (Information Sheet), https://www.supremecourt.gov/about/east_pediment_11132013.pdf.

flanked on his left by Solon and on his right by Confucius. The Chinese sage's position suggests that his ideas are a part of the legal tradition in which the justices of the Supreme Court participate, a suggestion confirmed by the pediment's sculptor, Hermon Atkins MacNeil (1866-1947), who wrote in his submission to the Supreme Court Building Commission:

> Law as an element of civilization was normally and naturally derived or inherited in this country from former civilizations. The "Eastern Pediment" of the Supreme Court Building suggests therefore the treatment of such fundamental laws and precepts as are derived from the East. Moses, Confucius and Solon are chosen as representing three great civilizations and form the central group of this Pediment.[211]

This idea of American law as emerging from a lengthy civilizational chain that includes ancient China is further reinforced by Confucius's second appearance at the Supreme Court, this time inside the building. On the south wall of the courtroom, Adolph Weinman's (1870-1952) frieze "Great Lawgivers of History," depicts the development of law from ancient pharaohs to John Marshall, including the pre-imperial Chinese philosopher.[212] The roughly 60-year period between the mid-1870s onset of Chinese exclusion and the 1935 enshrining of Confucius at the Supreme Court therefore saw the simultaneous entrenchment of anti-Chinese theory and practice in American law *and* the imagistic veneration of the single figure most prominently associated with the Chinese characteristics the exclusion laws were designed to keep out, in the places responsible for upholding those laws. We were putting him on pedestals while locking "his people" out.

Why were the judges who were so hostile to Chinese people and their culture that they were willing to reshape foundational allocations of American constitutional authority to keep them out willing to have their courthouses adorned with images of the man most generally associated with that culture? Perhaps even more strikingly, my research has revealed not a single derogatory reference to Confucius in the entire history of American jurisprudence. On the contrary, beginning in the early 19th century, Confucius was being treated in American judicial opinions with the respect appropriate to the depictions of him as a "great legislator" that were going up on courthouse walls. Though these opinions (unlike the visual representations) didn't generally focus on the potential connections between early Chinese and contemporary American legal ideas, they almost all acknowledged Confucius as a world-historical figure like Brama, Buddha, Moses, Mohammed, or Jesus, whose influence (according to American judges) was still the predominant and essential element in the social and religious culture of Chinese people.[213] As it turns out, this paradox reflected the state of the country at large. "The European stereotype of the devious, uncivilized Oriental was kept alive in the United States through the popular press," writes David Weir, "even as members of the cultural elite found inspiration in Indian antiquity and ancient China."[214] Weir points out that, in the late 19th century, America's elite were amusing themselves by attending lectures on ancient "Asiatic" cultures and investigating

---

[211] The East Pediment (Information Sheet), https://www.supremecourt.gov/about/east_pediment_11132013.pdf.
[212] Supreme Court of the United States, Self-Guide to the Building's Interior Architecture, https://www.supremecourt.gov/visiting/interiorbrochurewebversion_final_may2022.pdf.
[213] *See, e.g.,* Hendrickson v. Shotwell, 1 N.J. Eq. 577, 638 (1832); Fryatt v. Lindo, 3 Edw. Ch. 239, 241 (1838); Mayor & Common Council of Newark v. Board of Education, 30 N.J.L. 374, 377 (1863); Hale v. Everett, 53 N.H. 9, 87 (1868); Moore v. Connecticut Mut. Life Ins. Co., 17 F. Cas. 672, 676 (1874).
[214] David Weir, *American Orient: Imagining the East from the Colonial Era Through the Twentieth Century* (University of Massachusetts Press, 2011), 5–6.

Buddhist sutras while the exclusion laws were being passed, often on the basis of claims about the detrimental contemporary effects of precisely those cultures. "Not until the latter half of the nineteenth century did Americans come face to face with any of the Orientals they had hitherto known only from books," and "not surprisingly, the admiration of Asian culture and the parallel antagonism toward Asian people intensified as immigration became an increasingly uncomfortable fact of American life."[215] This is the answer to the mystery of Confucius' appearance on the buildings of the courts who were dedicated to keeping Chinese people out of the country based on their racial and cultural characteristics (partly understood as the legacy of "Confucianism"). American judges combined the respectful attitude toward pre-modern Asian culture typical of their class at that period—the legacy of the admiration of Voltaire and Benjamin Franklin—with the hostility toward contemporary manifestations of that culture expressed both by Kant, Hegel, and their intellectual heirs and the American politicians who saw Chinese immigrants as a convenient target of populist outrage. The American courts, with their statues, their respectful invocations of Confucius, and their anti-Chinese decisions simultaneously embodied both sides of this contradiction in a manner that has never before been observed.

China

Finally, the "Confucianization" theory today cannot be fully understood without some grasp of how it has been represented in China over the last century or so. The scholars who most influentially articulated the theories of "Confucianized" law were Chinese intellectuals deeply affected both by what their own country had experienced and by the Euro-American ideas about Confucius and Chinese legal history they studied.

The final story about "Confucian" law necessary to understanding its representation in American legal scholarship was told by 19th- and 20th-century Chinese scholars who need to explain why China kept losing to the West. Beginning with the Opium Wars in 1840, China was regularly defeated and subjected to humiliating terms of surrender as Western powers sought to wrest ever greater economic and territorial concessions from the country. This state of affairs naturally shook the confidence of late-imperial intellectuals.

> Once proud of being a central power in East Asia, late Qing scholar-officials witnessed China's abrupt decline by the late nineteenth century. Western powers "opened up" the Middle Kingdom through a series of military conflicts and diplomatic arrangements and gradually placed the country within a system that was dominated by global capitalism, colonialism, and imperialism.[216]

Late-Qing thinkers were cognizant of the connection between how China was being characterized in Western theory and how it was being treated by Western powers.

> Knowledge is power. Western imperialists worked with ethnographers, Orientalists, as well as historians to promote the discourse of civilization to ideologically justify their

[215] Weir, 6.
[216] Xin Fan, *World History and National Identity in China: The Twentieth Century* (Cambridge University Press, 2021), 20–21.

> atrocious behaviors. They divided the world according to the civilized, half- civilized, and non-civilized and refused to treat those "non-civilized" or "half-civilized" peoples on equal footings within international society. Chinese scholar-officials… were stunned by the realization that the West now despised China and considered it a land of barbarism.

"It therefore became an urgent intellectual challenge to make sense of China's decline in the globalized world."[217] Just as Americans and Europeans needed a justification for their attacks on China, Chinese thinkers likewise needed to rationalize why they kept losing those fights, and they looked for them in the same place.

One answer was to elevate the status of Confucius. Prior to the late 19th century, Chinese thinkers considered Confucius only one significant historical and moral figure among many,[218] and the influence his ideas were said to have exerted on law during the Western Han was very much a matter of debate. Some scholars did believe that Emperor Wu 漢武帝 (r. 141-87 BCE) of the Western Han 西漢 dynasty (202 BCE-9 CE), with the assistance of his advisor Dong Zhongshu 董仲舒 (179-104 BCE), elevated Confucianism to the status of state ideology, largely dispensing with the other "schools" of philosophy that (according to supporters of this claim) flourished before the establishment of the empires. But this belief was hardly universal.

> While the "[Confucianism] becoming the dominant school of thought during the period of Emperor Wu" theory was quite common before the late Qing, there were many scholars who expressed a different view. They believed that although Emperor Wu had a policy to "dismiss the hundred schools of thought and exalt the six classics" during the beginning of his reign, he did not hold Dong Zhongshu in so much esteem, nor can he be considered to have truly revered Confucianism.[219]

It wasn't until he was coopted by a late-Qing reformer as part of a "highly eccentric reading of Confucian tradition as the basis for a new 'state religion' in China"[220] that Confucius began to take on (in China) the central importance he is accorded today. In the 1890s, after the extent of Western military and cultural incursions in China had become painfully clear, Kang Youwei (1858-1927), in "an attempt to resist the twin evils of Western colonialism and Christianity,"[221] advocated making Confucianism a "national religion… modeled on Christian sects and equipped with its own churches and a unifying ideology combining the best features (the 'essence') of Chinese culture."[222] This was the beginning of a process that would turn Confucius into "'a free-floating signifier' (i.e., a pseudo-historical figure on which propaganda points were inscribed in the name of the Sage)."[223] Like the Jesuits who needed a canvas on which to project the images

---

[217] Fan, 20–21.
[218] Nylan and Wilson, *Lives of Confucius*.
[219] Fukagawa Maki, "Understanding 'Confucianism Becoming the Dominant School of Thought,'" *Contemporary Chinese Thought* 51, no. 2 (April 2, 2020): 124, https://doi.org/10.1080/10971467.2020.1800903.
[220] Nylan and Wilson, *Lives of Confucius*, 194.
[221] Nylan and Wilson, 192.
[222] Nylan and Wilson, 193.
[223] Nylan and Wilson, 195. See also the last chapter of Michael Nylan, *The Five "Confucian" Classics* (Yale University Press, 2008). Zhou Huilei 周会蕾, "Wanqing Zhongguo Fazhi Shixue Ke de Chansheng Yu Fazhan 晚清中国法制史学科的产生与发展 [The Production and Development of the Discipline of Chinese Legal History in the Late Qing]," *Henan Jiaoyu Xueyuan Xuebao* 河南教育学院学报：哲学社会科学版 35, no. 6 (2016): 73.

that would best support their projects in China, Chinese thinkers, too, required a powerful indigenous, ancient figure that could be made to serve a variety of contemporary political ends. While Kang argued that Confucius's ideas could save China, his opponents countered that he had done too much already, citing Western accounts of the primitive state to which his philosophy had condemned Chinese law and society.

This simultaneous elevation and hollowing out of Confucius as a symbol was happening as late imperial and early Republican Chinese thinkers were turning their attention to law and legal history as a separate discipline, drawing inspiration from and reacting against Western models. "Ming and Qing jurists or legal commentaries mainly focused on the dynastic law codes or model cases rather than trying to develop a long duree legal theory."[224] Zhou Huilei writes that this fact was a reflection of a broader trend in Chinese approaches to academic study.

> In traditional China, there was no modern Western-style system of field-based study that took "academic disciplines" as the standard. According to the four-category bibliographic 四部之学 knowledge system, in the research atmosphere of "putting classical learning first," what was sought was the broad learning of erudites.[225]

As a result, despite the existence of ancient works like the pre-imperial *Documents* classic and the Treatises on Law and Punishment (of which Zhou singles out the *History of Han* version), there was no separate field of legal history in China. "Even though research on Chinese legal history went through several thousand years of development," Zhou acknowledges, "as a component of grand-scale historical research, that development never escaped its subservience to historiography, and an independent construction was even further out of the question,"[226] at least until the encounters with Western ideas whose influence became particularly pronounced beginning in the mid-19th century.[227] Zhou's contention therefore is that Western contact spurred the fundamental shift in Chinese scholarly organization that allowed law to be the focus of particular study.

Once legal history became widely recognized as an important, independent subject, the field was dominated by Western preconceptions about Chinese law, which were in a particularly hostile state by the late 19th century. This is in part because, as Li Dejia writes, as much as the specific content of their ideas about the history of Chinese law, it was the methodological impulse of Weber and scholars like him to neatly categorize legal historical trends that drove the development of the subject. (A similar approach can be found in Robert Marsh's critique of Weber's understanding of Chinese historical law, in which he focuses on his "ideal-types of the rationalization of legal systems.")[228] As an example, Li cites the work of the famous author and statesman (and student of Kang Youwei) Liang Qichao 梁啓超 (1873-1929), who began dividing ancient Chinese theories of rulership according to labels that are still used today (although in ways quite different from Liang's original meanings). Liang's categories helped popularize the dichotomies that have so dominated scholarly approaches to Chinese legal history

---

[224] Li Chen, personal communication, December 3, 2021.

[225] Zhou Huilei 周会蕾, "The Production and Development of the Discipline of Chinese Legal History in the Late Qing," 73.

[226] Zhou Huilei 周会蕾, 74.

[227] Zhou Huilei 周会蕾, 73.

[228] Robert M. Marsh, "Weber's Misunderstanding of Traditional Chinese Law," *American Journal of Sociology* 106, no. 2 (September 2000): 281, https://doi.org/10.1086/316966.

over the last century. For instance, he divided imperial rulership into different types, each associated with broad intellectual movements that continue to define how scholars understand social and ideological trends in imperial China: Confucianism, whose adherents governed through their mastery of virtue, status, and ritual, and Legalism, an anti-status (anti-particularism, in Weber's terms) philosophy of equality before the law that ostensibly advocated for ruling a populace through frequent and inflexible application of draconian punishments. Liang's categories gave rise to contemporary scholarship's strict association of Confucianism with ritual (or *li* 禮) and Legalism with law (or *fa* 法). Although contemporary scholars have forcefully demonstrated that no such rigid dichotomy existed in early imperial China—and that thinkers of that era did not identify as belonging to one camp or the other[229]—the overwhelming majority of works on early imperial law approach the subject through the lens of these two "schools."

Once thinkers like Liang Qichao had established that Confucianism and Legalism were the core elements of Chinese law and the figure of Confucius had completed his transformation into the "greatest sage" of Chinese culture—responsible either for its most glorious achievements or most ignominious failures—it became critical to establish at what point Chinese law had become "Confucianized."

> Scholars such as Liang Qichao, Nakauchi, Yi Baisha, and others considered Emperor Wu establishing Confucianism as the sole legitimating authority to mean that other schools of thought were prohibited, asserting that this led to the stagnation of Chinese academia and hindered the development of Chinese thought, adding further that Dong Zhongshu largely bears the blame for this.[230]

This view of early imperial China and of the millennia-spanning consequences of Emperor Wu and his advisor's decision—which could be blamed for China's failure to industrialize and its inability to compete militarily with the West—was and continues to be very influential on other scholars: "This perspective has been particularly popular in Chinese language academic circles since the New Culture Movement," so much so that it "was once assumed as a matter of course in the academic circles of China, Japan, America, and Europe."[231]

This Han Confucianization hypothesis wasn't without its detractors. It was the subject of criticism shortly after it was proposed, criticism that grew sharper (if not necessarily more widely accepted) throughout the twentieth century.[232] Some scholars believed that Dong Zhongshu wasn't actually as influential as the theory held, some saw Emperor Wu's policy changes as weak evidence for Confucian supremacy,[233] and some doubted that other ways of thinking were suppressed.[234] But this work did little to dislodge the notion of Confucianization, whose proponents either rejected these findings outright or simply shifted the chronological focus of their inquiry. "Some scholars did not accept the critique, and some scholars (especially Japanese scholars of Chinese history) accepted the critique and began reinvestigating the specific

---

[229] See, e.g., Csikszentmihalyi and Nylan, "Constructing Lineages and Inventing Traditions"; Smith, "Sima Tan and the Invention of Daoism."
[230] Maki, "Understanding 'Confucianism Becoming the Dominant School of Thought,'" 125.
[231] Maki, 125.
[232] Maki, 125–26.
[233] Maki, 126.
[234] Maki, 126.

time during which 'Confucianism became the dominant school of thought.'"[235] While some authors located the start of Confucian dominance in particular moments later than the Western Han Emperor Wu, others argued for a longer-term view. They "do not consider the ascendancy of Confucianism as a particular historical event, but rather see it as a process comprised of many stages over a long period of time."[236] One of the earliest and most influential pieces that advocated this approach was Homer Dubs' brief 1938 article "The Victory of Han Confucianism,"[237] which continues to be cited in contemporary scholarship, though in quite different ways. While Sinologists refer to the "largely discredited hypothesis that there was a 'victory of Han Confucianism,' supposedly initiated during the reign of Emperor Wu,"[238] law review articles continue to describe early imperial law this way.[239]

It is to a single author, synthesizing many if not all of the previously described trends, that we owe a significant portion of the prevalence of the legal Confucianization hypothesis today: the historian Chü T'ung-tsu, whose *Law and Society in Traditional China* "remains required reading for anyone working in this field today."[240] He had absorbed the low opinion of "Confucian" law of both the Chinese intellectuals seeking to account for China's military and apparent cultural failures *and* the Euro-American scholars who were continuing to argue for their own civilizational superiority at China's expense. (He was educated at an American missionary school and invited to study in the US by Karl Wittfogel.)[241] Chü argued that all areas of society (including law) began to be Confucianized in the Western Han and continued through the Eastern Han, until finally culminating in the medieval Tang dynasty. Western Han rulers, the theory goes, wanted desperately to avoid a repeat of Qin's failure, but they also recognized that Qin's mechanisms of social and cultural control offered them the best tools for governing a large, administratively complex territory. One answer to this puzzle was to take Qin laws and adapt them to a collection of pre-imperial ideas that came to be associated with Confucius and followers, ideas which Han-era thinkers updated to make them as useful as possible to the government. In this way, the Han emperors got the best of both: they could rely on Qin's practical administrative tools while claiming to draw legitimacy from older and more respected sources. According to Chü's notion of "Confucianization of the law," the really significant change from Qin Legalism to the beginnings of Confucianization in the Western Han was the insertion of Weberian "particularism," i.e., the law's different treatment of different classes of people. Whereas, Chü believed, Qin law dealt with every offender strictly according to the nature of their offense, Han law worried about such things as family relations and official rank,

---

[235] Maki, 127.
[236] Maki, 130.
[237] Homer H. Dubs, "The Victory of Han Confucianism," *Journal of the American Oriental Society* 58, no. 3 (1938): 435–49.
[238] Esther S. Klein, *Reading Sima Qian from Han to Song: The Father of History in Pre-Modern China* (Brill, 2019), 18. The source for this insight is Michael Nylan, "A Problematic Model: The Han 'Orthodox Synthesis,' Then and Now," in *Imagining Boundaries: Changing Confucian Doctrines, Texts, and Hermeneutics*, ed. Kai-wing Chow, On-cho Ng, and John B. Henderson (Albany: SUNY Press, 1999), 17–56. See also Loewe, "'Confucian' Values and Practices in Han China." Benjamin E. Wallacker, "Han Confucianism and Confucius in Han," in *Ancient China: Studies in Early Civilization*, ed. David T. Roy and Tsuen-hsuin Tsien (Hong Kong: The Chinese University Press, 1978), 215–28.
[239] See, e.g., Jingyuan Ma and Mel Marquis, "Moral Wrongfulness and Cartel Criminalization in East Asia," *Arizona Journal of International and Comparative Law* 35 (2018): 401.
[240] Sommer, "The Field of Qing Legal History," 114.
[241] Don S. Zang, "The West in the East: Max Weber's Nightmare in 'Post-Modern' China," *Max Weber Studies* 14, no. 1 (2014): 37.

characteristics that might be used to aggravate or mitigate punishments. "Primary importance was given to particularism," he wrote. "As a result, the law was primarily concerned with status-relationship and the corresponding obligations, paying little attention to such matters as individual rights, which were incompatible with particularism."[242] As Sommer points out, Weber's immense influence on Chü led him to implicitly evaluate early imperial Chinese law against "an ideal type of 'the modern West,'" with the result that "China's failure is simply taken for granted." "The purpose of historical inquiry," therefore, "is to illuminate the inadequacies that predestined its failure."[243] Chü's work, which continues to provide the most basic lens through which the origins and features of Chinese imperial law are viewed by vast numbers of scholars, is thus at least partly dedicated to proving the deficiencies of the legal culture it describes.

Chü's approach predominated in later studies of early imperial law and continues to be extremely influential today. In their still widely cited *Law and Imperial China*, Derk Bodde and Clarence Morris wrote in 1967 of "Legalist Triumph but Confucianization of Law,"[244] explaining of the Legalists that, "In thinking and techniques they were genuine totalitarians, concerned with men in the mass, in contrast to the Confucians, for whom individual, family, or local community were of paramount importance."[245] In a 2005 book, John Head and Yanping Wang took a slightly different view, arguing that, while of course Han law was Confucianized, it was the overall Confucianization of Han society that had the greatest effects on the population, though they advance little evidence for this broad conclusion.[246] As Chi Zeng writes, Chü's view of legal Confucianization is now that of many scholars of China.

> A mainstream view on the origins of the imperial legal tradition in China is that imperial Chinese law underwent a process of Confucianization beginning in the Han dynasty. This point of view… traces the Confucianization of law back to the philosophical conflict between Legalism and Confucianism in the Spring and Autumn, and Warring [States] periods. It is argued that the dichotomy between Legalism and Confucianism directly formed the two main spirits of traditional Chinese law, namely the Legalist and Confucian.[247]

Many of the idea's early negative connotations have faded, particularly among Chinese scholars, who often identify the blend of Legalism and Confucianism as the most distinctive feature of imperial Chinese law and therefore view the process of their combination as a significant source of national pride. Nevertheless, Confucianization and the implication of anemic law that accompanies it continue to characterize depictions of early imperial law.

This view has been epitomized by one particular term: *dezhu xingfu* 德主刑輔 (more rarely called *lizhu xingfu* 禮主刑輔 by some authors), meaning "virtue (or ritual) is primary, punishments are secondary." Li Dejia explains that the phrase was coined by the historian Yang

---

[242] Chü T'ung-tsu, *Law and Society in Traditional China*, 284.
[243] Sommer, "The Field of Qing Legal History," 114.
[244] Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases (Translated from the Hsing-an Hui-Lan), With Historical, Social, and Juridical Commentaries* (Cambridge, Mass: Harvard University Press, 1967), 27 passim.
[245] Bodde and Morris, 18.
[246] Head and Wang, *Law Codes in Dynastic China*, 103.
[247] Chi Zeng, "'Confucianization of Law' Revisited," *Asian Philosophy* 31, no. 1 (January 2, 2021): 88, https://doi.org/10.1080/09552367.2020.1815987.

Honglie, a particularly influential scholar who extended the ideas of Weber, Liang, and Chü, which he used to summarize the general thrust of a long list of historical materials on the relationship between virtue and punishment. (The term appears in the fourth chapter of his book *The History of Chinese Legal Thought* 中国法律思想史, "The Era of Confucian Sole Supremacy" "儒家独霸时代," whose title is an additional indication of his commitment to the Confucianization hypothesis.) Yang's understanding is that pre-Qin Confucians originated the idea, which formed a part of their program of "rule by ritual." He argues that this view predominated after the end of the Warring States and that, during the imperial period, only a few people believed that law alone was an adequate tool of governmental policy.[248] Yang's phrase has been extraordinarily successful, used in thousands of works of scholarship describing all eras of imperial Chinese law that see law's inferiority to ritual as the result of the victory of Confucianism over Legalism. As Li reiterates, this contemporary scholarly preoccupation with the tension between Confucianism and Legalism—and between *li* and *fa*—in the early empires is in part the legacy of the encounter between Western theorists like Max Weber and Chinese scholars like Liang Qichao, echoing in the works of their intellectual heirs like Chü T'ung-tsu and Yang Honglie. "When modern scholars essentialize Confucianism as 'rule-by-virtue-ism' and Legalism as 'rule-of-law-ism,'" he writes, "this kind of dichotomy between 'rule by virtue' and 'rule of law' is itself a Western one."[249] It is largely these categories that we are still stuck with today: "The distinction between *li* and *fa* as representative of Confucian and Legal remains commonplace in scholarly discussions of traditional Chinese law."[250]

The prevalence of these perspectives has had major implications for the scholarship of early imperial law. Firstly, they have established that law was a somewhat inferior category of human endeavor, in two major senses: 1) imperial law was inferior to the Confucian ritual thought that served as the government's real source of authority; 2) Chinese law was thus inferior to Western law, which protected individual rights and thereby encouraged the growth and innovation that eventually enabled Euro-American technological supremacy in the modern era. Secondly, the entire two-millennia history of imperial Chinese law has come to be seen as largely static. Following legal Confucianization—again, Chü claims that this process, begun in the Western Han, was completed in the early Tang—"no significant change occurred until the early twentieth century when the Chinese government began to revise and modernize its law."[26] Throughout most of imperial history, Chü wrote, "there were no fundamental changes until the promulgation of the modern law. We find stability and continuity in law and society, both dominated by the Confucian values."[27] According to this view, once the text of the laws became fully subordinate to China's enduring Confucian culture and practice, it didn't much matter if the details of the statutes themselves changed.

---

[248] Li Dejia 李德嘉, "Dezhu Xingfu Shuo de Xueshuo Shi Kaocha '德主刑辅'说的学说史考察 [An Investigation into the History of the Academic Claim of 'Virtue First, Punishments Second']," *Zhengfa Luncong* 政法论丛, no. 2 (2018): 155.

[249] Li Dejia 李德嘉, 156.

[250] Paul R. Goldin, "Han Law and the Regulation of Interpersonal Relations: 'The Confucianization of the Law' Revisited," *Asia Major* 25, no. 1 (2012): 3n8. See also Ernest Caldwell, "Social Change and Written Law in Early Chinese Legal Thought," *Law and History Review* 32, no. 1 (February 2014): 3, https://doi.org/10.1017/S0738248013000606.: "the debates appear polarized, with most theories methodologically locked in a struggle to understand the rationale behind this legal transition from the perspective of one of two major schools of thought in early China: Confucianism or Legalism."

Whether one views it positively or negatively, to talk today about China's "Confucian" law is usually to tacitly admit one of the most dramatically inaccurate premises of Chü T'ung-tsu's argument, which is that after the Tang-era completion of legal "Confucianization," "no significant change occurred until the early twentieth century… there were no fundamental changes until the promulgation of the modern law. We find stability and continuity in law and society, both dominated by the Confucian values."[251] It is hardly revelatory to say that there were of course major legal and social changes in the region now called China over a millennium and a half, but many contemporary authors blithely continue to act as if continuity or stagnation (depending on whether it's supposedly good or bad) was one of the core elements of Chinese culture. To talk today about a transhistorical "Confucian" law is either to evoke a Euro-American history that began with an effort to peg everything Chinese to a single figure—first to aid the spread of Christianity, then to score points in Western debates, then to justify imperialism—or to validate a Chinese Communist Party narrative designed to augment the ethnic and cultural rootedness of the current government. The first emphasizes civilizational differences that encourage international conflict, the second underpins ethno-nationalist authoritarianism. Both results are to be feared, and there is no need for scholars to support either, as the subsequent chapters on the largely overlooked ethnic, administrative, and legal complexities of the Northern Wei period make clear.

[251] Chü T'ung-tsu, *Law and Society in Traditional China*, 289.

Chapter 2: Sinicization and Duets in the *History of Wei*

Almost since it was written, the *History of Wei* has been criticized as a work of propaganda for its alleged blurring of ethnic and cultural lines, ostensibly making the Tuoba look more "Chinese" than they really were. Wei Shou had distorted the truth to portray them in this way, it was claimed, in order to shore up the political legitimacy of the Northern Qi government who commissioned and oversaw his history, and who claimed descent from the Northern Wei. Although late twentieth-century scholarship seemed to have gone a long way towards convincing many that these longstanding attacks on Wei Shou's credibility were driven by ancient political rivalries and should be discarded in favor of a more positive appraisal, I argue that the *History of Wei* nevertheless continues to be treated as a text largely or entirely concerned with Chinese perspectives and practices. This view has different implications among different scholarly constituencies. Those who believe that the Northern Wei rulers had complex and sometimes fractious relationships with Central Plains people and their ideas that Wei Shou intentionally overlooked largely turn to other sources, often explicitly noting the *History of Wei*'s Sinicization as an indication of its unreliability. Others, who (generally accepting the story of Chinese legal history described in Chapter 1) see the Tuoba as enthusiastic adopters of Central Plains approaches to law and government, are more likely to cite heavily to Wei Shou's work, seeing its Chinese qualities as reflections of the Tuoba's own predilections. I argue that both views somewhat miss the mark: while the *History of Wei* clearly couches its history in Central Plains terms, the history it records is far more diverse than is generally acknowledged, a diversity reflected in other Northern Wei practices.

Reasons for Suspicion

Wei Shou's Life and Authorship

Wei Shou lived through a period of immense social, political, and military chaos, marked by the desperate need of brief and fragile dynasties to assert the legitimacy of their right to rule. He was born during the reign of Emperor Xuanwu 宣武 (r. 499-515) and lived through the collapse of the Northern Wei. In 528, when Wei Shou was 22 years old, Erzhu Rong 爾朱榮 (493-530), a Northern Wei general, deposed Empress Dowager Hu 胡太后 (d. 528)[252] installed Emperor Xiaozhuang 孝莊 (r. 528-530), and killed many officials, taking de facto control over the dynasty. The power struggles this coup set off continued until 534, when Gao Huan 高歡 (496-547), another Northern Wei general, left the capital of Chang'an 長安 for the city of Ye 鄴, where he installed a scion of the Northern Wei as emperor as the head of a new dynasty called the Eastern Wei 東魏 (534-550). At 28, Wei Shou chose to leave Chang'an and follow the Gao family. At roughly the same moment in Chang'an, the general Yuwen Tai 宇文泰 (507-556), installed a different Northern Wei heir as ruler of another new dynasty, the Western Wei 西魏 (535-557). Both dynasties claimed to be the legitimate heirs of the Northern Wei, and both were short-lived. In 550, Gao Huan's son, Gao Yang 高洋 (526-559), deposed the Eastern Wei emperor and established the Northern (or Later) Qi 北(後)齊 (550-577), and it was the Northern

[252] Also known as Empress Ling 靈皇后.

Qi government that commissioned Wei Shou to write his *History of Wei*. In 557, Yuwen Tai's nephew, Yuwen Hu 宇文護 (513-572), similarly overthrew the Western Wei, creating the Northern Zhou 北周 (557-581).[253] In his mid-sixties, Wei Shou died during the reign of Gao Wei 高緯 (r. 565-577), who presided over the tumultuous end of the Northern Qi. Five years later, Gao Wei was captured and executed when the Northern Zhou conquered the Northern Qi.

"Throughout his life, Wei Shou went through a politically very unstable period," to put it mildly, and "he got through it primarily thanks to his pen."[254] In the service of various governments, he wrote "official documents like decrees or proclamations" and "was on several occasions entrusted with writing historical annals."[255] Before fleeing Chang'an in 534, Wei Shou served in the brief government of the Northern Wei Emperor Jiemin 節閔 (r. 531-532), in which he was tasked with revising state histories, a responsibility he continued to be assigned until the fall of the Northern Wei. After the founding of the Northern Qi in Yecheng, he was appointed Director of the Secretariat 中書令 and editorial director[256] 著作郎. In 551 CE, he was ordered by Emperor Wenxuan 文宣 (r. 550-559 CE) to compile a history of the Wei dynasty.[257] "The date at which the *History of Wei* was sponsored is not insignificant."

> It was in 551, i.e., a year after having founded the Northern Qi, that Gao Yang ordered Wei Shou to compose the work. The temporal proximity between this order and the dynastic change that had just taken place is particularly telling: Gao Yang wanted to show that an era was over and the Wei belonged to the past, while in Chang'an another political power continued to call itself the Wei's successor. In addition, Wei Shou had not only contributed to the dynastic transition—since he was responsible for composing its official texts—but he was also in some sense the historiographical gravedigger of the fallen dynasty. [258]

Wei Shou undertook this project largely by himself. "In contrast with later official dynastic histories, for which committees of scholars were appointed to the task of writing under the direction of a lead author or editor, and in contrast with previous such histories, which are thought to have been privately initiated and written, the newly commissioned compilation of a *Wei shu* was assigned to Wei Shou alone."[259] This last statement is perhaps something of an overstatement, since the critic Liu Zhiji 劉知幾 (661-721) noted that several other officials were

---

[253] Damien Chaussende, "Un historien sur le banc des accusés : Liu Zhiji juge Wei Shou," *Études chinoises* 29, no. 1 (2010): 154, https://doi.org/10.3406/etchi.2010.939.
[254] Chaussende, 153.
[255] Chaussende, 153.
[256] "An office of compilers (*zhusuo lang* 著作郎) separate from the functions of the official note takers (*jizhu* 記注) was finally established for the first time in the Wei under Mingdi 明帝 (205-39) in the Taihe 太和 era (227-33). A History Office (Shiguan 史館) as such was first established by the Northern Qi 北齊 (550-77). Its main purpose was the compilation of a cumulative history of the current dynasty (*jianxiu guoshi* 監修國史), reign by reign (a function briefly carried out by the scribes at the palace library." Wilkinson, *Chinese History*, 675. The translation of "editorial director" comes from the usage in *Early Medieval Chinese Texts: A Bibliographical Guide*.
[257] 魏收之史學 "Wei Shou zhi shixue" [Wei Shou's Historiography], in Zhou Yiliang 周一良, *Weijin nanbei chao shi lunji* 魏晉南北朝史論集 *[Studies on the History of Wei, Jin, and the Northern and Southern Dynasties]* (Beijing: Zhonghua shuju *中華書局*, 1963), 236.
[258] Chaussende, "Un historien sur le banc des accusés," 154.
[259] Klein, "*Wei Shu* 魏書," 369.

ordered to assist Wei Shou. Kenneth Klein, author of this entry in *Early Medieval Chinese Texts*, writes that "[h]e was given much editorial support by the Northern Qi history editing office."[260] However, Liu Zhiji explains that these aides lacked historiographical skill and the consensus is largely that the *History of Wei* is primarily Wei Shou's work, though he of course relied significantly on the materials of the historians who preceded him. [261]

The Institution of "Historian"

Wei Shou was among the last to undertake a far-reaching work of state history largely unaided. He had famous models: in the second century BCE, the famous historian Sima Qian 司馬遷 (c. 145-c. 86 BCE) compiled the work (the *Records of the Historian* or *Shiji* 史記) whose organizational approach would serve as the basis for subsequent millennia of historical writing, including for Ban Gu and his renowned *History of Han* in the first century CE. Wei Shou arranged his history, too, according to the frameworks established by these influential historians of the Western and Eastern Han, including a collection of "annals" recording the affairs of emperors, a set of biographies of notable figures, and a number of treatises on issues of particular to the government. However, although he sought models among the authors of the early Central Plains empires who had lived and died hundreds of years before the founding of the Northern Wei, Wei Shou's understanding of his role, its official status, and the materials available to him were shaped by more recent history.

Our best information (which comes from Wei Shou himself) is that the Tuoba Xianbei, lacking written language, adopted both Central Plains writing (i.e., Chinese) and administrative approaches to the recording of history. According to the prologue of the *History of Wei*, the early Tuoba didn't use characters and recorded contracts on notched pieces of wood 不為文字, 刻木紀契而已. "Ancient and recent matters were passed from person to person, just like the historians had recorded events" 世事遠近，人相傳授，如史官之紀錄焉. By the time of the Tuoba ruler Shiyijian 什翼犍 (338-376), who had been named king of Dai by a Central Plains emperor, the *History of Wei* records that the king was appointing officers to keep official historical accounts.[262] After the founding of the Northern Wei, the emperors appointed "Compilers" (or "Editors"[263]) 著作郎, a post first created in the third century, after the fall of the Eastern Han.[264] This office was also employed by the Jin, under which a single person was appointed to this rank, assisted by up to eight Assistant Compilers 佐著作郎, "who were charged with researching and compiling the documents and materials that would serve as the basis of the writing of history," and other functionaries.[265]

---

[260] Klein, 369.
[261] Klein, 368–69.
[262] Niu Runzhen 牛润珍, "Beiwei Shiguan Zhi Yu Guoshi Zuanxiu 北魏史官制度与国史纂修 [The Historiographer's Office and the Writing of National History in Northern Wei]," *Shixueshi Yanjiu* 史学史研究, no. 2 (2009): 17.
[263] Wilkinson, *Chinese History*, 1061.
[264] Niu Runzhen 牛润珍, "The Historiographer's Office," 18.
[265] "The selection of candidates for these different posts was carried out along several lines. They were sometimes directly named by the emperor…; they could also be selected by the Inspector of the Grand Imperial Secretariat (*zhongshu jian* 中書監) or by the Inspector of the Palace Library (*mishu jian* 秘書監); sometimes, one of these titles was attributed to bureaucrats already in office, on top of their normal responsibilities; it was also possible for lower-

In the Northern Wei approach to historiography, "we find the same titles and functions as under the Jin."[266] Early in the dynasty, posts like Compiler may not have been permanent: "when there were matters to record it was established, and when there was nothing to record it wasn't."[267] (It drew its temporary incumbents from the government library and archives 秘書省[268] and the Central Secretariat 中書省.) Later in the Northern Wei—probably sometime between 460 and 471—the government established a permanent office of history writing (著作局 or 著作省), with two compilers 著作郎 and four assistant compilers 著作佐郎.[269] In addition to the writing and revision of history, the officials in the office of history writing held numerous other responsibilities, including "participating in debates over the name of the dynasty, discussing problems of imperial succession, correcting the calendrical system, debating rituals, rectifying musical rules, composing eulogies and inscriptions, and even standardizing characters."[270]

In addition to these offices, some officials (including the Compilers) were provisionally assigned the task of recording the emperors' speech and actions, in the tradition of *qiju zhu* 起居注, "usually glossed as being the chronological record of the proclamations (decisions) and activities of the emperor in the conduct of official business, normally as this occurred in formal sessions of the court each morning."[271] "We know from the frequent mention of them in the *Histories*" that these court diaries or "diaries of activity and repose" were "kept almost continuously from the end of the Han onwards."[272] However, there was no office tasked with overseeing these diaries in the early Northern Wei. Emperor Xiaowen established the Department of Scholarly Counsellors 集书省 under the Chancellery 門下省, and this office was also charged with recording the emperor's activities, but he was often unhappy with their performance and he created the official court diary system in 490, shortly after which it began producing written records.[273]

The first Northern Wei work resembling "dynastic history" was ordered by Tuoba Gui (r. 398-409), who commanded Deng Yuan 鄧淵 (d. 403) to "compose the state's records." The second was Cui Hao's *History of the State* 國書, composed on the basis of Deng Yuan's work in the 430s. For the third, Cui Hao was ordered in 439 to revise and extend the state history, with the assistance of various other officials, including compilers. By the time of the "State History

---

level bureaucrats, whether already attached to the Office of Secrets or not, to be promoted to one of these posts; in any case, a large majority of the successful candidates came from the literary social class. Out of the sixty nine Compilers and Assistant Compilers having been in office during the Jin dynasty, forty five were from literati elites, which is to say 65% versus only seven people from common families. At this time, the validation of the selected candidates was done through verifying their compositional capacities: each new holder of a compiler or assistant post had to, at his arrival in the service, write the biography of a famous minister. He was then watched, noted, and evaluated throughout his tenure. This system greatly influenced those of later dynasties." Valentin Philippon, "Médecine et médecins dans l'historiographie chinoise. Biographies de médecins et anecdotes médicales dans les vingt-six histoires (Ershiliu shi 二十六史)" (PhD, Université Paris sciences et lettres, 2019), 14.

[266] Philippon, 40.

[267] Niu Runzhen 牛润珍, "The Historiographer's Office," 18.

[268] Wilkinson, *Chinese History*, 1051.

[269] Both at the upper fifth rank. Later, they were demoted to lower fifth rank and seventh rank, respectively. Niu Runzhen 牛润珍, "The Historiographer's Office," 19.

[270] Niu Runzhen 牛润珍, 23.

[271] Wilkinson, *Chinese History*, 677.

[272] Wilkinson, 677.

[273] Niu Runzhen 牛润珍, "The Historiographer's Office," 24–25.

Case" in 450, for which Cui Hao was executed, 128 others also shared in his fate, demonstrating the expanding scope of Northern Wei historiographical projects.[274] "(Cui Hao and others had compiled a history of the Tuoba and the Northern Wei that, after being inscribed on stelae erected near the capital for all to read, caused a furor for allegedly exposing some very unflattering aspects.)"[275] You Ya 游雅 (d. 461) was ordered to conduct the fourth effort in 460, but he didn't complete it and the work was taken over by Gao Yun 高允 (390-487) under the auspices of the new compiler office, established between 467 and 471. After five or six years, he and Liu Mo 劉模 completed this fourth revision, still based on Cui Hao's initial work in annalistic style 編年.[276] In 487, Director of the Imperial Library 祕書令 Gao You 高祐 (d. 499) and Assistant Director of the Imperial Library 祕書丞 Li Biao 李彪 (440-501) wrote to Emperor Xiaowen, advocating that the state history be organized in biographical 紀傳 fashion, a suggestion the emperor accepted when he ordered Li Biao to spearhead the revision. The results of Li Biao's efforts were considered very poor, so a sixth revision was ordered by Emperor Xuanwu, though again under Li Biao's leadership.[277] Seventh and eighth revisions were also undertaken in the early sixth century.

Wei Shou drew on all of these works in completing his *History of Wei*.[278] "The reason the *History of Wei* could be completed was inextricably linked with the Northern Wei's repeated historical revisions and the materials amassed over a long time."[279]

> During the Northern Qi dynasty, the composition of history and its institutions was reinforced and began to be stabilized. It was during this key period that historical composition was systematized, by the creation of a first History Office (*shiguan* 史館). The official dynastic history of the Northern Qi was already being written in 577 by the bureaucrats of this office. This period was decisive in more ways than one, because it was marked by the fact that it was pursuant to the emperor's order and under the surveillance of his Secretary of State that the official text of this dynastic history was written by the History Office. History definitively became an autonomous domain of knowledge and historical works multiplied. It was on this foundation that the Tang History Office would be established.[280]

As Wilkinson puts it, "A History Office (Shiguan 史館) as such was first established by the Northern Qi 北齊 (550-77). Its main purpose was the compilation of a cumulative history of the

---

[274] Niu Runzhen 牛润珍, 27.

[275] Nina Duthie, "Origins, Ancestors, and Imperial Authority in Early Northern Wei Historiography" (PhD, New York, Columbia University), 170, accessed November 25, 2023, https://www.proquest.com/docview/1660540574/abstract/415A5D77A51E40FCPQ/1.

[276] Niu Runzhen 牛润珍, "The Historiographer's Office," 28.

[277] Niu Runzhen 牛润珍, 28.

[278] Chin-Yin Tseng, "The Making of the Tuoba Northern Wei: Constructing Material Cultural Expressions in the Northern Wei Pingcheng Period (398–494 CE): Constructing Material Cultural Expressions in the Northern Wei Pingcheng Period (398–494 CE)" (PhD, University of Oxford, 2012), 11n30, https://doi.org/10.30861/9781407311883.

[279] Niu Runzhen 牛润珍, "The Historiographer's Office," 29.

[280] Philippon, "Médecine et médecins dans l'historiographie chinoise," 41.

current dynasty (*jianxiu guoshi* 監修國史), reign by reign (a function briefly carried out by scribes at the palace library)."[281]

To sum up, Wei Shou lived during a time of immense political instability when the writing and presentation of history was considered a key factor in shoring up the fragile legitimacy of short-lived states. The historiographical materials from which he drew were composed under similar conditions by authors subject to similar pressures, and some of his predecessors had been executed for writing histories of which their rulers disapproved. He was also doing it largely alone, under the fairly direct supervision of the Northern Qi court, so it would have been difficult for him to share the blame for any missteps with any of his collaborators or to have his work go unnoticed. These were, perhaps, not the conditions most conducive to the production of disinterested history.

Old Attacks on the History of Wei

Wei Shou has long been, and continues, to be criticized for inappropriately favoring one group over others. (Which groups are which depends, naturally, on the identity of the critic.) Jennifer Holmgren details many such criticisms, which began almost as soon as the *History of Wei* was written and which continue to color contemporary views (even though scholars today are often unaware of how far back the origins of these approaches go). Early antipathy for Wei Shou and his work can be divided into four phases: 1) the author's own lifetime during the Northern Qi; 2) the Sui; 3) the early Tang; and 4) the early 8th century, when Liu Zhiji singled Wei Shou out for particularly severe criticism.[282] The Northern Qi critiques were essentially personal, levied by three members of prominent families who felt that their ancestors weren't represented with sufficient praise or accuracy, or who claimed that Wei Shou had unjustly elevated the status of his own relations by giving them their own biographies.[283] Holmgren surmises that these few criticisms—directed only at a very small number of the work's many details rather than its overall structure, content or approach—"would have been quickly forgotten had it not been for new concerns raised during the Sui period (580s)."[284]

The Sui criticism reflects a complicated reaction to the political turbulence of Wei Shou's era and an effort to craft a firm foundation of legitimacy for the recently established Sui. The Sui was created via the same process of regency followed by usurpation that had had produced first the Western and Eastern Wei and then the Northern Zhou and Northern Qi. In 581, Yang Jian 楊堅 (541-604), usurped the place of the last Northern Zhou emperor in Chang'an to become the first emperor of the Sui. The Sui's claim to legitimacy was thus: Western Jin -> Northern Wei -> Western Wei -> Northern Zhou -> Sui. Therefore, the Northern Wei -> Eastern Wei -> Northern Qi branch led by the Gao family and supported by Wei Shou (who was writing under the Northern Qi) represented a threat to the Sui accession, which made the *History of Wei* a suspect

[281] Wilkinson, *Chinese History*, 675.
[282] Holmgren, "Northern Wei as a Conquest Dynasty," 3.
[283] Chaussende explains that these contemporary criticisms of Wei Shou are found in his biographies in the *History of Northern Qi* by Li Baiyao 李百藥 (564-647 CE)and the *History of the Northern Dynasties* by Li Yanshou 李延壽 (*fl*. 650). The two biographies are very similar, and the *History of Northern Qi* biography was (to make up for failures of textual transmission) reconstituted with sections from the *History of the Northern Dynasties* as early as the Song dynasty. (Chaussende points out that these biographies also contain significant praise for Wei Shou and his history.) Chaussende, "Un historien sur le banc des accusés," 147.
[284] Holmgren, "Northern Wei as a Conquest Dynasty," 4.

work in the new regime. The Sui critics argued that Wei Shou was corrupt because he didn't criticize the Gaos and praised some of their associates,[285] particularly the Erzhu family (responsible for the 528 CE Chang'an massacre that marked the decline of the Northern Wei emperors' real power).[286] The Erzhu were a convenient target for Sui outrage because, unlike many other Northern Qi families, they "did not have relatives who had served Northern Zhou and who currently held positions of importance under Sui."[287] "Thus the rulers of Sui commissioned a new work to rid official history of any implied legitimacy for Northern Qi."[288]

From the sources available to us, it appears that the early Tang saw a diversification of opinion on the transmission of imperial legitimacy. The court's official position remained that the Tang had inherited its legitimacy from the Sui, who got it from the Northern Zhou, who got it from the Northern/Western Wei. However, many scholars harbored different opinions and increasingly had the opportunity to make those opinions known. For example, the Northern Qi "Bureau of History" 史館 was revived by the Tang for "the production of the official historical record of the current dynasty and the occasional compilation of other works."[289] "Because of the different backgrounds" of the many men tasked with the writing of history by this new office, "it was virtually impossible to maintain the official line on legitimacy with any consistency."[290] As a result, "There were those with secret sympathies for Northern Qi; those who supported the official line; those who felt that legitimacy lay with the Chinese states of the south; and those whose sympathies lay with particular regimes of both north and south."[291] However, none of this diversity did Wei Shou any favors. In fact, "the diversity of private opinion on legitimacy in the Sui/Tang era found common cause in attacking Wei Shou's history."[292] Criticizing his work could serve different purposes, depending on the particular legitimacy theory of the scholar making the argument.

All these criticisms found a vociferous champion in Liu Zhiji, the author of the *Thorough Exploration of History* 史通 (*Shitong*), a major work of criticism to which many pre-modern and contemporary scholars have turned for insights into Chinese historiography. Liu was unstinting in his attacks on Wei Shou:[293] the *History of Wei* is "a work about which Liu Zhiji speaks a lot, and… mostly in a bad light."[294] The longest section devoted to it appears in Liu's chapter entitled "Past and Present Official Histories" 古今正史, which gives a scathing account of the *History of Wei*'s creation, its faults, and the revisions those faults were thought to necessitate. According to Victor Xiong's forthcoming translation:

---

[285] Holmgren, 5.
[286] Holmgren, 5.
[287] Holmgren, 4.
[288] Holmgren, 4.
[289] Wilkinson, *Chinese History*, 675.
[290] Holmgren, "Northern Wei as a Conquest Dynasty," 5.
[291] Holmgren, 5.
[292] "Those with some sympathy for Qi were happy to deflect criticism away from the Gao by emphasising the atrocities of the Erzhu and the various faults of the *Wei-shu* as raised during Northern Qi; while those with southern sympathies were happy to follow the official line in criticising both the Erzhu and the Gao as a means of strengthening claims about Wei Shou's bias against the southern states." Holmgren, 5.
[293] Although Holmgren contends that Liu Zhiji's criticisms of Wei Shou were largely "trivial"—an observation she believes is supported by the work of Chinese and Western scholars from the 18th through the 20th centuries—they nevertheless occur with significant frequency and virulence in Liu's work. Holmgren, 6.
[294] Chaussende, "Un historien sur le banc des accusés," 145.

> Currying favor with the Qi lineage, Wei Shou often treated the Wei House unfairly. Being partial to the Northern Dynasties, he grossly maligned the south. He hated by nature anyone who surpassed him, and was fond of remembering past feuds. Those who were from first-rate households and endowed with virtue—so long as he bore a grudge against them—were all covered in vicious language, while their good deeds went unmentioned. When he poured out his fury, he would go so far as to defame the victim's grand- and great-grandfathers.[295]

Chaussende writes that this "hardly flattering summary essentially gives the tone of Liu Zhiji's whole disquisition on the *History of Wei*: Wei Shou is partial because he 'flatters the house of Qi' and 'takes the side of the Northern dynasties while freely slandering the Southern'; moreover, he takes advantage of his work to settle personal scores. Concluding this summary, Liu Zhiji does not fail to recall the appellation the *History of Wei* received, that of a 'foul history' (*huishi* 穢史)."[296]

Liu—possibly motivated in part by familial connections: his ancestors were from a Southern state[297] and then fled to the Northern Wei after that state's collapse—expressed much of his antipathy for Wei Shou and his work in ethnic terms.[298] His family background may "explain why Liu Zhiji is so attached to the legitimacy of the Southern Dynasties," a question which "reoccurs numerous times" in his work and which "considerably orients the critical judgment of Wei Shou, who becomes for him the very model of the historian who not only did not know how to discern where legitimacy was, but who moreover defended the indefensible: the barbarian rulers."[299] As Holmgren puts it, "In Liu's view, Wei Shou had slandered the rulers of the south by discussing them together with Northern Wei's non-Han neighbours and by referring to them under the rubric of 'Island Barbarians' (*daoyi*), a demeaning term used by the Chinese for aboriginal peoples of the south."[300]

Liu sees further evidence of Wei Shou's prejudice against the South in the way the latter refers to the leaders of the Southern dynasties, whom he often simply labels by ethnonyms such as Cong 賨, Xianbei 鮮卑, or Lushuihu 盧水胡, omitting any titles and thus "reducing them to the rank of subject."[301] By contrast, he affords posthumous honorifics to the ancestors of the Tuoba family who lived many generations before the Northern Wei founding, to which Liu Zhiji also objects. Liu, calling these pre-imperial Tuoba chieftains "crowned monkeys," disapproves of the valorization of Xianbei/Tuoba culture implicit in Wei Shou's use of their posthumous titles and explicit in several sections of the *History of Wei*, arguing that these nomadic

---

[295] Forthcoming *Thorough Exploration of History (Shitong)* translation by Victor Xiong from University of Washington Press.
[296] Chaussende, "Un historien sur le banc des accusés," 146–47.
[297] Holmgren, "Northern Wei as a Conquest Dynasty," 6.
[298] Chaussende's exploration of Liu's antagonism for Wei Shou reveals an ethnic element downplayed in Holmgren's work. Holmgren's analysis of the second and third stages (the Sui and early Tang) of the evolving criticism of Wei Shou argues that ethnic concerns—the fact that the Northern Wei were considered genetically distinct from both the Jin they followed and the Sui they preceded—weren't a significant factor in these authors' critiques. "[T]he official Sui/Tang view of dynastic legitimacy," writes Holmgren, "took no account of racial origins. The place of Northern Wei as a legitimate successor of Western Jin was thus rarely questioned." Holmgren, 4.
[299] Chaussende, "Un historien sur le banc des accusés," 157.
[300] Holmgren, "Northern Wei as a Conquest Dynasty," 6.
[301] Chaussende, "Un historien sur le banc des accusés," 160.

northerners could have had no deep knowledge of the classics and thus no worthy culture to speak of.[302]

In the late 1980s, Holmgren argued that, while the specifics of most of these criticisms of Wei Shou and his *History* have faded from common memory, their taint remains in the minds of many scholars, who therefore continue devalue both one of the most important sources of historical material for the Northern Wei and the period it describes. The situation isn't precisely the same today: scholars have increasingly paid lip service to Holmgren's conclusion that "Wei Shou's work is a careful and highly accurate (although often subtle) account of the Wei period and that it ranks with some of the better official histories produced in China during imperial times."[303] As mentioned above, Wilkinson writes that it is "now considered one of the best of the early standard histories."[304] For example, Pearce (who frequently cites Holmgren) agrees that the *History of Wei* "is overall a fairly good effort by a series of Chinese historians in the fifth and sixth centuries… Though far from perfect, [the *History of Wei*] was a serious effort in an ongoing process to gather what they could of documents and reported conversations into an emerging whole."[305] However, as I argue in the next section, Holmgren's critique is still a crucial key to contemporary understandings of the *History of Wei* because, while it's mostly no longer attacked in quite the same terms, it is often still either criticized or praised for giving too much positive or negative attention to the wrong groups.

Newer Views: The History of Wei *as "Chinese"*

Despite the influential work of scholars like Holmgren and Chaussende, many contemporary historians in fact tacitly or explicitly still agree with the substance of Liu Zhiji's critique: that Wei Shou's writing predominantly reflects Central Plains views to the occlusion or exclusion of other perspectives. One characterization of his historiography is that it was all largely driven by the Northern Wei government's desire—and that of their successors—for cultural legitimacy. Those governments, according to this view, used the historical materials they commissioned to demonstrate the extent of their Sinicization and thus their right to rule the people of the Central Plains. "Historiography," write Achim Mittag and Ye Min "contributed powerfully to the Tuoba regime's drive towards wholeheartedly embracing the Chinese model of imperial rule."[306] They point out that the earliest Northern Wei works of history were commissioned soon after the Tuoba moved their capital to the Central Plains city of Pingcheng, "adopted the Chinese calendar," and invested themselves with other markers of traditional Central Plains rulers.[307] "After that the archival and historiographical activities at the Tuoba court did not cease."[308] All of Wei Shou's source material was thus, according to Mittag and Ye, shot through with this propagandistic effort to show off Tuoba Sinicization and he self-consciously emphasized those elements to serve the needs of the Northern Qi rulers who

---

[302] Chaussende, 167–68.
[303] Holmgren, "Northern Wei as a Conquest Dynasty," 7–8.
[304] Wilkinson, *Chinese History*, 818.
[305] Scott Pearce, *Northern Wei (386-534): A New Form of Empire in East Asia* (New York, NY: Oxford University Press, 2023), 17.
[306] Achim Mittag and Ye Min, "Empire on the Brink: Chinese Historiography in the Post-Han-Period," in *Conceiving the Empire: China and Rome Compared*, ed. Fritz-Heiner Mutschler and Achim Mittag (Oxford University Press, 2008), 364.
[307] Mittag and Min, 364.
[308] Mittag and Min, 364.

commissioned his work: "Thrusting himself onto his task, Wei Shou formed of these materials a history which purported to confirm the Tuoba rulers' claim of ruling over All-under-Heaven in the succession of the Han, Cao-Wei, and Western Jin dynasties."[309] Wei Shou bolstered this claim both by employing a format and style of historiography that mirrored classical Central Plains approaches via the invention of genealogies linking the Tuoba to the mythical Yellow Emperor, the ostensible ancestor of all Central Plains people.[310] The *History of Wei* thus "achieved 'sinicization' of the alien Tuoba-Wei in the realm of history."[311] Though Mittag and Ye are careful to acknowledge that this orientation towards validating the legitimacy of the government ordering his work doesn't in itself make the rest of Wei Shou's writing unreliable, it's easy to draw from their claims the conclusion that we should at least be very cautious when citing the *History of Wei*.

Other scholars who largely agree with the view of Mittag and Ye on the *History of Wei* see Wei Shou's depiction of Tuoba legitimacy not as a potential pitfall of historiography but as a depiction of a historical reality in which a superior and stable Chinese culture was assimilating the outsiders who attempted to master it. For example, Wu Huaiqi writes that,

> Where the rise and fall of the Northern Wei was concerned, Wei [Shou] emphasized that the sovereigns' constant absorption of the (advanced) culture of Central Plains played quite a significant role in the development of such a non-Han dynasty. The historian was fervently opposed to the irrational efforts made by some ruling non-Han families to destroy the traditional Chinese culture; and meanwhile, he fairly attached importance to the culture of non-Han people.[312]

Wu does acknowledge the ethnic and cultural complexity of the medieval period and in Wei Shou's records, contending that "in an era when a kaleidoscopic array of ethnic groups were blending together in the traditional Chinese land, Wei's historical narratives as a whole was [*sic*] positive, innovatively giving expression to the coexistence of differing ideas of nationality."[313] However, his essential claim is that Wei Shou depicted a largely unified political and ethnic community, in part because he hoped to bolster his patrons' legitimacy, but more importantly because this unification was one of the essential characteristics of Chinese culture.

> Under the premise that the Yellow Emperor was the common ancestor of all ethnic groups in China, Wei intellectually and narratively did his utmost to win over the politico-cultural orthodoxy for the Northern Wei, of which he himself was in the service. His effort was an embodiment of the centripetal and cohesive force consolidating the entire Chinese nation.[314]

As Chapters 3 and 4 will show, Wu's claims are just one striking example of a pronounced trend in work on or citing the *History of Wei* and its author, regarding them as active champions of the adoption of the worthier ways of the Central Plains.

---

[309] Mittag and Min, 364.
[310] Mittag and Min, 365–66.
[311] Mittag and Min, 365–66.
[312] Wu Huaiqi, *An Historical Sketch of Chinese Historiography* (Springer, 2018), 231.
[313] Wu Huaiqi, 231.
[314] Wu Huaiqi, 231. This claim, of course, was not new: the *Shiji*, for example, likewise casts the Yellow Emperor as the progenitor of all the known world's people.

But whether these scholars cast doubt on (like Mittag and Ye) or valorize (like Wu) the *History of Wei*, they all see the work as reflecting a civilizational unity (ethnic, cultural, or both), either because that was the reality that Wei Shou experienced or because medieval Central Plains governments believed they could strengthen their claim to legitimate rule by representing the world in that way. Many works thus rely on what the scholar of medieval China Charles Holcombe calls "modern Chinese nationalist visions of a unitary, clearly defined China that has supposedly existed since the Neolithic period (and widespread popular belief that China has 'five thousand years of continuous history'),"[315] visions in which the Northern Wei play an important part.

Even those scholars who explicitly accept Holmgren's conclusion that the *History of Wei* is a generally reliable historical work (like Pearce) also largely view Wei Shou's history as predominantly reflecting "Chinese" attitudes and preoccupations and thus as peripheral to the most compelling work on medieval history. Felt, in keeping with his theme of geography as the key to politics, writes that the *History of Wei*'s descriptions of the Central Plains' physical and cultural terrain served the interests of the Tuoba by employing Chinese or Han ideas of space.

> Because of its control of the Sinitic heartland in the Yellow River Plains, the Tabgatch empire had the easier task of appropriating Han imperial geography, and the geographical rhetoric in the [*History of Wei*] 魏書 sounds more conservative—repeating the assumed overlays of political, cultural, and geographic spaces.[316]

Part of that geographic conservatism, in Felt's account, is a rejection of exactly the kind of ethnic and cultural variety that Felt, Chittick, Pearce, Holcombe, Yang, Elliot, Abramson, and others have been laboring to bring to the fore in their accounts of medieval China. The *History of Wei* "makes abundant use of these tropes of southern barbarism in an exotic southern wilderness,"[317] and, when describing many different southern states from different times "depicts them through the same essentializing lens."[318] At the same time, Felt argues, "Wei Shou was very careful in the [*History of Wei*] to downplay the notion of the Wei state as northern or barbarian."[319] Pearce himself makes a similar evaluation, writing that the *History of Wei* "generally swept Inner Asian origins under the rug,"[320] and that Wei Shou's work "is certainly a version of the dynasty's history constructed from within the context of the dramatic and imposed Sinicizing reforms of its last decades."[321] Chittick writes even more critically, claiming that "Wei Shou established a dismissive approach to the land, people, and culture of the Jiankang Empire using precedents from classical Sinitic texts"[322] and attributing his attitude to his need to placate his Northern masters,[323] which he did by employing derogatory ethnic and geographical terms that indicated

---

[315] Charles Holcombe, "The Tabgatch Empire and the Idea of China," *The Historian* 84, no. 2 (April 3, 2022): 245, https://doi.org/10.1080/00182370.2023.2167506.
[316] David Jonathan Felt, "The Metageography of the Northern and Southern Dynasties," *T'oung Pao* 103, no. 4–5 (November 30, 2017): 343, https://doi.org/10.1163/15685322-10345P02.
[317] Felt, 353.
[318] Felt, 353.
[319] Felt, 362.
[320] Pearce, *Northern Wei (386-534)*, 5.
[321] Pearce, 17.
[322] Andrew Chittick, *The Jiankang Empire in Chinese and World History*, Oxford Studies in Early Empires (New York, NY: Oxford University Press, 2020), 63.
[323] Chittick, 64.

the Southerners' remoteness from the "central" Northern Wei empire[324] and emphasizing their atypical syncretism with foreign religions like Buddhism.[325] Both Felt and Chittick are thus making more or less the same charge as Liu Zhiji, the eighth-century charge that Holmgren wrote in the late 1980s was still influencing scholarly appraisals of the *History of Wei*: that Wei Shou favored the North over the South.

This all leaves the impression that the *History of Wei* is really only interesting for studying techniques of legitimation and is thus a comparatively colorless take on a period that other work is showing to be far more diverse and exciting than many studies based on the official histories have suggested. This view is undoubtedly partially correct—Wei Shou omits a great deal from his accounts of recent history, as explained in Chapters 3 and 4—but it's a long way from the whole story.

Duality and Duets

One of the major features of medieval life these scholars think the History of Wei is missing is the quality of doubleness that makes the Northern Wei such a fascinating period to study. For example, Pearce (as quoted above) concedes that the *History of Wei* was "a fairly good effort" and that "little energy seems to have been given by [its authors] to produce history as moral judgment." Nevertheless, he stresses that it was a work written by Chinese historians "using their own writing system, to report on an alien regime that had seized control of their homelands,"[326] and thus made no serious attempt to capture the non-Chinese features of the regime it described. As one instance of many such omissions, Pearce cites the "the new forms of dual government invented by the Serbi [Xianbei]," whose nature and influence can also be seen in the subsequent Tang dynasty whose political practices derived in significant part from the Northern Wei: "at times, Tang monarchs took on two titles: that of Khaghan alongside that of August God-King, much as had the Taghbach monarchs."[327]

The question of whether the *History of Wei* does indeed capture this kind of complexity is vital to any appraisal of its value as a historical source, because scholarship on the Northern Wei has increasingly demonstrated how much duality was in fact the order of the day. Charles Holcombe emphasizes that hybridization was a key tactic employed by the Northern Wei founder: "As he now began expanding his conquests, he was careful to be conciliatory of local elites, inquiring of them about the institutions of former kings, promoting classical education, and collecting copies of the classics."[328] This demonstration of interest in Chinese ideas would likely have come easily to him, since "the founding emperor had apparently spent several formative years in his youth living as a captive in the north China metropolis of Chang'an, becoming exposed to Central Plains culture."[329] But his adoption of such ideas was at best partial:

> Despite presenting itself (at least to some extent) as a consciously Chinese-style empire, the early Northern Wei often broke from Zhou and Han dynasty precedents in its official

[324] Chittick, 65.
[325] Chittick, 296.
[326] Pearce, *Northern Wei (386-534)*, 17.
[327] Pearce, 304.
[328] Holcombe, "The Tabgatch Empire and the Idea of China," 250.
[329] Holcombe, 250.

> titles, forming something of a hybrid mix of Tuoba traditions, Chinese models, and other Sixteen Kingdoms practices.[330]

These breaks included honoring the Northern Wei founder as a Buddhist holy figure.[331]

Other recent work has confirmed the extent to which the practices and self-presentation of the Tuoba rulers reflected and attempted to harness this complexity. Chin-Yin Tseng calls their reign a "dual presence," which they maintained "by struggling between identifying themselves with certain cultural practices of the Eurasian steppe, and at the same time, adjusting to particular traditions of the Chinese arena."[332] Like the other scholars cited above, Tseng argues against the common view that, "the Tuoba's state-building success has generally been viewed as the result of an active Sinicization effort by these 'outside' rulers – a complete political and social acculturation into the so-called Han Chinese mainstream." Instead,

> the success of the Northern Wei as a conquest dynasty tells a much more complex story. In fact… it was through the construction of a "dual presence" in the Pingcheng period (398-494 CE) that the earlier phase of the Northern Wei crossed back and forth between the traditions and practices of the Chinese sphere and those of the Eurasian steppe. This was manifested in the application of mountain-side stone sculptures, tomb burials, as well as in the reification of the notion of a capital city. Consequently, a negotiation of material culture allowed the Tuoba to (re)create notions of kingship, dynastic identity, and representations of daily life, which were particular to fifth century northern China.[333]

Tseng gives numerous other examples of this dual presence, of which one is particularly striking: the early Northern Wei rulers adopted "two systems of state rituals," one in the style of the Central Plains and one in Tuoba fashion; the rulers tended to go in person to the latter and send proxies to the former.[334] Earlier scholars argued that this demonstrated "that deep down the Tuoba continued to value their own ritual practice, while using the 'Central Plains system' as a symbolic marker for ruling over the Han Chinese subjects."[335] Tseng sees it somewhat differently, as "a deliberate act by which the Tuoba again demonstrated their ability to maintain a 'dual presence.'"

> In this case, it is manifested in the negotiation of ritual practices for the construction of an early Northern Wei notion of statehood. Most importantly, aspects of the "Central Plains system" should not be relegated as meaningless to the Tuoba… I would even suggest that we should avoid treating the above mentioned ritual practices of the Pingcheng period as necessarily having belonged to two separate systems. What we see here is, in fact, a meshing together of different ritual traditions that appears to have been comfortably accepted in the Northern Wei society, and that the people living in Pingcheng, who

---

[330] Holcombe, 251.
[331] Holcombe, 251.
[332] Chin-Yin Tseng, "Imagining the Self in Northern Wei: Case Studies of Shaling M7 and Yanbei Shiyuan M5," in *Early Medieval North China: Archaeological and Textual Evidence*, ed. Shing Müller, Thomas O. Höllmann, and Sonja Filip, Asiatische Forschungen, Band 159 (Wiesbaden: Harrassowitz Verlag, 2019), 113.
[333] Tseng, "The Making of the Tuoba Northern Wei," 2.
[334] Tseng, 56–57.
[335] Tseng, 56–57.

> participated in these state rituals, may not have necessarily felt the "discord" as we do today when we label these different rituals under separate categories.[336]

As a further example, Tseng points to the fact that the early Northern Wei capital "may have contained the buildings and institutions that appeared to be essential to a Chinese-styled capital city," but that Northern Wei emperors continued to be essentially "peripatetic."[337] Yan Yaozhong—an expert in medieval Buddhism who wrote one of the most comprehensive works on Northern Wei bureaucracy—uses different language but describes the same phenomenon.

> We can see that in the Northern Wei from center to periphery—in all aspects, including the administration, the military, the economy, the law, and education—there existed very different structures from those we are used to seeing in the history of Chinese political systems… Throughout this more than one-hundred-year period, the key note of the Northern Wei political system was a duet.[338]

Whether Northern Wei regimes are best characterized as a dual presence, a dual government, a duet, or a hybrid, they seem to have retained their quality of multiplicity until the end of the era. "The last Northern Dynasties remained hybrids," writes Holcombe.[339] This multiplicity is perhaps best captured in an anecdote about Gao Huan (the general who backed the founding of the Eastern Wei) in the *Comprehensive Mirror in Aid of Governance* 資治通鑑, an influential Northern Song historical reference work:

> When he spoke to the Xianbei, he would say: "The Han people 漢民 are your slaves. They labor for you. Their women weave for you. They transport grain and cloth for you. It's thanks to them that you are warm and well fed. How can you oppress them as you do?" And when he spoke to the Hua 華人, he would say, "The Xianbei are your hosts. For a measure of grain and a bolt of cloth, they strike your enemies for you and assure you peace. How can you hate them as you do?"[340]

For the *History of Wei* not to capture this essential feature of the period in the interests of promoting the compatibility of the Tuoba with Central Plains culture would be a grievous failing indeed.

Doubling in the History of Wei

But the *History of Wei* is full of its own doubleness, too, a doubleness that often gets overlooked by authors who see it in primarily Chinese terms. One particularly salient example is his treatment of Buddhism, a philosophy that was gaining acceptance only gradually in medieval China. "By the end of the sixth century…. Foreign monks continued to play a significant role,

---

[336] Tseng, 56–57.
[337] Tseng, 31.
[338] Yan Yaozhong 严耀中, *Erchong Zou: Beiwei Qianqi Zhengzhi Zhidu* 二重奏: 北魏前期政治制度 *[Duet: The Early Northern Wei Political System]*, Di 1 ban (Shanghai: Zhongxi shuju *中西書局*, 2019), 15.
[339] Holcombe, "The Tabgatch Empire and the Idea of China," 256–57.
[340] Chaussende, "Un historien sur le banc des accusés," 169.

particularly in translation, but most monks (and, from the fourth century, nuns as well) were now Chinese, including even members of prominent families."[341] Nevertheless, its status was still sufficiently contested centuries after the Northern Wei that the renowned Tang-era official and essayist Han Yu 韓愈 (768-824) was banished for his repeated and public attacks on it as a foreign import.

This process of acculturation and integration was complex and often bloody, particularly during the Northern Wei, when influential officials saw the Daoist beliefs they favored as in competition with Buddhism and lobbied the rulers they served to persecute Buddhist adherents. "Influenced in part by the Daoist Kou Qianzhi and the official Cui Hao, Emperor Taiwu ordered the first large-scale suppression of Buddhism in China. In 444 and 446, imperial edicts ordered Buddhist images destroyed, scriptures burnt, and monks defrocked or executed."[342] Many factors lay behind these anti-Buddhist campaigns,[343] but this complexity is not reflected in Wei Shou's own representation of these conflicts. The *History of Wei* simplifies the story, attributing "the persecution to Daoist influence at court and monastic malfeasance." However, this simplification was not a sycophantic effort to justify the anti-Buddhist policies of the Northern Wei. Indeed, this choice was at odds with "the rhetoric of the edicts," which "explains the persecution as a necessary measure to address a corrupt and seditious sangha."[344] Wei Shou chose, in other words, to represent Buddhist persecutions in the Northern Wei in a way that challenged officially stated governmental policy.

Moreover, the fact that Wei Shou chose to write a treatise on Buddhism and Daoism was extremely unusual and never replicated by any subsequent official historian, although there were other histories of Buddhism being produced around the same time, by authors who (like Wei Shou) "attempted to grasp the fundamentals of Buddhist doctrine and to narrate the history of the arrival and growth of Buddhism in China."[345] "In the Chinese state," writes Hurvitz,

> which regarded the Confucian classics as the yardstick of politics and morality, things such as Buddhism and Taoism, standing as they did outside of the framework of these classics, were not the sort of things likely to have a whole treatise devoted to them in a

[341] John Kieschnick, "Buddhism," in *The Cambridge History of China: Volume 2: The Six Dynasties, 220–589*, ed. Albert E. Dien and Keith N. Knapp, vol. 2, The Cambridge History of China (Cambridge: Cambridge University Press, 2019), 532, https://www.cambridge.org/core/books/cambridge-history-of-china/buddhism/201BB18C94D564D35A419E4114A73C61.

[342] Kieschnick, 536. "Cui Hao had introduced the Daoist monk Kou Qianzhi 寇謙之 (365-448 CE) to serve as the emperor's religious advisor. In the year 440, Emperor Taiwu officially changed his reign name to that of Taiping Zhenjun 太平真君 (True Lord of the Great Peace) by the Daoist tradition, officially adopting Daoism as the new state religion; see *Wei shu*, *juan* 4, p. 93. There are other scholars who do not necessarily agree that the subtle balance of power between the state and the Buddhist monastic order was the reason for Emperor Taiwu's suppression of Buddhism. Luan Guichuan, for one, sees this issue from an ethnographic point of view, which I do not agree with. He believes that the Tuoba rulers' innate feeling of insecurity as outside rulers, who have come face to face with a sophisticated Chinese civilization, the choice of either Buddhism or Daoism as state sponsored religion was inevitably ambivalent and opportunistic; see Luan Guichuan 1995, pp. 57-61." Tseng, "The Making of the Tuoba Northern Wei," 147n408.

[343] "Modern scholarship has emphasized that the persecution was motivated by a conglomeration of interests, including economic concerns—Buddhist images made of precious metals were confiscated for the state coffers and officials had long bemoaned the presence of monks as useless leeches on society. Perhaps most important of all were political considerations, including Emperor Taiwu's desperate need to fill out his army with more conscripts and the fear of links between Buddhism and his enemies." Kieschnick, "Buddhism," 537.

[344] Kieschnick, 536–37.

[345] Kieschnick, 537–38.

> dynastic history compiled by the State. In fact, the composition of such a treatise as the *Shih-lao-chih* [Wei Shou's Treatise on Buddhism and Daosim] was unprecedented in Chinese historiography. Wei Shou, recognizing Buddhism and Taoism as "weights of the moment" (當今之重), i.e., as institutions occupying an extremely important position in his society, deliberately broke the precedent set by previous dynastic histories and devoted a special treatise to these two heterodox religions.

Although an early translator of the Treatise on Buddhism and Daoism notes that "even in his [Wei Shou's] case the restraints and the belief in the superiority of the Confucian classics were at work,"[346] the choice to carve out for special treatment using the treatise—the Chinese historiographical device originated by Ban Gu and his *History of the Han*—a philosophy responsible for a great deal of political unrest and often framed as an interloper in the Central Plains was hardly the mark of an author dedicated to smoothing over the complex ideological mix of the rulers he described. As I will argue in the following chapters, this same doubling is also visible in the administrative and legal treatises, though it's rarely remarked on by scholars of administrative history and almost never by scholars of legal history.

Although I believe that much of the scholarship I reference here is too categorical in describing the *History of Wei*, I also know that the work of its authors is a vital corrective to the views of Chinese history made so prevalent in the West by authors like Karl Wittfogel and other described in Chapter 1. My point is that, in making these corrections, some valuable sources have been needlessly left by the wayside, needlessly because they actually reflect exactly the multicultural complexity these scholars champion. To leave these sources disconnected from this new scholarship is to leave them entirely in the purview of the many authors who will continue to use them in incautious ways or to propagandistic ends, as the following chapters suggest. Our understanding of the textual sources has been hugely enriched by evidence from archeology and sources outside the *History of Wei* demonstrating the cultural and ethnic multiplicity of the Tuoba, evidence that allows us to make much more careful use of the information it contains. As a result, we cannot read Wei Shou's treatises without being aware that the theories and practices they catalogue can't either be characterized as entirely "Chinese" or trending inexorably towards Sinicization. They describe neither an always-present homogeneity nor a linear process of assimilation, but rather a dialectic of mutual influence in which it was often prudent for both the ruling Tuoba and their historiographers to frame their innovations in Central Plains terms.

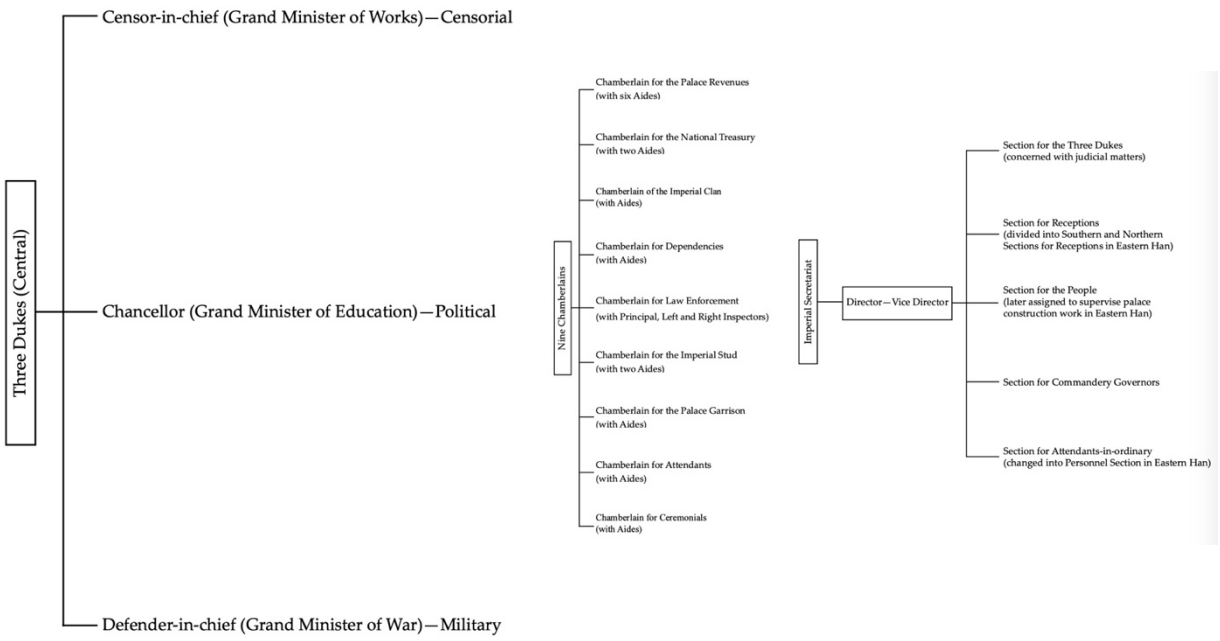
[346] Leon Hurvitz, *Treatise on Buddhism and Taoism: An English Translation of the Original Chinese Text of Wei-Shu CXIV and the Japanese Annotation of Tsukamoto Zenryū* (Kyoto: Jimbunkagaku kenkyusho, Kyoto University, 1956), 26.

Chapter 3: The *History of Wei* "Treatise on Administration and Lineages" 魏書 官氏志

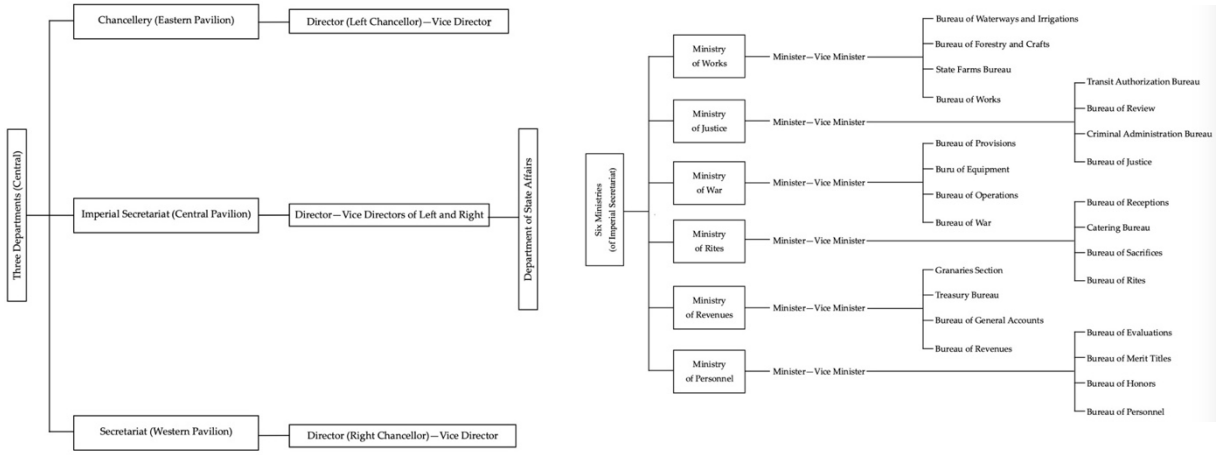
The multiethnic and multicultural world of the Northern Wei that the previous chapter describes is rarely taken seriously in contemporary scholarship that makes significant use of the administrative and legal treatises. The most common story told about the Northern Wei and political administration goes something like this: although they initially employed some non-Chinese techniques better suited to their nomadic existence, the Tuoba began relying on Chinese political institutions and offices to administer their territory even before the founding of their dynasty; the entire Northern Wei rule was then characterized first by a gradual adoption of Chinese modes of governance and then by a rapid and wholesale Sinicization when the Emperor Xiaowen mandated the use of Chinese governmental strategies in the 490s—the "Taihe reforms," named for the reign period in which they were enacted. While "many writers suggest that Wei was sinified or semi-sinified from the start (380s)… nearly all scholars also see the reign of the seventh emperor in the 480s and 490s as the most important and/or culminating stage of the sinification process."[347] Seen in this way, there doesn't seem to be much point in studying Northern Wei administration as an independent entity, since it was all pretty much just Chinese anyway. This contention plays a key role in major popular and scholarly conceptions of Chinese civilizational continuity. But the administrative treatise actually reflects significant changes that the Northern Wei introduced into Central Plains governmental practices and which were taken up by later dynasties, changes that may (some have argued) have contributed to the greater stability of medieval "Chinese" institutions relative to their contemporaries in Rome in what is sometimes called the "First Great Divergence."[348]

Part of what makes the Sinicization claim so surprising in the context of governmental structure is that every scholar acknowledges that the Eastern Han administration looked very different from that of the Tang, which was based in significant part on that of the Northern Wei. Here is how Xie Baocheng diagrams the second-century Eastern Han government[349]:

[347] Holmgren, "Northern Wei as a Conquest Dynasty," 12.
[348] Chen, Wang, and Zhang, "Leviathan's Offer." Scholars identify numerous possible "First Great Divergences" between the West and China. When speaking of it in this chapter, I am referring to its use as a description of medieval Chinese administrative stability in contrast with Roman administrative fragility.
[349] Baocheng Xie, *A Brief History of the Official System in China*, Economic History in China Series (London: Paths International Ltd, 2013), 196–97.



And here the seventh-century Tang[350]:



Explanations of the differences between these structures has filled many books, and even a cursory glance at the two diagrams reveals profoundly different organizational approaches.[351] For example, by the Sui-Tang era that followed the Northern Wei, the Department of State Affairs had become one of the core organs of the government, in what came to be known as the Three Departments and Six Ministries—as seen in Xie Baocheng's diagrams above—which

[350] Xie, 199–200.

[351] For more detail on the early imperial system, for example, see Luke Habberstad, *Forming the Early Chinese Court: Rituals, Spaces, Roles* (University of Washington Press, 2017). Habberstad gives a more careful and thorough account of the administrative situation in early imperial times. My point in using Xie's diagrams here is to show that even overviews of the kind that tend to deemphasize the role of the Northern Wei in Chinese history reflect profound differences before and after their era.

remained dominant until the Yuan dynasty in the thirteenth century. Much of the scholarship on medieval Chinese administration therefore emphasizes the Department's importance: Li Konghuai (author of a book on premodern Chinese administration) claims that, "During the Northern and Southern Dynasties period, the Department of State Affairs was the central government's highest administrative organ."[352] Li identifies its rise to prominence (along with the Central Secretariat and the Chancellery) as one of the most significant administrative developments during the chaotic period between the end of the Eastern Han and the founding of the Sui. "From the time of the Eastern Han, the Department of State Affairs gradually came to participate in political affairs, coming to concretely manage administrative matters, while political decision-making veered toward the Secretariat and the Chancellery," establishing the foundation of the Sui-Tang Three Departments.[353]

And yet, influential works surveying thousands of years of Chinese history claim that institutional continuity was actually the order of the day. Dingxin Zhao (discussed further below) writes that, "China is the only place in the world where a consistent imperial system persisted most of the time for over two millennia between the founding of the Qin dynasty in 221 BCE and the Republican Revolution in 1911."[354] The Northern Wei, in Zhao's telling, played an important role in assuring that consistency because Emperor Xiaowen (he of the Taihe reforms) "promoted Confucian learning" and "modeled the Northern Wei bureaucracy and legal system after that of the Han dynasty."[355] But it's hard to see in exactly what sense the Northern Wei could be said to have modeled their administration on the Eastern Han, when the Tang setup they inspired looks so radically different from that of the early empires. This odd paradox is common to overviews of Chinese administrative practice, which appear to argue that, despite the differences between the Eastern Han and Tang schema, both were essentially both "Chinese" and "Confucian" in some way that transcends any of the details of their actual arrangements. Moreover, scholars who take this position assert, the administration of the interstitial Northern Wei—which was in fact crucial in driving the evolution of these institutions from the former to the latter period—was primarily remarkable for the extent to which it adopted "Chinese" approaches. In other words, it was Chinese before and it was Chinese after and it was becoming Chinese in the middle, even though the meaning of "Chinese" was radically changing the whole time. To say that the Northern Wei was "becoming Chinese" (as many scholars do) is therefore both to imagine a Central Plains political culture that was far more static than was actually the case and to ignore the Northern Wei's effect on that culture.

The *History of Wei* administrative treatise is a key source for this story. The text is actually divided into several sections, the first a narrative dedicated to recording changes to governmental organization from just before the founding of the Northern Wei in the late fourth century through the Taihe reforms in the late fifth, followed by a long list of new titles established in the Taihe era; next comes a list of Xianbei family names and the Chinese names into which they were translated as part of the ostensible Taihe commitment to Sinicization. (The title is "The Treatise on Administration and Lineages" because it deals with both subjects, though the narrative of the former part is much longer and more detailed than any commentary in

---

[352] Li Konghuai 李孔怀, *Zhongguo gudai xingzheng zhidu shi* 中国古代行政制度史 *[History of the Ancient Chinese Administrative System]* (Fudan daxue chuban she *復旦大學出版社*, 2006), 115.

[353] Li Konghuai 李孔怀, 115.

[354] Dingxin Zhao, *The Confucian-Legalist State: A New Theory of Chinese History*, Oxford Studies in Early Empires (Oxford: Oxford University Press, 2015), 8.

[355] Zhao, 303.

the latter.) According to Wang Xiaoxiao and Hu Xiangqin (the authors of one of the few studies on the treatise I could locate), the "Treatise on Administration and Lineages"

> was a literary genre invented by Wei Shou, which not only enriched the form of the development of historiography, but also contains great value as a reference for later people's understanding of the historical development and progress of the Northern Wei Xianbei people. It preserves the situation of Xianbei development, while simultaneously recording materials of other tribes of the same era.[356]

Its form and content make it "must-be-consulted historical material,"[357] and Wang points to many studies on the Northern Wei that mine it for insights.[358] Despite this interest in what the work can tell us about medieval Chinese administration, however, "there is little research on the treatise itself."[359] But while Wang and Hu ostensibly set out to rectify that deficit, their article is much more interested in praising Wei Shou and his treatise than in exploring its challenges as a historical source. In addition, their approval derives in large part from their perception that the treatise records and approves the whole Sinicization of the Northern Wei in general and its administration in particular.

> From the "Treatise on Administration and Lineages," we can see Wei Shou's endorsement of Central Plains culture: in describing the process of Tuoba development, he intentionally relied on this culture, applying the technique of comparison to link together Xianbei and Central Plains administrative offices, with the result that Tuoba political power took on the form of the heir to Central Plains systems and culture.[360]

The result is that perhaps the only specific study of such an important source for Northern Wei administration wholeheartedly accepts its apparent premises regarding the superiority of Central Plains institutions and the Tuoba's gradual recognition of that fact.[361]

The claim that the Taihe reforms cemented a Chinese-style administration mainly or entirely unaffected by the non-Central Plains origins of the Northern Wei who promulgated them has had a long history. This idea is in large part traceable to the works of Chen Yinke 陳寅恪 (1890-1969), one of the most famous and influential Chinese historians of the twentieth century who wrote on medieval political history, among other subjects. Chen argued that the Taihe

---

[356] Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, "Lunshi 'Weishu Guanshizhi' de Chuangzuo Yitu Ji Jiazhi 试论《魏书·官氏志》的创作意图及价值 [A Tentative Discussion on the Creative Intentions and Value of the History of Wei Treatise on Offices and Lineages]," *Shanxi Datong Daxue Xuebao: Shehui Kexue Xuebao* 山西大同大学学报：社会科学版 34, no. 4 (2020): 40.

[357] Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, 40.

[358] Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, 38.

[359] Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, 38.

[360] Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, 42.

[361] There's quite a strange bifurcation of the scholarship on Northern Wei administration. On the one hand, many of the most detailed and sophisticated studies deal only with what they call the "early Northern Wei," by which they mean prior to the year 493. Given that the Northern Wei lasted for the 149 years between 386 and 535—and that these studies often also begin with pre-386 Xianbei administrative practices—it's pretty odd to call at least 67% of the dynasty "early." On the other hand, almost all the works that cover the Northern Wei era in longer overviews of Chinese administrative and legal history either omit discussion of the Northern Wei entirely or focus only on their administrative practices *after* 493.

Reforms largely adopted the approach of the Eastern Jin and Southern Dynasties. As I explained in Chapter 1, our views of these histories derive from particular people writing at particular historical moments whose influence is often detectable in their scholarship. Chen "came from a late Qing aristocratic family with strong nationalistic inclinations"[362] and was thus subject to similar pressures as the other late imperial Chinese scholars described in Chapter 1 to explain Chinese losses to the Western powers in cultural, historical, and ethnic terms (the latter possibly encouraged by his experiences under Japanese occupation[363]). Chen himself, however, would have resisted such overtly ideological approaches or uses of his work,[364] and spoke out against generalized overviews of Chinese history: he said that "he could not understand how one could teach the general history of ancient China (*Zhongguo shanggu shi*), a topic so broad and general, in one course."[365]

But Chen's conclusions about the Northern Wei were restated in much stronger terms by subsequent scholars, whose claims lend themselves to use by advocates of the Sinicization model. Huang Huixian 黃惠賢, for example, wrote that when the Northern Wei "arrived at the time of Emperor Xiaowen, under the helpful influence of the powerful Han families, the government modeled itself on the system of the Cao Wei, Jin, and Southern Dynasties, striving to shake off the influence of the old Xianbei aristocracy."[366] Chen and the scholars who followed him thus "believed that that the new Taihe administrative system merely copied the two Jin and Southern Dynasties, producing nothing new at all."[367] The broad significance of such an argument—otherwise relegated to niche technical disputes, interesting only to those already deeply invested in medieval Chinese administration—becomes obvious in the context of a Sinicizing view of Chinese history. If the Taihe reforms invented nothing, merely reestablishing older forms from dynasties that almost everyone agrees are "Chinese," then the Northern Wei can be safely ignored as a mere bump in the road of Chinese civilizational continuity. This looks a lot like Zhang Jinfan's statement about Chinese legal history: the Northern Wei merely connected the early empires to the Tang, ensuring the continuity of the early traditions and thus grounding the Tang and every other government that followed it in an unbroken chain of Chinese accomplishment. But there is significant evidence from both within and beyond the administrative treatise that should lead us to reject these conclusions.

What the Treatise Leaves Out

The first problem with relying unquestioningly on the administrative treatise, especially to support claims of Tuoba assimilation into Central Plains culture, is that we have known for decades that it omits significant features of Northern Wei administration that directly challenge easy narratives of Sinicization. The *History of Wei* was far from the only history being written in the sixth century and some of the others had quite different things to say on the subject of

[362] Sanping Chen, *Multicultural China in the Early Middle Ages*, 1st ed, Encounters with Asia (Philadelphia: University of Pennsylvania Press, 2012), 6.
[363] Chen, 6–7.
[364] Fan, *World History and National Identity in China*, 6.
[365] Fan, 73.
[366] Shi Dongmei 石冬梅, "Lun Beiwei Taihe Xin Guanzhi de Yuanyuan Ji Qi Yingxiang 論北魏太和新官制的淵源及其影響 [On the Source and Influence of the New Official System of the Northern Wei Dynasty]," *Hanxue Yanjiu* 漢學研究 25, no. 2 (December 1, 2007): 42.
[367] Shi Dongmei 石冬梅, 42.

Northern Wei administrative history. For example, the *History of the Southern Qi* 南齊書, written by Xiao Zixian 蕭子顯 (489-537) during the Liang 梁 dynasty (502-556), contains a list of titles used by the Tuoba before the founding of the Northern Wei, likely transliterating Xianbei words with Chinese characters.[368] The clear implication of this work (and others who record similar information) is that the Tuoba were simply covering their practices of nomadic governance with a Central Plains veneer. According to one study on Northern Wei legitimacy, this presentation was "quite opposite to the Northern Wei dynasty's image in the *Weishu* [*History of Wei*] as a 'normal' Chinese state"; instead, "all of these descriptions convey a clear image of the 'barbarian' Northern Wei dynasty… an alien one with a barbarous culture and strange names and titles."[369] These "histories mention the Northern Wei rulers by replacing their Tuoba names with Chinese words" and "to Chinese ears, these Tuoba titles were meaningless and must have sounded bizarre."[370]

There are, admittedly, several reasons to be somewhat suspicious of this characterization. Firstly, Wei Shou himself seems to answer or anticipate this attack on the Central Plains bona fides of the Northern Wei by referencing their separate schema of official titles in the administrative treatise and then emphasizing how quickly and thoroughly they were replaced by structures more familiar to his Central Plains readers. He writes that, "The Wei clan for generations ruled the dark North… when they dealt with the matter of establishing officers, they each had their own appellations and ranks" 魏氏世君玄朔… 掌事立司，各有號秩. But, according to Wei Shou, the Tuoba were altering their administration as soon as they began engaging in regular contact with Central Plains states—even before they established the Northern Wei dynasty—coopting the structures of the governments they would one day replace: "When they established friendly relations with the Central Plains, they also made some modifications and innovations… The various names of the other offices were largely the same as those of the Jin court" [i.e., of a Central Plains dynasty] 及交好南夏，頗亦改創… 餘官雜號，多同於晉朝. If we accept Wei Shou's account, therefore, the foreign-sounding offices listed in works like *History of Southern Qi* may have represented no more than a remnant of old Tuoba practices that were swept away by their adoption of Central Plains institutions. Moreover, just like Wei Shou, whose incentives to demonstrate the Northern Wei's legitimacy were explored in the previous chapter, Xiao Zixian had his own axe to grind: he wanted to *de*legitimate the Northern Wei so as to ingratiate himself with his emperor[371] and champion the legitimacy of his own state, which traced its origins to different sources. The foreign image he conveyed "apparently indicates the Northern Wei dynasty's failure to meet the ethnic criterion of legitimacy"[372] and must therefore be treated with caution as a genuine representation of the state of Northern Wei administration.

But we have further and more convincing evidence that the Northern Wei maintained a genuinely distinct set of official positions, even very late into their reign. A stele discovered in the late 1980s suggests that an elaborate, parallel rank arrangement maintaining Tuoba linguistic

---

[368] Yu Lunian 俞鹿年, *Zhongguo guanzhi da cidian* 中國官制大辭典 *[Big Dictionary of Chinese Bureaucracy]* (Hong Kong: Zhonghua shuju *中華書局(香港)有限公司*, 2020), 1385.

[369] Liu, *China's Northern Wei Dynasty, 386-535*, 84–85.

[370] Liu, 84–85.

[371] William Gordon Crowell, "*Nan Qi Shu* 南齊書," in *Early Medieval Chinese Texts: A Bibliographical Guide*, ed. Cynthia Louise Chennault et al., China Research Monograph 71 (Berkeley, CA: Institute of East Asian Studies, 2015), 206.

[372] Liu, *China's Northern Wei Dynasty, 386-535*, 84–85.

and cultural ideas persisted almost until the end of the Northern Wei, nearly until the ostensibly Sinicizing Taihe reforms.

> The stele inscription revealed a series of ranked inner court positions and titles regarding which the standard histories had made only passing references or no references whatsoever. Some of these titles used Chinese ideograms[373] to transliterate Xianbei language terms. The titles ranged from companions and advisors to the throne to a series of inner court palace guard generalships.[374]

On the basis of the stele's listing of ranks and their incumbents, Zhang Qingjie (who wrote extensively on the subject) concluded that—at least until the stele's date of 461 but likely beyond it as well—power in the Northern Wei government was concentrated in offices that superseded the traditional Chinese administrative structure, offices almost entirely occupied by ethnic Xianbei, referred to as "countrymen" or "men of the state" *guoren* 國人.[375] This tells us that Wei Shou is focusing on only one part of the administration, or at least on only one way of framing it (i.e., using Chinese terms). Another scholar of medieval administration, Hu Hong, argues that this method of subtly reading "Chinese" ideas and practices back into the Northern Wei is a common feature of Wei Shou's treatises.[376] Moreover, although the stele predated the Taihe reforms, it appears that at least some of these Tuoba offices survived the supposed wholesale Sinicization.[377] All of this tells us that there was much more going on in the world of Northern Wei administration than Wei Shou's treatise admits and poses fundamental challenges to the theories (largely based on his work) which hold that this era of administrative history can be seen as an exercise in pure Sinicization.

The Treatise's "Chinese" Frame

The scholarship that relies on the administrative treatise to prove its claims about a Sinicized or Sinicizing Northern Wei government isn't baseless, however: the treatise's framing, structure, and some of its content appears to support scholarly and popular views of the Northern Wei as governed by largely ad hoc institutions and practices until Emperor Xiaowen and his

---

[373] The term "ideograms" is no longer considered an appropriate way to refer to Chinese characters. "As with the other ancient writing systems, even though many of the earliest characters may have been pictographs or ideograms, Chinese writing for the last two thousand years has been neither pictographic, ideographic, phonographic, nor logographic (or morphographic), but morphosyllabic, because the majority of characters were compunds composed of a signific and a phonetic, the former suggesting the meaning and the latter the sound." Wilkinson, *Chinese History*, 242.

[374] Andrew Eisenberg, *Kingship in Early Medieval China*, Sinica Leidensia, v. 83 (Leiden ; Boston: Brill, 2008), 63n2.

[375] Zhang Wenjie 張文杰, "Beiwei Qianqi de Neishi Guan: Yi Wencheng Di 'Nanxun Bei' Wei Zhongxin 北魏前期的內侍官── 以文成帝 [南巡碑] 為中心 [Palace Attendants of the Early Northern Wei, Focusing on the 'Nanxun Stele' of Emperor Wencheng]," *Xingda Lishi Xuebao* 興大歷史學報 30 (2016): 49.

[376] Hu Hong 胡鸿, "Beiwei Chuqi de Jue Benwei Shehui Ji Qi Lishi Shuxie: Yi 'Weishu Guanshizhi' Wei Zhongxin 北魏初期的爵本位社会及其历史书写——以《 魏书· 官氏志》 为中心 [The Rank-Centered Society of the Early Northern Wei and Its Historical Writing: A Study Centering on the History of Wei 'Treatise on Administration and Lineages']," *Lishi Yanjiu* 历史研究 4 (2012): 50n6.

[377] Hu Hong 胡鸿, 50n5.

Taihe reforms came along in the late fifth century to impose almost totally Chinese-style laws and administration on his court and people.

Part of the difficulty (as discussed at greater length in Chapter 4) is that many scholars make the assumption that because the treatise situates itself within the genre of official history writing, the simple fact of its apparent conformity to preestablished categories indicates both an acceptance of and participation in civilizational continuity; such scholars then seek for confirmation of this idea in the work's contents. (This is the approach taken by Wang Zhigang, the author of the sole study on the treatise, who argues that it is dedicated primarily to recording Tuoba Sinicization.) There is no doubt that Wei Shou was drawing inspiration from Central Plains models in his decision to devote a treatise to administration, as well as in some of the treatise's content and organization. The first study of administrative offices in the official histories appears in the first-century *History of Han*, which contains a long table recording the identities of the holders of important offices, organized by reign period and year. This table isn't really a treatise (in the sense of a prose essay). Hans Bielenstein, an acknowledged expert on early imperial administration, calls it "disappointingly brief on the bureaucracy of Former Han times,"[378] but it did establish what became a tradition of historiographical focus on governmental administration. The first text explicitly identified as an administrative treatise appears today in the *History of Later Han*, which was compiled by Fan Ye 范曄 (398-446) and others in the fifth century. As discussed in more detail in Chapter 4, Wei Shou acknowledges his debt to these earlier models in the preface to the treatise section: "We have modeled ourselves on these wise men of former times, who condensed and compiled the ancient historical records, elucidating the material from the annals and biographies into essays and treatises" 憲章前哲，裁勒墳史，紀、傳之間，申以書、志.

More importantly, the structure and conclusion of the administrative treatise's first section—the semi-narrative, chronological account of the development of the Northern Wei approach—help explain why the scholarship on Northern Wei offices looks the way it does. Almost the entire section concerns events before the Taihe era; Taihe itself is dealt with only in the last few lines, in a somewhat breathless list of some of the many newly created offices. Wei Shou concludes with this summation:

> 自太祖至高祖初，其內外百官屢有減置，或事出當時，不為常目… 舊令亡失，無所依據。太和中高祖詔羣僚議定百官，著於令，今列於左，勳品、流外位卑而不載矣。
>
> From Taizu to the beginning of Gaozu's reign, inner and outer administrative offices were frequently eliminated or established. Other posts resulted from what fit the needs of the moment and did not serve as regular official titles… The old edicts have been lost and so cannot be relied upon. In the middle of the Taihe era, Gaozu ordered his assembled functionaries to deliberate and decide upon the administrative offices, which were recorded in an edict and which are now listed in what follows. As for the titles awarded for meritorious service or outside the principle rank system, their station was not high and they are thus not recorded.

[378] Hans Bielenstein, *The Bureaucracy of Han Times* (Cambridge University Press, 1980), 1.

In other words, this conclusion implies, the "early" Northern Wei administration was an unstable and ad hoc affair whose unsettled and poorly documented qualities make it unsuitable for systematic treatment in a treatise of which the bulk is given over to recording the dynasty's real administrative achievement: the Taihe reorganization of offices. As a result, scholars often interpret the treatise as a paen to the virtues of Sinicization in the realm of administration. For example, Wang Zhigang writes that, "The *History of Wei* Treatise on Administration and Lineages is a chapter specially created to focus on the Sinicization of the Tuoba Xianbei people… The first part records the tortuous process of the Tuoba Xianbei's reception of Central Plains political systems."[379]

In apparent support of Wang's contention, the opening of the administrative treatise evokes powerful symbols of continuity. Wei Shou's description of the ostensible origins of administration notes people and eras which the Han inhabitants of the Central Plains would also have seen as culturally foundational: Fuxi, the Yellow Emperor, Shao Hao, Zhuanxu, Yao, Shun, and the Xia, Shang, and Zhou dynasties.[380] He also mentions the Qin, Han, Cao Wei, and Jin dynasties, making no reference to any ruler or period that would have seemed unfamiliar or foreign to his Chinese-speaking audience. The effect of these invocations is to place the Northern Wei administrative developments described in the treatise in a legitimizing context of continuity. Just like the Yellow Emperor, the mythical ancient founder of the Chinese culture and race, Wei Shou seems to say, the Tuoba were faced with one of the essential problems of rulership and dealt with it in the same way: "Because the people could not govern themselves, therefore rulers were established to lead them. When these rulers could not govern alone, they ordained ministers to assist them." 百姓不能以自治，故立君以司牧；元首不可以獨斷，乃命臣以佐之. Wang Zhigang places a great deal of emphasis on this opening as demonstrating Wei Shou's acceptance of Central Plains culture, which (he argues) means that the Tuoba Xianbei did, too.[381]

Departing from the Models

However, despite these similarities and Wei Shou's own declarations, the administrative treatise is neither a work of slavish imitation nor one wholeheartedly devoted to a linear story of acculturation. As discussed in greater detail in the next chapter, the preface to the treatises—which many contemporary authors cite to claim that Wei Shou viewed his work as a continuation of that of the Central Plains historians it cites—also states explicitly that, "Affairs change with the times" 時移世易, requiring new historiographical approaches for new eras. In fact, the preface goes out of its way to single out administration as subject of unusual urgency during the period covered by Wei Shou's history: when he explains why, in contrast with earlier official histories, the *History of Wei* contains a treatise dedicated to the topic, Wei Shou writes that, "administration and familial lineage were of pressing concern during the Wei era" 官氏魏代之急. In other words, it could hardly be the case that Wei Shou saw this section as a simple extension of the historiographical approaches that preceded him, when he made sure to point out

[379] Wang Zhigang 王志刚, "Shilun 'Weishu' Dianzhi de Lishi Bianzuan Xue Jiazhi 试论《魏书》典志的历史编纂学价值 [Discussing the Historiographical Value of the History of Wei's Records of Laws and Institutions]," *Shixue Jikan* 史学集刊 2 (2008): 84.

[380] Mythical and ancient rulers and dynasties, often taken as models of virtuous and skillful governance.

[381] Wang Zhigang 王志刚, "Discussing the Historiographical Value of the History of Wei's Records of Laws and Institutions," 81.

that he saw the administrative treatise as a novel kind of work made necessary by evolving historical circumstances.

Specific examples demonstrate this general point. While it seems clear that the references to major mythical figures of Central Plains culture with which the treatise opens were meant to serve a legitimating function by casting the Northern Wei as the inheritors of a civilizational tradition, Wei Shou simultaneously emphasizes how little of the actual policies of these ancient rulers are either accessible to or useable by present-day administrators.

> 書契已外，其事蔑聞，至於羲、軒、昊、頊之間，龍、火、鳥、人之職，頗可知矣。唐虞六十，夏商倍之，周過三百，是為大備。而秦、漢、魏、晉代有加減，罷置盛衰，隨時適務。且國異政，家殊俗，設官命職，何常之有… 其由來尚矣。
> Aside from their written records, nothing is heard of their affairs. As for the offices performed by dragons, fire, birds, and men during the time of Fuxi, the Yellow Emperor, Shao Hao, and Zhuanxu, there is something that can be known.[382] Yao and Shun had sixty, the Xia and Shang increased their number, and the Zhou surpassed three hundred, completing the process. During the Qin, Han, Wei, and Jin dynasties, there were additions and subtractions, and the abolition and establishment of offices waxed and waned as occupations were made to fit the demands of the moment. Moreover, these states had different policies and their households had different customs, so what constancy could there be in their establishment of offices and ordering of responsibilities?... The origin of this is ancient indeed.

The opening of a treatise on administrative history is therefore largely dedicated to disproving the value or existence of a great deal of that history, in several distinct ways. Firstly, the oldest administrative methods (those of the Yellow Emperor, etc.) have simply been lost to time. Secondly, many offices were created to fit the needs of particular circumstances and thus varied from era to era. Finally, administrative structures should be responsive to the customs of the people over whom they exercise control, and customs also vary over time and space. Without drawing a great deal of attention to the full significance of this framing, Wei Shou is thus arguing that the Northern Wei were operating in (and derived legitimacy from) a Chinese context but were not bound by Chinese precedent.

Non-Central Plains Institutions and Offices

The administrative treatise (when contextualized) reflects the complexity of the Northern Wei world rather than a uniformly "Chinese" or "Confucian" style of government, even if that complexity is either unremarked on or deliberately obscured.

---

[382] The opening to the *History of Wei* Treatise on Buddhism and Daoism is quite similar. Leon Hurvitz translates it this way: "Great mean once arose and shepherded the people. But everything anterior to the tying of knots is unmentioned in literary records. Therefore there is no way of knowing about it" 大人有作，司牧生民，結繩以往，書契所絕，故靡得而知焉. Hurvitz, *Treatise on Buddhism and Taoism*, 25. Wang Xiaoxiao and Hu Xiangqin also read the administrative treatise's opening in this way. Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴, "A Tentative Discussion on the Creative Intentions and Value of the History of Wei Treatise on Offices and Lineages," 39.

It is true that the first actual administrative details the treatise records appear at first glance—like the treatise's opening, discussed above—to imply precisely the civilizational continuity that so many authors argue that the Northern Wei represent. Wei Shou's story about Northern Wei administrative history begins before the official founding of the dynasty in 386, with the reign of Tuoba Shiyijian 拓跋什翼犍 (r. 338-376) over the state of Dai. (It was Shiyijian's grandson, Tuoba Gui, who founded the Northern Wei.) His description of Shiyijian's approach to administration provides support to those scholars who see the Northern Wei primarily as a link in the chain of Chinese continuity: apart from two particularly senior officials, Wei Shou writes that in Shiyijian's administration, "The various names of the other offices were largely the same as those of the Jin court" 餘官雜號，多同於晉朝. In a recent article comparing the development of Western and Chinese civilization in the third through sixth centuries, Liu Jiahe and Liu Linhai cite this line as proof of their thesis about the Chinese administrative tradition: "Although there were differences in terms of concrete content, it was always the same in terms of theory: everything continued the tradition of the Han people."[383] Of the fact that Shiyijian also employed officers not found in Jin, Liu and Liu write that it didn't matter much, because the core of his administration adopted the approach of his Chinese predecessors: "Although these officials were initially largely appointed from the ranks of the Xianbei and did not use the old Zhou and Han names, nevertheless, its basic framework and method of selecting personnel still upheld those of the Cao Wei and Jin."[384] It's important to note, too, that Liu and Liu's thesis connects to the idea of the First Great Divergence[385] (though I don't believe they use the term): their argument is that medieval Chinese governmental structures survived while "Western" ones (for which Rome is a stand-in) failed, because Chinese administrations stressed unity through Confucian institutional longevity and Sinicization of minority peoples, while Roman ones allowed the maintenance of "barbarian" organizational schema that clashed with and destabilized the Roman state.

Liu and Liu's picture of a Sinicized Northern Wei administration is strikingly at odds with the conclusions of the scholars who have devoted serious effort to studying it. "Various studies have shown that, at the outset of Northern Wei rule, the Tuoba relied on systems and forms developed during their years of ruling a steppe society."[386] As Zheng Qinren, one of the few authors writing extensive studies of Northern Wei administration, put it, "I felt deeply that since the Northern Wei was a state founded by a nomadic people, therefore the establishment of its political systems should be investigated from the problems of a nomadic people and the

---

[383] Liu Linhai 刘林海 Liu Jiahe 刘家和, "3-6 shijie zhongxie lishi ji wenming fazhan bijiao yanjiu 3-6 世纪中西历史及文明发展比较研究 [A Comparative Study between the Roman World and China on the History and Civilization from the 3rd to 6th Century]," *Beijing shifan daxue xuebao* 北京师范大学学报 (社会科学版) 0, no. 5 (November 4, 2019): 83.

[384] Liu Jiahe 刘家和, 84.

[385] This is a commonly cited theory in work on the broad sweep of Chinese economic and state history and its comparison to Western trends. See, e.g., Walter Scheidel, "Fiscal Regimes and the 'First Great Divergence' between Eastern and Western Eurasia," in *Tributary Empires in Global History*, ed. Peter Fibiger Bang and C. A. Bayly, Cambridge Imperial and Post-Colonial Studies Series (London: Palgrave Macmillan UK, 2011), 193–204, https://doi.org/10.1057/9780230307674_11.

[386] Kenneth Douglas Klein, "The Contributions of the Fourth Century Xianbei States to the Reunification of the Chinese Empire" (PhD, University of California, Los Angeles, 1980), 109, https://www.proquest.com/docview/288336279/abstract/5A338B5A52E149C6PQ/1.

process of the development of a bureaucratic system."[387] As Yan Yaozhong explains, the early Northern Wei government "was quite different from the kingly court system of the Central Plains."[388] It was divided according to various "units" or "branches" 部. These branches were "social groups that also had administrative functions,"[389] the "most important units of civil administration below the state."[390] The men who headed them resolved disputes and exercised judicial power with terse rulings, "wielding state administrative authority in a time when governmental affairs were very simple."[391] In Yan's explanation, the branches stemmed from the simple needs of nomadic life.

> When the branch was only a unit of a tribal group, it naturally had no structure. A nomadic tribe on horseback had neither the need nor the capacity for relatively complex administrative organs. As the territorial aspect of the branch system was becoming more important, there was a proliferation in the number of departments 部门 with specific official functions.[392]

This simplified, territorial division had little in common with the Central Plains administrative structures with which the Northern Wei sought to integrate, such as the Eastern Han version sketched by Xie Baocheng (above).

So is this simply another omission on Wei Shou's part, another black mark against the treatise's reliability as a source? Not at all, as it turns out. While the preface to the treatises evokes mythical and historical figures from only Central Plains traditions and the earliest events recorded by the administrative treatise make little direct mention of the Tuoba's nomadic origins, it's nevertheless clear that the situation it describes is one of complex negotiation between two wildly different societies and their approaches to governance. Immediately after the line about Shiyijian adopting Jin offices that Liu and Liu make so much of, Wei Shou makes clear how much Shiyijian's government actually departed from those models.

> 建國二年，初置左右近侍之職，無常員，或至百數，侍直禁中，傳宣詔命。皆取諸部大人及豪族良家子弟儀貌端嚴，機辯才幹者應選。又置內侍長四人，主顧問…
> In the second year of the Jianguo era [339], Shiyijian first established the offices of personal attendants, which had no fixed quota and sometimes numbered in the hundreds. These attendants were responsible for the palace and they transmitted the king's edicts and commands. They were all chosen from tribal chieftains and those offspring of powerful and wealthy and respectable families who had a serious air and were eloquent and able.[393] He also established four Directors of Palace Attendants responsible for advising the emperor…

---

[387] Zheng Qinren 鄭欽仁, *Beiwei Guanliao Jigou Yanjiu* 北魏官僚機構研究 *[Research on the Bureaucratic Organization of the Northern Wei]* (Taipei: Mutong chubanshe *牧童出版社*, 1976), 1.

[388] Yan Yaozhong 严耀中, *Duet*, 35.

[389] Yan Yaozhong 严耀中, 35.

[390] Yan Yaozhong 严耀中, 39.

[391] Yan Yaozhong 严耀中, 39.

[392] Yan Yaozhong 严耀中, 44–45.

[393] Tang Zhangru suggests that this allowed the ruler to simultaneously establish his policies according to the views of important tribal families (and thus to ameliorate internal conflicts among them) and to use these younger

The treatise simply notes without further elaboration that Shiyijian adopted offices from the Jin, but spends far more time discussing his administrative innovations. Moreover, these innovations were designed to ensure Xianbei influence by concentrating power away from the Central Plains structures. For example, this section notes that Shiyijian "established the offices of personal attendants" 置左右近侍之職. These were intimates of the ruler, some of whom likely participated in consequential political decisions. They also helped to foster the younger members of powerful Xianbei families, ensuring that they were prepared to occupy important military posts while maintaining their loyalty to the Tuoba ruling group.[394] Their significance to the government is suggested by the fact that they "sometimes numbered in the hundreds" 或至百數. In other words, almost from the beginning of its explanation of Northern Wei administrative practice, the treatise is pointing out that a great deal of political power was actually in the hands of Xianbei aristocrats whose positions lay outside traditional Central Plains offices.

In fact, this section describes the origins of the so-called "Inner Court," the group of influential Xianbei who wielded power without necessarily holding Central Plains-style offices. "In early Wei, real power lay in the inner court, a holdover from the time of Shiyijian, if not before, whose inhabitants were overwhelmingly military men of Inner Asian descent."[395] While Shiyijian may have been inspired by Central Plains models, he wasn't bound to them: "even when borrowing official titles from Jin, they were quite differently organized," and "One key aspect of this was designation in 339 of attendant aides (referred to in Chinese as jin shi 近侍) who waited on and guarded the ruler and announced his decrees. This was the beginning of the creation of an 'inner court.'"[396] In the section quoted above, the treatise states that Shiyijian "established four Directors of Palace Attendants" 置內侍長四人, which were an important part of this organization: "The early Northern Wei established the office of Palace Attendants 內侍官 to handle important matters of state, administering affairs in different bureaus within the palace, so it was called 'internal administration' 內省."[397] According to the administrative treatise, Taizu (Tuoba Gui, who succeeded Shiyijian and founded the Northern Wei) took numerous steps to cement the power of this Inner Court. In the Tianxing era (398-404), Taizu established four new offices with which to reward his favorites: Receiver of Favor 受恩職, Tutor of Youth 蒙養職, Officer of Accomplished Virtue 長德職, and Officer of Remonstrance 訓士職. The first two were "given to the emperor's relatives or favorites, or to those of talent and renown" 親貴器望者為之 and "taken from old ministers who had provided meritorious service and who had free time" 取勤舊休閑者, respectively. In other words, all were likely Xianbei closely associated with the ruling family.[398] As with Shiyijian's palace attendants, Wei Shou notes that they had

members as hostages, checking the power of all the most powerful tribal leaders. Zhang Wenjie 張文杰, "Palace Attendants of the Early Northern Wei," 23n17.

[394] Zhang Wenjie 張文杰, 23n17.

[395] Pearce, *Northern Wei (386-534)*, 148.

[396] Pearce, 84.

[397] Yu Lunian 俞鹿年, *Big Dictionary of Chinese Bureaucracy*, 193.

[398] Zheng Qinren suggests these posts may have been a way for Taizu to provide positions for former tribal chiefs after dissolving the tribal system. Zheng Qinren 鄭欽仁, *Research on the Bureaucratic Organization of the Northern Wei*, 188.

"no fixed number of incumbents" 無常員, suggesting that the emperor was essentially free to design and modify his administration's center of power as he saw fit.

There are numerous scholarly theories about the nature and purpose of the Inner Court. Zhang Wenjie 張文杰 compiles many of the different the views,[399] including:

- They provided a new opportunity for the social advancement and distinction from central plains people for the scions of powerful Tuoba tribes, who were too numerous for the older and more rudimentary tribal offices to absorb.
- They served as the earliest form of official selection process that assisted the Tuoba elite to maintain their hereditary hold on power in their increasingly stratified society.
- They were part of a more elaborate group of Inner Administrative Offices 內行官, tasked with making important decisions for the state, and thus analogizable to the later Three Departments. Together with the Outer Court, these Inner offices formed co-equal branches.

Zhang himself argues that the simultaneous establishment of administrative ranks based on those of the Jin and the changing of the state name from Dai to Wei represented Shiyijian's efforts to "cast off the status of a tribe and assume that of a state."[400] But whether or not that desire was indeed Shiyijian's motivation (a difficult question to resolve, given the dearth of sources), the organization he adopted was a far cry from earlier Central Plains administrative structures. Zhang and the scholars he cites describe the creation of these offices as the origin of the dual tracks that defined pre-Taihe Northern Wei administration: an Inner Court dominated by non-Han people and an Outer Court[401] composed of Central Plains officers.[402] As Wei Shou's description of Shiyijian's court at the Northern Wei founding reflects, whatever interest the early Northern Wei rulers had in adopting Central Plains approaches that distributed power from the emperor to various administrative offices was counterbalanced by arrangements that kept that power in the hands of the emperor himself and in those of his intimate associates. Put even more starkly, "Until 493 [the beginning of the Taihe reforms], the Northern Wei regime formally functioned as an apartheid conquest dynasty."

As discussed in Chapter 2, many staunch opponents of the reductionism of the Sinicization hypothesis are inclined to see the *History of Wei* as characterized by Wei Shou's need to make the Tuoba look more Chinese than they were and downplay any hint their nomadic

---

[399] Zhang Wenjie 張文杰, "Palace Attendants of the Early Northern Wei," 21.

[400] Zhang Wenjie 張文杰, 23.

[401] Also during the Tianxing era, Taizu established the heads of the "Outer Court" 外朝大人 .

> 自侍中已下，中散已上，皆統之外朝大人，無常員。主受詔命，外使，出入禁中，國有大喪大禮皆與參知，隨所典焉。
>
> All officials below the rank of Palace Attendant and above that of Court Gentleman were under the auspices of the heads of the outer court, of which there was no fixed quota. They were in charge of receiving the emperor's orders, undertaking missions abroad, controlling access to the emperor's chambers [or the palace in general?], and managing state funerals and other important ceremonies. This office was organized according to these needs.

This outer court was "outer" in two senses: it was somewhat removed from direct interaction with and control by the emperor and it dealt with external affairs. This is the treatise's first use of the character for "outer" 外, contrasting with the numerous offices and institutions described as "inner" 內.

[402] Zhang Wenjie 張文杰, "Palace Attendants of the Early Northern Wei," 23.

origins. Scott Pearce, for example, claims at least twice in his new book on the Northern Wei that the *History of Wei* omits almost any mention of the Inner Court: in Pearce's view, it is "barely described in *Wei shu* though it actually ran the state"[403] and "the 'inner court,' the khaghan's Privy Council, which though ignored in *Wei shu* was the actual core of the early Wei state."[404] It's undoubtedly true that the administrative treatise leaves out a great deal—and probably leaves out more as its story progresses—but such evaluations somewhat underplay both the emphasis on non-Central Plains institutions in the treatise's opening and the consistent references to Tuoba governmental organization throughout its discursive section. This has the effect of ceding the administrative treatise to those scholars most firmly committed to the Sinicization view of Chinese history, despite the text's clear reflection of the mix of Tuoba and Central Plains approaches—with the Tuoba clearly playing the dominant role—in the pre- and early Northern Wei period.

It might be argued that this mix of Central Plains and non-Central Plains institutions gradually disappears from the treatise as it proceeds, replaced by a focus on Central Plains-style administration; this seems to be the thrust of scholarly arguments like Wang Zhigang's, which claims that the treatise shows the process of Tuoba acceptance of Central Plains administration. I think this characterization ignores references to Tuoba practices quite late into the Northern Wei, including Wei Shou's treatment of tribal organization and aristocratic ranks, though there is insufficient space to address those questions here. Nevertheless, perhaps proponents of the Sinicization hypothesis are right to conclude from the balance of the administrative treatise's focus that Wei Shou was primarily committed to demonstrating the effects of the Taihe reforms, the Sinicizing revolution of such apparent power that Xi Jinping references it in political speeches; maybe whatever heterogeneity was present in pre-Taihe Northern Wei administration was expunged by Emperor Xiaowen. So let's turn to the example of one of the most supposedly "Chinese" institutions (the Department of State Affairs) to see how the treatise deals with its growing importance and the assumption of its role as one of the principal organs of government after Taihe.

The Department of State Affairs

What came to be called the Department of State Affairs grew out of a Qin dynasty office and grew in importance through the Western and Eastern Han. Due to "the importance of written documents in the very first attempts at rationalization of administrative work,"

> It was a natural development that the officers concerned with the drafting, receiving, forwarding and preserving of the documents, as it would happen in Europe to the *secretarii ab epistulis*, that [*sic*] should become the most important joints of the whole machinery of the state administration.[405]

Thanks to its control over this key part of the state apparatus, the Department increased in importance during the Eastern Han and its officials were considered among the most influential

[403] Pearce, *Northern Wei (386-534)*, 19.
[404] Pearce, 301.
[405] Piero Corradini, "Notes on the Shangshu Departments in the Chinese Central Administration," *Monumenta Serica* 37 (1986): 22.

officials at the time of its fall in 220.[406] Several of the post-Eastern Han kingdoms employed offices that they referred to by similar names, though (as discussed below) they often had somewhat different functions and were of varying levels of importance in their respective governments. Andrew Eisenberg argues that the Department of State Affairs was of little real interest to early Northern Wei rulers. (Indeed, Eisenberg makes the larger claim that, "For the early and middle period of Northern Wei history it is debatable as to the relevance and importance of the entire Chinese style system of court administration that was developing in the Southern Dynasties."[407]) The Department's low status was partly a result of the Inner/Outer Court dynamic, in which Chinese people and ideas were relegated to secondary status in governmental spheres:

> At the central court the Chinese style Department of State Affairs along with the Secretariat (less so regarding the Chancellory) were mostly manned by Chinese courtiers in what has been referred to as the Northern Wei 'outer court', though, the highest ranking members of the Department of State Affairs could very well be Xianbei.[408]

As a result, the pre-Taihe Department seems not to have mattered a great deal to the Northern Wei central government. This conclusion is borne out by my analysis of the legal treatise, in which the Department of State Affairs doesn't begin its involvement with high-level legal debates until after 493 (although the neither the legal nor administrative treatises remark on this fact).

Strikingly, in his long study of administration, Li treats the Wei-Jin and Northern and Southern Dynasties as a single unit. Neither "Northern Wei" nor "Tuoba" appear in his 350-page work, nor does he discuss the branches or any other non-Central Plains form of governmental organization that might complicate his neat development narrative. This view is relatively standard in works of Chinese administrative history: that there is nothing worth noting about the Northern Wei in particular, and any differences of the period that might be noted are aberrations, mere bumps in the road from entirely "Chinese" developmental processes that transformed the Eastern Han bureaucracy and cemented it into its Tang form. Other scholars who do discuss the Northern Wei and the Department of State affairs argue that it was the Sinicization of the Taihe reforms that cemented the role of the Department's key role as a powerful organ of the central government,[409] and that its increasing power both encouraged and reflected a tighter connection between the Tuoba Wei and the Han.[410] Wang Huijuan cites the administrative treatise (among other materials) as proof of his thesis that

> We can see that when Emperor Daowu [Tuoba Gui] established the state, he positively promulgated Sinicization and established the Department of State Affairs. Apart from this, in the process of pursuing this Sinicization, the Northern Wei rulers employed ethnic

[406] Corradini, 25.
[407] Eisenberg, *Kingship in Early Medieval China*, 63n2.
[408] Eisenberg, 63n2.
[409] Wang Huijuan 王慧涓, "Beiwei Xiaowen Di Hanhua Gaige Dui Shangshu Zhidu de Yingxiang 北魏孝文帝汉化改革对尚书制度的影响 [The Influence of Emperor Xiaowen's Sinicization Reform on the Shangshu System]," *Longdong Xueyuan Xuebao* 陇东学院学报 25, no. 4 (2014): 49–52.
[410] Liu Dongsheng 刘东升, "Beiwei Nanbei Shangshu Zhidu Kao 北魏南北尚书制度考 [An Investigation into the Northern and Southern Shangshu System in Northern Wei]," *Beifang Luncong* 北方论丛, no. 1 (2017): 86–90.

> Han officials and relied on the institutions and systems with which those Han officials were conversant, so it was Han officials who drove the Sinicization of the Northern Wei.[411]

In these views, the Northern Wei either doesn't matter because it did nothing to interrupt the inevitable dominance of the Department of State Affairs, or that dominance is actually evidence of the extent to which the Northern Wei was committed to ensuring the continuity of the Chinese traditions whose legitimacy it sought to borrow.

There is no question that the Department of State Affairs occupies a significant position in the administrative treatise, which mentions its establishment, abolition, or modification at seven different moments of Northern Wei history, beginning in 396 when Emperor Taizu "began to establish the bureaus and departments" 始建曹省, which presumably included some early version of the Department of State Affairs.[412] Then, in 400, "the 36 bureaus of the Department of State Affairs were extended to the external offices, making 360 bureaus in all" 分尚書三十六曹及諸外署，凡置三百六十曹. Yet this seems far from a moment of triumph for Central Plains institutions, since Wei Shou notes that the emperor "ordered that tribal chieftains be placed at their head" 令大夫主之. Just two years later, the treatise says that "the 36-bureau Department of State Affairs was reestablished, each of which included one Dai [i.e., Xianbei] clerk 代人令史, one interpreter clerk 譯令史, and two scribes 書令史." 復尚書三十六曹，曹置代人令史一人，譯令史一人，書令史二人. Though it's not entirely clear what happened that required the *re*establishment of the recently created department, the treatise indicates "that it was necessary to establish within these bureaus one Xianbei director, as well as one director in charge of translation. We can see the Xianbei-Han multiplicity in governmental systems."[413] Yan Yaozhong concurs, arguing that the creation of the Dai clerks 代人令史 was a major way in which the Tuoba assured their control over what they perceived as somewhat foreign institutions, a claim somewhat supported by the need for translators. As Pearce points out, "'interpreter-clerks' (*yi ling shi* 譯令史)… played essential roles in the early Wei, in history writing and many other government activities,"[414] which should remind us of the distances both between the Tuoba rulers and the mechanisms they sought to employ and between the historiographers and their subjects: "More study is needed of the evolution of transcription and translation within the

---

[411] Wang Huijuan 王慧涓, "The Influence of Emperor Xiaowen's Sinicization Reform on the Shangshu System," 49.

[412] Somewhat surprisingly, it's difficult to find an explanation of the full implications of either line. "Surprisingly" because they suggest in just a few characters that the first Northern Wei emperor set up a large and complicated bureaucracy along the lines of what had previously existed to administer the central plains. Lou Jin 楼劲 does say that when a few years later Deng Yuan was asked to reform the official system, he was building on the foundation of Taizu's initial declaration, which "preserved the system of the Chancellor, Three Lords, and ministers and officials from Wei-Jin times." Lou Jin 劲楼, *Beiwei kaiguo shitan* 北魏开国史探 *[An Investigation into the History of the Northern Wei Founding]* (Beijing: Zhongguo shehui kexue chuban she *中国社会科学出版社*, 2017), 106. This is in line with several dictionaries of Chinese administration, including Lü Zongli 吕宗力 and Zhang Zhenglang 张政烺, eds., *Zhongguo lidai guanzhi da cidian* 中国历代官制大辞典 *[Big Dictionary of Chinese Historical Bureaucracy]* (Shangwu yinshu guan *商务印书馆*, 1994), 322.

[413] Zheng Qinren 鄭欽仁, *Research on the Bureaucratic Organization of the Northern Wei*, 98.

[414] Pearce, *Northern Wei (386-534)*, 17.

Chinese historiographical tradition, both to bring deeper understanding of that tradition, and to remind us more clearly that the authors[415] of *Wei shu* are chronicling an 'other.'"[416]

That the Department was not considered integral to early Northern Wei administration can be seen from the fact that, in about 406, it was completely abolished.[417] Zhang Wenjie, who characterized the earlier appointment of Xianbei offices above the standard (presumably Han-occupied) Department positions as "a reflection of the Northern reaction against the Sinicization process," writes that this later abolition represented "Northern intervention in the traditional Department system to the point of existential conflict."[418] Yan Yaozhong characterizes the Department's abolition as part of the Northern Wei government's efforts to navigate the duet with its subject population, its status alternating with the fluctuating power of the emperor.[419] Of the remaining four mentions of the Department (before the end of the narrative section), three are brief records of the establishment of particular positions. There is also an uncommented observation that the low-level officials 曹吏 were considered too numerous and so their number was reduced. Interestingly, given the common scholarly perspective that the Taihe reforms ensured a central role for the Department of State Affairs, the treatise makes no specific discursive mention of the Department's status under Emperor Xiaowen's rule, though the long list of official positions that follows the treatise's narrative portion lists many of the Department's offices. This hardly appears as a triumphant tale of the victory of Chinese-style governmental institution: when the administrative treatise discusses the Department of State Affairs at any length, it seems to emphasize both its foreignness to the Tuoba rulers and its use by those rulers as an instrument of control over a subject population.

Beyond the administrative treatise itself, there are other significant reasons to doubt that the rise of the Department of State Affairs represented increasing Han control over the Northern Wei government. First, members of the inner court often appear to have had more power the Department heads,[420] and heads of the surviving Tuoba tribal divisions sometimes directly intervened in the Department's affairs. Yan gives the example of Cui Cheng 崔逞 (d. 399?), a powerful minister who simultaneously held offices in both the "thirty six bureaus" (i.e., the Department of State Affairs) and was the head of the Southern Branch. He also cites Li Fu 李敷 (fl. 5th c.), who, while head of the of the Southern Branch of the Department of State Affairs, was involved (according to his *History of Wei* biography), in all the great debates of central court policy.[421] This arrangement constitutes an important part of what Yan calls the Northern Wei's

---

[415] As noted in Chapter 2, other officials were assigned to assist Wei Shou in writing the *History of Wei*, although our evidence suggests that Wei Shou himself did almost all of the writing, particularly where the treatises were concerned.

[416] Pearce, *Northern Wei (386-534)*, 18.

[417] It should be noted that there is an alternate (though minority) view of this episode. While the influential scholar Yan Gengwang 严耕望 believed that the whole Department had been abolished, the Japanese sinologist Kubozoe Yoshifumi 窪添庆文 argued that this line was simply about changing the names of important Department positions. Xu Meili 徐美莉, "Zailun Beiwei Qianqi Shangshu Zhidu de Zhifei Yu Biange 再论北魏前期尚书制度的置废与变革 [A Reexamination of the Establishment, Abolition, and Reform of the Early Northern Wei Shangshu System]," *Liaocheng Daxue Xuebao: Shehui Kexue Ban* 聊城大学学报：社会科学版, no. 2 (2013): 74.

[418] Zhang Wenjie 張文杰, "Palace Attendants of the Early Northern Wei," 25.

[419] Yan Yaozhong 严耀中, *Duet*, 26.

[420] Yan Yaozhong 严耀中, 40.

[421] Yan Yaozhong 严耀中, 41.

"duet" 二重奏, in which Han people were governed through the Three Department system in the capital, while the Tuoba "preserved their customary administrative groups."[422]

Second, the heads of the Department of State Affairs were largely identified as Xianbei rather than Central Plains inhabitants. Jennifer Holmgren, relying on numerous surveys of the ethnic composition of both senior and regional officials over the entirety of the Northern Wei period concludes that, "It would seem, then, that military posts, honorary titles at the top of the bureaucratic hierarchy, and high-ranking administrative posts in the executive sector of government [the Department of State Affairs], might have been more or less reserved for members of the non-Han community, with the Chinese being largely confined to the Secretariat."[423] Pushing back against many of the authors of these surveys, who conclude (in spite of their own evidence) that the pattern of officeholding in fact represents a gradual Central Plains takeover of important posts, Holmgren instead argues that,

> Rather these surveys suggest a classic imperialist structure in which higher-ranking supervisory posts in each sector of government are dominated by the ethnic minority with an ever-increasing proportion of appointments going to the conquered majority (the Chinese) as we descend the pyramid of power.[424]

Among other institutions, "The phenomenon is seen within the Department of State Affairs."[425] Finally, the Department's decisions at least in the matters detailed in the legal treatise—as discussed in more detail in Chapter 4, which, again, shows that their participation in legal debates doesn't begin to be recorded until *after* the Taihe reforms—don't seem to fit any clear "Confucian" paradigm, belying the claim that the increasing prominence of this "Chinese" institution produced any obvious "Confucianization" in the realm of administration or law.

Again, it might be objected that much of this applies to the Department of State Affairs in the years before the Taihe reforms. With the exception of Holmgren's multiple sources of data on officeholders—which continue to show Xianbei dominance of key government posts, including in the Department, even after Taihe—both the scholarship I have cited and the treatise's own narrative don't continue into the Taihe period. Indeed, the painstaking work of authors like Yan Yaozhong, Zheng Qinren, and the other most scrupulous scholars of medieval administration stops at the Taihe reforms, leaving us without similarly thorough investigations of the Taihe approach. Some have argued that the Taihe reforms should be seen more as an extension of the complex mix of assimilation and strategy that had always characterized the Northern Wei, part accommodation and part overlay of a Chinese veneer on a Tuoba ruling culture seeking a more effective language of authority. This is the view favored by Albert Dien, a major scholar of medieval China and Inner Asia. Part of the reforms, Dien writes,

> may be seen as an accommodation between the two social systems, bringing the [Tuoba] system into closer accord with the Chinese, but at the same time altering the Chinese system so as to ensure [Tuoba] control of that system. At one level, the accommodation gave the [Xianbei] the appearance of merging with their Chinese subjects: their names were changed to Chinese forms, their clothing and customs altered, and their language

[422] Yan Yaozhong 严耀中, 41.
[423] Holmgren, "Northern Wei as a Conquest Dynasty," 17.
[424] Holmgren, 18.
[425] Holmgren, 18.

> was forbidden at court. But as these outward manifestations of difference and possible areas of friction were reduced, the social-political structure was being manipulated to give the [Tuoba] a greater presence in the civil offices of the government. To accomplish this, Emperor [Xiaowen] did not draw on his own background; rather, he found the basic elements of his system in the Chinese society of his time.[426]

This work has also been challenged, however, by other scholarship claiming that the aspects of the Taihe reforms described by Dien give "very little additional power to the state" and that, "Consequently, there are no grounds for asserting that the T'o-pa were altering the Chinese system."[427]

This response to Dien notwithstanding, we do know that the Taihe reforms introduced a large number of specific changes into administrative practice that were carried forward into the governments of subsequent dynasties (though their full significance hasn't yet been analyzed, as far as I'm aware). This shouldn't come as a surprise given what the promulgator of the Taihe reforms, Emperor Xiaowen himself, signaled very clearly about his policies. Much like Wei Shou's preface to the treatises—in which he explains that he will be selecting judiciously from past models, rather than simply copying them—Xiaowen declared that his reforms would not be a wholesale adoption of preexisting norms: he announced that his administrative restructuring would "rely on old records from the distant past while also taking up those things suited to more recent times" 遠依往籍，近採時宜. "These 'old records' mainly indicate the Cao Wei and Jin administrative edicts, while the 'things suited to more recent times' are based on both the practices of administrative establishment from the early Northern Wei and the many transformations brought about by the political realities of Emperor Xiaowen's Taihe era."[428] Shi Dongmei lists numerous such transformations[429] and stresses that they went on to become the basis of the administrative practice of subsequent dynasties: "The new administrative system of the Taihe era greatly influenced the administrative systems of the Northern Qi and the Northern Zhou, as well as those of the Sui and Tang. The former's [i.e., Taihe] innovations and transformations of old systems were largely carried on by the latter [i.e., Northern Qi, Northern Zhou, Sui, and Tang]."[430]

Even if these differences were ultimately of little significance—again, the matter has yet to receive comprehensive study—and even if we were to grant the claims of many scholars that the Department of State Affairs became the key organ of political control dominated by some sort of Central Plains-centered perspective (particularly after the Taihe reforms), it still makes little sense to say that it demonstrates the continuous hold of some coherent "Chinese" (or worse, "Confucian") thought on the administrative structures used to govern the Central Plains. Prior to

---

[426] Albert E. Dien, "Elite Lineages and the T'o-Pa Accommodation: A Study of the Edict of 495," *Journal of the Economic and Social History of the Orient* 19, no. 1 (1976): 86, https://doi.org/10.2307/3631874.
[427] Kenneth W. Chase, "The Edict of 495 Reconsidered," *Journal of the Economic and Social History of the Orient* 39, no. 4 (1996): 391.
[428] Shi Dongmei 石冬梅, "On the Source and Influence of the New Official System of the Northern Wei Dynasty," 64.
[429] "Among the most important: the thirty 'principal' 正 and 'secondary' 從 levels of the nine-grade administrative ranking system; the systems of irregular 比視官 and supernumerary 流外官 administrators; the innovations and adjustments to the Chancellery, the heads of the Nine Courts 九寺卿, and other structures." Shi Dongmei 石冬梅, 72.
[430] Shi Dongmei 石冬梅, 72.

the medieval period, the Department was just one of many Central Plains administrative structures, and the Northern Wei chose, elevated, and used it to suit their particular purposes, while altering its nature and composition. It was (among other things) their needs and strategies that drove its development into one the key bases of Chinese administration for the subsequent six centuries. As Shi explains, there wasn't even a single version of the Department of State Affairs among the states established in the wake of the Eastern Han collapse: the Eastern Jin had 15 bureaus, the Liu-Song had 20, and the Western Jin had 35.[431] Though there was a good deal of overlap between these organizations—most of the Eastern Jin and Liu-Song subdivisions also appeared in the Western Jin schema—they varied significantly in scope and importance, particularly relative to other administrative organs like the Imperial Secretariat.

Though I don't have the space to detail the full significance of the distinctions between the Taihe Department of State of Affairs and the models that preceded it, what is clear is that Emperor Xiaowen was making intentional choices about what to include and what to leave out from among many possibilities. Moreover, while shoring up the Northern Wei's legitimacy in Central Plains terms was clearly a factor driving the Taihe reforms, the choices Xiaowen made were responsive to other concerns, too. "The post-Taihe system was different from the system of the Southern Dynasties. For example, the power of the secretaries of the Central Secretariat was immense."[432] But the Taihe reforms vastly degraded the power of the Secretariat relative to the Department of State Affairs.

> The major reason for this fact is that those with literary talent who could draft imperial edicts were largely Han scholars whom the Xianbei literati had no way of replacing. In order to safeguard their control, the highest Xianbei rulers needed to place Xianbei aristocrats in important posts, so they blocked the officials of the Central Secretariat "on the path of developing the management of edicts and proclamations into participation in political affairs."[433]

Because the Xianbei secretaries couldn't compete with their Central Plains counterparts in terms of literary and drafting ability, and Xiaowen needed both to solidify his rule and to find employment for the Xianbei aristocracy, he therefore chose to elevate the political role of a Department of State Affairs based on its Jin version, with its dozens of bureaus that could be headed by Xianbei princes who would direct the activities of their Central Plains subordinates. [434] Emperor Xiaowen relied on the more ancient Eastern Han, Cao-Wei, and Western Jin models—while adjusting many of their details in the ways Shi lists—rather than those of the contemporaneous Southern Dynasties because the latter were too simple for the emperor's needs: because the Northern Wei had to employ both Central Plains inhabitants and Xianbei in important governmental roles in order to shore up their influence among both groups, argues Shi, they needed to increase the number of available positions, and the Eastern Jin arrangement simply had more jobs.[435]

---

[431] Shi Dongmei 石冬梅, 54.

[432] Shi Dongmei 石冬梅, 64.

[433] Shi Dongmei 石冬梅, 64.

[434] Shi Dongmei 石冬梅, 64.

[435] Shi also cites a court debate over the Northern Wei's legitimacy according to Five Phases theory, in which influential officials held that the Jin were the last cosmologically legitimate dynasty and so it would further bolster the Northern Wei to claim descent from them. Shi Dongmei 石冬梅, 65–66. While Shi Dongmei doesn't provide a

Viewed in this way, the administrative treatise—still one of the foundational sources for our understanding of Northern Wei history—isn't telling a story of Sinicization, in which the conquerors recognized the superiority of Central Plains culture and dedicated themselves to assuring its continuation. Instead, it actually emphasizes the novel use and adjustment of one of many Central Plains models to address tensions internal to the ethnically distinct ruling group and to ensure that members of that group maintained their grip on the highest levels of the administration, so as to more effectively control the subject population. The practices recorded in the treatise were immensely influential in subsequent eras: "The origin of the Sui-Tang administrative system was largely that of the Western Wei, or, tracing it back one step further, it was the Northern Wei Taihe Reform system."[436] The hybrid structures they created were reflected in the administrations who followed them, including the "dual polity" of the Northern Qi[437] (under which Wei Shou wrote his history) and the Tang, who largely adopted an administrative approach derived from that of the Northern Wei. As Yan Yaozhong writes, Northern Wei "social structures and political systems contained the blended forms of nomadic and agricultural societies."

> Just like rapids pouring into a tranquil lake, the ancient traditional feudal political system took on a colorful elegance from this process. Innovating on the basis of the Sixteen Kingdoms, the Northern Wei system not only deeply influenced the Zhou, Qi, Sui, and Tang; it was also the forerunner of the Liao, Jin, Yuan, Qing, etc., ethnic minority regimes. The Northern Wei was thus an important source in the history of Chinese social and political development.[438]

We should thus see the administrative treatise as representing not a triumphalist narrative culminating in the definitive success of the Sinicizing Taihe reforms but as a partial reflection of a constant back-and-forth negotiation over government and culture whose repercussions continued into subsequent centuries.

Broader and Contemporary Implications

My claim here should be a moderate one: the Northern Wei selected among and made significant changes to the models of administration they encountered in the Central Plains; those practices that were taken up by many later dynasties, and those changes were partly the result of a minority ethnic group's need to balance competing imperatives of legitimacy and control rather than their acknowledgement of the naturally superior Confucian/Han/Chinese ways of doing things. To understand this history is thus to pay serious attention non-Han actors. The claim becomes radical only in the face of so much contemporary Chinese scholarship and propaganda that can't tolerate the ceding of any historical accomplishment to "outsiders," and to Western scholars, journalists, and politicians who accept the story of an ethnically homogenous imperial tradition.

---

great deal evidence for his conclusion about the need for more offices, it's strongly supported by Holmgren's exceptionally thorough analysis of many of studies of Northern Wei officeholding, showing that the revamped Department of State Affairs was dominated by Xianbei aristocrats.

[436] Shi Dongmei 石冬梅, 67.

[437] Eisenberg, *Kingship in Early Medieval China*, 97.

[438] Yan Yaozhong 严耀中, *Duet*, 15.

As I noted in the Introduction, dissents from the Sinicization hypothesis in which the Northern Wei play a starring role aren't new, but the view's staying power and influence are so great as to keep requiring still more challenges, as numerous recent examples demonstrate. One book that has attracted some significant attention in the years since its publication purports to explain Chinese political history in terms of the Confucian-Legalism dialectic birthed by the Western Han and cemented in the Tang[439] (the theory whose origins are examined in Chapter 1). When it comes to administration, Dingxin Zhao, the book's author—while admitting that "the structure of bureaucracy changed greatly from one dynasty to another"—makes clear that "the Chinese state" should be understood as a relatively coherent philosophical and logistical entity that maintained its stability over several millennia, beginning in the last centuries of the first millennium BCE. "Some of the most important features of the Western Han bureaucracy were retained throughout the history of imperial China," writes Zhao, meaning that, "The following discussion of the Western Han bureaucracy can, therefore, serve as a baseline model of the structure and nature of the premodern Chinese bureaucracy."[440] Zhao makes clear that his view of Chinese political history is of a Han core occasionally troubled by outside forces but never seriously influenced by them. "China's political system," in his telling, "faced numerous challenges," including "repeated nomadic invasions, nomadic occupations, and nomadic rule" (by which Zhao certainly intends to indicate the Northern Wei, among others).[441] "Yet, not until the arrival of the West in the nineteenth century did any of these forces undermine the Confucian-Legalist political system in any fundamental way."[442] Instead, in a paradigmatic statement of the Sinicization theory, these outsiders were transformed by the culture of the land they controlled, Zhao argues, as the ever-present Confucianized administrative structures came to replace foreign structures of authority and constrained their leaders' ability to act freely: "major dynasties of nomadic or semi-nomadic origins sooner or later adopted Confucianism as a ruling ideology and relied on the Confucian-Legalist bureaucracy to rule the most populated part of China, with concomitant decline in the rulers' autonomy."[443] Finally, even beyond failing to influence Central Plains political culture, "challenges" like the Northern Wei only *strengthened* this Chinese core, ensuring its place at the heart of Chinese civilization: "Facing these challenges and repeated end-of-dynasty devastation, this political system not only survived and developed and penetrated deeper into society, but also gave rise to numerous patterns of Chinese history."[444] Emperor Xiaowen and his Taihe reforms constitute a significant part of Zhao's argument: "Emperor Xiaowen of Northern Wei… even went so far as to compel his own people to assimilate, adopting Chinese norms and customs, and even intermarrying with the Chinese people. Repeated nomadic domination of China in the end only demonstrated the resilience of the Confucian-Legalist political system."[445]

Zhao's work, cited approvingly by dozens if not hundreds of other scholars, doesn't just make a historical claim: he sees clear connections between the nature of the governmental and administrative culture he describes and features of contemporary Chinese society. "The millennia-long domination of the Confucian-Legalist state has given China a strong state

[439] Zhao focuses more on the Song than the Tang as the second high point of political Confucianism. Zhao, *The Confucian-Legalist State*, 14–16.
[440] Zhao, 286.
[441] Zhao, 294.
[442] Zhao, 294.
[443] Zhao, 324.
[444] Zhao, 294.
[445] Zhao, 315.

tradition, a huge core territory, a large population with a shared identity, and a pro-education ideal."[446] While Zhao draws on narratives that lend themselves to triumphalist views of Chinese civilization, he is no triumphalist about the CCP government and its policies, warning that the administration may face significant unrest if it doesn't keep delivering rapid economic growth.[447] But others who contextualize the Northern Wei administration within similarly grand storylines are less nuanced in their use of history to analyze the present day. For example, a YouTube series called "China History" 中国通史 (produced by CCTV6, a Chinese-language channel with nearly 2 million subscribers that specializes in nationalistic fare) put out a video in 2018 titled, "Northern Wei Emperor Xiaowen's Reforms" 北魏孝文帝改革. The video, which has been viewed more 192,000 times as of late 2023,[448] features stirring music befitting a heroic theme, over which the announcer intones:

> In the north was established the first stable political power controlled by an ethnic minority in the Chinese territory… When the rough and bold nomadic civilization of the grasslands encountered the agricultural civilization of the Central Plains that valued the will of the people, it naturally produced a fierce and painful collision and fusion of cultures.

The video's perspective, naturally, is that this "collision and fusion" entirely favored the Chinese civilizational core, and that administrative structures were a key part of the Northern Wei's adaptation to Chinese modes of life and governance.

> As one can imagine, when the Northern Wei went through the Taihe reform, the economy and political system had already been extremely Sinicized and they were bringing forth many scenes of prosperous life, so they were already the legitimate political authority in the area of the Central Plains.

The extent to which administration serves as a key part of even these most reductionist views of Chinese history and the role of "outsiders" in it can be seen by who the video's producers chose to interview: scholars who do serious work on difficult problems of medieval Chinese history, including two (Hu Hong and Lou Jin) whose articles I have returned to over and over in my studies of the administrative and legal treatises. Scholarship on these seemingly niche concerns of the "Period of Division" continues to matter a great deal to today's messaging about what matters in Chinese history and culture, given current ethnic tensions in the PRC. As one group of researchers writing about Northern Wei administration put it: "Contemporary Chinese state propaganda tends to highlight a cultural reform of ethnic integration beginning in 493 AD under Emperor Xiaowen."[449] The persistence of this narrative—drawing heavily on ideas about Northern Wei administration and Wei Shou's administrative treatise—require persistent challenge.

It should, finally, be noted that a somewhat more radical argument concerning the importance of the particulars of Northern Wei administration is perhaps beginning to be made.

---

[446] Zhao, 374.
[447] Zhao, 376.
[448] *Di Sanshiliu Ji: Beiwei Xiaowen Di Gaige* 第三十六集：北魏孝文帝改革【中国通史 | China History】[The Reforms of Northern Wei Emperor Xiaowen] , 2018, https://www.youtube.com/watch?v=CsiNs7LVgMA.
[449] Chen, Wang, and Zhang, "Leviathan's Offer," 67.

The authors who identify Northern Wei government as a central concern of "contemporary Chinese state propaganda" also claim that Tuoba administrative practices may have been significantly responsible for the so-called "First Great Divergence": broadly speaking, the view that European political communities crumbled under invasions by Visigoths and Vandals while Chinese ones thrived under takeovers by groups like the Northern Wei. Unlike Liu and Liu, who see Confucianism as the key ingredient ensuring Chinese stability, Chen, Wang, and Zhang argue that the Taihe reform was significant not for its adoption of Chinese practices but for its efforts to extend state control to regions outside the capital. These efforts were successful, according to Chen et al., because they compensated local elites for the expansion of state power that infringed on their prerogatives with offices in the national government, which gave them a vested interest in, and helped insure the longer survival of, the Tuoba regime. This provides further support for Shi Dongmei's thesis that the late Northern Wei government selected its particular institutional arrangements—especially the adoption of the Jin Department of State Affairs—because it needed more posts to manage its relations both with powerful Xianbei aristocrats and with the Han population. My aim here isn't to take a position on the persuasiveness of the "First Great Divergence" theory, but some frequently cited scholars (like Walter Scheidel) clearly find it appealing as a key to understanding the relative geostrategic positions of China and the West in the world today. If we credit Chen et al.'s findings (based on records of thousands of officeholders during the Northern Wei), this suggests that "China" owes its ostensibly superior institutional stability in the medieval period—an important point of national pride in contemporary historical debates—not to Confucian philosophies of governance but to strategies of population management put in place by a ruling group still very cognizant of the political perils of its foreignness.

Chapter 4: The *History of Wei* "Treatise on Punishments" 魏書 刑罰志

Describing the Northern Wei

In evaluations of the grand sweep of Chinese legal history, the Northern Wei are often largely or completely omitted. For example, the eminent legal academic He Qinhua's 何勤华 otherwise detailed survey of particular sources and features of Chinese legal thought leaves out the Northern Dynasties 北朝 almost entirely.[450] In their lengthy and much-cited investigation of unearthed early imperial[451] laws, Anthony Barbieri-Low and Robin Yates argue that one of the key lessons to be drawn from the statutes of that period is of the continuity between the laws of the early empires and of the early Tang. "The inescapable conclusion," they write, is that "the foundation of the Tang Code, often referred to as the most influential legal document in all of East Asian history, lay buried deep in the imperial and pre-imperial past, resting firmly on the vilified laws of the Qin."[452] There is ample evidence for this conclusion—and it makes sense for Barbieri-Low and Yates to want to underscore the importance of their work in this way—but it also leaves out all the intervening centuries, thereby lending support to the already prevalent belief that nothing of any great significance happened between the third and seventh centuries. In this, they echo the findings of Geoffrey MacCormack, an influential author on *longue durée* Chinese legal culture, who likewise views Tang-era law as largely based on "transmitted" Han legal texts and thus downplays the importance of the Northern Wei (and, indeed, the Northern Dynasties generally).[453]

When the Northern Wei are mentioned at all, the story is generally one of accommodation, assimilation, and adoption. In this view, a small group of nomads found itself in control of a large sedentary population in the North China Plain that dressed differently, spoke differently, and was used to different laws and customs, so full-on Sinicization was the best method for insuring obedience from mistrustful subjects. As Ho Ping-ti puts it, the Tuoba Xianbei "had to follow the logic of the time: to shift a largely nomadic economy to the Chinese type of sedentary agriculture and to adopt by increasing measure the Chinese imperial system and bureaucracy for better management of the majority Chinese subjects."[454] Given the complex requirements of ruling over a population with such different customs, "culturally and institutionally sinicization would serve as a common denominator with which to homogenize the polyethnic subject population."[455] As a result, according to Ho, Emperor Xiaowen 孝文帝(r. 471-499)—the emperor named by President Xi in his speech on the attractive force of Chinese culture—instituted "a policy of systematic sinicization" that included moving the capital to the historically significant Luoyang, banning the Xianbei language and promoting Chinese, replacing Xianbei with Chinese clothing, "and the full-scale adoption of Chinese rituals and legal

[450] He Qinhua 何勤华, *An Outline History of Legal Science in China*, 98.

[451] Broadly speaking, the term "early imperial" relates to the Qin 秦 (221-206 BCE), Western Han 西漢 (202 BCE-9 CE), and Eastern Han 東漢 (25-220) dynasties, while "medieval" largely refers to the Tang 唐 (618-907).

[452] Barbieri-Low and Yates, *Law, State, and Society in Early Imperial China (2 Vols)*, 242.

[453] Geoffrey Maccormack, "The Transmission of Penal Law (Lü) from the Han to the T'ang: A Contribution to the Study of the Early History of Codification in China," *Revue Internationale Des Droits de l'antiquité* 51 (2004): 82–83.

[454] Ho Ping-Ti, "In Defense of Sinicization: A Rebuttal of Evelyn Rawski's 'Reenvisioning the Qing,'" *The Journal of Asian Studies* 57, no. 1 (February 1998): 131.

[455] Ho Ping-Ti, 131.

code."[456] Ho characterizes Emperor Xiaowen's reforms as largely strategic in nature: "All these were parts of long-range planning for a military conquest of the southern Chinese dynasty—the only way to gain legitimacy to supreme rulership of the entire China world."[457] Other scholars, however, cast the Northern Wei as the paradigmatic example of the power the ethnic Han people have supposedly long possessed to impress their civilizational superiority on other groups with which they come in contact. Zhang Jinfan, for example, argues that many of the Northern Wei legal reforms were designed to "absorb the advanced legal culture of Han nationality."[458] Less strident scholars than Zhang repeat more or less the same claim. Quoting others, John Head and Yanping Wang (whose book on Chinese legal history is commonly found in law libraries around the world) write that Tuoba Sinicization "amounted to a conscious and deliberate attempt to bring the country closer to the… ideal of a Han-Chinese, Confucianized bureaucratic monarchy ruling an ordered, aristocratic state."[459]

But these views are immensely simplistic. As Jennifer Holmgren laments: "where conquest dynasties are concerned, traditional Chinese historiography still plays a part in descriptions of the downfall and collapse of a regime, collapse being attributed to one of two factors: an inability to complete the sinification process; or decadence and loss of martial vigour due to sinification."[460] Whether we view this period as one of genuine Sinicization, strategic cooption, or something else, framing our investigation of Northern Wei phenomena in this way confines us to endless arguments over whether they're "Chinese" or not and reduces scholarly interest in the period. For example, unlike the treatises of the *History of Han* 漢書 or *History of Jin* 晉書—the court sanctioned official histories from the Western Han and Tang, respectively, containing the other two major essays on law with which the present text is most frequently compared—the legal treatise in the *History of Wei* has rarely been the sole focus of scholarly inquiry. The most detailed studies of the text appear in books or articles dedicated to legal treatises in all or some of the official histories, an indication of the extent to which it is seen primarily as one link in the chain of "Chinese" tradition. This view is partially a function of what makes the text so important: it is one of the few extant sources about a period in the law of the North China Plain that scholars have long seen as foundational to the Tang Code, and thus the rest of Chinese legal history. Cheng Shude 程樹德 (1877-1944), the Chinese legal historian whose work remains foundational for contemporary Chinese scholars of law, wrote that:

> 自晉氏而後，律分南北二支: 南朝之律，至陳併於隋，而其祀遽斬; 北朝則自魏及唐，統系相承，迄於明清，猶守舊制… 然則唐宋以來相沿之律，皆屬北系，而尋流湖源，又當以元魏之律為北系諸律之嚆矢。
>
> After the Jin dynasty, the statutes were split into north and south branches: the statutes of the southern dynasties arrived at Chen and combined with Sui, but their sacrifices were rapidly cut short. The northern dynasties continued from the Wei to the Tang, inheriting their systems from one another. Up until the Ming and Qing, the old rules were still preserved … Thus all the statutes that have been passed down since the Tang and Song

[456] Ho Ping-Ti, 131.
[457] Ho Ping-Ti, 131.
[458] Zhang, *The History of Chinese Legal Civilization*, 403.
[459] Head and Wang, *Law Codes in Dynastic China*, 111–12.
[460] Holmgren, "Northern Wei as a Conquest Dynasty," 40.

belong to the northern line. If we trace back their origins, the statutes of the [Northern] Wei should be considered the precursors to the all the statutes of the northern line.[461]

The dearth of sources concerning the period the treatise covers has led those few scholars who have examined it to view it primarily as a tool for explaining how "China" got from the Han to the Tang with its tradition more or less intact. It's much more interesting, however, when viewed not as a bridge shoring up a legal culture's unchanging core, but rather as a window into an era of multicultural, multiethnic complexity in which identities, theories, and practices were all up for grabs. What follows is an examination of some of the most important issues raised by the *History of Wei* legal treatise, a complete translation of which accompanies the full chapter.[462]

The History of Wei *Legal Treatise*[463]

The treatise begins with an account of the origins of criminal punishment, then discusses a few important moments in pre-imperial legal history before explaining that its primary focus will be the era after Emperor Xiaowen's reforms.

自太祖撥亂，蕩滌華夏，至於太和，然後吏清政平，斷獄省簡，所謂百年而後勝殘去殺。故榷舉行事，以著於篇。

---

[461] Gao Chao 高潮 and Ma Jinshi 马建石, *Zhongguo lidai xingfa zhi zhuyi* 中国历代刑法志注译 *[Annotations and Translations of Chinese Historical Treatises on Law and Punishment]* (Jilin renmin chubanshe *吉林人民出版社*, 1994), 137.

[462] It was preparing that translation that led me to discover what those important issues are. The unusual durability of Chinese orthography—the same characters, more or less, have been in continuous use for millennia—exacerbates the problem of narratives of continuity: when you're already inclined to see the whole Northern Wei period as simply a vehicle for conveying early imperial ideas to the early Tang, it's easy to imagine that the institutions and practices described with words similar to those used in earlier or later periods must have actually looked like those earlier or later versions. This is the approach that many scholars take to the legal treatise, and it often produces confusing results for a translator seeking to explain the exact nature of the ideas and occurrences described in the text. Trying to sort out that linguistic confusion helped me to see where the treatise was actually saying something quite different from what is usually understood, demonstrating not continuous but diverse legal perspectives that belie present-day attempts to coopt or ignore this fascinating period for political purposes.

[463] It should be noted that the text has undergone significant reconstruction. Both in the Baina 百衲—"The title means 'hundred patches edition of the *24 Histories*,' referring to the fact that each *History* in this collection was photo-lithographically reproduced from the best Song and Yuan editions (with missing sections filled in from Ming and later editions…)." Wilkinson, *Chinese History*, 699.— and all the Ming and Qing woodblock editions of the History of Wei legal treatise, there is a missing page after the last *er* 而 in the emperor's initial edict in the case of Bi Yangpi's daughter (just before he orders the case to be adjudicated as if Zhang Hui had made a complete sale). Scholars have made several efforts to reconstruct it. For an account of one such reconstruction, see Uchida Ginpu 内田吟风, "'Weishu Xingfa Zhi' Que Ye Kao 《魏书 · 刑罚志》缺页考 [A Study of the Missing Page of the *History of Wei* Treatise on Penal Law]," trans. Chen Han 陈翰, *Guji Zhengli Yanjiu Xuekan* 古籍整理研究学刊 1 (1986): 66–71. *TU* 220n7 explains that Uchida has attempted to reconstruct the missing text on the basis of the *Outstanding Models from the Storehouse of Literature* 冊府元龜, a collection presented to the Northern Song emperor in 1013 containing excerpts from many important works of Chinese history, supplemented with another edition of the *Outstanding Models* from the Japanese Seikadō Bunko Library 靜嘉堂文庫 (Wilkinson, *Chinese History*, 1100.), as well as the *Comprehensive Statutes* 通典. However, because *TU* has some doubts about Uchida's reconstruction—though he doesn't say what they are—his own efforts rely on the Seikadō Bunko *Outstanding Models* (while noting similarities and differences with the text of a Ming-era edition of the *Outstanding Models*).

> Beginning from Taizu's reestablishment of order, *huaxia* began to be cleansed from the Taihe era [477-499] on. Officers were upright and policy was fair, and the number of criminal cases diminished. This matches the proverbial "cruelty can be vanquished and executions eliminated after a hundred years." That is why I have especially selected these deeds and events to write down in this section.

This statement is followed by a brief history of the Tuoba clan's laws before the founding of the Northern Wei and up to Emperor Xiaowen's reign. The remainder (and majority) of the treatise is devoted to particular legal problems under Xiaowen and his successors, sometimes introduced by the author, sometimes framed by quotations from memorials by important officials. These problems are either stated generally (people aren't following the law, judges are too harsh, etc.) or expressed through debate over specific cases.

As of 2010, there was almost no scholarship in Chinese or English on the *History of Wei* treatises or the legal treatise in particular,[464] and little has been published since. This is undoubtedly partly a feature of the low esteem in which the *History of Wei* has long been held (described in Chapter 2), as well as the desire to frame the legal treatise as one link in a long-running chain of Chinese legal theory. Chan Chun-Keung, however, does provide some background to the legal treatise's composition. According to Wei Shou's biography in Li Daishi 李大師 (572-628) and Li Yanshou's 李延壽 (fl. 618-76) *History of the Northern Dynasties* 北史 (compiled between 643 and 659[465]), Wei Shou completed the treatises in 555, a year after submitting the annals and biographies.[466] It is likely, speculates Chan, that Wei Shou's ability to produce ten treatises in only a year reflected both his longstanding engagement with Northern Wei history and his ability to build on the substantial but unpublished work of previous historians (including Li Yanshou himself).[467] Both because (as discussed in Chapter 2) the men assigned to help Wei Shou were not especially gifted and because Li Yanshou describes Wei Shou as seeking and being granted permission to complete the unfinished treatises, "it is highly likely," Chan argues, "that the ten treatises were completed through Wei Shou's individual effort."[468]

While many of the subjects of Wei Shou's treatises were largely drawn from those of the histories that preceded him, he changed all their titles. The "Treatise on Law and Punishment" 刑法志 became the "Treatise on Punishments" 刑罰志, a title which the *History of Wei* was the only post-*History of Han* official history to adopt.[469] While numerous historical works between the fall of the Eastern Han and the founding of the Tang included chapters on law and punishments, not all of them did, so it's worth asking to what extent Wei Shou's inclusion of this

---

[464] Chan Chun-Keung 陳俊強, "Hantang zhengshi 'xingfa zhi' de xingcheng yu bianqian 漢唐正史〈刑法志〉的形成與變遷 [The Formation and Evolution of the 'Treatises on Law and Punishment' in Official Histories from the Han to Tang]," *Taiwan shida lishi xuebao* 臺灣師大歷史學報, no. 43 (January 1, 2010): 16, https://doi.org/10.6243/BHR.2010.043.001.

[465] David Graff, "*Bei Shi* 南齊書," in *Early Medieval Chinese Texts: A Bibliographical Guide*, ed. Cynthia Louise Chennault et al., China Research Monograph 71 (Berkeley, CA: Institute of East Asian Studies, 2015), 20–21.

[466] Li Yanshou 李延壽, *Beishi* 北史 *[History of the Northern Dynasties]* (Beijing: Zhonghua shuju *北京: 中華書局*, 1974), 2030.

[467] Chan Chun-Keung 陳俊強, "The Formation and Evolution of the 'Treatises on Law and Punishment' in Official Histories from the Han to Tang," 17–18.

[468] Chan Chun-Keung 陳俊強, 18.

[469] Chan Chun-Keung 陳俊強, 19.

treatise can be understood as a response to the needs of his time.[470] For example, according to the *History of Jin* legal treatise, the so-called "Taishi statutes" of 268—named for the reign period of Jin Emperor Wu 晉武帝 (r. 266-290) who ordered them—constituted one of the most significant revisions of the existing laws in the period between the Eastern Han and the Tang, so it's hardly surprising that most works dealing with Jin history contained a treatise on law. On the other hand, according to the official histories, subsequent states largely continued to use these Jin statutes unchanged, so the history of (for example) the state of Song 宋 (420-479) has no legal treatise, despite containing thirty essays on other topics.[471] Chen therefore speculates that Wei Shou decided to include a separate legal treatise due to the numerous efforts of successive Northern Wei rulers to reform punishments, legal statutes, and lawsuits, efforts detailed in the *History of Wei* legal treatise.[472]

Theory versus Practice

While there is a great deal to be learned about Northern Wei legal theory from careful study of the *History of Wei* legal treatise, the work—along with other roughly contemporaneous texts—also demonstrates that there was nevertheless a significant gap between that theory and its implementation. Yan Yaozhong explains that one of the underappreciated stories in Northern Wei legal culture is the complex accommodation between written law, often constructed with "Chinese" legal terms and philosophies, and legal practice, which reflected Tuoba customs. His account of the development of Northern Wei law is of a transition from simple but harshly enforced customary prohibitions to a complex and leniently administered collection of statutes, a transition significantly influenced by the use of the Chinese language used to write the statutes.

Yan explains that the process of transforming a oral customary law into coherent statutes takes time, as evidenced by the numerous legal reforms of the early Northern Wei. In addition, these reforms would have produced documents which the Xianbei administrators (including the emperor) would have been unable to read, increasing their latitude to judge cases according to their preexisting customary sensibilities.[473] As Yan writes, citing the scholar Yin Yijun 尹伊君, this is the natural process of legal development: "Even though law goes through many changes, it is still absolutely impossible to shake off the old and make a completely new law. People cannot be completely divorced from their selves of yesterday, which means that they also cannot completely leave their laws in the past."[474]

Yan points to numerous important ways in which the Northern Wei laws appear to reflect Tuoba customs. For example, he cites an incident recorded in the *History of Song*: after a campaign undertaken by Emperor Taiwu 太武帝 (r. 423-452), the families of the slain were forbidden from mourning them under penalty of death. "Of course, it's implausible that in the Northern Wei statutes there were provisions making it a capital crime for families to mourn their relatives killed in battle, but the Tuoba regime certainly had a tradition of indiscriminately killing

[470] Chan Chun-Keung 陳俊強, 21.
[471] Chan Chun-Keung 陳俊強, 21.
[472] Chan Chun-Keung 陳俊強, 22.
[473] Yan Yaozhong 严耀中, "Beiwei Chengwen Fa Yu Sifa Shijian de Guanxi 北魏成文法与司法实践的关系 [The Relationship Between Northern Wei Written Law and Judicial Practice]," *Huadong Shifan Daxue Xuebao* 华东师范大学学报 53, no. 6 (November 15, 2021): 6, https://doi.org/10.16382/j.cnki.1000-5579.2021.06.001.
[474] Yan Yaozhong 严耀中, 6.

innocents according to political or military necessity."[475] He also notes that while allowing both officials and commoners to raise accusations against governors was the normal order of the Tuoba clan, this approach wasn't adopted in early Northern Wei because the ruling house likely didn't trust the ethnic Han officials who would have been in a position to challenge the authority of their Tuoba governors.[476] One particularly dramatic instance of the persistence of Tuoba practice is the use of apparently ritual methods of execution unknown in Chinese sources before or after the Northern Wei. For example, during the reign of Emperor Taiwu 太武帝 (r. 423-452 CE), his minister in charge of legal reform "divided the death penalty into two categories of capital punishment: death by decapitation and death by strangulation." 分大闢為二科死，斬死，入絞. However, immediately after this description, Wei Shou relates numerous executions that departed wildly from this neat dichotomy:

> 害其親者轘之。為蠱毒者，男女皆斬，而焚其家。巫蠱者，負羖羊抱犬沉諸淵。
> Those who killed their relations were to be torn apart by chariots. Of those who made venom to poison others, both men and women were to be decapitated and their homes burned. Practitioners of black magic were to be drowned in deep pools with a black sheep strapped on their backs and a dog in their arms.

Seconding Yan, Huang Zhen writes that these punishments exemplify the disjunction between the text and practice of criminal statutes that persisted from the founding of the Northern Wei until the reign of Emperor Xiaowen.[477] Finally, the Northern Wei court relied on a large number of "special amnesties" 曲赦, which Yan notes increased along with the number of statutory revisions. Those revisions rendered the law stricter and more complicated, and so the amnesties were meant to reduce the difficulties of Xianbei adaptation. As Yan puts it,

> Although there was a general developmental trend, there was a mutual influence between written law and legal practice that followed real situations. Because customary law is a traditional psychological deliberation or standard, "often it doesn't serve as the basis of any regulation, but instead as an element in the formation of actual law, or as a composite element in the details at the time when laws are used."[478]

In other words, the Northern Wei was a period of far greater legal diversity than almost any overview of Chinese legal culture—or, in many cases, specific studies of Northern Wei law—allow, not simply because the laws being issued by the emperor and his ministers differed in significant ways from what came before but also because the people implementing those laws were doing so according to internal psychological standards and customs that had little to do with those of the Central Plains.

---

[475] Yan Yaozhong 严耀中, 6.

[476] Yan Yaozhong 严耀中, 6.

[477] Huang Zhen 黃楨, "Zailun Liuxing Zai Beiwei de Chengli: Beizu Yinsu Yu Jingdian Bifu 再論流刑在北魏的成立—北族因素與經典比附 [A Reconsideration of the Establishment of the Punishment of Banishment in the Northern Wei: The Elements of the Northern Tribes and the Additions of the Classics]," *Zhonghua Wenshi Luncong* 中华文史论丛 4 (2017): 91.

[478] Yan Yaozhong 严耀中, "The Relationship Between Northern Wei Written Law and Judicial Practice," 8.

The Legal Treatise "Genre"

While there are a few semi-recent studies dedicated to single legal treatises, many scholarly works treat them as a unified genre that largely replicate their early imperial model: the legal treatise in Ban Gu's *History of Han*. This approach dates at least to the immensely influential legal historian, reformer, and official Shen Jiaben, who approached the use of historical legal texts in this way with his *Studies on Historical Criminal Law* 歷代刑法考 in the early twentieth century. As Li Chen points out, many of Shen's ideas were formed via his efforts to reform Qing law in line with foreign powers' disapproval of the Chinese legal system. "Hence, foreign representation and criticism of Chinese law and justice exerted enormous influence on the guiding principles of the late Qing legal reform,"[479] as well as on Shen's representation of Chinese legal history as a semi-coherent single unit of analysis. As one such more contemporary collection of legal treatises (whose commentary I have consulted in preparing my own translation) states: "Since Ban Gu wrote the *History of Han* and established the 'Treatise on Law and Punishment' section, each dynastic history in the annals and biography style has largely followed in his footsteps."[480]

> Although the study of Chinese law in ancient times waxed and waned due to the influence of authoritarianism, it nevertheless remained unchanged for several thousand years, particularly in the vast collection of legal materials, among which the legal treatises recorded in the twenty-five histories are the most important part. When Ban Gu wrote the *History of Han* legal treatise with clear-eyed foresight, knowledge and courage, it was of groundbreaking significance.[481]

This collection, like most works that treat the legal treatises as a block, views them as a genre dedicated to recording a purely Chinese legal tradition: "They are nothing other than a developmental history… of several thousand years of Chinese legal thought and evolution."[482] Moreover, although this preface nods to the ideas of "development" and "evolution," the authors clearly believe that the real story of Chinese legal civilization is in fact stability and continuity, an ancient and unbroken lineage which the legal treatises were written to convey, to the enormous advantage of contemporary Chinese society.

> If we survey the more than four thousand years of Chinese legal history, with its clear threads and coherent connections, never having been interrupted, this is a great particularity unlike the world's other civilized ancient states. This is significant not only as an example of Eastern practices, but it also provides us extremely favorable conditions for drawing lessons from the experience of ancient legal systems.[483]

---

[479] Li Chen, "Traditionalising Chinese Law: Symbolic Epistemic Violence in the Discourse of Legal Reform and Modernity in Late Qing China," in *Chinese Legal Reform and the Global Legal Order*, ed. Yun Zhao and Michael Ng, 1st ed. (Cambridge University Press, 2017), 198, https://doi.org/10.1017/9781316855645.010.

[480] Gao Chao 高潮 and Ma Jinshi 马建石, *Annotations and Translations of Chinese Historical Treatises on Law and Punishment* Preface.

[481] Gao Chao 高潮 and Ma Jinshi 马建石 Preface.

[482] Gao Chao 高潮 and Ma Jinshi 马建石 Preface.

[483] Gao Chao 高潮 and Ma Jinshi 马建石 Preface.

> After the *History of Han*, the subsequent thirteen legal treatises… are all linked in the same spirit, showing the long scroll of the more than four thousand years of development of Chinese legal history.[484]

Unsurprisingly, the Northern Wei generally has no significant role to play in these sweeping overviews of ethnic homogeneity and continuity. In introducing the *History of Wei* legal treatise, the collection's authors emphasize that the legal developments it records were primarily those of Tuoba acceptance of Han and Confucian ideas:

> After Emperor Taiwu (Tuoba Tao) unified the North, the [Northern] Wei kings placed a great deal of emphasis on ruling through law, so they employed the Han [here, used ethnically] Confucians Cui Hao, Gao Yun, You Ya,[485] and others to compile and edit the laws and edicts and to pass on the study of laws; this produced the flourishing of jurisprudence in the Northern Dynasties.[486]

This approach is largely echoed in numerous articles that address the legal treatises as a single genre. In addition, while this narrative serves contemporary Chinese political purposes (as explained in Chapter 1), it is by no means limited to Chinese scholarship. A major Japanese-language translation and study of several of the legal treatises—those of the *History of Han, History of Wei,* and *History of Jin*; again, treated as a coherent genre—makes largely the same claim: "These are interesting materials because they make known the process by which the foreign Tuoba clan gradually cast off their ancestral tribal punishment system and established a Chinese-style legal system."[487]

Even the most sophisticated scholarship on the treatises can't help but characterize them as a unit simultaneously embodying and creating the unity of Chinese legal civilization. Chan Chun-Keung's otherwise detailed and insightful study of the *History of Han*, *History of Wei*, and *History of Jin* legal treatises analyzes them parts of a coherent trajectory: the larger point of his article is to show how the legal treatise genre was born, developed, and became fixed. This approach relegates his analysis—and our understanding, since Chen's work continues to be one of the only serious pieces of scholarship specifically focused on this text—to how well it conforms to and then transmits a historiographical approach to legal ideas that reflects continuities of both genre and content: while Chan notes important differences between the works and the things they document, his basic message (mirrored in a great deal of contemporary scholarship) is that a relatively stable kind of text recorded a relatively stable legal tradition over millennia. Though Chan does not make this mistake, many other scholars who adopt the same broad view thus either simplistically characterize many of the important legal concepts described in the legal treatise as functions of the Tuoba recognition and adoption of superior Han practices

---

[484] Gao Chao 高潮 and Ma Jinshi 马建石 Preface.

[485] Two of these figures (Cui Hao and You Ya) are cited in the legal treatise. Gao Yun was one of the historical compilers whose work predated Wei Shou's.

[486] Gao Chao 高潮 and Ma Jinshi 马建石, *Annotations and Translations of Chinese Historical Treatises on Law and Punishment*, 137.

[487] Tomō Uchida 内田智雄, *Yakuchū Chūgoku Rekidai Keihō Kokorozashi* 訳注中国歴代刑法志 *[Translations and Annotations of the Chinese Treatises on Law and Punishment of Each Dynasty]* (Tokyo: Sōbunsha *創文社*, 1964), 5.

or ignore them entirely, even when those Tuoba ideas became the basis of widely praised elements of subsequent Chinese law.

Continuity and Tradition in the Preface to the History of Wei *Legal Treatise*

How does the legal treatise itself view its own role in the transmission of an ostensibly continuous traditions? Surprisingly, this question is rarely examined in any detail by the many scholars who identify Northern Wei law as a key link in the chain of the Chinese legal tradition. A short preface that precedes all ten of the *History of Wei* treatises gives some insight into Wei Shou's views on the subject.[488] In apparent proof of the position of the authors who argue for a continuous tradition, the preface's opening praises the famous Western and Eastern Han Chinese historians and asserts that the *History of Wei* treatises are modeled on their work:

> 昔子長命世偉才，孟堅冠時特秀，憲章前哲，裁勒墳史，紀、傳之間，申以書、志，緒言餘迹，可得而聞。
> In the past, Sima Qian was universally acclaimed and greatly talented, and Ban Gu was the greatest of his age and particularly excellent. We have modeled ourselves on these wise men of former times, who condensed and compiled the ancient historical records, elucidating the material from the annals and biographies into monographs and treatises, so that the words and traces of former times could still be perceived.

Some Chinese scholars have seized on this framing to characterize Wei Shou's work as simply carrying forward the tradition begun in the Western and Eastern Han: a "Confucianized" culture reflecting the moral sentiments of an ethnically homogenous populace. For example, Wang Zhigang, a frequent author on Six Dynasties history and the *History of Wei* in particular, writes that Wei Shou's preface demonstrates the *History of Wei*'s "historical view of ethnic unification."[489] To take such scholars at their word is to read Wei Shou as a wholehearted believer in the continuous tradition.

But in the preface, Wei Shou also explicitly states that he is intentionally departing from his venerated models. In explaining why he included new subjects and omitted previous ones, he writes that "Affairs change with the times." 時移世易.

> 河溝往時之切，釋老當今之重，藝文前志可尋，官氏魏代之急，去彼取此，敢率愚心。
> Irrigation was an urgent concern of former times, while Buddhism and Daoism are weighty matters today; bibliographic information can be found in prior treatises, whereas

[488] Wei Shou's preface to the treatises is mentioned in no English-language scholarship, aside from a Springer translation of a Chinese book. Wu Huaiqi, *An Historical Sketch of Chinese Historiography*. The short text does receive some attention in a hefty 2018 master's thesis by Wu Danyang. Wu Danyang 吴丹阳, "Quan Beiqi Wen Jiaozhu 全北齐文 校注 [Collation and Annotation of Complete Northern Qi Prose]" (Masters, Guanxi University 广西大学, 2018), 114–16. Wu provides modern annotations to the Qing scholar Yan Kejun's 嚴可均 (1762-1843) collection of Northern Qi writing.

[489] Wang Zhigang 王志刚, "Beichao Minzu Shi Zhuanshu de Fazhan 北朝民族史撰述的发展 [The Development of the Writing of Northern Dynasty Ethnic History]," *Shixue Shi Yanjiu* 史学史研究 1 (2007): 29.

> administration and familial lineage were of pressing concern during the Wei era. In discarding that and adopting this, we have dared to follow our own humble opinions.

This seems a far cry from the preface's earlier claim that its authors were "modeling ourselves on the wise men of former times," at least as that phrase is interpreted by the most continuity-committed scholars. So was Wei Shou a copier or an innovator?

In fact, the implicit message of the preface is much more interesting than either wholesale rejection or wholesale acceptance of pre-existing models: the very phrase Wei Shou employs to indicate the independence of his judgment in selecting ideas and materials—"discarding that and adopting this" 去彼取此—*is itself* a reference to a famous pre-imperial work, the *Daode jing* 道德經 (also called the *Laozi* 老子), in which the phrase appears three times.[490] Moreover, centuries before the Northern Wei, the phrase had been seen as sufficiently interesting to be worthy of commentary. The early imperial philosophical work the *Huainan zi* 淮南子 contains a chapter illustrating various quotations from the *Daode jing* with short stories designed to make them more useful as guides to the actions of rulers. These rulers all face the same dilemma: how should they respond to changing circumstances while still acting in accordance with ostensibly constant virtues? The "passages were the ideal literary medium to illustrate the relationship between the Way 道 and human affairs 事 as unfolding in the context of change."[491] Some stories "depict Confucius as a Daoist sage,"[492] implicitly arguing that there is no substantive distinction between Confucius' and Laozi's philosophical approaches, to the extent that such a distinction was believed to exist anyway. Others emphasize the flexibility that rulers must demonstrate. For example, one story tells of Confucius criticizing his student Zigong for refusing to accept reimbursement after paying to ransom one of his people. His critique focuses on Zigong's rigid adherence to personal principle:

> 賜失之矣。夫聖人之舉事也，可以移風易俗，而受教順可施後世，非獨以適身之行也。
>
> Si [Zigong] has committed an error! When sages initiate undertakings, they are able to shift with prevailing habits to change local customs. Their teachings and instructions can be applied by future generations. It is not the case that they suit their personal conduct alone.[493]

The story commenting on the phrase cited by Wei Shou makes a similar point.

> 季子治亶父三年，而巫馬期絻衣短褐，易容貌，往觀化焉。見 得魚釋之。巫馬期問焉，曰:"凡子所為魚者，欲得也。今得 而釋之，何也?"漁者對曰:"季子不欲人取小魚也。所得者小 魚，是以釋之。"巫馬期歸，以報孔子曰:"季子之德至矣使人 暗

[490] Though I do not have the space here to explore the complex issues raised by efforts to interpret these references, at least one widely cited scholar views one of them as a rejection of the virtues identified as Confucian. Paul Rakita Goldin, *The Art of Chinese Philosophy: Eight Classical Texts and How to Read Them* (Princeton: Princeton University Press, 2020), 111.
[491] Sarah A. Queen and Michael Puett, eds., *The Huainanzi and Textual Production in Early China*, Studies in the History of Chinese Texts, volume 5 (Leiden ; Boston: Brill, 2014), 109.
[492] Queen and Puett, 111.
[493] Queen and Puett, 109–10. Queen and Puett's translation.

> 行，若有嚴刑在其側者。季子何以至於此?”孔子曰:“丘嘗問之以治，言曰:‘誡于此者刑於彼。’季子必行此術也。”故老 子曰:“去彼取此。”
> Mizi had governed Shanfu for three years, when Wuma Qi changed his appearance by wearing tattered clothes and a short hemp jacket, so that he could [secretly] observe what transformations had taken place there. He saw a night fisherman catch a fish and let it go. Wuma Qi asked him: "You sir, being a fisherman, want to catch fish. Why then do you catch them and let them go?" The fisherman replied: "Mizi does not want us to catch small fish. Since all the fish I caught were small ones, I let them go." Wuma Qi returned home and reported his findings to Confucius: "Mizi is the most Morally Potent of all! He is able to inspire people to conduct themselves in the dark of the night as if they were facing a strict punishment for their actions. How is Master Mi able to achieve such things?" Confucius replied: "I, Qiu, once asked him about governing. He replied, 'Sincerity in this takes shape in that.' Mizi must be practicing this technique." Therefore the *Laozi* says: "He discards that and takes this."[494]

Here, the ruler's virtuous example allows him to reshape his people's habits without resorting to the threat of punishment. These stories both "confirm… the legitimacy of moral transformation"[495] and, by citing phrases from the *Daode jing* as sources of ancient authority, help to establish the text and its ideas as "an authoritative source of sagely rule."[496]

Therefore, when Wei Shou asserts his freedom to select from among the materials and examples that preceded him—perhaps even suggesting a rupture with those precedents—he does so by referencing a canonical text that had long been viewed as a potential aid to legitimate political authority. But that aid didn't derive from the simple copying of previous practices: as the *Huainanzi*'s gloss on the phrase Wei Shou cites demonstrates, it was at least sometimes seen as confirming the crucial importance of rulers behaving in ways that departed from what had come before in response to changed circumstances, just as the Northern Wei would have to do. Its invocation in the *Huainanzi* is also supposed to knit together potentially at-odds views (Daoism-Confucianism) while indicating that the core ideals of both views are preserved despite outwardly changing manifestations. For an author writing under the auspices of a government still concerned about being perceived as "foreign" by the population over which it ruled, the invocation of an authoritative indigenous precedent about the need sometimes to discard precedents is a subtle and powerful argument. This is the same kind of complex doubling on display in, for example, the Tuoba's two versions of official sacrifices (described in Chapter 2). To parse the meaning of that doubling—as Chin-Ying Tseng does by pointing to which version of the sacrifices the Tuoba were actually attending—we have to ask to what extent the ideas and practices the legal treatise describes seem to depart from previous models.

The Legal Treatise's Innovations

The claim that the legal treatises both embody and transmit a four-thousand-year-old culture elides the fact many of the texts don't actually look much like one another. As Chan Chun-Keung demonstrates, "eliminating that and incorporating this" led Wei Shou to make

[494] Queen and Puett, 110–11. Queen and Puett's translation.
[495] Queen and Puett, 111.
[496] Queen and Puett, 109.

significant departures from Ban Gu's Eastern Han work that supposedly served as the template for all the subsequent treatises. Chan lays out a number of significant differences of form and content between the *History of Han* and *History of Wei* legal treatises:

1. Unlike the *History of Han*, which discusses both punishments and law, the *History of Wei* describes punishments in detail but laws only sketchily, as seen in (among other things) the omission of major statutory reforms.[497]
2. The *History of Wei* abandons the *History of Han*'s framing of military actions as punishment.[498]
3. Unlike the *History of Han*, the *History of Wei* devotes considerable time to the examination of individual cases, which provide insight into Northern Wei legal procedure.[499]
4. The *History of Wei* largely follows the *History of Han* in claiming that punishments originate from features of the natural word and human inclination.[500] However, the *History of Han* views law as arising directly from the natural world, while the *History of Wei* views law as the product of sages who act according to the will of Heaven.[501]

In addition to these, perhaps the most dramatic departure is that the *History of Wei* doesn't even agree with the *History of Han* that the need for punishments is derived from the same aspects of human life! While the *History of Han* states that punishments arise from the need to regulate the societies humans must form to survive despite their natural deficiencies relative to other animals, the *History of Wei* argues instead that punishments exist to deter the transgressions naturally resulting from the emotions that make humans susceptible to outside influence.[502] The *History of Han* explains that people are too weak to protect themselves from the world as individuals and that laws arise to ameliorate the conflicts that will arise when the groups they must inevitably form are short on resources:

> 爪牙不足以供耆欲，趨走不足以避利害，無毛羽以禦寒暑，必將役物以為養，任智而不恃力，此其所以為貴也。故不仁愛則不能群，不能群則不勝物，不勝物則養不足。群而不足，爭心將作，上聖卓然先行敬讓博愛之德者，眾心說而從之。
> Their hands and teeth are insufficient to supply their wants, their running is insufficient to escape harm; they have neither fur nor feathers with which to avoid cold and heat. They must thus use things in order to sustain themselves, and they are ennobled through relying on wisdom rather than strength. Therefore, without humanity and affection, people cannot form groups; without forming groups, they cannot master things; without mastering things, they will be unable to sustain themselves. If they do form a group but their wants aren't met, a spirit of contention will be created. Hence, the ancient sages, in

[497] Chan Chun-Keung 陳俊強, "The Formation and Evolution of the 'Treatises on Law and Punishment' in Official Histories from the Han to Tang," 24–26.
[498] Chan Chun-Keung 陳俊強, 26.
[499] Chan Chun-Keung 陳俊強, 26.
[500] Chan Chun-Keung 陳俊強, 24.
[501] Chan Chun-Keung 陳俊強, 27.
[502] Chan Chun-Keung 陳俊強, 27.

their eminence, first practiced the virtues of respectful yielding and general cherishing; the hearts of the multitude were persuaded and followed them.[503]

Law is thus an inevitable and positive consequence of the natural conditions of human life. The *History of Wei*, on the other hand, states that laws derive from not from people's inadequate natural endowments but from their overactive emotions.

> 生民有喜怒之性，哀樂之心，應感而動，動而逾變。淳化所陶，以下淳樸。故異章服，畫衣冠，示恥申禁，而不敢犯。其流既銳，奸黠萌生。是以明法令，立刑賞。
> The people have natures of delight and anger, and hearts of sorrow and pleasure: responding to stimuli, they are moved; being moved, they change again. If what transforms them is simple and honest, those below become simple and honest. Therefore, outlandish garments and painted clothing and hats were used to display shame and make restrictions known, and the people did not dare to violate the laws. Once the current of this tradition dwindled, the seeds of treachery and deceit sprouted, at which point laws and ordinances were clarified and punishments and rewards established.

Because people are so swayed by these emotions, according to this view, the earliest and best rulers recognized that they could be controlled simply by threatening to make them wear strange outfits denoting their criminality. This is a reference to the so-called "representational punishments," an old theory about the origin of criminal sanctions whose adherents believed that ancient Chinese rulers had only to make the crimes of their subjects known via odd clothing in order to restrain their bad behavior. Law is thus the sad result of a defective emotional relationship between ruler and ruled.

Wei Shou, therefore, makes a radical departure from Ban Gu's basic philosophical orientation towards the nature and importance of law, one significant enough that you might think more than one scholar would have noticed it. In fact, Ban Gu specifically attacks the view of penal history on which Wei Shou relies. Towards the end of his treatise, Ban Gu provides a lengthy quotation from the famous pre-imperial philosopher Xunzi on precisely this question:

> 世俗之為說者，以為治古者無肉刑，有象刑墨黥之屬，菲履赭衣而不純，是不然矣。以為治古，則人莫觸罪邪，豈獨無肉刑哉，亦不待象刑矣。以為人或觸罪矣，而直輕其刑，是殺人者不死，而傷人者不刑也。罪至重而刑至輕，民無所畏，亂莫大焉。凡制刑之本，將以禁暴惡，且懲其末也。殺人者不死，傷人者不刑，是惠暴而寬惡也。故象刑非生治古，方起於亂今也。
> When ordinary people debate, they believe that there were no mutilating punishments in well-governed antiquity. Instead, they say there were things like representational and tattooing punishments, or making criminals wear straw shoes and orange clothing with no ornamental trim. This is incorrect. If they believe that antiquity was perfectly governed, then that means that no one committed any crimes or other malevolent acts. In that case, not only would mutilating punishments have been unnecessary; there would also have been no need of representational punishments. If some people *were* committing crimes but were punished only lightly, that would have meant that murderers didn't die and

[503] *GC* 5.

> those who harmed others weren't punished. If crimes are extremely serious but punishments extremely light, then the people will hold nothing in awe; no chaos is greater than this. The fundamental purpose of ordaining punishments is the restraint of violence and ill-deeds through restraining the seeds of such behavior. When those who kill don't die and those who harm aren't punished, this is exercising benevolence towards violence and leniency towards malefaction. Representational punishments, therefore, were not born in well-governed antiquity, but instead arose from the chaos of our present age.[504]

If these representational punishments were so great, asks Ban Gu, "Where are the grass shoes and dark red clothes?" 安有菲屨赭衣者哉？ This is the real value of treating the texts together: not imposing a constructed narrative of continuity that obscures their content but pointing to what's revealed by their differences.

"Filial Piety"?

A major claim made about Northern Wei law is that it represents an important step in the "Confucianization" of Chinese law: the ostensible process by which concerns of statutory interpretation and imperial authority were relegated to secondary importance next to government's practice and promotion of the values associated with Confucius and his followers. Perhaps the most widely recognized such value is that of filial piety (the respect that children owe their parents), which scholars often identify as a key component of Northern Wei law and its Sinicization/Confucianization. [505] One section of the legal treatise in particular—the case of Bi Yangpi's daughter—is often said to reflect the Northern Wei's wholesale acceptance of filiality as a cardinal virtue.

As Chan Chun-Keung observes, the *History of Wei* legal treatise records a number of specific cases in great detail, which affords us significant insight into the process of high-level debate over thorny legal issues. The longest such case in the treatise concerns the daughter (whose name was not recorded) of a man named Bi Yangpi 費羊皮, who in the year 514 sold her to another man named Zhang Hui 張回 to pay the costs of burying his mother. Zhang Hui, in turn, sold Fei's daughter to a third man, Liang Dingzhi 梁定之. After a senior minister wrote to the emperor about the case, numerous important legal decision-makers weighed in. The ministers disagreed over who should be punished and how much, and Emperor Xuanwu's 宣武帝 (r. 499-515) final decision was to choose a lighter punishment than had been suggested for Zhang Hui and to spare Bi Yangpi entirely:

> 詔曰：「羊皮賣女葬母，孝誠可嘉，便可特原。張回雖買之於父，不應轉賣，可刑五歲。」
> An edict was issued, ordering: "Bi Yangpi sold his daughter in order to bury his mother. His filiality was truly laudable and he may thus receive an exceptional pardon. Although Zhang Hui bought her from her father, he should not have resold her, so he may be sentenced to five years' labor."

[504] *GC* 45
[505] Geoffrey MacCormack, "Filial Piety and the Pre-T'ang Law," n.d., 152.

This case is sometimes seen as a paradigmatic example of law yielding to Confucian imperatives. For example, one brief article dedicated to it is titled, "Seeing the Submission of Northern Dynasties Law to Confucian Ritual from the Case of Bi Yangpi Selling his Daughter." Its author argues that the case represented a conflict between the Tuoba laws and Confucian ritual teachings in which the latter emerged completely victorious, validating Max Weber's contention that Confucian morality has always been the dominant force in the lives of Chinese people.

> Just as Max Weber described in "Confucianism and Daoism": "Innumerable ritual shackles constrain the lives of Chinese people from fetus to funeral." Restraining themselves according to Confucian ritual thought, even if the conduct violated the law, the rulers would gladly pervert the law, simultaneously providing a high-level moral judgement and positive legal relief.[506]

Though the author's meaning here is not entirely transparent, what is clear is that he has fully adopted the disparaging views of the foundational Western legal sociologists and turned them into laudatory descriptions of the unbroken and superior influence of Confucianism on Chinese legal culture (in a perfect exemplar of the process described in Chapter 1). In his view, the case of Bi Yangpi's daughter represents the Northern Wei rulers' abandonment of the whole idea of law at all in the face of Confucian moral power. This is how the Northern Wei is often used in scholarship today: as proof of both the fact and the rightness of the domination of a Han-identified "Confucianized" law, a concept created through the 400-year process of Western and Chinese propagandizing described in Chapter 1.

Situated in its proper context, however, the case of Bi Yangpi's daughter demonstrates no such thing. Instead, it exemplifies multiple aspects of the complex project of intercultural legitimation in which the Northern Wei were engaged. To begin with, the notion that the case's decision represents a wholesale "Confucianization" of Northern Wei law is belied by looking at what the ministers debating the case were actually proposing. Scholars who make this claim don't note that, of the four ministers who offered the emperor advice on the Bi Yangpi case, only one suggested pardoning Bi Yangpi, demonstrating that—to whatever extent legal recognition of the filiality of a defendant's actions constitutes "Confucianization"—late Northern Wei law was far from "Confucianized." It should be remembered that this case arose in 514, decades after the reforms of Emperor Xiaowen that President Xi finds so powerful an example of Sinicization. If that process really had taken such hold of Northern Wei legal thought, one might expect more than 25% of the officials involved to have expressed support for such a prototypical example of Confucian filial piety, rather than either ignoring it or actively advocating for it to be punished, as the statutes in fact called for: as one of the emperor's advisors pointed out, "According to the statutes, 'selling one's children is punished with a year of forced labor.'" 案律賣子有一歲刑. Moreover, although the emperor himself pardoned Bi Yangpi, he did so in a purely ad-hoc manner, issuing only a "special pardon" 特原. The statutory prohibition against selling one's

[506] Xin Yugang 辛宇罡, "Cong Fei Yangpi Mai Nü an Kan Beichao Falü Dui Lijiao de Qucong 从费羊皮卖女案看北朝法律对礼教的屈从 [Seeing the Submission of Northern Dynasties Law to Confucian Ritual from the Case of Fei Yangpi Selling His Daughter]," *Fazhi Yu Shehui* 法制与社会 8 (2009): 387.

children presumably remained in place, so it's hard to see this as any major victory for the value of filial piety.

Much more dramatically, we should be suspicious of any claim that the Northern Wei were especially enamored of expressions of children's love for their parents because there's good evidence that the Tuoba often killed the mothers of future rulers. As Valentin Golovachev explains, despite the large extent to which the Tuoba were influenced by the customs of the North China Plain, many of the "specific traditions of their steppe culture" retained "extraordinary vitality."

> One such tradition, with a profound influence on political life in the Northern Wei 北魏 (386-534) was the Xianbei custom of killing the mother of the royal heir-apparent. It would seem that such an alien custom—one which contradicted all the basic grounds of Confucian ethics—would be one of the first to disappear from Northern Wei society. Instead, this custom continued to be practiced for nearly a century following the foundation of the Tuoba-Xianbei empire.[507]

Most strikingly, Emperor Xuanwu himself—the man who oversaw the case of Bi Yangpi's daughter and whose decision has been hailed by many as an important marker of Northern Wei legal "Confucianization"—may well have lost his own mother to this tradition. When he was the heir-apparent in 497, the *History of Wei* records, a concubine named Feng 馮 (d. 499) was suspected of killing his biological mother in the "hopes of becoming an empress and also acting as a foster-mother to the heir-apparent."[508] Moreover, Emperor Xuanwu's wife was believed to have killed the mother of his first son.[509] The practice of matricide was so well entrenched during Emperor Xuanwu's time that "an extremely paradoxical situation developed at the Northern Wei court. Almost every woman of [Xuanwu's] harem preferred the option of bearing daughters rather than heirs-apparent."[510] Given this context, which goes almost entirely ignored by scholars attempting to situate the Northern Wei into a neat story of "Confucianization" or "Sinicization," it's impossible to read the case as an uncomplicated reflection of the Northern Wei court's recognition of the superior virtues of filiality.

So why does the case of Bi Yangpi's daughter get so much attention in the legal treatise, if it's not about the importance of filial piety to late Northern Wei rulers? In 2006, Chen Dengwu and Yu Xiaowen, decrying the fact that no serious academic attention had yet been paid to the case of Bi Yangpi's daughter, argued that examining the case would offer insights into premodern debt and human trafficking.[511] First, they note that Bi Yangpi's act was merely one example of a common Six Dynasties approach to coping with economic pressure, citing various examples of people selling their family members in hard times recorded in the *History of Wei*

---

[507] Valentin C. Golovachev, "Matricide among the Tuoba-Xianbei and Its Transformation during the Northern Wei," *Early Medieval China* 2002, no. 1 (June 2002): 1, https://doi.org/10.1179/152991002788193933.
[508] Golovachev, 31.
[509] Golovachev, 22.
[510] Golovachev, 34. *Ibid*., 34.
[511] Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯, "Cong Beiwei 'Fei Yangpi Mai Nü an' Shuodao Zhongguo Gudai de Zhaiwu He Renkou Maimai 從北魏 [費羊皮賣女案] 說到中國古代的債務和人口買賣 [On Debt and Human Trafficking during the Northern Wei Dynasty: The Case of Fei Yangpi Selling His Daughter]," *Fazhi Shi Yanjiu* 法制史研究 9 (2006): 5.

and other histories.[512] Second, they demonstrate how the case's focus on the specifics of different types of the sale of humans reflects complex developments in the law and ideology governing such transactions from the early imperial through the medieval period. Nevertheless, despite their thorough and detailed examination of the case, Chen and Yu view its greatest significance as reflecting the victory of the continuous "Confucian" legal tradition. They close their article by highlighting this continuity:

> Although this case was a political decision, its result still accorded with the fundamental spirit of Confucianism… When this case was recorded in the *History of Wei* "Treatise on Punishment," it not only embodied the special characteristics of traditional Chinese legal culture, but also revealed the compositional model and background of the 'Treatise on Law Punishment' genre throughout the ages.[513]

Though they stop short of attributing the decision to Emperor Xuanwu's personal recognition of the superiority of "Confucian" values—as champions of the "Sinicization" and "Confucianization" narratives do—Chen and Yu are clearly still committed to evaluating the Northern Wei relative to a simplified "Confucian" baseline.

The most important feature of the case, though it builds on approaches and ideas that originated in the early imperial period, gives us greater insight not into how the Northern Wei upheld the traditions they inherited but into how the very different circumstances of their rule spurred the generation of new principles of social organization that eventually coopted "Chinese" methods of self-justification, methods which obscured their novelty. That feature is the issue of status. Bi Yangpi's family had the status of *liang* 良 ("good"), meaning they could not permanently be reduced to servile status (*jian* 賤 "base"). The ministers discussing the case imply that, despite having been sold by her father, Fei's daughter should at some future point have been able to regain her freedom. When Zhang Hui resold her, however, he didn't disclose her status to Liang Dingzhi, meaning that she would have no clear way to free herself in the years to come. Consequently, much of the argument turned not on Bi Yangpi's culpability, but Zhang Hui's, whom the ministers saw as having consigned the young woman to a lifetime of servitude that was, crucially, inappropriate for someone of her *liang* status.

To a modern reader, it's not immediately obvious why this single instance of status confusion should have occasioned so much debate and disagreement among the most important legal officials of the time or why it should be the longest case described in the legal treatise, which also gives no hint as to its broader significance beyond the injury done to Bi Yangpi's daughter herself. The particular distinction between *liang* and *jian*, however, was of enormous concern to the early 6th-century administration, which viewed it as a way to broaden its control over every member of the populace. The late 5th-century emperor who oversaw the Taihe Reforms, Emperor Xiaowen, promulgated numerous policies designed to strengthen his administration's authority. His "Equal Fields legislation… consisted of interlocking procedures for registering the population, allocating land, and levying taxes on those allocations."[514] The

[512] Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯, 14–15.

[513] Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯, 34.

[514] Scott Pearce, "Status, Labor, and Law: Special Service Households Under The Northern Dynasties," *Harvard Journal of Asiatic Studies* 51, no. 1 (1991): 110, https://doi.org/10.2307/2719243.

population was thus divided into two categories: those who paid taxes and received land and those who didn't (who were also of a servile condition). In other words, Emperor Xiaowen

> sought to include all his subjects—both aristocrats and commoners—in a unitary social order. This was done by establishing a strict new dichotomy between those who were "good" (*liang* 良) and those who were "base" (*chien* 賤), and by extending the former category to include many individuals previously considered beyond the pale of imperial control.[515]

Once Emperor Xiaowen made the distinction between the two statuses so significant, it became extremely important for Northern Wei subjects to make sure they were falling on the right side of the line, and "the next several decades were marked by endless litigation over who was good and who a slave. The government finally put a stop to these lawsuits in 513 with the promulgation of a new "system of slave and good" (*nu liang chih chih* 奴良之制) and a declaration that any controversy predating the year 500 would not be adjudicated."[516]

According to Scott Pearce, the system underlying the consternation about Bi Yangpi's daughter was the result of a long-running "change in the nature of political power," brought about initially by the collapse of the Eastern Han and the rise of regimes whose "power came to rest preeminently on naked force." The rulers of the post-Eastern Han states "were perfectly willing to resort to coercion to extract what they needed or wanted from their subjects." This included the Tuoba:

> during the Period of Division, a desperate need for manpower led rulers arbitrarily to designate certain families for special service. The [Tuoba] adapted this method of exploiting their subject's labor for their own needs, and during the conquest of northern China converted huge numbers of war captives into state laborers. They made little or no effort to justify the disadvantages endured by these groups.[517]

However, this coercive approach softened over the course of the Northern Wei: "As the alien rulers of the north became more deeply involved in Chinese society, they became more concerned with fostering in the population a sense of their regime's legitimacy." This meant justifying who was free and who was condemned to labor:

> Although the first groups of menials were luckless captives taken in wars of conquest, the later additions came from the ranks of felons. This led to a change in the idiom used to describe and explain their condition: although the state continued to employ unfree, hereditary labor, the lot of those individuals was described not in terms of their subjugation by a superior power, but in terms of the degradation that they called down upon themselves by breaking the law.[518]

This was why the case of Bi Yangpi's daughter was so distressing to so many important officials: the status system that was originally used by the conquering Tuoba to manage their extreme need

[515] Pearce, 108.
[516] Pearce uses "slave" here to translate what I call "servile status." Pearce, 110.
[517] Pearce, 137.
[518] Pearce, 137–38.

for labor power under the direction of the government had by the late Northern Wei morphed into an important basis of their legitimacy, an indication that they served as figures of virtue in the sense that inhabitants of the North China Plain would have understood it. When that system that both organized the labor necessary to state enterprises and conferred political legitimacy on the rulers as moral arbiters came into conflict with *another* crucial symbol of moral action—the self- or child-sacrificing filial piety that Chen and Yu explain had become a fundamental feature of Six Dynasties morality—the government was faced with a significant crisis. The emperor (who was himself participating in a matricidal tradition) resolved that crisis through a limited concession to popular conceptions of filiality that preserved both his legitimacy and his administration's ability to extract labor from its subjects, not a "capitulation" to "Confucian" values that weakened the authority of statutory law, as is claimed by proponents of the "Confucianization" hypothesis.

Proof via Circumstantial Evidence

Some scholars thus minimize the complex motivations and effects of Northern Wei lawmaking by viewing it all through the lens of the supposedly continuous "Confucian" tradition. Others simply fail to remark upon Northern Wei contributions to "Chinese" law at all, even when those contributions are closely connected to some of the most important historical and contemporary debates over the Chinese legal tradition.

For example, it has long been argued that confessions extracted through torture constitute one of the central features of that tradition. In a much-cited article, W. Allyn Rickett writes that,

> The Chinese, both in their traditional and modern legal systems, have great importance to a confession or admission of guilt in criminal proceedings. In fact, under the system of law that existed in China until the early years of the twentieth century, a confession was considered essential to the successful conclusion of a criminal case, and certain forms of torture were permitted in order to obtain confessions from accused offenders as well as evidence from reluctant witnesses.[519]

This view remains prevalent among scholarly overviews of Chinese law: "The scholarly world of legal history generally considers that the principle pieces of evidence used by ancient Chinese judges in deciding cases were confessions coerced through legal or illegal torture; confessions were the main, if not the only, evidence needed for adjudication."[520] This scholarly emphasis on confession stems in part from some of the Orientalist imperatives described in Chapter 1: Western observers have long been fixated on the ostensibly exotic cruelty of the Chinese use of torture in judicial interrogation. As Nancy Park explains, "Conveniently ignoring the fact that Europe's own longstanding tradition of judicial torture had been banned less than a century before, they seemed to view torture as a symbol of all that they perceived to be wrong with the imperial Chinese system of justice."[521] It is true that even scholars firmly and explicitly

[519] W. Allyn Rickett, "Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity," *The Journal of Asian Studies* 30, no. 4 (August 1971): 797, https://doi.org/10.2307/2052988.
[520] Zu Wei 祖伟 and Jiang Jingkun 蒋景坤, "Zhongguo Gudai 'Juzhuang Duanzhi' Zhengju Guize Lunxi 中国古代'据状断之'证据规则论析 [Discussion and Analysis of the 'Material Evidence' Rule of Proof in Ancient China]," *Fazhi Yu Shehui Fazhan* 法制与社会发展 4 (2011): 111.
[521] Nancy Park, "Imperial Chinese Justice and the Law of Torture," *Late Imperial China* 29, no. 2 (2008): 37-67, 59.

committed to the "Confucianization" hypothesis acknowledge that confession was supplemented by other kinds of evidence. In Zhang Jinfan's description of pre-imperial criminal law, he explains that, "Apart from oral confessions, documentary evidence, testimony of a witness, and physical evidence were of great significance as well."[522] Nevertheless, for various points in Chinese history, Zhang repeatedly emphasizes that "oral confession was considered as the basis of a trial"[523] and "oral confession was the most important basis for settling cases."[524]

The prevalence of this view has presented an attractive target to other scholars hoping to highlight the other ways in which Chinese magistrates arrived at convictions. In fact, they argue, what they see as the continuous Chinese legal tradition leading up to the Qing 清 dynasty (1644-1911) actually produced a system of coercive interrogation that was considerably more limited than those employed in other places. These scholars tend to identify the Tang Code—the major repository of Tang law and the earliest extant Chinese legal code—as the principal origin of Chinese defendants' protections against the arbitrary use of torture.

> Judicial torture, at least in theory, was reserved as a last resort for those who were under strong suspicion, but chose to defy confession of their moral faults (Tang Code, Art. 476). It had been long recognized by Chinese lawmakers that the agony of torture may induce the innocent to confess things that they never did (Zu, 2008). Hence, a highly detailed set of rules governing the application of torture was put forward by the Code to enhance the reliability of tortured confessions and to acquit the innocent.[525]

In this view, those protections were then in more or less continuous operation for the next millennium and a half: "Through the interplay between Confucian moral standards and legalist's bureaucracy, this 'persuasive' interrogation model of the Tang Code proved astoundingly stable by thriving until the early twentieth century."[526] Some authors attribute enormous significance to the development of these limitations, identifying it as part of a major shift in relations between the government and the people in Chinese history. Zu Wei and Jiang Jingkun write that,

> The standard of power leads to an indifference to human rights, to trampling on people's bodies and dignity, in order to bring about the aims power wishes to achieve. The standard of rights, of protecting human rights, is the embodiment of a rule-of-law civilization. Thus, when the antennae of such a civilization touch the domain of a system of proof, people are liberated from the shackles of punishment, ceasing to be a means for achieving the aims of power and are instead the object of rights.[527]

In Zu and Jiang's view, one of the bases of this immensely consequential shift from a cruel and coercive regime to one that embodies the concept of the rule of law—one of the key indicators of modernity—was "adjudication based on circumstances" 據狀斷之, a method that allowed judges

---

[522] Zhang, *The History of Chinese Legal Civilization*, 104.
[523] Zhang, 227.
[524] Zhang, 905.
[525] Wei Wu and Tom Vander Beken, "The Evolution of Criminal Interrogation Rules in China," *International Journal of Law, Crime and Justice* 40, no. 4 (December 1, 2012): 278, https://doi.org/10.1016/j.ijlcj.2011.09.007.
[526] Wu and Vander Beken, 279.
[527] Zu Wei 祖伟 and Jiang Jingkun 蒋景坤, "Discussion and Analysis of the 'Material Evidence' Rule of Proof in Ancient China," 121.

to bypass the need for torture and thus (in this account) demonstrate their respect for the human and legal rights of defendants. Zu and Jiang trace this method to an article of the Tang Code that specifically permits conviction without confession.

> 若贓狀露驗，理不可疑，雖不承引，即據狀斷之。
> In cases where stolen goods or the circumstances of the offense are plain and proven so that the principle of the case cannot be doubted, even if the defendant does not admit it, the case may be decided based on circumstances.

Zu and Jiang argue that this article, which was imitated by the legal codes of most subsequent dynasties, was one of the important mechanisms by which respect for human rights was established in Chinese law. These articles mostly used similar language to that found in the Tang Code, allowing judgements based on circumstantial evidence in cases in which "stolen goods or the circumstances of the offense are plain and proven" 贓狀露驗. This is one of many issues in Chinese legal history that attracts a great deal of attention in Chinese-language scholarship and is completely overlooked by those writing in Western languages: 116 articles and 112 Chinese theses and dissertations reference this phrase on evidence regarding goods and circumstances ("贓狀露驗") compared to zero European or American sources. Like Zu and Jiang's paper, these works of Chinese scholarship largely identify the phrase as the origin of a major principle of Chinese law, and almost all attribute its inception to the Tang Code.

These views overstate the innovative nature of the Tang Code in several ways. First, they ignore the fact that early imperial law already contained many significant limitations on the use of judicial torture. While an examination of the early imperial period is beyond my scope here, it's crucial to note the work of scholars demonstrating how much such protections were already in place.[528] Second and more strikingly, even the specific language that so many Chinese scholars see as foundational to the longstanding humanitarian limitations on the use of torture—a major premise of the scholarly rejection of Western disparagement of the Chinese legal tradition, since it supposedly underlies the rule of law whose absence in China Western theorists have long decried—does not originate with the Tang Code. The earliest use of the phrase 贓狀露驗 I have been able to identify is the *History of Wei* legal treatise.

> 寇盜微戾，贓狀露驗者，會赦猶除其名。
> In cases of minor bribery or low-level banditry, when stolen goods or the circumstances of the offense are plain and proven, offenders are stripped of their posts even if they meet with an amnesty.

Although the phrase 贓狀露驗 is used only once and without explanation, concern over the use of torture recurs throughout the *History of Wei* legal treatise, demonstrating the issue's significance to Wei Shou and the authors of the documents he was drawing on. Very near the beginning, the legal treatise quotes an early imperial source on the dangers of legal officials trying to secure confessions. Lu Wenshu 路溫舒 (fl. 74-50 BCE) submitted a memorial to the Western Han Emperor Xuan 漢宣帝 (r. 74-48 BCE), in which he warned:

[528] Ulrich Lau and Thies Staack, *Legal Practice in the Formative Stages of the Chinese Empire: An Annotated Translation of the Exemplary Qin Criminal Cases from the Yuelu Academy Collection* (Brill, 2016), 42.

> 夫獄者天下之命… 捶楚之下，何求而不得。故囚人不勝痛，則飾辭以示人。吏治者利其然，則指導以明之；上奏畏卻，則鍛煉而周內之。雖咎繇聽之，猶以為死有餘罪。何則？文致之罪故也。故天下之患，莫深於獄。
> The realm's fate lies in its criminal proceedings…. Under blows of the switch, anything sought will be found. So when those in prison cannot bear the pain, then they embellish the confessions that will be made public. Officials in charge of cases profit from this fact, and thus lead prisoners on to make their statements clear. When they memorialize the cases to higher authorities, they fear they will be rejected, so they hone and refine them so everything goes in. Even if Gao Yao himself heard these cases, he would believe the malefactors deserved death and worse. Why? Because the text has brought about the crime. That is why, of all the land's afflictions, none is deeper than criminal proceedings.

In the treatise's idealized legal past—the fourth-century Tuoba founding of the state of Dai 代 as a subsidiary polity to the Jin 晉 dynasty (266-420)—"there were no laws on imprisonment or interrogation" 無囹圄考訊之法. In all, the legal treatise mentions torture or interrogation six or seven times, always either harking back to a better time when it didn't exist or discussing ways to limit its use in the present.

This issue is a further demonstration of what gets lost in the haze of narratives of continuity. This *History of Wei* legal treatise's general concern with interrogation and its discontents is far sharper that of the legal treatises that preceded or followed it. For example, the *History of Han* legal treatise—the supposed model for all those that followed, which many scholars claim Wei Shou was largely imitating—cites the same Western Han memorial on incompetent or malicious legal officials with which the *History of Wei* treatise opens but makes no mention of their methods of interrogation. The *History of Han* treatise doesn't even quote the memorial at length, focusing instead on Emperor Xuan's response to Lu Wenshu:

> 間者吏用法，巧文寖深，是朕之不德也。夫決獄不當，使有罪興邪，不辜蒙戮，父子悲恨，朕甚傷之。
> In recent times, when officials employ the law, they twist its provisions, making it even more severe. This is due to my lack of virtue. When criminal cases are decided inappropriately, it gives rise to perniciousness among the guilty and humiliation among the innocent; between fathers and sons, there is grief and recrimination. I am greatly saddened by this.[529]

Here, the focus is clearly on the sentence itself, not the method by which that sentence was arrived at. In a further such example, the *History of Wei* treatise records regulations regarding the size and use of cudgels used in coercive interrogation:

> 理官鞫囚，杖限五十，而有司欲免之則以細捶，欲陷之則先大杖。民多不勝而誣引，或絕命於杖下。顯祖知其若此，乃為之制。其捶用荊，平其節，訊囚者其本大三分，杖背者二分，撻脛者一分，拷悉依令。皆從於輕簡也。

[529] Gao Chao 高潮 and Ma Jinshi 马建石, *Annotations and Translations of Chinese Historical Treatises on Law and Punishment*, 33.

> When judges were interrogating prisoners, the cudgel was limited to fifty strokes, but those officials who wanted spare defendants used thin cudgels, while those who wanted to entrap them used large ones from the start. Many people, unable to bear it, falsely implicated others. Others had their lives cut short under the cudgel. Xianzu, knowing of this, made a ruling: cudgels were to be made from *Cercis* trees and their joints were to be made smooth. The cudgels of those interrogating prisoners were to have a diameter of 3 *fen*; those for striking the back, 2 *fen*; those for beating the calf, 1 *fen*. All floggings to follow this ordinance, and all these punishments became lighter and simpler.

The *History of Han* treatise also records restrictions on cudgels, but only in the context of punishment, not investigation.

> 笞者，箠長五尺，其本大一寸，其竹也，末薄半寸，皆平其節。當笞者笞臀。毋得更人，畢一罪乃更人。
> For beatings, the cane should be 5 *chi* long and its handle 1 *cun* in diameter. It is to be made of bamboo, tapering to a half-*cun* point, and all its joints are to be smoothed. Those to be beaten shall be struck on the buttocks. The person doing the beating cannot be changed until all the strokes due for one offense have been administered.[530]

As far as I know, these differences have never been observed, because the texts that contain them are generally viewed as relatively homogenous carriers of a continuous legal tradition.

The concern evidenced by the *History of Wei* legal treatise with restrictions on coercive interrogation and the dangers of their absence—along with the particular language used to express that concern—demonstrates that these sections of the Tang Code (so lauded for their commitment to the protection of individual rights) are merely the earliest extant formalization of a principle stated much more powerfully in a treatise recording the ideas and practices of a non-Han dynasty than in similar works on Han governments. To the extent that we are inclined to see medieval Chinese restraints on the power of the state to hurt and degrade its subjects as important countervailing evidence against stories of a Chinese legal culture still mired in the barbarism of cane and cudgel, those restraints are at least as much the result of a "foreign" government trying to fine-tune its management of its subject population as they are proof of a pre-Tang or Tang commitment to virtuous rulership.

Strangulation

This difference over the use of torture reflects a broader disagreement between the *History of Han* and *History of Wei* legal treatises. Ban Gu firmly believed that punishments of mutilation, which had supposedly been eliminated in the Western Han several hundred years before, should be reinstated and would remedy much of what ailed the Eastern Han administration of justice. The *History of Han* treatise devotes a good deal of space to this argument. Moreover, the legal treatise in the *History of Jin* (composed in the early Tang, about a century after the *History of Wei*) records centuries of debates over whether the mutilating punishments should be brought back. Strikingly, the *History of Wei* treatise has nothing to say about them at all. Instead, it subtly describes the introduction of the capital punishment of

[530] Gao Chao 高潮 and Ma Jinshi 马建石, 31.

strangulation, a method of execution that notably leaves the body intact and became a fixture of Chinese death sentences. Later Western observers of Chinese attitudes to law and punishment focused on strangulation as representing an indigenous cultural obsession with bodily integrity. In addition to limitations on coercive interrogation, therefore, the Northern Wei origins of what is often viewed as one of the most important premodern Chinese punishments are likewise almost never remarked on, despite the fact that it is seen as reflecting a fundamental Chinese attitude towards body and spirit.

In their history of the practice and perception of the slicing punishment known popularly as "death by a thousand cuts," Timothy Brook, Jérôme Bourgon, and Gregory Blue point to what they call "a meaningful distinction between the Chinese and Western cultures of punishment," which (they claim) is that Chinese people were far more concerned with "somatic integrity" (the wholeness of the body) than Westerners.[531] This would be a surprising claim in the early imperial period, when punishments of bodily mutilation were an important tool of exemplary justice, but might make more sense when applied to medieval China. One of the principal pieces of evidence scholars offer for the Tang Code's "Confucianization" is its criminal punishments, which officially eliminated some of the harshest sanctions in Chinese history. Before the Western Han, the five major punishments "had been tattooing (*mo* 墨), amputation of the nose (*yi* 劓), amputation of one or both feet (*yue* 刖), castration (*gong* 宮), or death (*dapi* 大辟)." (There were others, including exile.) By the Tang, however, the situation was completely different: there were only "three types of punishments (beating with a bamboo stick, deportation, and death)."[532]

The death penalty in particular had changed radically: while decapitation was still practiced, strangulation was the far more common method of execution.

> The lighter form of the death penalty, strangulation, permitted the victim "to preserve his corpse whole," according to the [Tang] Code, implying the importance of retaining somatic integrity even after death. The next heavier form, decapitation, in contrast, meant that "the head and the body should be separated." The Code further acknowledged the anxiety about somatic integrity by noting that, in a case in which official provisions called for a sentence to be increased to match the severity of a crime, it was not permissible to increase a sentence of strangulation to decapitation, unless the Code specifically allowed for this escalation. The gulf between strangulation and decapitation was too great to be jumped by a technicality.[533]

Brook, Bourgon, and Blue argue that, in the centuries after the Tang Code, this view of death and dismemberment became deeply embedded in Chinese cultural attitudes: "Chinese law and popular perception considered prolonged strangulation, despite the pain it caused, a punishment less severe than the instantaneous death of beheading."[534]

Both the early modern Western observers who saw strangulation as an essential component of China's "Confucian" legal tradition and most of the scholars who write about it today ignore the extent to which Tang laws were in fact influenced by the non-Han cultures that dominated the centuries after the fall of the Eastern Han. The replacement of the pre-imperial approach of mutilating offenders' bodies by one that largely left those bodies whole was not a

[531] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 88.
[532] Wilkinson, *Chinese History*, 578.
[533] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 50.
[534] Brook, Bourgon, and Blue, 88.

development arrived at by the native inhabitants of the North China Plain (i.e., the ethnic Han). In work that, a decade after publication, has gone almost completely unnoticed in any English-language writing about Chinese legal history,[535] Itaru Tomiya demonstrates that strangulation as a method of execution does not exist in Chinese sources until the Northern Wei. Because the Xianbei left no written records prior to the conquest, we don't know either the origins of strangulation as they practiced it or how they conceived of it, though Tomiya suggests that it may have come from the way in which they killed animals for sacrificial purposes, reflecting their nomadic origins.[536] Whatever the Xianbei thought of it, strangulation introduced a radical change into the Chinese theory and practice of punishments. "With the coming of strangulation, the death penalty was no longer the ultimate mutilation; nor was it the banishment or elimination of criminals from the realm of the living. It became mere deprivation of life."[537]

> No trait reminiscent of the basic philosophy of punishment in ancient China—injuring the body or banishment from society—can be identified in these five forms of punishment. This was a turning point that marked the second stage in the history of punishment in China, which was brought about by strangulation.[538]

Tomiya's views appear to be supported by one of the legal treatise's few direct references to strangulation. Wei Shou describes Emperor Xiaowen's views on the death penalty this way:

> 高祖馭宇，留心刑法。故事，斬者皆裸形伏質，入死者絞，雖有律，未之行也。太和元年，詔曰：「刑法所以禁暴息奸，絕其命不在裸形。其參詳舊典，務從寬仁。」
> When Gaozu ruled the land [471-499], his attention remained on penal law. According to the precedents, those sentenced to decapitation were all to prostrate themselves naked on the executioner's block. Others condemned to death were supposed to be strangled. Although there was a statute to this effect, it hadn't been put into practice. In the first year of the Taihe era [477], an edict was issued, saying: "Penal law is meant to restrain violence and put a stop to treachery. Ending an offender's life does not require him to be naked. The old models of law are to be consulted in detail, with every effort made to follow the principles of magnanimity and humanity."

Strikingly, this passage demonstrates that the punishment of strangulation was *not* introduced by the "Confucianized" Tang Code in an indigenously Chinese/Han evolution that finally recognized the horror of the mutilating punishments that had so long been part of imperial

---

[535] Brook, Bourgon, and Blue, for example, do not note the punishment's origin, despite the critical role it plays in their argument.

[536] Tomiya has no evidence for this supposition, but he offers comparisons to Biblical texts describing animal strangulation. Itaru Tomiya 富谷至, "The Transition from the Ultimate Mutilation to the Death Penalty: A Study on Capital Punishment from the Han to the Tang," in *Capital Punishment in East Asia*, ed. Itaru Tomiya 富谷至 (Kyoto University Press, 2012), 52n42. Some ancient Indian groups appear to have employed the same practice. Annette Yoshiko Reed, "From Sacrifice to the Slaughterhouse: Ancient and Modern Approaches to Meat, Animals, and Civilization," *Method & Theory in the Study of Religion* 26, no. 2 (May 6, 2014): 111–58, https://doi.org/10.1163/15700682-12341269.

[537] Itaru Tomiya 富谷至, "The Transition from the Ultimate Mutilation to the Death Penalty," 53.

[538] Itaru Tomiya 富谷至, 53.

Chinese legal practice and therefore enshrined protections of the principle of Confucian somatic integrity. Rather, strangulation was a foreign import that was imposed only with difficulty: Tomiya points out that the reason the statute hadn't been "put into practice" 未之行也 was likely resistance from native Chinese,[539] many of whom would likely have been content—as evidence from the *History of Han* and *History of Jin* legal treatises shows—for the mutilating punishments to remain in place; this was in large part because it was they (rather than strangulation, which preserved the body) that to many early imperial and medieval Chinese authors seemed to reflect the pre-imperial world they associated with Confucius. After all, as the legal treatise explicitly states, Emperor Xiaowen's efforts to implement strangulation ran directly counter to the precedents 故事—the Han precedents—of exposure and decapitation. As Tomiya indicates, Emperor Xiaowen is no longer concerned here with the expressive functions of execution: his is interested purely in "cutting his life short" 絕其命, and it is *that* principle rather than the ideology of mutilation that preoccupied early imperial Chinese authors that is reflected in the Tang Code and its inheritors down to twentieth century.

In more recent centuries, Westerner observers of China were both fixated on the punishment of strangulation and blind to its origins, with immensely significant consequences. Though Chinese law and punishments had been a source of fascination (much of it positive) for Westerners as early as the 16th century—as partly detailed in Chapter 1—the mid-19th century saw a significant increase in Western horror at Chinese "barbarism." Brook et al. attribute this to a "trick of timing, in two ways." Following the conclusion of the second Opium War in 1860, the number of Westerners in China grew rapidly and they were witness to a great deal of violent upheaval, including the Taiping Rebellion, which eventually caused tens of millions of deaths. In its efforts to suppress that uprising and others, the government was particularly invested what it hoped would be the deterrent effect of widely publicizing its executions. Simultaneously, European attitudes to punishment were changing, abandoning judicial torture and mutilation in search of more humane practices. "As the tormented body vanished from the West, it reappeared in that now quintessentially Oriental place, China."[540]

Strangulation played an important role in Western revulsion at Chinese punishments. An 1876 article in the *North China Herald* ("Execution by Strangling") made the case particularly forcefully, stating that "the 'Heathen Chineee,' in dying as in living, is peculiar," because "in China how not to be, or rather how to go out of the world in a respectable manner, is a matter of really more importance than the cutting short of one's existence."[541] The article's author was particularly disturbed by the fact that the executioners appeared to intentionally pause in the course of their killing, allowing the condemned prisoner to regain consciousness a number of times before he finally succumbed to their efforts. He contrasted this practice unfavorably with Euro-American hanging, which "carried out in our rough and ready, happy-go-lucky, break-neck sort of way," the author asserts, "would be too abrupt for the dignified Chinaman."[542] The article ends with a general indictment of the country's law and culture:

> And this is China!... with all its boasting of antiquity and civilisation, it is guilty of such acts of barbarism… In the anxiety of the Chinese to follow the fashion of our armaments,

[539] Itaru Tomiya 富谷至, 32–33.
[540] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 26–27.
[541] "Execution by Strangling," *North China Herald*, May 6, 1876, Vol. XVI, No. 469 edition, 421.
[542] "Execution by Strangling," 421.

> it has never occurred to them to take a leaf from the book of our humanity,—to engage surgeons, and establish a hospital in which their sick and wounded could be tended to. No; these things are far from a race which would impress on us, if it could, its pretence of being civilised; but all whose strivings towards western arts have had one aim, and one only, in view,—the destruction of life, and the rivoting still tighter the chains of an unprincipled bureaucracy.[543]

Of course, the Europeans, though undertaking genuine reforms to reduce the cruelty of their criminal punishments at home, were happily imposing far crueler penalties in their own colonies.[544]

These kinds of descriptions played a key role in cementing one persistent Western view of Chinese approaches to punishment: that their commitment to preserving their bodies whole led them to prefer such barbarous methods of killing as strangulation to the quicker methods ostensibly favored by civilized Europeans. The *North China Herald* author writes of the condemned man: "Lucky dog!—the Chinese, it seems, think him—that, in addition to losing his life, he does not also lose his head."[545]

> "He is able to appear in the presence of those who have gone before him with his head on his shoulders, instead of being relegated to that Orcus where dwell the manes of the halt, the lame, and the mutilated."[546]

> "His head being where it ought to be, and his neck not unduly elongated, he has escaped mutilation, that bugbear which makes decapitation so terrible to Chinamen, and renders poisoning, drowning, starving, and strangling the fashionable methods of committing suicide."[547]

This view has become fixed in many Western descriptions of Chinese legal, in part thanks to Bodde and Morris' immensely influential *Law in Imperial China*, which states that,

> Although strangulation is thus a slower and more painful death than decapitation, it has always been regarded as a lesser punishment for socio-religious reasons: According to the tenets of Chinese filial piety, one's body is not one's own property, but a bequest from his parents. To mutilate one's body, therefore, or allow it to be mutilated, is to be unfilial. Strangulation, from this point of view, is superior to decapitation since it leaves the body intact. Furthermore, by the same token, strangulation is superior because it leaves the spirit of the executed man an intact body which it can continue to inhabit.[548]

Brook et al. note that this is the "standard formulation" of the common belief in a "'socio-religious' aversion to decapitation." They also point out that Bodde and Morris do not cite "a Chinese source for this belief"[549] and explain that they have likewise found no such evidence:

---

[543] "Execution by Strangling," 422.
[544] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 27–28.
[545] "Execution by Strangling," 421.
[546] "Execution by Strangling," 421.
[547] "Execution by Strangling," 422.
[548] Bodde and Morris, *Law in Imperial China*, 92.
[549] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 254 n19.

"we have found no Chinese source from the imperial era that explicitly spells out the afterlife consequences of *lingchi* [death by slicing],"[550] or, it appears, any other form of mutilation. In fact, they actually argue that the 19th-century Dutch Sinologist J.J.M. De Groot was one of the sources of this idea, and that his interpretation inappropriately imposed a Christian view of the resurrection of the body on Chinese fears.[551] And yet, Brook et al. make liberal and pivotal use of the concept of what they call (citing another scholar) "somatic integrity," the ostensibly extreme Chinese commitment to preserving the body whole. In their work dedicated to the practice and perception of death by slicing, they write that, "The loss of somatic integrity was the outcome most feared and the threat most potent in the system of imperial punishments."[552] They seem to consider Bodde and Morris' standard formulation sufficiently persuasive to make it a centerpiece of their argument, despite finding no evidence. All they can say is that, "the notion that Chinese feared the disarticulation of the body because of its posthumous implications is too consistently reported to be dismissed as a Western fantasy" and that, "This notion has become conventional wisdom in Chinese legal histories by Western scholars and will have to stand until we have an alternative understanding of the religious logic behind popular conceptions of *lingchi* that is better grounded in the logic and language of indigenous texts."[553]

If it's true that the formal introduction of strangulation into the Chinese repertoire of capital punishments represented a definitive end to the tradition of mutilation, it came from a ruling group that had no investment either way in the long-running and consequential Chinese debate over the practice. The Tuoba were still happy to use mutilation under certain conditions[554] but equally prepared to ignore it as a matter of standard sentencing practice. But it soon became an important technique of political legitimation to cast the Tang as the virtuous government who had finally gotten rid of mutilating punishments once and for all. Brook et al. note that, as early as the tenth century, Chinese authors began to tell the story of Chinese punishments as beginning with the pre-imperial cruelties of mutilation, whose elimination was begun in the Western Han and formalized in the Sui and Tang. "This narrative always finds its happy ending with the reformed scale of penalties included in the Tang Code, which largely followed the Sui Code."[555] This way of telling the story conferred a special status on those laws: "The Sui-Tang penal scale thereafter served as the legal model for assessing the legitimacy of all punishments."[556] These stories lent support to the theories of Confucianization described in Chapter 1, and their success is reflected in Brook et al.'s own adoption of the narratives promoted by these works: despite being largely dedicated to Chinese ideas about bodily integrity and the Western reaction to those ideas—*and* despite both relying on strangulation as an important piece of evidence *and* even noting the propagandistic qualities of narratives of Chinese legal history that identify the Tang as the humanizers who got rid of mutilation—*Death by a Thousand Cuts* nevertheless never mentions the Northern Wei or the fact that this supposedly crucial facet of a uniquely deeply held revulsion to mutilation had non-Chinese origins.

There's thus a strange hole in stories that have been told about Chinese law since at least the 19th century and continuing into present-day scholarship: people keep repeating that Chinese

[550] Brook, Bourgon, and Blue, 15.
[551] Brook, Bourgon, and Blue, 92.
[552] Brook, Bourgon, and Blue, 11.
[553] Brook, Bourgon, and Blue, 15.
[554] Michael Hoeckelmann, "To Rot and Not to Die: Punitive Emasculation in Early and Medieval China," *T'oung Pao* 105, no. 1–2 (June 21, 2019): 1–42, https://doi.org/10.1163/15685322-10512P01.
[555] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 83.
[556] Brook, Bourgon, and Blue, 83.

people are obsessed with bodily wholeness without providing any Chinese citations. People have tried to plug that hole with vague references to Confucianism or an enduring Chinese culture, of which the punishment of strangulation is supposedly a manifestation: this is not only superimposing a Chinese view on a non-Chinese practice; it's superimposing an *invented* (or at least very thinly sourced) Chinese view that likely contained a great deal more complexity, including the apparent resistance of Northern Wei-era Chinese to the introduction of a punishment that should (according to this narrative) have perfectly accorded with their anxiety over bodily integrity.

There is beginning to be some more work on views of bodily wholeness in Chinese history.[557] These, along with Brook et al.'s work, suggest that something like a concern for "somatic integrity" was present and effective in early imperial and medieval China. However, they don't demonstrate that such a concern was extreme in the way that later Western observers suggest.[558] After all, plenty of European sources attest to horror over bodily mutilation, and they don't seem to believe that this repulsion warped their approach to capital punishments. It seems more likely that this account of Chinese moral and legal views fits neatly with the attempt (well described by Brook et al.) to distinguish European values from Chinese ones, always emphasizing the superior civilization of the former over the exotic barbaric of the latter.

There are many of these ideas about "traditional" Chinese legal culture that some Western observer—or some Chinese scholar in response to Western criticism, as Li Chen explains was true of Shen Jiaben[559]—simply asserted in the late 19th or early 20th century that have never really been challenged. The result is that we're still living with this zombified mess of unsupported presuppositions about premodern Chinese law. These kind of generalizations are much easier to make than they are to disprove. It takes the kind of detail-oriented, period- (and often text-) specific work of the kind attempted here to begin to complicate or outright dismantle the most influential narratives.

---

[557] Albert Galvany and Romain Graziani, "Legal Mutilation and Moral Exclusion: Disputations on Integrity and Deformity in Early China," *T'oung Pao* 106, no. 1–2 (May 29, 2020): 8–55, https://doi.org/10.1163/15685322-10612P02; Charles Sanft, "Six of One, Two Dozen of the Other: The Abatement of Mutilating Punishments under Han Emperor Wen," *Asia Major* 18, no. 1 (2005): 79–100; Hoeckelmann, "To Rot and Not to Die."

[558] In fact, they imply a similar doubling to that discussed in Chapter 2 "As for the Tuoba rulers' rationale behind the emasculation of the sons of recalcitrant officials and their employment as eunuchs, it may have been twofold: On the one hand, by overtly complying with Han law (or their understanding of it), they may have been striving to appear more civilized to their Chinese subjects. On the other, while fearing retribution by the descendants of rebellious Chinese officials, they may have been using the combination of both practices as a means to show clemency and, at the same time, to keep potential enemies close at hand. The form and role of punitive emasculation under the Northern Wei was unique insofar as it combined elements of the earlier manifestations of that punishment with the institution of eunuchs." Hoeckelmann, "To Rot and Not to Die," 33.

[559] "Likewise, the New Draft Criminal Code (*Xin xinglü cao'an*), first presented to the throne in 1906, sought to change the forms of Chinese corporal punishment into the death penalty (only by strangulation), imprisonment, detention and fines; reduce the number of capital statutes; abolish adjudication by analogy (*bifu*) where no applicable statutes existed; and build juvenile correctional facilities. Shen Jiaben justified these changes by citing examples from Chinese law in *earlier* dynastic periods and from contemporary Western legal systems, recasting existing laws as repugnant to both the better tradition of Chinese law and the 'universal' practice of the modern world. Although he appeared to be more sympathetic to the preservation of indigenous Chinese legal culture, Shen was fully aware that the extraterritorial powers, now including Japan, would not be satisfied with piecemeal changes to the legal system." Chen, "Traditionalising Chinese Law," 198–99.

Such generalizations have been and continue to be consequential fantasies.[560] The *North China Herald*, so offended by 19th-century Chinese strangulations, argued that China's moral and legal sensibilities were so degraded as to require European intervention: "Let European nations compel these real barbarians to fulfill their treaties and another order of things must gradually ensue."[561] As Brook et al. explain, the prejudiced Western belief in the barbarity of Chinese law constituted "grounds for disdaining the 'inhumanity and injustice' of the Chinese legal system and confirming the cultural superiority of the West."

> China's backwardness could then be pushed back by millennia, not just decades. Chinese treatment of prisoners of war resembled the conduct of "ancient Egyptians," insisted an English observer in Canton in 1854. Six years later a French officer in China declared the gruesome executions of two French captives during the 1859–1860 Anglo-French campaign "crimes of another age." From where they stood, China had been left behind in Europe's steady ascent from barbarism to civilization, from irrationality to rationality, from a benighted past to an enlightened present.[562]

Dramatically disparaging characterizations of particular punishments (including strangulation) were thus used to support Euro-American views of the longstanding inadequacy of Confucianized Chinese legal culture in general. This inadequacy required the paternalistic treatment of China in international affairs and the imposition of extraterritoriality by foreign powers within China itself, setting the stage for the Century of Humiliation—the series of military defeats and the unequal and punishing treaties imposed on China in their wake—that fuels so much Chinese resentment towards the West today. Finally, the fact that these ideas continue to be so firmly embedded in both Chinese and Western scholarship risks further straining the already fraught Sino-American relationship, with consequences that are daily becoming easier to imagine.

---

[560] Another equally unsupported but significant claim is the idea that traditional Chinese notions of law viewed crime as creating a cosmic imbalance that needed to be rectified through the imposition of punishment on some other person, whether or not they were guilty. Hsu Dau-Lin (like Brook et al.) can find no original Chinese source for this assertion, which was initially made by 19th-century authors. Hsu Dau-lin, "Crime and Cosmic Order," *Harvard Journal of Asiatic Studies* 30 (1970): 111, https://doi.org/10.2307/2718767.

[561] Chen, *Chinese Law in Imperial Eyes*, 156.

[562] Brook, Bourgon, and Blue, *Death by a Thousand Cuts*, 26–27.

Conclusion

Documents like the legal and administrative treatises are special. First, although a great deal of work has shown that the history of the medieval period can be told from other sources in far more interesting ways than the narratives constructed predominantly on the basis of the official histories, many other scholars continue to consult them for a wide range of arguments about the Northern Wei. As I have argued elsewhere in this dissertation, the stories that rely on works like the administrative and legal treatises tend to support those reductionist accounts of Chinese legal and ethnic history that support both some of the worst policies of the Chinese government and some of the most unnecessary hostility towards that government on the part of others. Complicating the meaning and nature of these sources, as this dissertation has attempted to do, is thus also an effort to challenge those accounts.

Many of the theorists whose ideas are foundational to our sense of ourselves as modern people in a modern (often Western) world relied on these narratives: many were engaged in a practice of comparative law in which a misunderstood Chinese legal tradition acted as a definitive foil. As James Whitman warns, "comparative lawyers always run the risk of creating false impressions—of seeming to claim more than they should."[563] As explained in Chapter 1, Montesquieu and those who followed in his footsteps—including Hegel, Marx, Weber, Wittfogel, and Huntington—used their reductionist impressions of Chinese legal history to construct their images of a modern and enlightened West against the backdrop of a benighted Orient.[564] In articulating his much-cited theory of "legal Orientalism," Ruskola explains that this hubris on the part of the most influential Euro-American social theorists was integral to their construction of the most fundamental concepts about our civilizations and ourselves on which we still rely: "rule of law," "the West," "modernity."

> There is no discourse of rule-of-law that is not at the same time a discourse of legal Orientalism—a set of usually unarticulated cultural assumptions about that which is not law, and about those who do not have it. Whether we choose to recognize it or not, there is no world of legal modernity without an unlegal, despotic Orient to summon it into existence. [565]

Mathias Siems makes clear that the stakes of comparative law reductionism far transcend the purely academic, writing that,

> the concept of legal families [a basic premise of traditional comparative law] is used so as to favour one's own conception of law. It can lead to an 'exoticization of legal cultures', where the West is seen as the centre and the developing world as the periphery. This may have the deeper purpose of legitimising the Western supremacy of law, by way of constructing the identities of 'us' and 'them'. And if these groups of legal systems are seen as incompatible, such an approach may even contribute 'to conflictual and antagonistic relations between peoples and laws'.[566]

---

[563] James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press, 2005), 17.
[564] Mathias Siems, *Comparative Law* (Cambridge University Press, 2018), 383.
[565] Ruskola, *Legal Orientalism*, 10.
[566] Siems, *Comparative Law*, 96.

As Teemu Ruskola argues, the American government's unequal and coercive approach to legal relations with Native American tribes in the late 19th century was partly an outgrowth of the simultaneous degradation of outsiders and concentration of executive power that was required to produce and enforce the policies of Chinese exclusion. As explained in Chapter 1, the late-19th-century Chinese Exclusion laws were based partly on the belief Chinese legal history made Chinese people incapable of living under American systems of law:

> a large part of the rhetorical justification for Chinese Exclusion Laws in the United States was the premise that the Chinese, as born slaves of Oriental despots, were incapable of understanding the notion of individual rights and could therefore never assimilate into America's republican system of values.[567]

This view held that Chinese legal culture was an unbroken Confucian tradition: part of the reason it was said to have such a powerful grip on contemporary Chinese people was that it hadn't changed in thousands of years. Such a view necessarily overlooked periods like the Northern Wei, both because detailed knowledge about such less-famous periods of Chinese history were less available to Westerners and because the theory about an unchanging core legal culture antithetical to that of the United States couldn't accommodate powerful counterexamples demonstrating that millions of "Chinese" people had lived under a great variety of legal regimes throughout their history. The US Supreme Court, equally convinced of this story, attributed tremendous power to Congress power to keep anyone it wished out of the country.

> In sweeping terms, the U.S. Supreme Court held that the right to do so was an inherent power of sovereignty—a core attribute of what it means to be an independent nation. It did not derive from the Constitution, but from the law of nations and the very notion of sovereignty itself. Therefore, however that power was exercised, there was no appeal from it, for it was simply not constrained by the Constitution.[568]

This "plenary power," as the dissent noted in *Fong Yue Ting v. US*, was "unlimited and despotic."[569]

This denial of China's multiplicity has played a significant role in denying our own in ways that we are still living with. As Ruskola explains, the plenary conception of the Congressional power did not remain confined to the domain of immigration. In the *Insular Cases*, for example, the Court extended the notion of plenary power to cover "the annexation of permanently disenfranchised colonies,"[570] such as Puerto Rico. The plenary power was turned inward, too, and applied to relations between the federal government and Native American tribes. "In the view of the U.S. Supreme Court, the federal government was therefore at liberty to regulate Indian tribes at its pleasure, again with plenary authority unchecked by the Constitution."[571] The stories about the cultural incommensurability of Chinese people were

---

[567] Ruskola, *Legal Orientalism*, 143.
[568] Ruskola, 143.
[569] Ruskola, 146.
[570] Ruskola, 146.
[571] Ruskola, 147. Teemu Ruskola, *Legal Orientalism* (Harvard University Press, 2013), 147. Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* (Cambridge University Press, 2015), 190.

repurposed for Native Americans in the eyes of American law, recasting them as what Ruskola calls "internal Orientals."[572] This situation has resulted in our current mishmash of custom and authority that has for decades hampered the investigation of crimes committed on reservations.[573]

The situation hasn't much improved in contemporary comparative law. As John Langbein wrote in an influential article, thinking about our own law in comparison to that of others often remains a repository of harmful stereotypes that have been banished from other social realms. "Shivering to recall" the anti-Polish slurs, gendered classified ads, and segregated schools of his youth, Langbein celebrates the fact that, "Happily, my children are growing up in a society that is bent on casting off ethnic and other stereotyping."[574] Yet he also notes that a response to his article on advantages of the German system of civil procedure over the American constitutes "telling on the Americans what amounts to the Polish joke of comparative law"[575] by arguing that different cultures (here, German authoritarianism and American individualism) must produce different legal systems. Langbein characterizes this response as, "cultural chauvinism," which "is an effort to switch off the searchlight of comparative law."[576]

Though Langbein was criticizing one particular scholar, those who cite his work have used it to illuminate a general reliance on stereotype in comparative law, a reliance still clearly visible in the many, many publications and speeches decrying China's ostensible disdain for "rule of law." Jacques Gernet, for example, wrote that "in China the laws had never been anything but a collection of penal dispensations, which were considered no doubt as indispensable, but at the same time as quite incapable in themselves of causing order to prevail."[577] This view has been especially prevalent among legal academics, as William Alford detailed in an influential article.[578] To take one influential example, this attitude is evident in Randall Peerenboom's frequently cited work on the origins and contemporary state of rule of law in China. Writing about the early empires, Peerenboom makes the same claim about law's instrumentality: "Law was simply a pragmatic tool for obtaining and maintaining political control and social order."[579] Though he acknowledges that imperial power wasn't unlimited, he reiterates that legal decrees were primarily tools on which the ruler relied to enforce compliance from people and ministers.[580] Moreover, Peerenboom clearly accepts the Confucian-Legalist synthesis described and challenged in Chapter 1.[581]

Despite his clear-eyed critiques of other scholars' pitfalls, Alford himself relies on the idea of Confucianized Chinese law and historiography to explain the problem. The received

---

[572] Ruskola, *Legal Orientalism*, 165.
[573] Sierra Crane-Murdoch, "On Indian Land, Criminals Can Get Away With Almost Anything," *The Atlantic*, February 22, 2013, https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/.
[574] John H Langbein, "Cultural Chauvinism in Comparative Law," *Cardozo Journal of International and Comparative Law* 5, no. 41 (1997): 41.
[575] Langbein, 41.
[576] Langbein, 48–49.
[577] Jacques Gernet, "Introduction," in *Foundations and Limits of State Power in China*, ed. Stuart Schram (London: SOAS, University of London, 1987), xxiv.
[578] William P. Alford, "Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law," *Modern China* 23, no. 4 (October 1, 1997): 398–419, https://doi.org/10.1177/009770049702300402.
[579] Peerenboom, *China's Long March Toward Rule of Law*, 33.
[580] Peerenboom, *China's Long March Toward Rule of Law*, 41.
[581] Peerenboom, *China's Long March Toward Rule of Law*, 41.

texts—like the treatises studied in this dissertation—were written (in Alford's telling) by and for officials allied with the "Confucian" cause who must therefore necessarily have been anti-law.

> As such, unwittingly or otherwise, those scholars subscribed to and helped perpetuate an image of imperial China in which law was seen as an inferior social instrument, and resort to it was taken as an indication that the ruler and his delegates had failed properly to lead the people by moral suasion and exemplary behavior. It should, therefore, be no surprise that such scholars, for example, equated public, positive law with the philosophy of Legalism, which they in turn equated with the brutality and barbarism of the Legalist-influenced Qin—with the result that most viewed law as little more than an instrument of authoritarian control throughout pre-twentieth-century Chinese history.[582]

Karen Turner warns that the story of China's always-deficient (because Confucian) law has become almost impossible to escape, even by those who—like Alford, whom she cites—are mounting explicit and powerful challenges to wrongheaded conceptions of Chinese legal history. "The Confucian model," writes Turner,

> which celebrates the moral man over the law, ritual over legal systems, and the familial over the impersonal model of society, has so deeply influenced our understanding of law in China that attempts to escape Western paradigms at times fall back on the Confucian grand theory. And I think that the Confucian view has obscured the importance of other discussions about government in early China that looked toward formal laws and models derived from abstract standards as ways mitigate the influence of particularized, kin-based conceptions of the state.[583]

We must be exceptionally careful when we put faith in a comparative legal process responsible for some of the most pernicious worldviews that bedevil the world today by muddying our understandings of the past and making dangerous intercultural conflict more likely.

But that doesn't mean that we shouldn't try. As I hope the foregoing demonstrates, studying under-considered works like the *History of Wei* legal treatise can have enormous value for our understanding of Chinese legal history. In addition to more purely sinological analyses, that study can be enriched through the comparative application of Western legal ideas. Some scholars have begun to do this in a serious way that produces impressive results, illuminating features of premodern Chinese law that might not have stood out so clearly without the framework supplied by reference to Western scholarship. Maxim Korolkov, for example, relies on the American legal scholar Tom Tyler's work on "procedural justice"[584]—the idea that a great deal of people's feelings about the legitimacy of legal judgements comes from how those judgements were arrived at, rather than just their effects—to argue that early imperial interrogations were designed not just to secure convictions but also to allow defendants to feel they had had a chance to speak.[585]

---

[582] Alford, "Law? Law? What Law?," in *The Limits of the Rule of Law in China*, 48.
[583] Turner, Karen. "Rule of law ideals in early China." *J. Chinese L.* 6 (1992): 1. 14-15
[584] Drawing, in part, on Stuart Hampshire, *Justice Is Conflict* (Princeton University Press, 2018).
[585] Maxim Korolkov, "Arguing about Law: Interrogation Procedure under the Qin and Former Han Dynasties," *Études Chinoises* 漢學研究 30, no. 1 (2011): 37–71, https://doi.org/10.3406/etchi.2011.956.

There are significant benefits to the comparative law approach, when employed with proper caution and attention to complex detail. As the prominent legal academic James Whitman puts it,

> No absolute descriptive claim about any legal system is ever true. Human society is much too complex for that; there are always exceptions. If we make the absolute claim, for example, that American law is committed to the values of the free market, we are saying something false: there are many exceptions. On the other hand, if we claim that American law is *more* committed to the values of the free market than are most comparable legal systems, we are saying something that is both true and extremely important. As this example suggests, relative claims can be a good bit more revealing than absolute ones. Therein lies the unique strength of comparative law.[586]

In a passing reference to Asia—his book is a comparative analysis of approaches to punishment in Europe and America—Whitman demonstrates the value of this way of thinking, writing,

> Thus we can guess that broadly similar Confucian traditions of status hierarchy stand in the historical background of contemporary realities in both Japan (a place of proverbially mild practices) and China (a place of fearsomely harsh ones). The Confucian tradition certainly does not dictate any single contemporary result, but it surely consistently plays some role.[587]

Though (as explained in Chapter 1) I would dispute his characterization that contemporary Chinese values can be broadly defined as "Confucian," his explanation of the term's role and multiple meanings in different contexts already represents a significantly more sophisticated understanding than that of many authors writing about Chinese law. Even better, other comparative legal scholars are able to dispense with such ill-defined cultural concepts altogether. Børge Bakke, building in part on Whitman's insights in the work I cite here, rejects the popular explanation that premodern legal traditions account for contemporary China's widespread use of capital punishment, arguing instead that much more political choices have produced the specifics of its legal regime today. As a result,

> we do not have to rely on a more reductionist argument about the inevitability of deeply rooted "cultures" of punitive sentiments among the people to understand the causes of today's justice systems. The culture of punitiveness is learned in a historical and political context, and this context is much easier to manipulate, particularly by strong states, than the alleged inertia of deeply rooted popular cultural elements.[588]

There is enormous value to comparative legal scholarship when performed with this kind of care and precision.

Though the Northern Wei period is rarely considered from a comparative law perspective, Yan Yaozhong makes significant reference to general legal theories drawn from

---

[586] Whitman, *Harsh Justice*, 16–17.
[587] Whitman, 206.
[588] Børge Bakken, "China, a Punitive Society?," *Asian Journal of Criminology* 6, no. 1 (June 1, 2011): 35, https://doi.org/10.1007/s11417-010-9086-3.

non-Chinese contexts in his explanation of the distinction between the written law and legal practice of the era. The effect of Yan's commentary is to situate pre- and early Northern Wei legal practices within the context of global legal philosophical ideas, rather than simply within the stale arguments about "Confucianization" and "Sinicization" that currently occupy the bulk of academic writing about the period. The result both enriches our understanding of the Northern Wei, allowing us to see their choices not as driven simply by exotic and ineffable cultural factors but as exemplars of strategies widely employed by new states. It thus has the potential to make major contributions to the work of scholars making the biggest claims about punishments in human society in general, work that, when written in European languages, rarely takes any significant (or significantly informed) account of China.

For example, when describing the harsh punishments of the early Northern Wei, Yan explains that there's nothing unique about this state of affairs, quoting a 1955 Soviet general history of states and legal power for the proposition that "in many newly established states all over the world, 'punishments are extremely harsh and the scope of the death penalty is very broad.

> Slight violations of the bases of state and social systems are subject to severe sanctions, and the cruelty of punishments will inevitably produce terror. The greatest crimes are treason, insurrection, and conspiracy against one's country. As for these kinds of criminals, not only they themselves are put to death, but also their families, including their mothers and sisters are executed at the same time (Plutarch)… Beyond this, there are also humiliating punishments, such as displaying people to the masses tied up on pillories, etc.[589]

"The legal practices of the early Xianbei," writes Yan, "were of course no exception." This insight tracks one of the central claims of Pieter Spierenburg's classic *The Spectacle of Suffering*, which traces the rise and then disappearance of spectacular corporal and capital punishments in Europe, beginning in the medieval period. Spierenburg's claim about the origin of spectacular punishments is the same as that of Yan and the scholars he cites: they arise from the needs of weak states to awe their subject populations into compliance.

> Criminal justice emerged as a concomitant of the early beginnings of state formation. Nascent ruling groups expropriated private vengeance, so in the beginning there was violence. As the vendetta exercised by individual persons was violent, so was the state's revenge. Then there was exemplarity. I argued that it served a double purpose. It was supposed to frighten potential criminals and it warned against taking the law into one's own hands. Hence visible, violent repression exemplified a relative monopoly of authority. Since violence was still accepted in society to a large degree, it created no additional problems of injured sensibilities. This all took place before the sixteenth century. The authorities in question were still relatively weak.[590]

Work like Spierenburg's can help shed light on certain puzzles posed by the *History of Wei* legal treatise. For example,

---

[589] Yan Yaozhong 严耀中, "The Relationship Between Northern Wei Written Law and Judicial Practice," 4.

[590] Petrus Cornelis Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience* (Cambridge University Press, 1984), 77–78.

> 昭成建國二年：當死者，聽其家獻金馬以贖；犯大逆者，親族男女無少長皆斬；男女不以禮交皆死；民相殺者，聽與死家馬牛四十九頭，及送葬器物以平之；無系訊連逮之坐；盜官物，一備五，私則備十。法令明白，百姓晏然。
> In the second year of the Jianguo era [340] of Emperor Zhaocheng's reign: The families of those convicted of capital crimes could offer gold or horses to redeem their crimes. For those who committed high treason, all the men and women of their immediate family (irrespective of age) were to be decapitated. All men and women who engaged in illicit relations were to be strangled. If people killed one another, it was permitted for the killer's family to pacify the victim's family by offering them forty-nine horses or oxen, plus grave goods. There was to be no interrogation while incarcerated and no guilt-by-association punishments. Thefts of government property were to be repaid fivefold, while thefts of private property were to be repaid tenfold. Laws and ordinances were clear and simple and the people were contented.

In a nascent state so concerned about challenges to its authority that it inflicts spectacular punishments on offenders and their families, why should the regime allow private acts of retribution? Moreover, why would offenses against private property be more severely punished than offenses against the property of the "government," the entity whose fragile existence all these punishments were ostensibly designed to secure? Spierenburg explains that the transition from small, hierarchy-free groups whose injurious interactions are regulated by vengeance to larger groups in which local lords or nascent state institutions dispense impersonal justice is neither smooth nor immediate.

> The early modern states represent an intermediary phase between the older territories and the later national—liberal states. They were more stable and pacified than those preceding them but less so than those following them. A system of justice worked but in practice it was still a marginal justice and the degree of public security, especially in the countryside, was still relatively low. This makes the continued emphasis on personalistic rule and the demonstration of a monopoly of violence understandable. On the other hand, the transference of vengeance had more or less faded from memory. Revenge was no longer a primary motive in repression. Justice rather aimed at preserving the shaky balance of relative stability.[591]

One way of seeing the early Northern Wei situation, therefore, is as part of the messiness of the consolidation of judicial power, in which the aspirational "government" is capable of and interested in regulating some spheres of human activity but leaves untouched some vestiges of older modes of life in which hierarchy (and thus third-party adjudication) played a much-diminished role.

If Western comparative law has something to offer the study of Northern Wei, the reverse is also true. To take one small example: while Spierenburg's book is clearly and persuasively argued, the evidence he offers doesn't support the breadth of claim he wants to make. In his Introduction, he asserts that while the book mostly examines records from mid-seventeenth to mid-eighteenth-century Amsterdam, the experiences of this single city should be taken as

[591] Spierenburg, 78.

emblematic of European penal phenomena in general, and (by implication) of general trends in human social organization. Spierenburg argues that, "There are no indications that the Amsterdam experiences deviated in any significant respect from those in Western Europe generally,"[592] a claim which is hard to take entirely seriously, especially given the specific and granular observations about Amsterdam's practices of punishment that constitute major elements of Spierenburg's argument. The addition of evidence like the similar Tuoba legal strategy would vastly enhance the credibility of such claims, and is merely a random instance of the many ways in which understandings Chinese legal history in all its complexity would enrich, enhance, and challenge Western legal historical scholarship, if the latter could be convinced to pay attention.

Even more compellingly, the study of multiethnic and multicultural medieval Chinese law may help us to understand similar puzzles of our own. It would be ironic if a clearer understanding of the Chinese legal history about which intentionally simplified stories were told to support the policies of Chinese exclusion could now help us navigate the internal legal maze those policies helped to create, as we look to the Northern Wei for examples of how a government (as in the case of Bi Yangpi's daughter) can balance conflicting multicultural imperatives to arrive at solutions considered just by all constituents. For example, although we don't tend to think of the United States government this way, it could also be conceived of as a "conquest dynasty" (as the Northern Wei continues to be described) from the perspective of Native Americans or Puerto Ricans. What that meant for the Northern Wei is that they had to find ways to rule by persuasion rather than force, which entailed adapting their laws and institutions to provide opportunity for and representation of the cultural values of their subject population. This is the path (in general terms, obviously) advocated by many writing about Puerto Rico and the laws derived from anti-Chinese prejudice that determine its fate: "The *Insular Cases,* tainted by racial and religious intolerance, were bad law at the beginning of the twentieth century; they should not control the twenty-first."[593] The way forward may be a greater recognition of the complexity of identity for many people who live within the borders of the United States but maintain multiple separate self-conceptions.

> Most analysts tend to think of the USA as a polyethnic nation-state, rather than a multinational state, in part because stateless nations within it are a relatively small proportion of the population, geographically isolated, and living under subordinate political arrangements. Yet, Puerto Ricans in Puerto Rico – a part of the USA since 1898 – have a genuinely distinct societal culture.[594]

This isn't merely a labeling issue. Failing to conceive of the full intricacy of the relationship between territories like Puerto Rico and the American government—as the Han population's relationship to the Northern Wei government has not been well understood—stymies our ability to imagine productive future arrangements, as more scholars are now trying to do:

---

[592] Spierenburg, x–xi.
[593] T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* (Harvard University Press, 2002), 94.
[594] Jaime Lluch, "Varieties of Territorial Pluralism: Prospects for the Constitutional and Political Accommodation of Puerto Rico in the USA," in *Constitutionalism and the Politics of Accommodation in Multinational Democracies*, ed. Jaime Lluch (Springer, 2014), 22.

> the political relations between the federal government and the people of Puerto Rico… must evolve in the manner in which it was initiated in the 1950s— with the mutual consent of both parties. Finally, the Constitution should not be read—out of fear and loathing of new understandings of sovereignty—to prevent promising power-sharing arrangements that provide a space for political and cultural autonomy. Neither Puerto Rican statehood nor enhanced commonwealth puts the nation at risk.[595]

Clearer understandings of the various strategies the Northern Wei deployed to manage their own multiethnic polity might help us move toward the view urged by Thomas Aleinikoff that, "the Constitution is large enough, and strong enough, to affirm a multinational America that embraces its peoples as its people."[596]

It is clear to me that the oppositional self-definition focusing on China has been baked into Euro-American conceptions and continues to reify the contemporary attitudes most likely to lead to conflict. In this, it is only one of myriad such divisions, and it is my hope that the rejection of one of the simplistic dichotomies that underlies many of our most foundational concepts may cast doubt on others. As Arshin Adib-Moghaddam writes, "One will be castigated for questioning the sovereignty of the 'official discourse' that is not only at the heart of the 'Westphalian nation-state', but our very 'identity' as Muslims, Christians, Hindus, Argentineans, Americans, Arabs, Chinese, Turks, that many of us believe in so strenuously."

> Make no mistake about it, it is much easier to take sides in a particular clash situation, especially the side of the country and culture one lives in. But what we need is the opposite. Today, more than ever we need people who are willing to tip-toe between the trenches rather than to shoot from within them. Alas, amongst the mainstream, converse preferences rule. In the absence of a future-oriented alternative that would be powerful enough to question the status quo, belief in binary divisions remains rather strong. In other words, we are continuously compelled to maximise our difference to the other. As a result, totalitarian methodologies thrive, and epistemologies of difference continue to be spun. By the force of the us-versus-them dichotomisations thus created, an exponential mass of violence in the name of the 'in-group' (and converting the out-group) is repeatedly unleashed.[597]

To try to break down these dichotomies isn't to say that we're all the same, but rather to recognize that many aspects of our identities are constructed against one another, and that those identities are therefore mutually constitutive: "If it is in the difference to the other that our own appearance emerges, if we can not sustain our identity in total isolation, if sameness is unachievable, we are compelled to accept the other's identity as such, not at least because it is the source of our own identity in the first place."[598] This was true of the Northern Wei and its Han population in medieval China and has been true of America and China from the 18th century

---

[595] Aleinikoff, *Semblances of Sovereignty*, 94.
[596] Aleinikoff, 94.
[597] Arshin Adib-Moghaddam, *A Metahistory of the Clash of Civilisations: Us and Them Beyond Orientalism* (Hurst and Company, 2014), 284, https://doi.org/10.1093/acprof:oso/9780199333523.001.0001.
[598] Adib-Moghaddam, 290.

to today. There is no America as it presently exists without the stories of Chinese law this dissertation has challenged.

My brief suggestion about the relevance of Chinese legal history to present-day conflicts is admittedly speculative and would require more thought and examination than I am able to give it here, though I do believe that the detailed study of premodern China has far more to offer contemporary political theorists and politicians than is almost ever recognized. This is the second feature of the treatises that makes them special and worth studying. They reflect a government trying and (by many measures) succeeding to construct and articulate policies and systems that represent and accommodate identities being defined in opposition to one another; they also, insofar as this kind of historiography was itself a state project that likewise aimed to speak to some important strata of the governed population, actually constitute a part of those policies and systems, too. If we take these sources seriously, they show that a government could be multiple things simultaneously (Tuoba and Han) and productively, not simply either a fake Chinese overlay over a Tuoba concentration of power or a Tuoba surrender to a superior Chinese culture. That's why it matters to specifically recover the complexity of works of state history concerned with political legitimation like the administrative and legal treatises, in addition to all of the vital work that has gone far beyond these traditional sources. We need more models of administrative and legal approaches that make serious efforts to accommodate widely divergent identities, and that thrive in the effort. The legal treatise reminds of the consequences of failing to seek those models: "The dead were counted in the tens of thousands and so the state declined, shaken and terrorized." 死者以萬計。於是國落騷駭。

Bibliography

Abbattista, Guido. "Chinese Law and Justice: George Thomas Staunton (1781-1859) and the European Discourses on China in the Eighteenth and Nineteenth Centuries." In *Law, Justice and Codification in Qing China: European and Chinese Perspectives: Essays in History and Comparative Law*, edited by Guido Abbattista, 1–138. Trieste: EUT Edizioni Università di Trieste, 2017.

Abramson, Marc S. *Ethnic Identity in Tang China*. Philadelphia, Pa.: University of Pennsylvania Press, 2011.

Adib-Moghaddam, Arshin. *A Metahistory of the Clash of Civilisations: Us and Them Beyond Orientalism*. Hurst and Company, 2014. https://doi.org/10.1093/acprof:oso/9780199333523.001.0001.

Aleinikoff, T. Alexander. *Semblances of Sovereignty: The Constitution, the State, and American Citizenship*. Harvard University Press, 2002.

Alford, William P. "Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law." *Modern China* 23, no. 4 (October 1, 1997): 398–419. https://doi.org/10.1177/009770049702300402.

———. "The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past." *Texas Law Review* 64 (1986 1985): 915.

AP News. "UK Tribunal to Hear Witnesses on China Genocide Accusations," February 4, 2021. https://apnews.com/article/race-and-ethnicity-london-china-slobodan-milosevic-dce87ecaa1500434bbc098725dfc5f1b.

Bailey, Paul. "Voltaire and Confucius: French Attitudes towards China in the Early Twentieth Century." *History of European Ideas* 14, no. 6 (November 1, 1992): 817–37. https://doi.org/10.1016/0191-6599(92)90168-C.

Bakken, Børge. "China, a Punitive Society?" *Asian Journal of Criminology* 6, no. 1 (June 1, 2011): 33–50. https://doi.org/10.1007/s11417-010-9086-3.

Balazs, Etienne. *Chinese Civilization and Bureaucracy: Variations on a Theme*. Yale University Press, 1967.

Barbalet, Jack. "Max Weber and China: Imperial Scholarship, Its Background and Findings." In *Sino-German Encounters and Entanglements: Transnational Politics and Culture, 1890–1950*, edited by Joanne Miyang Cho, 133–55. Palgrave Series in Asian German Studies. Cham: Springer International Publishing, 2021. https://doi.org/10.1007/978-3-030-73391-9_6.

Barbieri-Low, Anthony J., and Robin D. S. Yates. *Law, State, and Society in Early Imperial China (2 Vols): A Study with Critical Edition and Translation of the Legal Texts from Zhangjiashan Tomb No. 247*. Brill, 2015.

Barresi, Paul A. "The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: Toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics." *Pace Environmental Law Review* 30 (2013 2012). https://heinonline.org/HOL/Page?handle=hein.journals/penv30&id=1181&div=&collection=.

Beck, B. J. Mansvelt. *The Treatises of Later Han: Their Author, Sources, Contents and Place in Chinese Historiography*. Brill, 1990.

Bian, Yongmin, and Xiaobao Liu. “Corporate Social Responsibility with Chinese Characteristics: A Rivalry of Western CSR?” *US-China Law Review* 19 (2022): 167.

Bielenstein, Hans. *The Bureaucracy of Han Times*. Cambridge University Press, 1980.

Biot, Edouard, trans. *Le Tcheou-li ou Rites des Tcheou*, 1851. https://www.google.com/books/edition/Le_Tcheou_li_ou_Rites_des_Tcheou_tr_par/13sIAAAAQAAJ?hl=en&gbpv=1&dq=Le+Tcheou+li+ou+Rites+des+Tcheou&printsec=frontcover.

Bo Juncai 柏俊才. “Beiwei Sandu Daguan Kao 北魏三都大官考 [Investigation into the Great Officials of the Three Areas of the Northern Wei].” *Zhongnan Daxue Xuebao* 中南大學學報 17, no. 1 (2011): 94–98.

Bodde, Derk, and Clarence Morris. *Law in Imperial China: Exemplified by 190 Ch’ing Dynasty Cases (Translated from the Hsing-an Hui-Lan), With Historical, Social, and Juridical Commentaries*. Cambridge, Mass: Harvard University Press, 1967.

Boltz, William G. “*Chou Li* 周禮.” In *Early Chinese Texts: A Bibliographical Guide*, edited by Michael Loewe, 24–32. Society for the Study of Early China, 1993.

Brook, Timothy, Jérôme Bourgon, and Gregory Blue. *Death by a Thousand Cuts*. Cambridge, Mass: Harvard University Press, 2008.

Brunson, Katherine, Brian Lander, and Mindi Schneider. “Cattle and People in China From the Neolithic to the Present.” In *Cattle and People: Interdisciplinary Approaches to an Ancient Relationship*, edited by Catarina Ginja and Elizabeth Wright, 281–301. Lockwood Press, 2022.

Caldwell, Ernest. “Social Change and Written Law in Early Chinese Legal Thought.” *Law and History Review* 32, no. 1 (February 2014): 1–30. https://doi.org/10.1017/S0738248013000606.

Chan Chun-Keung 陳俊強. “Beichao Liuxing de Yanjiu 北朝流刑的研究 [A Study on Banishment in the Northern Dynasties].” *Fazhi Shi Yanjiu* 法制史研究: 中國法制史學會會刊, no. 10 (December 1, 2006): 33–82.

———. “Hantang zhengshi ‘xingfa zhi’ de xingcheng yu bianqian 漢唐正史〈刑法志〉的形成與變遷 [The Formation and Evolution of the ‘Treatises on Law and Punishment’ in Official Histories from the Han to Tang].” *Taiwan shida lishi xuebao* 臺灣師大歷史學報, no. 43 (January 1, 2010). https://doi.org/10.6243/BHR.2010.043.001.

Chase, Kenneth W. “The Edict of 495 Reconsidered.” *Journal of the Economic and Social History of the Orient* 39, no. 4 (1996): 383–97.

Chaussende, Damien. “Un historien sur le banc des accusés : Liu Zhiji juge Wei Shou.” *Études chinoises* 29, no. 1 (2010): 141–80. https://doi.org/10.3406/etchi.2010.939.

Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯. “Cong Beiwei ‘Fei Yangpi Mai Nü an’ Shuodao Zhongguo Gudai de Zhaiwu He Renkou Maimai 從北魏 [費羊皮賣女案] 說到中國古代的債務和人口買賣 [On Debt and Human Trafficking during the Northern Wei Dynasty: The Case of Fei Yangpi Selling His Daughter].” *Fazhi Shi Yanjiu* 法制史研究 9 (2006).

Chen, Joy, Erik H. Wang, and Xiaoming Zhang. “Leviathan’s Offer: State-Building with Elite Compensation in Early Medieval China.” *SSRN Electronic Journal*, 2021. https://doi.org/10.2139/ssrn.3893130.

Chen, Li. *Chinese Law in Imperial Eyes: Sovereignty, Justice, & Transcultural Politics*. Studies of the Weatherhead East Asian Institute, Columbia University. New York: Columbia University Press, 2016.

———. "Traditionalising Chinese Law: Symbolic Epistemic Violence in the Discourse of Legal Reform and Modernity in Late Qing China." In *Chinese Legal Reform and the Global Legal Order*, edited by Yun Zhao and Michael Ng, 1st ed., 181–210. Cambridge University Press, 2017. https://doi.org/10.1017/9781316855645.010.

Chen, Sanping. *Multicultural China in the Early Middle Ages*. 1st ed. Encounters with Asia. Philadelphia: University of Pennsylvania Press, 2012.

Cheng, Anne. "Morality and Religiousness: The Original Formulation." *Journal of Chinese Philosophy* 41, no. 5 (March 3, 2014): 587–608. https://doi.org/10.1163/15406253-04105006.

Chittick, Andrew. *The Jiankang Empire in Chinese and World History*. Oxford Studies in Early Empires. New York, NY: Oxford University Press, 2020.

Chü T'ung-tsu. *Law and Society in Traditional China*. Mouton, 1961.

Cole, Simon A. *Suspect Identities: A History of Fingerprinting and Criminal Identification*. Harvard University Press, 2009.

Corradini, Piero. "Notes on the Shangshu Departments in the Chinese Central Administration." *Monumenta Serica* 37 (1986): 13–34.

Crane-Murdoch, Sierra. "On Indian Land, Criminals Can Get Away With Almost Anything." *The Atlantic*, February 22, 2013. https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/.

Crowell, William Gordon. "*Nan Qi Shu* 南齊書." In *Early Medieval Chinese Texts: A Bibliographical Guide*, edited by Cynthia Louise Chennault, Keith Nathaniel Knapp, Alan J. Berkowitz, and Albert E. Dien, 202–8. China Research Monograph 71. Berkeley, CA: Institute of East Asian Studies, 2015.

Csikszentmihalyi, Mark, and Michael Nylan. "Constructing Lineages and Inventing Traditions through Exemplary Figures in Early China." *T'oung Pao* 89, no. 1/3 (2003): 59–99.

Dau-lin, Hsu. "Crime and Cosmic Order." *Harvard Journal of Asiatic Studies* 30 (1970): 111. https://doi.org/10.2307/2718767.

DeLapp, Kevin Michael, ed. *Portraits of Confucius: The Reception of Confucianism from 1560 to 1960*. London; New York: Bloomsbury Academic, 2022.

Di Cosmo, Nicola. "Han Frontiers: Toward an Integrated View." *Journal of the American Oriental Society* 129, no. 2 (2009): 199–214.

Di Sanshiliu Ji: Beiwei Xiaowen Di Gaige 第三十六集：北魏孝文帝改革【中国通史 | China History】[The Reforms of Northern Wei Emperor Xiaowen] , 2018. https://www.youtube.com/watch?v=CsiNs7LVgMA.

Dien, Albert E. "Elite Lineages and the T'o-Pa Accommodation: A Study of the Edict of 495." *Journal of the Economic and Social History of the Orient* 19, no. 1 (1976): 61–88. https://doi.org/10.2307/3631874.

Dubs, Homer H. "The Victory of Han Confucianism." *Journal of the American Oriental Society* 58, no. 3 (1938): 435–49.

Duthie, Nina. "Origins, Ancestors, and Imperial Authority in Early Northern Wei Historiography." PhD, Columbia University. Accessed November 25, 2023. https://www.proquest.com/docview/1660540574/abstract/415A5D77A51E40FCPQ/1.

Eisenberg, Andrew. *Kingship in Early Medieval China*. Sinica Leidensia, v. 83. Leiden ; Boston: Brill, 2008.

———. “Weberian Patrimonialism and Imperial Chinese History.” *Theory and Society* 27, no. 1 (1998): 83–102.

Elliott, Mark. “*Hushuo*: The Northern Other and the Naming of the Han Chinese.” In *Critical Han Studies*, edited by Thomas Mullaney, James Patrick Leibold, Stéphane Gros, and Eric Armand Vanden Bussche. Univ of California Press, 2012.

Elliott, Mark C. *The Manchu Way: The Eight Banners and Ethnic Identity in Late Imperial China*. Stanford University Press, 2001.

Fan, Xin. *World History and National Identity in China: The Twentieth Century*. Cambridge University Press, 2021.

Fang, Qiang. “The Spirit of the Rule of Law in China.” *Education about Asia* 13, no. 1 (2008): 36–41.

Felt, David Jonathan. “The Metageography of the Northern and Southern Dynasties.” *T’oung Pao* 103, no. 4–5 (November 30, 2017): 334–87. https://doi.org/10.1163/15685322-10345P02.

Fu, Yiqin, Yiqing Xu, and Taisu Zhang. “Does Legality Produce Political Legitimacy? An Experimental Approach.” SSRN Scholarly Paper. Rochester, NY, November 18, 2021. https://doi.org/10.2139/ssrn.3966711.

Galvany, Albert, and Romain Graziani. “Legal Mutilation and Moral Exclusion: Disputations on Integrity and Deformity in Early China.” *T’oung Pao* 106, no. 1–2 (May 29, 2020): 8–55. https://doi.org/10.1163/15685322-10612P02.

Gao Chao 高潮 and Ma Jinshi 马建石. *Zhongguo lidai xingfa zhi zhuyi* 中国历代刑法志注译 *[Annotations and Translations of Chinese Historical Treatises on Law and Punishment]*. Jilin renmin chubanshe *吉林人民出版社*, 1994.

Goldin, Paul R. “Han Law and the Regulation of Interpersonal Relations: ‘The Confucianization of the Law’ Revisited.” *Asia Major* 25, no. 1 (2012): 1–31.

———. “Persistent Misconceptions About Chinese ‘Legalism.’” *Journal of Chinese Philosophy* 38, no. 1 (2011): 88–104. https://doi.org/10.1111/j.1540-6253.2010.01629.x.

Goldin, Paul Rakita. *The Art of Chinese Philosophy: Eight Classical Texts and How to Read Them*. Princeton: Princeton University Press, 2020.

Golovachev, Valentin C. “Matricide among the Tuoba-Xianbei and Its Transformation during the Northern Wei.” *Early Medieval China* 2002, no. 1 (June 2002): 1–41. https://doi.org/10.1179/152991002788193933.

Graff, David. “*Bei Shi* 南齊書.” In *Early Medieval Chinese Texts: A Bibliographical Guide*, edited by Cynthia Louise Chennault, Keith Nathaniel Knapp, Alan J. Berkowitz, and Albert E. Dien, 18–23. China Research Monograph 71. Berkeley, CA: Institute of East Asian Studies, 2015.

Gu Yuan 顾元. “Zhang Jinfan: Xin Zhongguo Falü Shixue de Zhuyao Kaichuang Zhe He Dianji Ren 张晋藩教授: 新中国法律史学的主要开创者和奠基人 [Professor Zhang Jinfan: Principal Founder and Pioneer of New Chinese Legal History].” *Zhongguo Dizhi Daxue Xuebao* 中国地质大学学报：社会科学版 4, no. 1 (2004): 1–6.

Gyory, Andrew. *Closing the Gate: Race, Politics, and the Chinese Exclusion Act*. Univ of North Carolina Press, 2000.

Habberstad, Luke. *Forming the Early Chinese Court: Rituals, Spaces, Roles*. University of Washington Press, 2017.
Hahm, Chaihark. "Law, Culture, and the Politics of Confucianism." *Columbia Journal of Asian Law* 16 (2003 2002): 253.
Hampshire, Stuart. *Justice Is Conflict*. Princeton University Press, 2018.
He Qinhua 何勤华. *An Outline History of Legal Science in China*. Translated by Fu Junwei et al. Wolters Kluwer, 2016.
———. "'Fajing' Xinkao 《法经》新考 [A New Investigation into the *Classic of Laws*]." *Faxue* 法学, no. 2 (1998): 16–19.
Head, John W. "Feeling the Stones When Crossing the River: The Rule of Law in China." *Santa Clara Journal of International Law* 7 (2010 2009): 25.
Head, John W., and Yanping Wang. *Law Codes in Dynastic China: A Synopsis of Chinese Legal History in the Thirty Centuries from Zhou to Qing*. Durham, N.C: Carolina Academic Press, 2005.
Ho Ping-Ti. "In Defense of Sinicization: A Rebuttal of Evelyn Rawski's 'Reenvisioning the Qing.'" *The Journal of Asian Studies* 57, no. 1 (February 1998): 123–55.
Hoeckelmann, Michael. "To Rot and Not to Die: Punitive Emasculation in Early and Medieval China." *T'oung Pao* 105, no. 1–2 (June 21, 2019): 1–42. https://doi.org/10.1163/15685322-10512P01.
Holcombe, Charles. "Chinese Identity During the Age of Division, Sui, and Tang." *Journal of Chinese History* 4, no. 1 (January 2020): 31–53. https://doi.org/10.1017/jch.2019.37.
———. "The Tabgatch Empire and the Idea of China." *The Historian* 84, no. 2 (April 3, 2022): 242–61. https://doi.org/10.1080/00182370.2023.2167506.
———. "The Xianbei in Chinese History." *Early Medieval China* 2013, no. 19 (December 2013): 1–38. https://doi.org/10.1179/1529910413Z.0000000006.
Holmgren, Jennifer. "Northern Wei as a Conquest Dynasty: Current Perceptions; Past Scholarship." *Papers on Far Eastern History* 40 (1989): 1–50.
———. "Women and Political Power in the Traditional t'o-Pa Elite: A Preliminary Study of the Biographies of Empresses in the Wei-Shu." *Monumenta Serica* 35 (1981): 33–74.
Hu Hong 胡鸿. "Beiwei Chuqi de Jue Benwei Shehui Ji Qi Lishi Shuxie: Yi 'Weishu Guanshizhi' Wei Zhongxin 北魏初期的爵本位社会及其历史书写——以《魏书·官氏志》为中心 [The Rank-Centered Society of the Early Northern Wei and Its Historical Writing: A Study Centering on the History of Wei 'Treatise on Administration and Lineages']." *Lishi Yanjiu* 历史研究 4 (2012).
Huang, Philip C. C. "Our Sense of Problem: Rethinking China Studies in the United States." *Modern China* 42, no. 2 (March 1, 2016): 115–61. https://doi.org/10.1177/0097700415622952.
Huang Zhen 黃楨. "Zailun Liuxing Zai Beiwei de Chengli: Beizu Yinsu Yu Jingdian Bifu 再論流刑在北魏的成立—北族因素與經典比附 [A Reconsideration of the Establishment of the Punishment of Banishment in the Northern Wei: The Elements of the Northern Tribes and the Additions of the Classics]." *Zhonghua Wenshi Luncong* 中华文史论丛 4 (2017).
Hulsewé, Anthony François Paulus. *Remnants of Han Law*. Brill Archive, 1955.
Huntington, Samuel P. *The Clash of Civilizations and the Remaking of World Order*. Simon&Schuster hardcover ed. New York: Simon & Schuster, 2011.

Hurvitz, Leon. *Treatise on Buddhism and Taoism: An English Translation of the Original Chinese Text of Wei-Shu CXIV and the Japanese Annotation of Tsukamoto Zenryū*. Kyoto: Jimbunkagaku kenkyusho, Kyoto University, 1956.

Hutton, Eric L. "On Ritual and Legislation." *European Journal for Philosophy of Religion* 13, no. 2 (June 30, 2021): 45–64. https://doi.org/10.24204/ejpr.2021.3333.

Itaru Tomiya 富谷至. "The Transition from the Ultimate Mutilation to the Death Penalty: A Study on Capital Punishment from the Han to the Tang." In *Capital Punishment in East Asia*, edited by Itaru Tomiya 富谷至, 1–54. Kyoto University Press, 2012.

Kern, Martin. "Language and the Ideology of Kingship in the 'Canon of Yao.'" In *Origins of Chinese Political Philosophy: Studies in the Composition and Thought of the Shangshu (Classic of Documents)*, edited by Martin Kern and Dirk Meyer, 23–61. Brill, 2017. https://doi.org/10.1163/9789004343504_003.

Kieschnick, John. "Buddhism." In *The Cambridge History of China: Volume 2: The Six Dynasties, 220–589*, edited by Albert E. Dien and Keith N. Knapp, 2:531–52. The Cambridge History of China. Cambridge: Cambridge University Press, 2019. https://www.cambridge.org/core/books/cambridge-history-of-china/buddhism/201BB18C94D564D35A419E4114A73C61.

Klein, Esther S. *Reading Sima Qian from Han to Song: The Father of History in Pre-Modern China*. Brill, 2019.

Klein, Kenneth. "*Wei Shu* 魏書." In *Early Medieval Chinese Texts: A Bibliographical Guide*, edited by Cynthia Louise Chennault, Keith Nathaniel Knapp, Alan J. Berkowitz, and Albert E. Dien, 368–72. China Research Monograph 71. Berkeley, CA: Institute of East Asian Studies, 2015.

Klein, Kenneth Douglas. "The Contributions of the Fourth Century Xianbei States to the Reunification of the Chinese Empire." PhD, University of California, Los Angeles, 1980. https://www.proquest.com/docview/288336279/abstract/5A338B5A52E149C6PQ/1.

Korolkov, Maxim. "Arguing about Law: Interrogation Procedure under the Qin and Former Han Dynasties." *Études Chinoises* 漢學研究 30, no. 1 (2011): 37–71. https://doi.org/10.3406/etchi.2011.956.

Kroncke, Jedidiah Joseph. *The Futility of Law and Development: China and the Dangers of Exporting American Law*. New York, NY: Oxford University Press, 2016.

Kubat, Aleksandra. "Morality as Legitimacy under Xi Jinping: The Political Functionality of Traditional Culture for the Chinese Communist Party." *Journal of Current Chinese Affairs* 47, no. 3 (December 1, 2018): 47–86. https://doi.org/10.1177/186810261804700303.

Kwong, Lucas. "The Yellow Peril's Second Coming." *The Revealer* (blog), June 3, 2021. https://therevealer.org/the-yellow-perils-second-coming/.

Langbein, John H. "Cultural Chauvinism in Comparative Law." *Cardozo Journal of International and Comparative Law* 5, no. 41 (1997): 41–49.

Lau, Ulrich, and Thies Staack. *Legal Practice in the Formative Stages of the Chinese Empire: An Annotated Translation of the Exemplary Qin Criminal Cases from the Yuelu Academy Collection*. Brill, 2016.

Lee, Erika. *America for Americans: A History of Xenophobia in the United States*. Basic Books, 2019.

———. *At America's Gates: Chinese Immigration during the Exclusion Era, 1882 - 1943*. Chapel Hill, NC: Univ. of North Carolina Press, 2003.

Lee, Jen-Der. “Crime and Punishment: The Case of Liu Hui in the Wei Shu.” In *Early Medieval China: A Sourcebook*, edited by Wendy Swartz, Robert Ford Campany, Yang Lu, and Jessey Choo, 156–65. Columbia University Press, 2014. https://doi.org/10.7312/swar15986-015.

Lewis, Margaret K. “Criminalizing China.” *The Journal of Criminal Law and Criminology (1973-)* 111, no. 1 (2021): 145–225.

Li Cui 李翠. “Beiwei Xiaowen Di Hanhua Gaige: Ge Minzu Wenhua Hujian Rongtong de Jingcai Pianzhang 北魏孝文帝汉化改革：各民族文化互鉴融通的精彩篇章 [The Sincization Reforms of the Northern Wei Emperor Xiaowen: An Excellent Chapter of the Mutual Learning and Intermixing of Each Ethnic Group].” 中国共产党新闻网 [Chinese Communist Party News Web], July 19, 2021. http://cpc.people.com.cn/n1/2021/0719/c437562-32162232.html.

Li Dejia 李德嘉. “Dezhu Xingfu Shuo de Xueshuo Shi Kaocha ‘德主刑辅’说的学说史考察 [An Investigation into the History of the Academic Claim of ‘Virtue First, Punishments Second’].” *Zhengfa Luncong* 政法论丛, no. 2 (2018): 153–60.

Li Konghuai 李孔怀. *Zhongguo gudai xingzheng zhidu shi* 中国古代行政制度史 *[History of the Ancient Chinese Administrative System]*. Fudan daxue chuban she *復旦大學出版社*, 2006.

Li Yanshou 李延壽. *Beishi* 北史 *[History of the Northern Dynasties]*. Beijing: Zhonghua shuju *北京: 中華書局*, 1974.

Lin Fushi 林富士. *Zhongguo shi xinlun: Zongjiao shi fence* 中國史新論：宗教史分冊 *[New Discussions of Chinese History: Volume on the History of Religion]*. Academia Sinica *中央研究院*, 2011.

Linton, Matthew. “The Transformation of Cain: Karl August Wittfogel’s American Acculturation and the Cold War, 1934-1963.” Masters, Brandeis University, 2011. https://s3.amazonaws.com/na-st01.ext.exlibrisgroup.com/01BRAND_INST/storage/alma/5A/D5/D3/1A/D6/08/1E/1D/87/D4/1F/30/CD/6B/AD/54/Wittfogel%20Final%20Draft.pdf?response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Date=20231119T200148Z&X-Amz-SignedHeaders=host&X-Amz-Expires=119&X-Amz-Credential=AKIAJN6NPMNGJALPPWAQ%2F20231119%2Fus-east-1%2Fs3%2Faws4_request&X-Amz-Signature=a1b58a436f10d71b5d12da3a712a538a3f6f3506ab623e6e68adc4b0412d24a3.

Listen Notes. “Christ’s Return - Part 2 - 2 Peter 3:1-18 - Milton Community Church (Podcast),” August 16, 2020. https://www.listennotes.com/podcasts/milton-community/christs-return-part-2-2-ixP1GLQz-09/.

Liu Dongsheng 刘东升. “Beiwei Nanbei Shangshu Zhidu Kao 北魏南北尚书制度考 [An Investigation into the Northern and Southern Shangshu System in Northern Wei].” *Beifang Luncong* 北方论丛, no. 1 (2017): 86–90.

Liu, Jennifer. “Painting the Formless and Strumming the Soundless: Yang Xiong’s Taixuan Jing as Expression of the Absolute.” PhD, University of Washington, 2019. https://digital.lib.washington.edu:443/researchworks/handle/1773/43866.

Liu Jiahe 刘家和, Liu Linhai 刘林海. “3-6 shijie zhongxie lishi ji wenming fazhan bijiao yanjiu 3-6 世纪中西历史及文明发展比较研究 [A Comparative Study between the Roman

World and China on the History and Civilization from the 3rd to 6th Century].” *Beijing shifan daxue xuebao* 北京师范大学学报 (社会科学版) 0, no. 5 (November 4, 2019): 73–99.

Liu, Puning. *China’s Northern Wei Dynasty, 386-535: The Struggle for Legitimacy*. Asian States and Empires 19. London: Routledge, 2021.

Lluch, Jaime. “Varieties of Territorial Pluralism: Prospects for the Constitutional and Political Accommodation of Puerto Rico in the USA.” In *Constitutionalism and the Politics of Accommodation in Multinational Democracies*, edited by Jaime Lluch, 21–45. Springer, 2014.

Loewe, Michael. “Cai Yong 蔡邕: A Neglected Figure of Late Eastern Han.” *Journal of the American Oriental Society* 142, no. 3 (September 2022): 503–22.

———. “‘Confucian’ Values and Practices in Han China.” *T’oung Pao* 98, no. 1–3 (January 1, 2012): 1–30. https://doi.org/10.1163/156853212X629884.

———. *The Men Who Governed Han China: Companion to A Biographical Dictionary of the Qin, Former Han and Xin Periods*. Brill, 2004. https://doi.org/10.1163/9789047413363_017.

———. “The Organs of Han Imperial Government: *Zhongdu Guan, Duguan, Xianguan and Xiandao Guan*.” *Bulletin of the School of Oriental and African Studies* 71, no. 3 (October 2008): 509–28. https://doi.org/10.1017/S0041977X08000864.

Lou Jin 劲楼. *Beiwei kaiguo shitan* 北魏开国史探 *[An Investigation into the History of the Northern Wei Founding]*. Beijing: Zhongguo shehui kexue chuban she *中国社会科学出版社*, 2017.

Lou Jin 楼劲. “Beiwei Taiwu Di ‘Gaiding Lü Zhi’ Kao 北魏太武帝 ‘改定《 律》 制’ 考 [Investigation into Northern Wei Emperor Taiwu’s Order Reforming the Statutes].” *Wenshi* 文史 4 (2014): 37–54.

———. “Beiwei Tianxing ‘Lüling’ de Xingzhi He Xingtai 北魏天兴 ‘律令’ 的性质和形态 [The Nature and Form of the Statutes and Edicts of the Tianxing Era of the Northern Wei].” *Wenshi Zhe* 文史哲 2 (2019): 112–26.

Lü Zongli 吕宗力 and Zhang Zhenglang 张政烺, eds. *Zhongguo lidai guanzhi da cidian* 中国历代官制大辞典 *[Big Dictionary of Chinese Historical Bureaucracy]*. Shangwu yinshu guan *商务印书馆*, 1994.

Ma, Jingyuan, and Mel Marquis. “Moral Wrongfulness and Cartel Criminalization in East Asia.” *Arizona Journal of International and Comparative Law* 35 (2018): 377.

MacCormack, Geoffrey. “Filial Piety and the Pre-T’ang Law,” n.d.

———. “From Zei 賊 to Gu Sha 故殺: A Changing Concept of Liability in Traditional Chinese Law.” *Journal of Asian Legal History*, 2007. https://kuscholarworks.ku.edu/handle/1808/3849.

Maccormack, Geoffrey. “The Transmission of Penal Law (Lü) from the Han to the T’ang: A Contribution to the Study of the Early History of Codification in China.” *Revue Internationale Des Droits de l’antiquité* 51 (2004): 47–83.

Maki, Fukagawa. “Understanding ‘Confucianism Becoming the Dominant School of Thought.’” *Contemporary Chinese Thought* 51, no. 2 (April 2, 2020): 123–39. https://doi.org/10.1080/10971467.2020.1800903.

Marsh, Robert M. “Weber’s Misunderstanding of Traditional Chinese Law.” *American Journal of Sociology* 106, no. 2 (September 2000): 281–302. https://doi.org/10.1086/316966.

Matsushita Kenichi 松下憲一. “Hokugi saikō kuni-shi jiken -- hōsei kara no saikentō 北魏崔浩國史事件--法制からの再檢討 [The Incident of Cui Hao’s Dynastic History During the Northern Wei--A Reexamination from the Perspective of the Legal System].” *Tōyōshikenkyū* 東洋史研究 69, no. 2 (September 2010): 205–32. https://doi.org/10.14989/180040.

Mittag, Achim, and Ye Min. “Empire on the Brink: Chinese Historiography in the Post-Han-Period.” In *Conceiving the Empire: China and Rome Compared*, edited by Fritz-Heiner Mutschler and Achim Mittag. Oxford University Press, 2008.

Morgan, Daniel Patrick, Damien Chaussende, and Karine Chemla, eds. *Monographs in Tang Official Historiography: Perspectives from the Technical Treatises of the History of Sui (Sui Shu)*. Springer Nature, 2019.

Mungello, D. E. *Curious Land: Jesuit Accommodation and the Origins of Sinology*. University of Hawaii Press, 1988.

Ngai, Mae. “Opinion | Ron DeSantis ‘Banned China From Buying Land in the State of Florida.’ How Did We Get Here?” *The New York Times*, December 11, 2023, sec. Opinion. https://www.nytimes.com/2023/12/11/opinion/chinese-people-property-sale.html.

Ngai, Mae M. “The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924.” In *Race, Law and Society*. Routledge, 2007.

Niu Runzhen 牛润珍. “Beiwei Shiguan Zhi Yu Guoshi Zuanxiu 北魏史官制度与国史纂修 [The Historiographer’s Office and the Writing of National History in Northern Wei].” *Shixueshi Yanjiu* 史学史研究, no. 2 (2009): 16–29.

North China Herald. “Execution by Strangling.” May 6, 1876, Vol. XVI, No. 469 edition.

Nylan, Michael. “A Problematic Model: The Han ‘Orthodox Synthesis,’ Then and Now.” In *Imagining Boundaries: Changing Confucian Doctrines, Texts, and Hermeneutics*, edited by Kai-wing Chow, On-cho Ng, and John B. Henderson, 17–56. Albany: SUNY Press, 1999.

———. *The Chinese Pleasure Book*. New York: Zone Books, 2018.

———. *The Five “Confucian” Classics*. Yale University Press, 2008.

Nylan, Michael, and Michael Loewe. *China’s Early Empires: A Re-Appraisal*. Cambridge University Press, 2010.

Nylan, Michael, and Thomas Wilson. *Lives of Confucius: Civilization’s Greatest Sage Through the Ages*. Crown, 2010.

Park, Peter K. J. *Africa, Asia, and the History of Philosophy: Racism in the Formation of the Philosophical Canon, 1780-1830*. SUNY Press, 2013.

Parker, Kunal M. *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000*. Cambridge University Press, 2015.

Pearce, Scott. “Northern Wei.” In *The Cambridge History of China: Volume 2: The Six Dynasties, 220–589*, edited by Albert E. Dien and Keith N. Knapp, 2:155–83. The Cambridge History of China. Cambridge: Cambridge University Press, 2019. https://www.cambridge.org/core/books/cambridge-history-of-china/northern-wei/44687DABD9B387BEB77442A1559AB8FD.

———. *Northern Wei (386-534): A New Form of Empire in East Asia*. New York, NY: Oxford University Press, 2023.

———. “Status, Labor, and Law: Special Service Households Under The Northern Dynasties.” *Harvard Journal of Asiatic Studies* 51, no. 1 (1991): 89–138. https://doi.org/10.2307/2719243.
Pee, Christian De. “Cycles of Cathay: Sinology, Philology, and Histories of the Song Dynasty (960–1279) in the United States” 2 (2012).
Peerenboom, Randall. “The X-Files: Past and Present Portrayals of China’s Alien Legal System.” *Washington University Global Studies Law Review* 2 (2003): 37.
Pelikan, Jaroslav. *Jesus Through the Centuries: His Place in the History of Culture*. Yale University Press, 1999.
Philippon, Valentin. “Médecine et médecins dans l’historiographie chinoise. Biographies de médecins et anecdotes médicales dans les vingt-six histoires (Ershiliu shi 二十六史).” PhD, Université Paris sciences et lettres, 2019.
Pokora, T. “The Canon of Laws by Li K’uei-A Double Falsification?” *Archív Orientální* 27, no. 1 (1959): 96–121.
Pulleyblank, E. G. “Karl A. Wittfogel, Oriental Despotism (Book Review).” *Journal of the Economic and Social History of the Orient* 1, no. 3 (October 1, 1958): 348–50.
Qin Shuangxing 秦双星. “Gusheng Yu Minyi: Yi Dengwen Gu Zhidu Weilie de Jiedu 鼓声与民意—以登闻鼓制度为例的解读 [Beating Drums and Public Opinion: An Interpretation Based on the Example of the Petition Drum System].” *Hebei Faxue* 河北法学 29, no. 11 (2011): 160–64.
Queen, Sarah A., and Michael Puett, eds. *The Huainanzi and Textual Production in Early China*. Studies in the History of Chinese Texts, volume 5. Leiden ; Boston: Brill, 2014.
Quesnay, François. “Despotisme de la Chine, par François Quesnay (1767).” *Institut Coppet* (blog). Accessed November 25, 2023. https://www.institutcoppet.org/despotisme-de-chine-francois-quesnay-1767/.
Reed, Annette Yoshiko. “From Sacrifice to the Slaughterhouse: Ancient and Modern Approaches to Meat, Animals, and Civilization.” *Method & Theory in the Study of Religion* 26, no. 2 (May 6, 2014): 111–58. https://doi.org/10.1163/15700682-12341269.
Rickett, W. Allyn. “Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity.” *The Journal of Asian Studies* 30, no. 4 (August 1971): 797–814. https://doi.org/10.2307/2052988.
Rogacz, Dawid. “The Idea of Supreme Peace (Taiping) in Premodern Chinese Philosophies of History.” *Asian Studies* 10, no. 1 (January 19, 2022): 401–24. https://doi.org/10.4312/as.2022.10.1.401-424.
Ruskola, Teemu. *Legal Orientalism: China, the United States, and Modern Law*. Cambridge, Mass.: Harvard University Press, 2013.
Salyer, Lucy E. *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*. Univ of North Carolina Press, 1995.
Sands, Leo. “How Often Do Men Think about Ancient Rome? Quite Frequently, It Seems.” *Washington Post*, September 15, 2023. https://www.washingtonpost.com/lifestyle/2023/09/14/roman-empire-trend-men-tiktok/.
Sanft, Charles. “Six of One, Two Dozen of the Other: The Abatement of Mutilating Punishments under Han Emperor Wen.” *Asia Major* 18, no. 1 (2005): 79–100.
Scheidel, Walter. “Fiscal Regimes and the ‘First Great Divergence’ between Eastern and Western Eurasia.” In *Tributary Empires in Global History*, edited by Peter Fibiger Bang

and C. A. Bayly, 193–204. Cambridge Imperial and Post-Colonial Studies Series. London: Palgrave Macmillan UK, 2011. https://doi.org/10.1057/9780230307674_11.

Shi Dongmei 石冬梅. "Lun Beiwei Taihe Xin Guanzhi de Yuanyuan Ji Qi Yingxiang 論北魏太和新官制的淵源及其影響 [On the Source and Influence of the New Official System of the Northern Wei Dynasty]." *Hanxue Yanjiu* 漢學研究 25, no. 2 (December 1, 2007): 41–74.

Shwu-Yuan Lee 李淑媛. "Tangdai de 'Dianmai Qinü' Xianxiang: Yi Lüling Wei Zhongxin 唐代的「典賣妻女」現象－以律令為中心 [A Study the Phenomenon of Wife and Daughter Pawning and Selling in the Tang Dynasty: Focusing on the Statutes and Edicts]." *Taiwan Shida Lishi Xuebao* 臺灣師大歷史學報, no. 42 (December 1, 2009): 51–80. https://doi.org/10.6243/BHR.2009.042.051.

Siems, Mathias. *Comparative Law*. Cambridge University Press, 2018.

Smith, Kidder. "Sima Tan and the Invention of Daoism, 'Legalism,' et Cetera." *The Journal of Asian Studies* 62, no. 1 (February 2003): 129–56. https://doi.org/10.2307/3096138.

Sommer, Matthew. "The Field of Qing Legal History." In *A Scholarly Review of Chinese Studies in North America*, edited by Haihui Zhang, Zhaohui Xue, Shuyong Jiang, and Gary Lance Lugar, 113–32. Asia Past & Present: New Research from AAS. Association for Asian Studies, Inc., 2013. https://www.asianstudies.org/wp-content/uploads/A_Scholarly_Review_ePDF.pdf#page=122.

Spierenburg, Petrus Cornelis. *The Spectacle of Suffering: Executions and the Evolution of Repression: From a Preindustrial Metropolis to the European Experience*. Cambridge University Press, 1984.

Tanner, Harold Miles. *China: A History*. Hackett Publishing, 2009.

Tchen, John Kuo Wei. *New York Before Chinatown: Orientalism and the Shaping of American Culture, 1776-1882*. JHU Press, 2001.

The Economist. "Transcript: An Interview with Marco Rubio." Accessed November 21, 2023. https://www.economist.com/democracy-in-america/2018/05/14/transcript-an-interview-with-marco-rubio.

The New York Times. "Foo-Che-Pang." June 8, 1876.

"The Project Gutenberg eBook of Voltaire's Philosophical Dictionary." Accessed November 25, 2023. https://www.gutenberg.org/files/18569/18569-h/18569-h.htm.

Tobin, David. "The 'Xinjiang Papers': How Xi Jinping Commands Policy in the People's Republic of China." University of Sheffield, School of East Asian Studies, May 19, 2022. https://www.sheffield.ac.uk/seas/news/xinjiang-papers-how-xi-jinping-commands-policy-peoples-republic-china.

Tomō Uchida 内田智雄. *Yakuchū Chūgoku Rekidai Keihō Kokorozashi* 訳注中国歴代刑法志 *[Translations and Annotations of the Chinese Treatises on Law and Punishment of Each Dynasty]*. Tokyo: Sōbunsha *創文社*, 1964.

Tseng, Chin-Yin. "Imagining the Self in Northern Wei: Case Studies of Shaling M7 and Yanbei Shiyuan M5." In *Early Medieval North China: Archaeological and Textual Evidence*, edited by Shing Müller, Thomas O. Höllmann, and Sonja Filip, 113–31. Asiatische Forschungen, Band 159. Wiesbaden: Harrassowitz Verlag, 2019.

———. "The Making of the Tuoba Northern Wei: Constructing Material Cultural Expressions in the Northern Wei Pingcheng Period (398–494 CE): Constructing Material Cultural

Expressions in the Northern Wei Pingcheng Period (398–494 CE).” PhD, University of Oxford, 2012. https://doi.org/10.30861/9781407311883.

Turner Karen, ed. *Meiguo xuezhe lun zhongguo falü chuantong* 美国学者论中国法律传统 *[American Scholars Talking about the Tradition of Chinese Law]*. Qinghua daxue chubanshe youxian gongsi *清华大学出版社有限公司*, 2004.

Uchida Ginpu 内田吟风. “‘Weishu Xingfa Zhi’ Que Ye Kao 《魏书 · 刑罚志》缺页考 [A Study of the Missing Page of the *History of Wei* Treatise on Penal Law].” Translated by Chen Han 陈翰. *Guji Zhengli Yanjiu Xuekan* 古籍整理研究学刊 1 (1986): 66–71.

Wallacker, Benjamin E. “Han Confucianism and Confucius in Han.” In *Ancient China: Studies in Early Civilization*, edited by David T. Roy and Tsuen-hsuin Tsien, 215–28. Hong Kong: The Chinese University Press, 1978.

Wang Hongbin 王宏彬. “Woguo Gudai Xingzheng Jiancha Zhidu de Lishi Shanbian 我国古代行政监察制度的历史嬗变 [The History and Evolution of China’s Ancient Administrative Inspection System].” *Heilongjiang Shehui Kexue* 黑龙江社会科学, no. 3 (2002): 62–65.

Wang Huijuan 王慧涓. “Beiwei Xiaowen Di Hanhua Gaige Dui Shangshu Zhidu de Yingxiang 北魏孝文帝汉化改革对尚书制度的影响 [The Influence of Emperor Xiaowen’s Sinicization Reform on the Shangshu System].” *Longdong Xueyuan Xuebao* 陇东学院学报 25, no. 4 (2014): 49–52.

Wang, Tao. “The Temporality of Law in Traditional China and Its Contemporary Implications.” *Loyola University Chicago International Law Review* 18 (2022): 133.

Wang Xiaoxiao 王宵宵 and Hu Xiangqin 胡祥琴. “Lunshi ‘Weishu Guanshizhi’ de Chuangzuo Yitu Ji Jiazhi 试论《魏书·官氏志》的创作意图及价值 [A Tentative Discussion on the Creative Intentions and Value of the History of Wei Treatise on Offices and Lineages].” *Shanxi Datong Daxue Xuebao: Shehui Kexue Xuebao* 山西大同大学学报：社会科学版 34, no. 4 (2020): 38–43.

Wang Zhigang 王志刚. “Beichao Minzu Shi Zhuanshu de Fazhan 北朝民族史撰述的发展 [The Development of the Writing of Northern Dynasty Ethnic History].” *Shixue Shi Yanjiu* 史学史研究 1 (2007): 24–29.

———. “Shilun ‘Weishu’ Dianzhi de Lishi Bianzuan Xue Jiazhi 试论《魏书》 典志的历史编纂学价值 [Discussing the Historiographical Value of the History of Wei’s Records of Laws and Institutions].” *Shixue Jikan* 史学集刊 2 (2008).

Weir, David. *American Orient: Imagining the East from the Colonial Era Through the Twentieth Century*. University of Massachusetts Press, 2011.

Whitman, James Q. *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*. Oxford University Press, 2005.

Wilkinson, Endymion Porter. *Chinese History: A New Manual*. Fiftieth anniversary edition. Enlarged sixth edition. Cambridge, Massachusetts: Harvard University Asia Center, 2022.

Wittfogel, Karl A. “Chinese Society: An Historical Survey.” *The Journal of Asian Studies* 16, no. 3 (May 1957): 343–64. https://doi.org/10.2307/2941230.

Wittfogel, Karl August. *Oriental Despotism: A Comparative Study of Total Power*. 1st Vintage Books ed. New York: Vintage Books, 1981.

WNYC Studios. “What the Press and ‘The Post’ Missed | On the Media.” Accessed November 21, 2023. https://www.wnycstudios.org/podcasts/otm/segments/what-post-missed-episode.

Wu Danyang 吴丹阳. “Quan Beiqi Wen Jiaozhu 全北齐文 校注 [Collation and Annotation of Complete Northern Qi Prose].” Masters, Guanxi University *广西大学*, 2018.

Wu Huaiqi. *An Historical Sketch of Chinese Historiography*. Springer, 2018.

Wu, Wei, and Tom Vander Beken. “The Evolution of Criminal Interrogation Rules in China.” *International Journal of Law, Crime and Justice* 40, no. 4 (December 1, 2012): 271–95. https://doi.org/10.1016/j.ijlcj.2011.09.007.

Xie, Baocheng. *A Brief History of the Official System in China*. Economic History in China Series. London: Paths International Ltd, 2013.

Xin Yugang 辛宇罡. “Cong Fei Yangpi Mai Nü an Kan Beichao Falü Dui Lijiao de Qucong 从费羊皮卖女案看北朝法律对礼教的屈从 [Seeing the Submission of Northern Dynasties Law to Confucian Ritual from the Case of Fei Yangpi Selling His Daughter].” *Fazhi Yu Shehui* 法制与社会 8 (2009).

Xu Meili 徐美莉. “Zailun Beiwei Qianqi Shangshu Zhidu de Zhifei Yu Biange 再论北魏前期尚书制度的置废与变革 [A Reexamination of the Establishment, Abolition, and Reform of the Early Northern Wei Shangshu System].” *Liaocheng Daxue Xuebao: Shehui Kexue Ban* 聊城大学学报：社会科学版, no. 2 (2013): 71–77.

Yan Yaozhong 严耀中. “Beiwei Chengwen Fa Yu Sifa Shijian de Guanxi 北魏成文法与司法实践的关系 [The Relationship Between Northern Wei Written Law and Judicial Practice].” *Huadong Shifan Daxue Xuebao* 华东师范大学学报 53, no. 6 (November 15, 2021): 3–11. https://doi.org/10.16382/j.cnki.1000-5579.2021.06.001.

———. *Erchong Zou: Beiwei Qianqi Zhengzhi Zhidu* 二重奏: 北魏前期政治制度 *[Duet: The Early Northern Wei Political System]*. Di 1 ban. Shanghai: Zhongxi shuju *中西書局*, 2019.

Yang, Shao-Yun. “Becoming Zhongguo, Becoming Han: Tracing and Reconceptualizing Ethnicity in Ancient North China, 770 BC-AD 581.” Masters, National University of Singapore, 2007.

Yang, Shao-yun. “Making Sense of Messianism: Buddhist Political Ideology in the Mahayana Rebellion and the Moonlight Child Incident of Early Sixth-Century China,” n.d. https://d1wqtxts1xzle7.cloudfront.net/32186357/Making_Sense_of_Messianism-libre.pdf?1391539525=&response-content-disposition=inline%3B+filename%3DMaking_Sense_of_Messianism_Buddhist_Poli.pdf&Expires=1701749593&Signature=QdvxvXtdRSUajIRLZlH7NdjC-GYvM3y4Bxy5QWsCbz8OtEgOTELRbWkq2e~Y06J6gcVsPsHfZ0n8zz18S0zpiTYb~M7xAJLHZjCUwFr7Q-yaF4XHXNywjvz~QhyBeQt1V2PaXnXindvX2Qz1VwFN4N3Ks-DF67Vq5ny0y4GGxzSa2MYtMdy-Sjm0ShrW7ybx~qVN9tBzfZB1UcdnaduMC4HrbEohwxNtLxtqC9nFhN2XK9vUx4h-c~ugMlD5Tbh8K-AE3x7stiPnve8kFN4B3pkSo-Gcr0iB6aLaoh585X3Thrfkc4Tqfa46G7mI8~-NpHcg1Ah771pinwxH~N6sQw__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA.

Yang, Yuan. “Jing Tsu: ‘The Days of Armchair Scholarship Are over If You’Re Studying China.’” *Financial Times*, February 10, 2023.

Yin Xiaohu 殷啸虎. “‘Fajing’ Xinbian 《法经》考辨 [Examination and Verification of the *Classic of Laws*].” *Faxue* 法学, no. 12 (1993): 34–36.

Yu, Leo. “From Criminalizing China to Criminalizing the Chinese.” SSRN Scholarly Paper. Rochester, NY, 2023. https://papers.ssrn.com/abstract=4250525.

Yu Lunian 俞鹿年. *Zhongguo guanzhi da cidian* 中國官制大辭典 *[Big Dictionary of Chinese Bureaucracy]*. Hong Kong: Zhonghua shuju *中華書局(香港)有限公司*, 2020.

Zang, Don S. “The West in the East: Max Weber’s Nightmare in ‘Post-Modern’ China.” *Max Weber Studies* 14, no. 1 (2014): 33–53.

Zeng, Chi. “‘Confucianization of Law’ Revisited.” *Asian Philosophy* 31, no. 1 (January 2, 2021): 88–103. https://doi.org/10.1080/09552367.2020.1815987.

Zenz, Dr Adrian. “The Xinjiang Papers: An Introduction.” *The Uyghur Tribunal*, February 10, 2022. https://uyghurtribunal.com/wp-content/uploads/2021/11/The-Xinjiang-Papers-An-Introduction-1.pdf.

Zhang Jihao 張繼昊. “Tuoba gui de jueqi yu Beiwei wangchao de zhaojian 拓跋珪的崛起與北魏王朝的肇建 [The Rise of Tuoba Gui and the Founding of the Tuoba Court].” *Kongda renwen xuebao* 空大人文學報 9 (October 2000): 131–64.

Zhang, Jinfan. *The History of Chinese Legal Civilization: Ancient China—From About 21st Century B.C. to 1840 A.D.* Singapore: Springer Nature, 2020.

Zhang Jinfan 张普藩. “Zhongguo Fazhi Shixue Fazhan Licheng de Fansi He Qiwang 中国法制史学发展历程的反思和期望 [Reflections on and Hope for the Process of Historical Development of the Historical Study of Chinese Law].” *US-China Law Review* 美中法律评论 3, no. 1 (2006).

Zhang, Taisu. *The Laws and Economics of Confucianism: Kinship and Property in Pre-Industrial China and England*. Cambridge Studies in Economics, Choice, and Society. Cambridge [UK] ; New York: Cambridge University Press, 2019.

Zhang Wenjie 張文杰. “Beiwei Qianqi de Neishi Guan: Yi Wencheng Di ‘Nanxun Bei’ Wei Zhongxin 北魏前期的內侍官── 以文成帝 [南巡碑] 為中心 [Palace Attendants of the Early Northern Wei, Focusing on the ‘Nanxun Stele’ of Emperor Wencheng].” *Xingda Lishi Xuebao* 興大歷史學報 30 (2016): 19–50.

Zhao, Dingxin. *The Confucian-Legalist State: A New Theory of Chinese History*. Oxford Studies in Early Empires. Oxford: Oxford University Press, 2015.

Zheng Qinren 鄭欽仁. *Beiwei guanliao jigo yanjiu xupian* 北魏官僚機構研究續篇 *[A Continuation of Research on Northern Wei Administrative Organization]*. Daohe chuban she *稻禾出版社*, 1995.

———. *Beiwei Guanliao Jigou Yanjiu* 北魏官僚機構研究 *[Research on the Bureaucratic Organization of the Northern Wei]*. Taipei: Mutong chubanshe *牧童出版社*, 1976.

“Zhongyuan.” In *Wikipedia*, July 24, 2023. https://en.wikipedia.org/w/index.php?title=Zhongyuan&oldid=1166879725.

Zhou Dongping 周东平 and Xue Yifeng 薛夷风. “Beichao Huhan Ronghe Shiyu Xia Zhongguo ‘Wuxing’ Xingfa Tixi Xingcheng Shi Xinlun 北朝胡汉融合视域下中古‘五刑’刑罚体系形成史新论 [On a New Theory of the History Regarding the Formation of the

Medieval Penalty System of 'Five Punishments' against the Backdrop of the Hu-Han Fusion in Northern Dynasty]." *Xueshu Yuekan* 學術月刊 53 (March 2021): 181–92.

Zhou Huilei 周会蕾. "Wanqing Zhongguo Fazhi Shixue Ke de Chansheng Yu Fazhan 晚清中国法制史学科的产生与发展 [The Production and Development of the Discipline of Chinese Legal History in the Late Qing]." *Henan Jiaoyu Xueyuan Xuebao* 河南教育学院学报：哲学社会科学版 35, no. 6 (2016): 73–76.

Zhou Yiliang 周一良. *Weijin nanbei chao shi lunji* 魏晉南北朝史論集 *[Studies on the History of Wei, Jin, and the Northern and Southern Dynasties]*. Beijing: Zhonghua shuju *中華書局*, 1963.

Zu Wei 祖伟 and Jiang Jingkun 蒋景坤. "Zhongguo Gudai 'Juzhuang Duanzhi' Zhengju Guize Lunxi 中国古代'据状断之'证据规则论析 [Discussion and Analysis of the 'Material Evidence' Rule of Proof in Ancient China]." *Fazhi Yu Shehui Fazhan* 法制与社会发展 4 (2011): 111–22.

Županov, Ines G., ed. *The Oxford Handbook of the Jesuits*. Oxford University Press, 2017. https://doi.org/10.1093/oxfordhb/9780190639631.001.0001.

Zurndorfer, H. T. "Not Bound to China: Etienne Balazs, Fernand Braudel and the Politics of the Study of Chinese History in Post-War France." *Past & Present* 185, no. 1 (November 1, 2004): 189–221. https://doi.org/10.1093/past/185.1.189.

Appendix A: Chronology

Dynasties

Xia 夏 (end c. 1600 BCE)

Shang 商 (c. 1600-1045 BCE)

Zhou 周 (c. 1046-256 BCE)

Warring States 戰國 (c. 476-221 BCE)

Qin 秦 dynasty (221-206 BCE)

Western Han 西漢 dynasty (202 BCE-9 CE)

Eastern Han 東漢 dynasty (25-220 CE)

Cao Wei 曹魏 dynasty (220-266 CE)

Jin dynasty 晉 (266-420 CE)

Northern Wei 北魏 dynasty (386-535 CE)

Sui dynasty 隋 (581-618 CE)

Tang dynasty 唐 (618-907 CE)

Northern Wei Rulers (with era names when mentioned in the legal treatise)

Tuoba Gui 拓拔珪, Emperor Daowu 道武帝 (r. 386-409)

Tuoba Si 拓拔嗣, Emperor Mingyuan 明元帝 (r. 409-423)

Tuoba Tao 拓拔燾, Emperor Taiwu 太武帝 (r. 423-452 CE), temple name Shizu 世祖

Shenjia 神䴥 era (428-431 CE)

Taiyan era 太延 (435-440 CE)

Zhenjun era 真君 (440-451 CE)

Zhengping 正平 era (451-452 CE)

Tuoba Jun 拓拔濬, Emperor Wencheng 文成帝 (r. 452-465 CE), temple name Gaozong 高宗

Taian 太安 era (455-459 CE)

Heping 和平 era (460-465 CE)

Tuoba Hong 拓拔弘, Emperor Xianwen 獻文帝 (r. 465-471), temple name Xianzu 顯祖

Tuoba/Yuan Hong 拓拔宏/元宏 , Emperor Xiaowen 孝文帝 (r. 471-499 CE), temple name Gaozu 高祖

Yanxing 延興 era (471-476 CE)

Taihe 太和 era (477-499 CE)

Yuan Ke 元恪, Emperor Xuanwu 宣武帝 (r. 499-515 CE), temple name Shizong 世宗

Zhengshi 正始 era (504-508 CE)

Yongping 永平 era (508-512 CE)

Yanchang 延昌 era (512-515 CE)

Yuan Xu 元詡, Emperor Xiaoming 孝明帝 (r. 516-528 CE), temple name Suzong 肅宗

Xiping 熙平 era (516-518 CE)

Shengui 神龜 era (518-520 CE)

Xiaochang 孝昌 era (525-527 CE)

Post-Wei

Tianping 天平 era (534-537 CE)

Xinghe 興和 era (539-542 CE)

Wuding 武定 era (543-550 CE)

Appendix B: The *History of Wei* Treatise on Punishments 魏書 刑罰志

Editions relied upon (with acronyms used throughout)

GC

Gao Chao 高潮 and Ma Jianshi 马建石. *Zhongguo lidai xingfazhi zhushi* 中国历代刑法志注译 [Annotations and Translations of Chinese Historical Treatises on Law and Punishment]. Jilin renmin chubanshe, 1994.

TU

Tomō Uchida 内田智雄. *Yakuchū Chūgoku rekidai keihōshi* 譯注中国历代刑法志 [Translations and Annotations of the Chinese Treatises on Law and Punishment of Each Dynasty]. Tokyo: Sōbunsha, 1964.

For titles:

BD

Loewe, Michael. *A Biographical Dictionary of the Qin, Former Han and Xin Periods (221 BC-AD 24)*. Brill, 2000. (Titles appear on pp. 758-768.)

Supplemented by (when not available in Loewe):

DOTIC

Hucker, Charles. *A Dictionary of Official Titles in Imperial China*. Stanford: Stanford University Press, 1985.

二儀既判，匯品生焉，五才兼用，廢一不可。金木水火土，咸相愛惡。陰陽所育，稟氣呈形，鼓之以雷霆，潤之以雲雨，春夏以生長之，秋冬以殺藏之。斯則德刑之設，著自神道。聖人處天地之間，率神祇之意。生民有喜怒之性，哀樂之心，應感而動，動而逾變。淳化所陶，以下淳樸。故異章服，畫衣冠，示恥申禁，而不敢犯。其流既銳，奸黠萌生。是以明法令，立刑賞。

Origins of Punishments

After the two primordial principals were divided, the multitudinous things were born, all of them relying on the Five Phases, of which all were necessary. Metal, wood, water, fire, and earth all hate and love each other.[599] The myriad things were nourished by *yin* and *yang*, and their innate spirits took shape. They were shaken by lightning and thunder, watered by cloud and rain; spring and summer was for their birth and growth, and autumn and winter for their death and harvest. Thus, the establishment of virtuous punishments was made evident by this spiritual way. Sages stand between Heaven and Earth, following the intentions of the spirits. The people have natures[600] of delight and anger, and hearts[601] of sorrow and pleasure[602]: responding to stimuli, they are moved; being moved, they change again. If what transforms them is simple and honest, those below become simple and honest. Therefore, outlandish garments and painted clothing and hats were used to display shame and make restrictions known, and the people did not dare to violate the laws. Once the current of this tradition dwindled, the seeds of treachery and deceit sprouted, at which point laws and ordinances were clarified and punishments and rewards established.

[599] A reference to the theory of mutual conquest and mutual generation of the Five Phases. "The scheme of the *Wu xing* 五行, Five Elements, Agents or Phases, embraces a whole range of concepts. They cover those of a cosmology whereby the universe operates, and the correlation therewith of the qualities, characteristics and functions of all manner of things both seen and unseen. Those who acquired dynastic power would seek the support of the *Wu xing* to strengthen their claims." Michael Loewe, *The Men Who Governed Han China: Companion to A Biographical Dictionary of the Qin, Former Han and Xin Periods* (Brill, 2004), 457, https://doi.org/10.1163/9789047413363_017.

[600] "Human nature (*xing* 性) endowed at birth." Michael Nylan, *The Chinese Pleasure Book* (New York: Zone Books, 2018), 165.

[601] "In addition to the sensory organs, with their range of dispositions, humans — unlike the beasts — come equipped with another faculty, the feeling and thinking heart (*xin* 心), whose function it is to process contacts made through the sensory receptors and correlate those impressions with stored memories of preceding encounters, resulting in more deliberate, that is, mindful and committed, actions to some ends, but not others. Such deliberations, made time and time again, inform and affect the dispositions prior to the self's taking action, we learn; habits of reflection can become second nature." Nylan, 180–81.

[602] This delight *xi* 喜 "connotes short-term delight that is not necessarily wrong in itself, but that may conduce to eventual harm, insofar as it consumes bodily resources without replenishing them." Nylan, 42.

故《書》曰：

> 「象以典刑，流宥五刑，鞭作官刑，撲作教刑，金作贖刑，怙終賊刑，眚災肆赦。」

舜命咎繇曰：

> 「五刑有服，五服三就，五流有宅，五宅三居。」

夏刑則大闢二百，臏闢三百，宮闢五百，劓墨各千。殷因於夏，蓋有損益。《周禮》：建三典，刑邦國，以五聽求民情，八議以申之，三刺以審之。左嘉石，平罷民；右肺石，達窮民。宥不識，宥過失，宥遺忘；赦幼弱，赦耄耋，赦蠢愚。

周道既衰，穆王荒耄，命呂侯度作祥刑，以詰四方，五刑之屬增矣。夫疑獄泛問，與眾共之，眾疑赦之，必察小大之比以成之。先王之愛民如此，刑成而不可變，故君子盡心焉。

Therefore, the *Documents* says:

> Representation was used for the constant punishments. Banishment mitigated the Five Mutilating Punishments. Whips were official punishments and rods were instructive punishments. Metal was used to redeem punishments. Those who persisted in doing harm were punished, while those whose crimes were unfortunate accidents were spared.

Shun ordered Gao Yao:

> The five kinds of punishments shall have their applications, the five kinds of applications shall have three kinds of gradations. The five kinds of banishments shall have their localities, the five kinds of localities shall have three kinds of specific places.[603]

The Xia punishments had two hundred articles on capital punishment, three hundred on kneecapping, five hundred on castration, and one thousand each on nose cutting and tattooing. Yin relied on Xia, though with some additions and subtractions. According to the *Rites of Zhou*[604]: three constant punishments were established to deal with states; the Five Indications[605] were used to seek out people's dispositions; the Eight Deliberations[606] were used to explicate their cases; and the Three Investigations[607] was used to examine cases. To the left of the court's entrance, a beautiful rock regulated people who had committed minor offenses; to the right, a red one allowed poor people to express their complaints.[608] Ignorance was pardoned, mistake was pardoned, negligence was pardoned. The very young were amnestied, the very old were amnestied, the imbeciles were amnestied.

Once the way of Zhou had declined, King Mu [r. 10th c. BCE], then an old man, ordered the Lord of Lü to create propitious punishments to govern the Four Directions. The number of articles pertaining to the Five Mutilating Punishments increased. In doubtful cases, broad surveys were made, including the masses. When the masses were in doubt, defendants were amnestied. All sorts of comparable cases would always be consulted to reach a decision. Early kings cherished their people like this. Because punishments could not be altered once imposed, the wise dedicated themselves entirely to adjudication.

---

[603] A slight modification of Martin Kern's translation. Martin Kern, "Language and the Ideology of Kingship in the 'Canon of Yao,'" in *Origins of Chinese Political Philosophy: Studies in the Composition and Thought of the Shangshu (Classic of Documents)*, ed. Martin Kern and Dirk Meyer (Brill, 2017), 49, https://doi.org/10.1163/9789004343504_003.

[604] The *Rites of Zhou* 周禮 "gives an elaborately laid out and detailed description of what purports to be the governmental and administrative structure and organisation of the royal state of" Zhou. The text "is not known before the" Western Han. William G. Boltz, "*Chou Li* 周禮," in *Early Chinese Texts: A Bibliographical Guide*, ed. Michael Loewe (Society for the Study of Early China, 1993), 24–25.

[605] Five indications of the truthfulness of defendants or witnesses to which interrogators were supposed to pay attention: speech, expression, breathing, ears, and eyes.

[606] Eight categories of people who were entitled to special consideration for leniency in their cases.

[607] In capital cases (according to this supposed model), execution would be carried out only if the senior ministers, the officials, and the people all agreed.

[608] Edouard Biot, trans., *Le Tcheou-li ou Rites des Tcheou*, 1851, 302, https://www.google.com/books/edition/Le_Tcheou_li_ou_Rites_des_Tcheou_tr_par/13sIAAAAQAAJ?hl=en&gbpv=1&dq=Le+Tcheou+li+ou+Rites+des+Tcheou&printsec=frontcover.

逮於戰國，競任威刑，以相吞噬。商君以《法經》六篇，入說於秦，議參夷之誅，連相坐之法。風俗凋薄，號為虎狼。及於始皇，遂兼天下，毀先王之典，制挾書之禁，法繁於秋荼，網密於凝脂，奸偽並生，赭衣塞路，獄犴淹積，囹圄成市。於是天下怨叛，十室而九。漢祖入關，蠲削煩苛，致三章之約。文帝以仁厚，斷獄四百，幾致刑措。孝武世以奸宄滋甚，增律五十餘篇。

This extended until the Warring States, which competed with fearful punishments to swallow each other up. Using the six-section *Classic of Laws*,[609] Lord Shang entered Qin as an persuader.[610] There he advocated for laws mandating the extermination of three generations of offenders' families and collective punishment. Morals degenerated and Qin was called a tiger and a wolf, down to the time of the first emperor. He successfully united the realm, demolished the former kings' precedents, and established the ruling banning private possession of books. Laws multiplied, until they were as numerous as autumn grasses and the net of the law grew denser than congealed fat. Treacheries and hypocrisies grew side by side and convicts' with their dark red clothes clogged the roads. Lawsuits dragged on and the prisons bustled like marketplaces. As a result, the whole realm—nine of every ten households—seethed with resentment and revolted. When Emperor Gaozu of Han [r. 202-195 BCE] entered the passes, he simplified those vexatious and exacting laws into the Three Articles. Emperor Wen acted with bountiful benevolence, reducing the number of cases to four hundred a year, to such an extent that punishments were almost laid aside.[611] In Emperor Wu's era [r. 141-87 BCE], because traitors and brigands had proliferated, more than fifty sections were added to the statutes.

[609] This is one the earliest historical mentions of this supposedly foundational text. The *Classic of Laws* is now cited in many overviews of Chinese legal history as the origin of an unbroken textual tradition of Chinese law. Geoffrey MacCormack notes many influential Western scholars (with whom he agrees) who have accepted the view presented by Wei Shou and those who followed him, particularly in a longer account of the text in the *History of Jin* Treatise on Law and Punishments. Maccormack, "The Transmission of Penal Law (Lü) from the Han to the T'ang," 51n6. For a representative view of the Chinese acceptance of the *Classic*'s foundational importance, see He Qinhua 何勤华, "'Fajing' Xinkao 《法经》新考 [A New Investigation into the *Classic of Laws*]," *Faxue* 法学, no. 2 (1998): 16–19. Other Chinese scholars, however, seriously doubt that the *Classic* represents an actual collection of pre-imperial laws. Yin Xiaohu 殷啸虎, "'Fajing' Xinbian 《法经》考辨 [Examination and Verification of the *Classic of Laws*]," *Faxue* 法学, no. 12 (1993): 34–36. For one of the most influential arguments against the *Classic*'s authenticity, see T. Pokora, "The Canon of Laws by Li K'uei-A Double Falsification?," *Archív Orientální* 27, no. 1 (1959): 96–121.

[610] An official who traveled between states in search of employment by a ruler who would take his advice.

[611] Wei Shou's positive evaluation of Emperor Wen's policies isn't supported by the historical evidence. Of Wen's elimination of the mutilating punishments, for example, Charles Sanft writes that, "With one command, Wen did away—for a time, at least—with the amputations and tattooings that had formed such an integral part of earlier penal practice. Yet, despite its fame, the case is problematic, because the oft-praised change effectively worsened the punishment in many cases. What replaced mutilation was, in some case, capital punishment; in other cases, it was a harsh beating that amounted to a *de facto* death sentence." Sanft, "Six of One, Two Dozen of the Other," 80.

宣帝時，路溫舒上書曰：

> 「夫獄者天下之命，《書》曰：與其殺不辜，寧失有罪。今治獄吏，非不慈仁也。上下相毆，以刻為明，深者獲公名，平者多後患。故治獄吏皆欲人死，非憎人也，自安之道，在人之死。夫人情安則樂生，痛則思死，捶楚之下，何求而不得。故囚人不勝痛，則飾辭以示人。吏治者利其然，則指導以明之；上奏畏卻，則鍛煉而周內之。雖咎繇聽之，猶以為死有餘罪。何則？文致之罪故也。故天下之患，莫深於獄。」

宣帝善之。

In Emperor Xuan's time [r. 74-48 BCE], Lu Wenshu submitted a memorial to the emperor, saying:

> The realm's fate lies in its criminal proceedings. The *Documents* says: "Rather than kill an innocent person, it is better to let a guilty one go free." Among legal officials today, there is not one who is not compassionate, and yet above and below compete with each other in mistaking cruelty for enlightenment, so those who are severe achieve reputations for impartiality while many of those who are fair eventually come to grief. The reason, therefore, that all the officials in charge of deciding cases want people to die is not that they hate them. Rather, the way to achieve their own security[612] lies in others' deaths. Now, people's dispositions are such that when they are secure, they take pleasure in their lives,[613] and when they are in pain, they long for death. Under blows of the switch, anything sought will be found. So when those in prison cannot bear the pain, then they embellish the confessions that will be made public. Officials in charge of cases profit from this fact, and thus lead prisoners on to make their statements clear. When they memorialize the cases to higher authorities, they fear they will be rejected, so they hone and refine them so everything goes in. Even if Gao Yao himself heard these cases, he would believe the malefactors deserved death and worse. Why? Because the text has brought about the crime. That is why, of all the land's afflictions, none is deeper than criminal proceedings.

Emperor Xuan approved of what he had written.

[612] Nylan, *The Chinese Pleasure Book*, 35, 40.
[613] Nylan, 35–42.

痛乎！獄吏之害也久矣。故曰，古之立獄，所以求生；今之立獄，所以求殺人。不可不慎也。於定國為廷尉，集諸法律，凡九百六十卷，大闢四百九十條，千八百八十二事，死罪決比，凡三千四百七十二條，諸斷罪當用者，合二萬六千二百七十二條。後漢二百年間，律章無大增減。

魏武帝造甲子科條，犯鈦左右趾者，易以斗械。明帝改士民罰金之坐，除婦人加笞之制。晉武帝以魏制峻密，又詔車騎賈充集諸儒學，刪定名例，為二十卷，並合二千九百餘條。

晉室喪亂，中原蕩然。魏氏承百王之末，屬崩散之後，典刑泯棄，禮俗澆薄。自太祖撥亂，蕩滌華夏，至於太和，然後吏清政平，斷獄省簡，所謂百年而後勝殘去殺。故榷舉行事，以著於篇。

How painful! The harm done by these legal officials is old indeed. That's why it's said that in ancient times, criminal proceedings were established to preserve life, whereas today they are established to try to kill people. This must be treated with great care. When Yu Dingguo became Minister of Justice, he collected all the laws and statutes, of which there were 960 volumes, including 490 articles on the death penalty, 1,882 cases, and 3,472 examples of previous rulings. Altogether, the sentences worth using came to 26,272. During the two hundred years of the Later Han, the statute sections neither grew nor shrank by much.

Emperor Wu of Wei [r. 216-220] made the *jiazi* regulations and articles[614] so that criminals whose left and right feet were to be bound together were to be fettered with wooden rather than iron implements. Emperor Ming [r. 226-239] changed the regulation regarding punishments that could be commuted via monetary fines and eliminated the ruling subjecting women to caning. Emperor Wu of Jin [r. 266-290] believed the Wei rulings were very strict, so he issued another edict ordering Cavalry General Jia Chong to assemble all the classicists and scholars to edit and fix the law's section on general principles. Their revision came to twenty volumes, consisting of over 2,900 articles in total.

As the house of Jin descended into chaos, the Central Plains were in turmoil. The Wei clan inherited only the vestiges of the hundred kings. After collapse and dissipation, the models of punishment had been ruined and abandoned and rites and customs had become diluted and diminished. Beginning from Taizu's reestablishment of order, *huaxia*[615] began to be cleansed from the Taihe era [477-499] on. Officers were upright and policy was fair, and the number of criminal cases diminished. This matches the proverbial "cruelty can be vanquished and executions eliminated after a hundred years." That is why I have especially selected these deeds and events to write down in this section.

[614] Named for the day of their promulgation.
[615] See Introduction.

魏初，禮俗純樸，刑禁疏簡。宣帝南遷，復置四部大人，坐王庭決辭訟，以言語約束，刻契記事，無囹圄考訊之法，諸犯罪者，皆臨時決遣。神元因循，亡所革易。

穆帝時，劉聰、石勒傾復晉室。帝將平其亂，乃峻刑法，每以軍令從事。民乘寬政，多以違命得罪，死者以萬計。於是國落騷駭。平文承業，綏集離散。

昭成建國二年：當死者，聽其家獻金馬以贖；犯大逆者，親族男女無少長皆斬；男女不以禮交皆死；民相殺者，聽與死家馬牛四十九頭，及送葬器物以平之；無系訊連逮之坐；盜官物，一備五，私則備十。法令明白，百姓晏然。

Developments and Problems in Northern Wei Law

At the beginning of the Wei, rites and customs were simple and honest, and punishments and restrictions were rough and simple. When Emperor Xuan [1st c. BCE] moved the capital to the south, he reestablished the Four Regional Chiefs,[616] who sat in the royal court to decide cases. Their words were binding and they carved their decisions on wood. There were no laws on imprisonment or interrogation, so all criminal cases were decided on an ad hoc basis. Emperor Shenyuan [219-277] maintained this way of doing things and nothing was altered.

In Emperor Mu's time, Liu Cong and Shi Le overthrew the Jin ruling house [310-333]. Only as the emperor was preparing to put down their disorder did punishments and law become very strict, and every matter was dealt with according to military ordinances. The people, however, availed themselves of the previously lenient policies, so many of them violated orders and committed crimes. The dead were counted in the tens of thousands and the state thus declined, shaken and terrorized. Emperor Pingwen [r. 316-321] inherited this state of affairs. He worked to settle and recollect in their native places those who had scattered.

In the second year of the Jianguo era [340] of Emperor Zhaocheng's reign: The families of those convicted of capital crimes could offer gold or horses to redeem their crimes. For those who committed high treason, all the men and women of their immediate family (irrespective of age) were to be decapitated. All men and women who engaged in illicit relations were to be strangled. If people killed one another, it was permitted for the killer's family to pacify the victim's family by offering them forty-nine horses or oxen, plus grave goods. There was to be no interrogation while incarcerated and no guilt-by-association punishments. Thefts of government property were to be repaid fivefold, while thefts of private property were to be repaid tenfold. Laws and ordinances were clear and simple and the people were contented.[617]

[616] According to the *History of Wei*, the number of these positions fluctuated throughout early Tuoba history. See, e.g., Bo Juncai 柏俊才, "Beiwei Sandu Daguan Kao 北魏三都大官考 [Investigation into the Great Officials of the Three Areas of the Northern Wei]," *Zhongnan Daxue Xuebao* 中南大學學報 17, no. 1 (2011): 95.
[617] Nylan, *The Chinese Pleasure Book*, 44.

太祖幼遭艱難，備嘗險阻，具知民之情偽。及在位，躬行仁厚，協和民庶。既定中原，患前代刑綱峻密，乃命三公郎王德除其法之酷切於民者，約定科令，大崇簡易。是時，天下民久苦兵亂，畏法樂安。帝知其若此，乃鎮之以玄默，罰必從輕，兆庶欣戴焉。然於大臣持法不舍。季年災異屢見，太祖不豫，綱紀褫頓，刑罰頗為濫酷。

太宗即位，修廢官，恤民隱，命南平公長孫嵩、北新侯安同對理民訟，庶政復有敘焉。帝既練精庶事，為吏者浸以深文避罪。

When Emperor Taizu [r. 386-409][618] was young, he encountered grave difficulties.[619] Well acquainted with such circumstances, he completely understood what was true and what was false in the people's claims. Upon taking the throne, he personally enacted policies of benevolence and generosity, to bring harmony to the common people. Once the Central Plains were pacified, he deemed the strict penal laws of his predecessors to be the trouble, so he ordered the legal official Wang De to eliminate those severe laws that oppressed the people, to excise some rulings and ordinances, greatly upholding simplicity and ease. At that time, the realm's people had long suffered the chaos of war; they feared the laws and took pleasure in security. Given that the emperor knew they were like this, he thus settled them through profound silence.[620] His punishments were unfailingly lenient and the masses gladly acknowledged[621] his authority. But his highest-ranking officials never abandoned their grip on the law. When numerous disasters occurred late in his reign and Taizu grew gravely ill, his framework was stripped away and abruptly halted, and punishments inclined towards extravagant cruelty.

When Emperor Taizong [409-423] took the throne, he restored official positions that had been abolished and pitied the people's suffering. He ordered the lord of Nanping, Changsun Song, and the lord of Beixin, An Tong, to investigate the people's complaints. Many governmental affairs became well-ordered once again. Since the emperor was so well-versed in the details of all these matters, the officials gradually came to rely on rigorous application of the laws in order to avoid committing offenses.

---

[618] I.e., Tuoba Gui.

[619] Tuoba Gui's father died protecting his grandfather, Shiyijian, when Tuoba Gui's mother was still pregnant with him, and, as a child, he lived through numerous attacks on the Tuoba family that caused them to make frequent retreats from the lands they sought to control. Jennifer Holmgren, "Women and Political Power in the Traditional t'o-Pa Elite: A Preliminary Study of the Biographies of Empresses in the Wei-Shu," *Monumenta Serica* 35 (1981): 51–58. See also Zhang Jihao 張繼昊, "Tuoba gui de jueqi yu Beiwei wangchao de zhaojian 拓跋珪的崛起與北魏王朝的肇建 [The Rise of Tuoba Gui and the Founding of the Tuoba Court]," *Kongda renwen xuebao* 空大人文學報 9 (October 2000): 137–39.

[620] One recent analysis of the term *xuanmo* 玄默 cites a famous second-century BCE collection of essays, many of which concern the qualities of rulers: "The *Huainanzi* clearly correlates the heavenly way with profound silence, the latter of which appears to be an attribute of the human person who is able to access the absolute truth of the heavens. The context warns that the carelessness of the senses (sight, hearing, and speech) can lead to frivolity." Jennifer Liu, "Painting the Formless and Strumming the Soundless: Yang Xiong's Taixuan Jing as Expression of the Absolute" (PhD, University of Washington, 2019), 47, https://digital.lib.washington.edu:443/researchworks/handle/1773/43866. This is similar to the concept of *wuwei* 無為, often translated as "non-action," which is used to describe another ideal of rulership. Michael Nylan argues that "non-action" is a confusing term—rulers, after all, must act in some way if they are to be effective—and suggests "activities without fixed goals and polarizing effects." Nylan, *The Chinese Pleasure Book*, 228.

[621] "A profound trust lodged in a higher power or in an inclusive order that fosters flourishing and a correspondingly heightened sensitivity toward the fine, often accompanied by an appreciative laugh, smile, or glance. Allegiance to this superior power or order… means willing service in the furtherance of its goals and a gratifying sense of community engendered by gratitude for the good life that it enables and enhances." Nylan, *The Chinese Pleasure Book*, 328.

世祖即位，以刑禁重，神麚中，詔司徒浩定律令。除五歲四歲刑，增一年刑。分大闢為二科死，斬死，入絞。大逆不道腰斬，誅其同籍，年十四已下腐刑，女子沒縣官。害其親者轘之。為蠱毒者，男女皆斬，而焚其家。巫蠱者，負羖羊抱犬沉諸淵。

When Emperor Shizu [424-452] took power, he believed that punishments and restrictions were too heavy, so in the middle of the Shenjia era [428-431], he ordered Minister over the Masses Cui Hao to fix the statutes and ordinances.[622] He eliminated four- and five-year punishments, adding instead a one-year punishment.[623] He divided the death penalty into two categories of capital punishment: death by decapitation and death by strangulation. High treason and moral corruption[624] were to be punished by cutting in half at the waist and execution of their household, though youths under fourteen were instead to be castrated and women were to be made government bondservants.[625] Those who killed their relations were to be torn apart by chariots. Of those who made venom to poison others, both men and women were to be decapitated and their homes burned. Practitioners of black magic were to be drowned in deep pools with a black sheep strapped on their backs and a dog in their arms.[626]

[622] For a detailed examination of this reform, see Lou Jin 楼劲, "Beiwei Taiwu Di 'Gaiding Lü Zhi' Kao 北魏太武帝 '改定《 律》 制' 考 [Investigation into Northern Wei Emperor Taiwu's Order Reforming the Statutes]," *Wenshi* 文史 4 (2014): 37–54.

[623] This account is somewhat at odds with the commentary to the Punishments Board section of the *Tang Administration* 唐六典 刑部, which records that it was a two-year (rather than a one-year) punishment implemented by Emperor Taiwu's reforms. Lou Jin 楼劲, "Beiwei Tianxing 'Lüling' de Xingzhi He Xingtai 北魏天兴 '律令' 的性质和形态 [The Nature and Form of the Statutes and Edicts of the Tianxing Era of the Northern Wei]," *Wenshi Zhe* 文史哲 2 (2019): 117. See also Chan Chun-Keung 陳俊強, "Beichao Liuxing de Yanjiu 北朝流刑的研究 [A Study on Banishment in the Northern Dynasties]," *Fazhi Shi Yanjiu* 法制史研究: 中國法制史學會會刊, no. 10 (December 1, 2006): 33–82.

[624] *TU* 196n5 glosses this as violations of the duties of ministers and sons or "inhumane behavior." Cui Hao himself seems to have been convicted of and executed for this crime, possibly for writing an unflattering history of the Tuoba family. For more detail on this crime and Cui Hao's own activities, see Matsushita Kenichi 松下憲一, "Hokugi saikō kuni-shi jiken -- hōsei kara no saikentō 北魏崔浩國史事件--法制からの再檢討 [The Incident of Cui Hao's Dynastic History During the Northern Wei--A Reexamination from the Perspective of the Legal System]," *Tōyōshikenkyū* 東洋史研究 69, no. 2 (September 2010): 205–32, https://doi.org/10.14989/180040.

[625] "In the majority of cases, xianguan 縣官 refers indiscriminately to organs of government, whether central or provincial, without any specification." Michael Loewe, "The Organs of Han Imperial Government: *Zhongdu Guan, Duguan, Xianguan and Xiandao Guan*," *Bulletin of the School of Oriental and African Studies* 71, no. 3 (October 2008): 509–10, https://doi.org/10.1017/S0041977X08000864.

[626] Lin Fushi explains that these two offenses (poisoning *gudu* 蠱毒 and black magic *wugu* 巫蠱) are often confused because of the similarity in their names, and because the character they share refers to ingredients (often harvested from insects and reptiles) that might be used for either purpose. Lin argues, however, that this passage indicates that they were conceived of as distinct crimes requiring different responses. The houses of those involved in making poisons were burned in order to eliminate their noxious products, whereas practitioners of black magic were killed in a ceremonial fashion reflecting the supernatural nature of their offense. Lin Fushi 林富士, *Zhongguo shi xinlun: Zongjiao shi fence* 中國史新論: 宗教史分冊 *[New Discussions of Chinese History: Volume on the History of Religion]* (Academia Sinica *中央研究院*, 2011), 126.

當刑者贖，貧則加鞭二百。畿內民富者燒炭於山，貧者役於圊溷，女子入舂槁；其固疾不逮於人，守苑囿。

王官階九品，得以官爵除刑。婦人當刑而孕，產後百日乃決。年十四已下，降刑之半，八十及九歲，非殺人不坐。拷訊不逾四十九。

論刑者，部主具狀，公車鞫辭，而三都決之。當死者，部案奏聞。以死不可復生，懼監官不能平，獄成皆呈，帝親臨問，無異辭怨言乃絕之。諸州國之大闕，皆先讞報乃施行。闕左懸登聞鼓，人有窮冤則撾鼓，公車上奏其表。是後民官瀆貨，帝思有以肅之。

For crimes that could be redeemed by paying fines, if the offender was indigent, two hundred strokes of the lash were added. For those who committed crimes within the capital and its environs, the wealthy were to be sent to make charcoal through burning wood in the mountains, while the poor were to be made to labor in the latrines and pigsties, and women were to be made to pound grain stalks. Those whose incurable illnesses made them less capable than ordinary people were to be set to guard the imperial park.

There were nine grades of administrative rank, and both administrative and aristocratic ranks could be used to redeem punishments. For women who were supposed to be punished but were pregnant, their sentences would not be carried out until one hundred days after the birth. For youths under fourteen, punishments were to be reduced by half; those over eighty or under nine, if they weren't murderers, were not to be tried. Interrogations involving beatings were not to exceed forty-nine blows.

In criminal sentencing,[627] the head of the branch would lay out the charges, agents of the Director of Official Carriages[628] would interrogate the accused and memorialize the case, and the three head legal officials[629] made the decision. In capital cases, the branch's dossier was sent up for further review. Because "the dead cannot be brought back to life," faint-hearted supervising officials were unable to be fair, so completed criminal cases were all reported up. The emperor personally investigated those involved in preparing and judging the case and only if there were no dissents or recriminations would offenders be executed. In all the provinces and kingdoms, death penalty cases would first be reported to the central court and only carried out after its approval. Hanging on the left pillar of the palace door was a "petition drum,"[630] which people suffering extreme resentment[631] could strike. The agents of the Director of Official Carriages would then memorialize their petitions. Some time after this, officials with jurisdiction over the people[632] began to take bribes, and the emperor longed for ways to set things right.

---

[627] This process may well have applied only to Xianbei accused of crimes, as Yu Lunian argues, because the head of the branch (the primary pre-dynastic administrative unit) was responsible for initiating the charge. Yu Lunian 俞鹿年, *Big Dictionary of Chinese Bureaucracy*, 794–95.

[628] *BD* 759. According to Hucker, they were initially "responsible for accepting certain kinds of memorials and tribute articles intended for the Emperor and for maintaining vehicles in readiness to fetch personages summoned to court." *DOTIC* entry 3394. In later periods, the name appears to refer (as here) to police or other judicial agents tasked with investigation.

[629] The Northern Wei divided their territory into three broad regions (中都，外都，都坐), each one overseen by an official empowered to make legal decisions. *GC* 149n11. These officials were members of the inner court and reflected pre-dynastic tribal arrangements. Yan Yaozhong sees the *sandu* as one of the chief ways in which the Tuoba maintained Xianbei legal practices. Yan Yaozhong 严耀中, "The Relationship Between Northern Wei Written Law and Judicial Practice," 7.

[630] There are a number of studies on the role of petition drums in the Chinese legal history. See, e.g., Qin Shuangxing 秦双星, "Gusheng Yu Minyi: Yi Dengwen Gu Zhidu Weilie de Jiedu 鼓声与民意—以登闻鼓制度为例的解读 [Beating Drums and Public Opinion: An Interpretation Based on the Example of the Petition Drum System]," *Hebei Faxue* 河北法学 29, no. 11 (2011): 160–64.

[631] I.e., claiming miscarriages of justice.

[632] In contrast to those with military jurisdiction.

太延三年，詔天下吏民，得舉告牧守之不法。於是凡庶之兇悖者，專求牧宰之失，迫協在位，取豪於閭閻。而長吏咸降心以待之，苟免而不恥，貪暴猶自若也。

時輿駕數親征討及行幸四方，真君五年，命恭宗總百揆監國。少傅游雅上疏曰：

> 「殿下親覽百揆，經營內外，昧旦而興，諮詢國老。臣職忝疑承，司是獻替。漢武時，始啟河右四郡，議諸疑罪而謫徙之。十數年後，邊郡充實，並修農戍，孝宣因之，以服北方。此近世之事也。帝王之於罪人，非怒而誅之，欲其徙善而懲惡。謫徙之苦，其懲亦深。自非大逆正刑，皆可從徙，雖舉家投遠，忻喜赴路，力役終身，不敢言苦。且遠流分離，心或思善。如此，奸邪可息，邊垂足備。」

恭宗善其言，然未之行。

In the third year of the Taiyan era [437], he issued an order to all the realm's people, officials and commoners alike, allowing them to report the illicit behavior of the governors of provinces and commanderies. At this, all those the miscreants set on rebellion dedicated themselves to faulting provincial and county heads, compelling the acquiescence of those in office and gathering toughs from the alleys. So the senior officials all suppressed their feelings when dealing with such people. So long as they could avoid harm, they felt no shame. Greed and violence seemed to be business as usual.

At that time, the emperor was personally waging numerous punitive campaigns, as well as making progresses to the Four Directions. In the fifth year of the Zhenjun era [444], he ordered his eldest son, Gongzong, to take charge of governmental affairs and act as regent. Junior Tutor You Ya submitted a memorial to Gongzong, saying:

> Your majesty is personally overseeing all governmental affairs, managing things both inside and outside the palace, rising at dawn to consult with elder statesmen. I will do my humble best to fill the role of imperial counsellor, and my function is to present to you what is good and reject what is bad. In the time of Emperor Wu of Han, he began to develop the four commanderies west of the Yellow River.[633] When judgements resulted in doubtful convictions, offenders were exiled there. Ten-odd years later, these border commanderies were fully populated, and they had put their farms and garrisons in good order. Emperor Xuan followed this approach to subdue the northern regions. These are recent events. The way emperors and kings treat criminals is to punish them without anger: they desire to turn people toward the good and to punish wrongdoers. The bitterness of exile is already a heavy punishment. Except for those who commit high treason, all others can be given a sentence of exile. Even if the whole family is sent far away, they will delight in setting out on the road and energetically perform corvée all their lives without daring to call it bitter. Moreover, exiled far away and separated from each other, their thoughts perhaps will turn to doing good. In this way, treachery and evil may cease and the borders may be made secure.

Gongzong approved his words, but he had not put them into practice before he died.

[633] Wuwei 武威, Jiuquan 酒泉, Zhangan 張按, Dunshan 敦煽, all in present-day Gansu 甘肅. Late second century BCE. *GC* 198n7.

六年春，以有司斷法不平，詔諸疑獄皆付中書，依古經義論決之。初盜律，贓四十匹致大闢，民多慢政，峻其法，贓三匹皆死。

正平元年，詔曰：

> 「刑綱大密，犯者更眾，朕甚愍之。其詳案律令，務求厥中，有不便於民者增損之。」

於是游雅與中書侍郎胡方回等改定律制。盜律復舊，加故縱、通情、止舍之法及他罪，凡三百九十一條。門誅四，大闢一百四十五，刑二百二十一條。有司雖增損條章，猶未能闡明刑典。

In the spring of the sixth year, because some officials were deciding cases unjustly, the emperor ordered all doubtful cases to be presented to the Central Secretariat to be adjudicated according to the principles of the ancient classics. Originally, the statutes on theft stated that stealing forty bolts' worth of goods was punishable by death, but the people largely neglected this policy, so the law was made more severe: anyone who stole three bolts' worth would die.

In the first year of the Zhengping era [451], the emperor issued this order:

> The mesh of the penal law's net is tight and yet criminals are even more numerous. We are greatly dismayed by this. The statutes and ordinances are to be scrupulously examined and every effort made to find out those which are appropriate and those which do not benefit the people. The laws are to be added to or subtracted from accordingly.

At this, You Ya, Vice Minister of the Central Secretariat Hu Fanghui, and others corrected the statutes and rulings. The robbery statute was restored, and they added 391 articles on intentionally allowing criminals to escape justice,[634] informing criminals of imminent arrest, and harboring criminals, among other crimes. There were four articles on household executions,[635] 145 on the death penalty, and 221 on labor[636] punishments. But although the officials revised the articles and sections, they still were unable to clarify the corpus of penal law.

[634] *TU* 199n6 says this refers particularly to officials failing to report the criminal behavior of those under their jurisdiction, or to allowing them to escape prosecution or punishment.
[635] Punishments in which all members of an offenders' household were executed. The scope of this punishment was later limited by an edict of Emperor Xiaowen recorded in his biography in the *History of Wei*. *TU* 200n9.
[636] *TU* 199 and *GC* 151 both read *xing* 刑 as *tuxing* 徒刑. The *Comprehensive Mirror for Aid in Government* reads "miscellaneous punishments" *zaxing* 雜刑. *TU* 199-200n8. I read it as labor punishments, because when the character *xing* 刑 often appears by itself in this treatise, it is often accompanied by a number of years, making forced labor the most likely referent.

高宗初，仍遵舊式。太安四年，始設酒禁。是時年穀屢登，士民多因酒致酗訟，或議主政。帝惡其若此，故一切禁之，釀、沽飲皆斬之，吉兇賓親，則開禁，有日程。增置內外候官，伺察諸曹、外部州鎮，至有微服雜亂於府寺間，以求百官疵失。其所窮治，有司苦加訊惻，而多相誣逮，輒劾以不敬。諸司官贓二丈皆斬。又增律七十九章，門房之誅十有三，大闢三十五，刑六十二。

和平末，冀州刺史源賀上言：

「自非大逆手殺人者，請原其命，謫守邊戍。」

詔從之。

顯祖即位，除口誤，開酒禁。帝勤於治功，百僚內外，莫不震肅。及傳位高祖，猶躬覽萬機，刑政嚴明，顯拔清節，沙汰貪鄙。牧守之廉潔者，往往有聞焉。

When Gaozong [452-465] first became emperor, he still respected the old models. In the fourth year of the Taian era [458], he established restrictions on alcohol. At that time, the harvests were increasing every year, and the people often got drunk and filed lawsuits in their inebriation. Some had the temerity to debate the ruler's manner of governance. Finding it abhorrent that things had reached this state, the emperor completely banned alcohol: anyone brewing, selling, or drinking would be decapitated. For auspicious and inauspicious rites, guests, and family members, the restrictions were lifted, for a set number of dates. Additional men were appointed to the office of Interior and Exterior Inspector[637] to surveil all the ministries in the central court as well as outer departments in the provincial seats, going so far as to disguise themselves so they could mingle in government offices and search for the officials' faults. In cases they thoroughly investigated, the officials were subjected to painful interrogations, so many of them falsely accused each other and were thus accused of lèse majesté.[638] All officials who had accepted bribes of two staves' length of silk were decapitated. The statutes were also augmented by seventy-nine sections, including thirteen articles on household punishments, thirty-five on the death penalty, and sixty-two on labor punishments.

At the end of the Heping era [460-465], Yuan He, the Regional Inspector of Jizhou,[639] wrote to the emperor to say:

> Except for traitors and those who have personally murdered others, I request that their lives be spared, and that they be exiled to man the border garrisons.

An edict granted this.

When Xianzu [466-471] became emperor, he eliminated the laws punishing slips of the tongue[640] and lifted the restrictions on alcohol. He zealously devoted himself to governance, so there wasn't a single official inside or outside the palace who wasn't in awe of him. Until he passed the throne to Gaozu [471-499], Xianzu continued to personally supervise the realm's many moving pieces. The government's penal policy was strict and clear, and he praised and promoted those of irreproachable character while weeding out the greedy and mean. There were many tales heard of the incorruptible probity of commandery and provincial governors.

---

[637] Yu Lunian treats this as a single office, viewing it as a reflection of the severe control the Northern Wei rulers attempted to exercise over the people and noting that its staff had grown to more than a thousand by the time of the Taihe reforms. Yu Lunian 俞鹿年, *Big Dictionary of Chinese Bureaucracy*, 837. Yan Yaozhong takes this office of further proof of the persistence of Tuoba customary legal practice in pre-Taihe Northern Wei law. Yan Yaozhong 严耀中, "The Relationship Between Northern Wei Written Law and Judicial Practice," 8.

[638] A capital crime, often concerning disobedience to the emperor. Michael Loewe, "Cai Yong 蔡邕: A Neglected Figure of Late Eastern Han," *Journal of the American Oriental Society* 142, no. 3 (September 2022): 512. Geoffrey MacCormack, "From Zei 賊 to Gu Sha 故殺: A Changing Concept of Liability in Traditional Chinese Law," *Journal of Asian Legal History*, 2007, 12, https://kuscholarworks.ku.edu/handle/1808/3849. Hulsewé, *Remnants of Han Law*, 156.

[639] A province covering present-day Hebei 河北 and the northern part of present-day Henan 河南.

[640] Such as uttering taboo names. These punishments (as well as others for making similar mistakes in written official reports) can be found in Tang laws governing the behavior of officials. *GC* 153n2.

延興四年，詔自非大逆干紀者，皆止其身，罷門房之誅。自獄付中書復案，後頗上下法。遂罷之。獄有大疑，乃平議焉。先是諸曹奏事，多有疑請，又口傳詔敕，或致矯擅。於是事無大小，皆令據律正名，不得疑奏。合則制可，失衷則彈詰之，盡從中墨詔。自是事咸精詳，下莫敢相罔。

In the fourth year of the Yanxing era [474], the emperor issued an edict ordering that, except for those who violate laws against high treason, all punishments would stop with their persons, ceasing the household punishments. Ever since criminal cases began being sent to the Central Secretariat for further review, considerable discrepancies in the severity of laws had developed,[641] so the practice of Central Secretariat review was abandoned. Only when there were significant doubts in a case would it be decided through impartial discussion.[642] Prior to this, every department had memorialized cases to the emperor, often asking for him to resolve doubtful questions. Moreover, because his edicts and commands were transmitted orally, there were some who went so far as to illegally arrogate the emperor's powers. But from that point on, whether an affair was big or small, all officials were ordered to justify their sentences according to specific statutes, and were not allowed to memorialize doubtful cases without a decision. If the decision was fitting, then it would be ordered approved; if it was off the mark, then the official would be denounced and investigated. All adhered to the palace orders[643] personally written by the emperor. From this time on, all cases were meticulous and detailed in their presentation, and none below dared to try to ensnare each other.

[641] Presumably because the Central Secretariat was making somewhat ad-hoc decisions when it reviewed cases.
[642] *TU* 202 reads this as saying that a group of ministers at the Central Secretariat would discuss the doubtful cases.
[643] *TU* 202 reads *zhong* 中 here as referring to the palace interior from which the emperor issued his personal decrees.

顯祖末年，尤重刑罰，言及常用惻愴。每於獄案，必令復鞫，諸有囚系，或積年不斬。群臣頗以為言。帝曰：

> 「獄滯雖非治體，不猶愈乎倉卒而濫也。夫人幽苦則思善，故囹圄與福堂同居。朕欲其改悔，而加以輕恕耳。」

由是囚系雖淹滯，而刑罰多得其所。又以赦令屢下，則狂愚多僥幸，故自延興，終於季年，不復下赦。理官鞫囚，杖限五十，而有司欲免之則以細捶，欲陷之則先大杖。民多不勝而誣引，或絕命於杖下。顯祖知其若此，乃為之制。其捶用荊，平其節，訊囚者其本大三分，杖背者二分，撻脛者一分，拷悉依令。皆從於輕簡也。

In the last year of Xianzu's reign [471], the emperor laid particular importance on punishments. When talk turned to them, it often left him grief-stricken. Every criminal case file, without fail, was ordered to undergo review. During this time, all the condemned were locked up and sometimes years would pass before they were executed. All the ministers made the issue a topic of significant discussion. The emperor said:

> Although criminal cases dragging on is not the embodiment of good government, is it not still superior to being overly hasty and excessive? Because people in dark misery think on good deeds, prisons and auspicious places occupy the same spaces. We wish criminals to reform and repent, and, moreover, to treat them with lenience and consideration.

From this point on, although prisoners continued to languish, a majority of punishments met the mark. In addition, because amnesty ordinances were repeatedly published, many arrogant and ignorant people luckily escaped being punished. Therefore, from the Yanxing era [471-476] until Xianzu's death[644] no further amnesties were declared. When judges were interrogating prisoners, the cudgel was limited to fifty strokes, but those officials who wanted spare defendants used thin cudgels, while those who wanted to entrap them used large ones from the start. Many people, unable to bear it, falsely implicated others. Others had their lives cut short under the cudgel. Xianzu, knowing of this, made a ruling: cudgels were to be made from *Cercis* trees[645] and their joints were to be made smooth. The cudgels of those interrogating prisoners were to have a diameter of 3 *fen*;[646] those for striking the back, 2 *fen*; those for beating the calf, 1 *fen*. All floggings to follow this ordinance, and all these punishments became lighter and simpler.

[644] Xianzu abdicated to Gaozu in 471 but continued to have a strong influence on policy (particularly criminal justice) until his death in 476 CE. *TU* 204n2.
[645] On the character *jing* 荊: "A class of small deciduous trees and shrubs often identified with the genus *Cercis*, whose wood was used to make caning rods and whose branches could be used to weave baskets." Barbieri-Low and Yates, *Law, State, and Society in Early Imperial China (2 Vols)*, 1409n15.
[646] A few millimeters. One hundredth of a *chi* 尺 (24.6cm by Sui times). Wilkinson, *Chinese History*, 3531.

高祖馭宇，留心刑法。故事，斬者皆裸形伏質，入死者絞，雖有律，未之行也。太和元年，詔曰：

「刑法所以禁暴息奸，絕其命不在裸形。其參詳舊典，務從寬仁。」

司徒元丕等奏言：

「聖心垂仁恕之惠，使受戮者免裸骸之恥。普天感德，莫不幸甚。臣等謹議，大逆及賊各棄市袒斬，盜及吏受賕各絞刑，踣諸甸師。」

又詔曰：

「民由化穆，非嚴刑所制。防之雖峻，陷者彌甚。今犯法至死，同入斬刑，去衣裸體，男女褻見。豈齊之以法，示之以禮者也。今具為之制。」

When Gaozu ruled the land [471-499], his attention remained on penal law. According to the precedents, those sentenced to decapitation were all to prostrate themselves naked on the executioner's block. Others condemned to death were supposed to be strangled. Although there was a statute to this effect, it hadn't been put into practice. In the first year of the Taihe era [477], an edict was issued, saying:

> Penal law is meant to restrain violence and put a stop to treachery. Ending an offender's life does not require him to be naked. The old models of law are to be consulted in detail, with every effort made to follow the principles of magnanimity and humanity.

Minister over the Masses Yuan Pi and others submitted a memorial in response, saying:

> Your majesty's intention is to extend the benevolence of humanity and forbearance in allowing those who are to be killed to avoid the shame of exposing their naked bodies. All the land is moved by your virtue and there is no one who does not feel deeply fortunate to be living under your rule. Your ministers' carefully considered opinion is that traitors and murderers should be stripped to the waist and decapitated[647] in the marketplace, while robbers and officials who take bribes should be strangled. They are to be executed at the office of the Master of the Hinterland.[648]

Another edict was issued, saying:

> The people become harmonious through civilizing influences, not by regulation through harsh punishments. Although the safeguards are strict, those trapped by the laws are greatly multiplying. Nowadays, when criminals are condemned to death, they are all sentenced to beheading and their upper garments are removed to expose their bodies, so that men and women regard each other with contempt. How can this be "regulating the people with laws and guiding them with ritual"? From today, let it be the ruling that this is not done.

---

[647] Zhou Dongping and Xue Yifeng (relying and commenting on Tomiya Itaura's work, discussed in Chapter 4) argue that, throughout the treatise, the character *zhan* 斬 by itself refers to decapitation; it means "cutting in half at the waist" only when it appears as *yaozhan* 腰斬, which it does once. Their argument is based in part on the fact that the treatise is generally somewhat inexplicit about methods of execution, particularly when discussing strangulation, for reasons discussed in detail in Chapter 4. Zhou Dongping 周东平 and Xue Yifeng 薛夷风, "Beichao Huhan Ronghe Shiyu Xia Zhongguo 'Wuxing' Xingfa Tixi Xingcheng Shi Xinlun 北朝胡汉融合视域下中古'五刑' 刑罚体系形成史新论 [On a New Theory of the History Regarding the Formation of the Medieval Penalty System of 'Five Punishments' against the Backdrop of the Hu-Han Fusion in Northern Dynasty]," *Xueshu Yuekan* 學術月刊 53 (March 2021): 187.

[648] *Dianshi* 甸師 The name of an official found in the *Rites of Zhou*. *DOTIC* entry 6641 calls this office the "Master of the Hinterland… who generally supervised the administration of the royal domain beyond the environs of the capital" and was "also reportedly responsible for executing members of the royal family who were sentenced to death." *TU* 205n6 suggests that the purpose of having offenders executed in this place was to have them killed before the eyes of those who live outside the capital, presumably to more forcefully demonstrate the dire consequences of particularly heinous behavior.

三年，下詔曰：

> 「治因政寬，弊由綱密。今候職千數，奸巧弄威，重罪受賕不列，細過吹毛而舉。其一切罷之。」

於是更置謹直者數百人，以防喧鬥於街術。吏民安其職業。

先是以律令不具，奸吏用法，致有輕重。詔中書令高閭集中秘官等修改舊文，隨例增減。又敕群官，參議厥衷，經御刊定。五年冬訖，凡八百三十二章，門房之誅十有六，大闢之罪二百三十五，刑三百七十七；除群行剽劫首謀門誅，律重者止梟首。

時法官及州郡縣不能以情折獄，乃為重枷，大幾圍。復以縋石懸於囚頸，傷內至骨，更使壯卒迭搏之。囚率不堪，因以誣服。吏持此以為能。帝聞而傷之，乃制非大逆有明證而不款闢者，不得大枷。

In the third year [479], the emperor issued an edict saying:

> Good order relies on magnanimous policy while ruin comes from tightening the law's net. Today, there are thousands of inspectors, who with cleverly manipulate imperial authority. With heavy crimes, they take bribes and do not record them, whereas small faults are reported at the drop of a hat.[649] Let their positions all be abolished.

He thereupon established in their places several hundred upright officials to prevent clamor and brawling in the streets. The officials and the people were secure in their offices and occupations.

Before this, because the statutes and ordinances were incomplete, corrupt officials used the laws to bring about lighter or heavier sentences. The Director of the Central Secretariat Gao Lü was ordered by edict to gather officials from places like the Central Secretariat and the Palace Library[650] to improve and emend the old text of the laws, adding to or removing from them according to the precedents. The assembled officials were also ordered to debate their appropriateness, and the emperor personally arranged and supervised the editing and finalizing of the new laws. The work was completed in the winter of the fifth year [481], coming to 832 sections in all, including sixteen on household punishments, 235 on capital crimes, and 377 on labor punishments. It got rid of the household punishment for bands of brigands and the leaders of robbers, and the new statutes' most severe punishments stopped at exposure of the offender's severed head.

At that time, when legal officials and the provincial, commandery, and county administrators were unable to crack a case according to the facts, they would then use heavy cangues, and increase their size by several *wei*.[651] Then they would hang cords of rocks from prisoners' necks, wounding them inwardly to the bone. Strong soldiers then took turns beating them. Most prisoners, unable to bear it, made false confessions. Officials grasped these confessions as proof of their own abilities. Only once the emperor heard of these things and lamented was it ordered that, in cases other than clearly proven treason, where the prisoner had not confessed, the large cangue could not be used.

---

[649] Literally, "with the blow of a feather" *chuimao* 吹毛.

[650] Zheng Qinren explains that *zhongmi* 中秘 is an abbreviation of *zhongshu sheng* 中书省 and *mishu sheng* 秘书省. Zheng Qinren 鄭欽仁, *Beiwei guanliao jigo yanjiu xupian* 北魏官僚機構研究續篇 *[A Continuation of Research on Northern Wei Administrative Organization]* (Daohe chuban she *稻禾出版社*, 1995), 33.

[651] 圍. There is significant disagreement about how large a *wei* is, though most believe it refers to the circumference of the circles formed either by a person's two arms or by his two thumbs and forefingers. *GC* 157n2.

律:

「枉法十匹，義贓二百匹大闢。」

至八年，始班祿制，更定義贓一匹，枉法無多少皆死。是秋遣使者巡行天下，糾守宰之不法，坐贓死者四十餘人。食祿者跼蹐，賦謁之路殆絕。帝哀矜庶獄，至於奏讞，率從降恕，全命徙邊，歲以千計。京師決死獄，歲竟不過五六，州鎮亦簡。

One statute read:

> If an official perverts the law for a bribe of ten bolts or receives an illicit gift of two hundred bolts,[652] he shall be put to death.[653]

In the eighth year of the Taihe era [484], there began to be rulings setting up clear salaries for officials. The amount in the law concerning receipt of illicit gifts was lowered to one bolt, and anyone convicted of perverting the law would be executed, no matter the size of the bribe. That autumn, envoys were sent on inspection tours all over the land to correct the illegal acts by the heads of commanderies and counties; more than forty people were convicted of receiving illicit gifts and executed. Salaried officials thus watched their step, and the avenue of bribery under the guise of official visits was virtually cut off. The emperor felt grief[654] and compassion in all these cases, so much so that if they were appealed to him, he would generally follow the path of forgiveness and reduce their punishments, preserving offenders' lives by banishing them instead. Such cases numbered in the thousands every year. By year's end, there were no more than five or six[655] cases resulting in death sentences in the capital, and the numbers in the provincial seats were likewise reduced.

---

[652] The *Comprehensive Statutes* and the *Comprehensive Mirror for Aid in Government* have 20 instead of 200. *GC* 157n2 suggests that 20 is likely the correct figure; it is certainly more in line with the other number given in the same statute, as well as with the adjustment described in the following sentence.

[653] Hu Sansheng's commentary on this line in the *Comprehensive Mirror for Aid in Government* is: "'Perverting the law' means receiving a bribe and perverting the law in order to adjust the level of someone's culpability. Receiving bribes means people privately exchanging gifts; even if the desired end is not achieved, what is received is still tallied and is judged to be illicit gain." 枉法, 謂受賕枉法而出入人罪者. 義贓, 謂人私情相饋遺, 雖非乞取, 亦計所受論贓.

[654] Nylan, *The Chinese Pleasure Book*, 35.

[655] *TU* 208n13 says this should be 50. *GC* 158 has "five or six."

十一年春，詔曰：

「三千之罪，莫大於不孝，而律不遜父母，罪止髡刑。於理未衷。可更詳改。」

又詔曰：

「前命公卿論定刑典，而門房之誅猶在律策，違失《周書》父子異罪。推古求情，意甚無取。可更議之，刪除繁酷。」

秋八月詔曰：

「律文刑限三年，便入極默。坐無太半之校，罪有死生之殊。可詳案律條，諸有此類，更一刊定。」

冬十月，復詔公卿令參議之。

十二年詔：

「犯死罪，若父母、祖父母年老，更無成人子孫，又無期親者，仰案後列奏以待報，著之令格。」

In the spring of the eleventh year [487], an edict was issued, saying:

> "Of the three thousand crimes, none is worse than unfiliality," but in the statutes on not submitting to one's parents, the punishment stops at head-shaving. This does not accord with proper principle and these statutes may again be carefully revised.

Another edict was issued, saying:

> In the past, the highest ministers were ordered to discuss and determine the penal law, but the household punishment is still in the collections of the statutes. This contravenes the Zhou writings, which says that the crimes of father and son are distinct. When probing into ancient times to seek the truth, their meaning is extremely difficult to grasp. This punishment is to be discussed again and superfluous and cruel statutes eliminated.

In the eighth month of autumn, an edict was issued, saying:

> In the text of the statutes, labor punishments are limited to three years, and the immediate next punishment is death. Although criminals are sentenced for almost the same behavior, which crime they are convicted of will mean the difference between life and death. The statutes and article may be carefully examined, and wherever this kind of situation exists, let each be edited and finalized again.

In the tenth month of winter, another edict was issued to the highest ministers, commanding them to debate the matter.

In the twelfth year [488], there was an edict:

> For those condemned to death, if their parents and grandparents are old and also have no other adult children or grandchildren, and moreover no close relations, we anticipate that you will memorialize them at the end of the case dossier and await the response. Write this into the ordinances and regulations.

世宗即位，意在寬政。正始元年冬，詔曰：

> 「議獄定律，有國攸慎，輕重損益，世或不同。先朝垂心典憲，刊革令軌，但時屬征役，未之詳究，施於時用，猶致疑舛。尚書門下可於中書外省論律令。諸有疑事，斟酌新舊，更加思理，增減上下，必令周備，隨有所立，別以申聞。庶於循變協時，永作通制。」

When Shizong [r. 500-515] took power, his thoughts were on magnanimous policies. In the winter of the first year of the Zhengshi era [504], his edict ordered:

> Deciding criminal cases and finalizing statutes are what rulers attend to with great care. Whether punishments are light or heavy, whether laws shrink or increase, varies from age to age. The previous courts gave their attention to laws and institutions, paring down and reforming ordinances and rules, but at that time, those laws largely pertained to military conscripts.[656] If the laws are not carefully considered and applied according to changing circumstances, it will produce doubts and errors. The officials of the Department of State Affairs and the Imperial Chancellery are permitted to debate the statutes and ordinances in the Exterior Department of the Imperial Secretariat. In all doubtful matters, they are to deliberate the old and the new, bringing their own thoughts to bear, adding and subtracting, making the sentences heavier or lighter. The ordinances must be made complete. Follow what has been established; report all others[657] for higher review. My hope is that in keeping up with the changes and harmonizing with the times, we will create a comprehensive ruling for all time.

[656] Both *GC* 159 and *TU* 210 read 征役 as referring primarily to the use of military conscripts for war. In other words, this was an era in which the courts were primarily occupied with adjudicating cases under martial law. Shizong's point is therefore that peacetime demands different legal approaches.
[657] I.e., those cases in which there are no directly relevant official statutes.

永平元年秋七月，詔尚書檢枷杖大小違制之由，科其罪失。尚書令高肇，尚書僕射、清河王懌，尚書邢巒，尚書李平，尚書、江陽王繼等奏曰：

「臣等聞王者繼天子物，為民父母，導之以德化，齊之以刑法，小大必以情，哀矜而勿喜，務於三訊五聽，不以木石定獄。伏惟陛下子愛蒼生，恩侔天地，疏網改祝，仁過商後。以枷杖之非度，愍民命之或傷，爰降慈旨，廣垂昭恤。雖有虞慎獄之深，漢文惻隱之至，亦未可共日而言矣。

In the seventh month of the autumn of the first year of the Yongping era [508], an edict ordered the Department of State Affairs to investigate the origins of violations of the rulings on the sizes of cangue and cudgel, and to adjudicate these offenses. Director of the Department of State Affairs Gao Zhao, Deputy Director of the Department of State Affairs and King of Qinghe Yuan Yi, Ministry Chief Xing Luan, Ministry Chief Li Ping, Ministry Chief and King of Jiangyang Yuan Ji, and others memorialized as follows:

> Your ministers have heard that true kings, having succeeded to the position of Son of Heaven, take all people as their children, then guide them with suasive influence and regulating them with punishments and law. Whether small or great, the sentences must accord with the situation and be administered with grief and compassion rather than with delight. Rulers must exert themselves in the Three Investigations and Five Indications[658] and not decide criminal cases by using wood and stone.[659] We humbly believe that your majesty loves the common people like his children. Your beneficence is like Heaven and Earth. In loosening the net of the laws and changing the invocation, your humanity surpasses King Tang of Shang.[660] Because of irregularities in the use of the cangue and cudgel, you have been pained that some people have been fatally injured, so much so that you published this compassionate order, broadly bestowing your radiant sympathy. Even the depth of Yu's conscientiousness in deciding criminal cases or the extent of Emperor Wen of Han's compassionate grief do not compare with your merits.

[658] As referenced at the beginning of the treatise. The Three Investigations refers to getting the agreement of the ministers, officials, and the people for death sentences, while the Five Indications means the demeanor of defendants and witnesses to which investigators were supposed to pay attention to evaluate their honest.
[659] I.e., using implements of torture.
[660] This refers to a story recorded in the *Shiji* about King Tang of Shang spreading a net in a field and praying for birds to come, which they did. He further prayed that those who didn't obey his orders would likewise be trapped. *TU* 213n14. The point of this line is to say that, unlike King Tang, the emperor no longer prays that disobedient people will be caught in the net of his laws.

謹案《獄官令》：諸察獄，先備五聽之理，盡求情之意，又驗諸證信，事多疑似，猶不首實者，然後加以拷掠；諸犯年刑已上枷鎖，流徙已上，增以杻械。迭用不俱。非大逆外叛之罪，皆不大枷、高杻、重械，又無用石之文。而法官州郡，因緣增加，遂為恆法。進乖五聽，退違令文，誠宜案劾，依旨科處，但踵行已久，計不推坐。

In our humble opinion, the ordinance on judges says:[661] all criminal investigations must begin by thoroughly applying the principle of the Five Indications and completely committing to the intention of seeking out the truth of the situation. Moreover, all evidence must be substantiated. If there are many apparent doubts in the case, and there is still no confession or eyewitness testimony, then flogging and cudgeling is to be applied. For all crimes punishable by one year or more, the cangue and manacles are to be used; for all crimes punishable by banishment or more, handcuffs and fetters are to be added. These implements are to used in turn, not all at once. For all crimes other than high treason, revolt, and defection,[662] the large cangue, high cuffs, and heavy shackles are not to be used, nor are the articles on the use of stones to be employed. However, judges in the provinces and commanderies seize opportunities to make these measures more severe, and so their harsher practices become the norm. On the one hand, they turn away from the Five Indications; on the other, they disobey the text of the ordinances. Although such men truly deserve to be investigated and denounced, and then sentenced according to your order, they have been acting in this way for a long time already without being probed and sentenced.

[661] A Northern Wei edict whose contents are now lost. *GC* 161n15.

[662] *GC* 161 reads *waipan* 外叛 as two different concepts: *panbian* 叛變 (“revolt”) and *waitao* 外逃 (“defection”). *TU* 214n20 concurs, suggesting that the “defection” in question entails the surrendering of cities or territory to foreign powers, not simply an individual running away from their home country.

檢杖之小大，鞭之長短，令有定式，但枷之輕重，先無成制。臣等參量，造大枷長一丈三尺，喉下長一丈，通頰木各方五寸，以擬大逆外叛；杻械以掌流刑已上。諸臺、寺、州、郡大枷，請悉焚之。枷本掌囚，非拷訊所用。從今斷獄，皆依令盡聽訊之理，量人強弱，加之拷掠，不聽非法拷人，兼以拷石。」

自是枷杖之制，頗有定準。未幾，獄官肆虐，稍復重大。

> When we investigated the size of the cudgel and the length of the lash, we found that there were set forms for these things in the ordinances. By contrast, previously, there was no ruling on the weight of the cangue. Your ministers have debated the appropriate weight and had made a large cangue 1 *zhang*[663] and 3 *fen* long, 1 *zhang* long below the throat, with the wood around the face 5 *cun*[664] on all sides. By imitating this, traitors, rebels, and defectors may be dealt with. Handcuffs and fetters are to be used to handle those who have committed crimes meriting exile or worse. We request that all the large cangues of the tribunals, government offices, provinces, and commanderies be burnt. The cangue was originally for controlling prisoners, and is not to be used in coercive interrogations. From now on, criminal cases are all to be judged according to the ordinances, in total accord with the principle of oral interrogation.[665] A defendant's strength is to be measured before flogging or cudgeling. Illegal flogging is not to be permitted. This includes stones used for beatings. [666]

From that time, the rulings regarding cangues and cudgels generally had fixed standards. It didn't take long, however, for criminal judges to give free rein to their cruelty and they gradually restored the heavy cangues and large cudgels.

[663] "Said to be the height of a male adult." Wilkinson, *Chinese History*, 3516.
[664] "The width of a thumb." Wilkinson, 3516.
[665] I.e., judges are to scrutinize the Five Indications to determine whether defendants or witnesses are telling the truth.
[666] Likely a reference to the cords of stones that interrogators are described as using during Gaozu's reign.

《法例律》：

> 「五等列爵及在官品令從第五，以階當刑二歲；免官者，三載之後聽仕，降先階一等。」

延昌二年春，尚書刑巒奏：

> 「竊詳王公已下，或析體宸極，或著勛當時，咸胙土授民，維城王室。至於五等之爵，亦以功錫，雖爵秩有異，而號擬河山，得之至難，失之永墜。刑典既同，名復殊絕，請議所宜，附為永制。」

詔議律之制，與八座門下參論。

The statutes on applying the law[667] say:

> For those who hold one of the five noble ranks[668] and those with at least a second-class fifth-grade official rank[669] as laid out in the ordinances on official grades[670], they may redeem two years of a criminal sentence in exchange for each step in the ranks. Those who are dismissed from office will be allowed to serve again after three years, at one step below their former rank.

In the spring of the second year of the Yanchang era [513], Ministry Chief Xing Luan memorialized:

> I take the liberty of going into the details. Of the kings[671] and highest-ranking nobles on down, some are offshoots of the imperial throne, and some have distinguished themselves through meritorious service in their time. They all have had lands and peasants bestowed on them, and their walls surround the royal palace. As for those who hold one of the five noble ranks, their station has also been granted according to merit. Although there are differences in rank and salary between them, their responsibilities and titles will last as long as the rivers and mountains. Achieving these ranks is the hardest and losing one represents a perpetual fall. Although our penal laws have been unified, cases involving the restoration of a nobility are still treated differently [from those involving the restoration of official status]. I humbly request a debate as to what is appropriate, with the results appended to the existing law, so that it may become an eternal ruling.

An edict ordered that the rulings on these statutes be debated and determined with the eight heads of the central government administration and the Imperial Chancellery.

---

[667] Now-lost Northern Wei statutes, containing general principles for applying the laws to particular cases. *GC* 162n1.

[668] G*ong* 公, *hou* 侯, *bo* 伯, *zi* 子, and *nan* 男.

[669] By the Taihe era, each of the nine official grades was sub-divided into upper 正 and lower 從 classes. *GC* 162n2.

[670] Emperor Xiaowen promulgated ordinances edicts on officials in the 490s. *TU* 216n2.

[671] Descendants of the Wei emperor could be enfeoffed as kings; there were also some who inherited the title. *GC* 162n5.

皆以為:

> 「官人若罪本除名，以職當刑，猶有餘資，復降階而敘。至於五等封爵，除刑若盡，永即甄削，便同之除名，於例實爽。愚謂自王公以下，有封邑，罪除名，三年之後，宜各降本爵一等，王及郡公降為縣公，公為侯，侯為伯，伯為子，子為男，至於縣男，則降為鄉男。五等爵者，亦依此而降，至於散男。其鄉男無可降授者，三年之後，聽依其本品之資出身。」

詔從之。

The consensus was:

> If an official commits a crime whose original punishment was loss of status and, after having redeemed his punishment with his office, still retains some rank, his rank is reduced and he is then reemployed according to that status. As for the five types of nobilities, if the punishment completely eliminates their titles, they are forever debased, stripped of their rank. So, with respect to the punishments that eliminate official status, these rules are truly different for nobles. Our humble opinion is that, from the kings and highest-ranking nobles on down, anyone possessed of a fief who commits a crime punishable by the elimination of rank should be able to reclaim their noble status after three years, at one rank below their previous rank: kings and *gongs* who rule commanderies will be reduced to *gong* in the counties; a *gong* will become a *hou*; a *hou* will become a *bo*; a *bo* will become a *zi*; a *zi* will become a *nan.* As for the *nan* in counties, they will be reduced to *nan* of districts. Those who hold the five noble ranks but have no lands, their ranks should also be reduced according to this rule, down to the rank of honorary *nan*.[672] As for *nan* of districts who cannot be demoted, after three years, they should be allowed to reenter government service at a rank commensurate with their original grade.

An edict granted this.

[672] I.e., without official post or fief.

其年秋，符璽郎中高賢、弟員外散騎侍郎仲賢、叔司徒府主簿六珍等，坐弟季賢同元愉逆，除名為民，會赦之後，被旨勿論。

尚書邢巒奏：

> 「案季賢既受逆官，為其傳檄，規扇幽瀛，遘茲禍亂。據律準犯，罪當孥戮，兄叔坐法，法有明典。賴蒙大宥，身命獲全，除名還民，於其為幸。然反逆坐重，故支屬相及。體既相及，事同一科，豈有赦前皆從流斬之罪，赦後獨除反者之身。又緣坐之罪，不得以職除流。且貨賕小愆，寇盜微戾，贓狀露驗者，會赦猶除其名。何有罪極裂冠，釁均毀冕，父子齊刑，兄弟共罰，赦前同斬從流，赦後有復官之理。依律則罪合孥戮，準赦例皆除名。古人議無將之罪者，毀其室，洿其宮，絕其蹤，滅其類。其宅猶棄，而況人乎？請依律處，除名為民。」

Case: Gao Xian, Zhong Xian, and Liu Zhen

In the autumn of that year [513], the Palace Attendant in Charge of Seals Gao Xian, his younger brother, supernumerary[673] Gentleman Cavalier Attendant Zhong Xian, and his uncle, Registrar in the Ministry of the Masses Liu Zhen were sentenced for Gao Xian's younger brother Ji Xian's participation in the rebellion of Yuan Yu. They lost their posts and were made commoners. After an amnesty,[674] they received an imperial order holding them innocent.[675]

Ministry Chief Xing Luan memorialized:

> In this case, since Ji Xian received an office from a rebel, disseminating his incitements and plotting riots in Youzhou and Yingzhou,[676] he contributed to this calamity and chaos. If his crime is gauged according to the statutes, the execution should extend to his entire family; his brothers and uncles should thus be sentenced to die. The law has clear standards on this point. Having had the good fortune to receive a general amnesty through which their lives were preserved, they should consider themselves lucky to only lose their status and be demoted to commoners. That said, being convicted of rebellion is a weighty matter, which is why relatives are punished for one another's revolts. Since family members are implicated in one another's crimes, and their cases are adjudicated according to the same regulations, how is it that before an amnesty, they all would be exiled or beheaded, but after an amnesty, only the rebel himself is eliminated? Moreover, in guilt-by-association offenses, official rank cannot be used to redeem punishments of exile. Another consideration: even in cases of minor bribery or low-level banditry, when stolen goods or the circumstances of the offense are plain and proven, offenders are stripped of their posts even if they meet with an amnesty. Where is the sense in the principle that, before an amnesty, for crimes as egregious as rending one's official cap and inciting all to damage the imperial crown, fathers and sons suffer the same punishment, as do elder and younger brothers—whether it is execution or exile—whereas after an amnesty, they are allowed to return to officialdom? If we rely on the statute, then the crime should merit implicating his family members. However, considering what is fair by the amnesties, they should all be deprived of titles. When people in ancient times convicted others of violating laws against plotting rebellion, they would demolish the offenders' dwellings and turn their habitations into swamps, cutting off all traces of them and extinguishing anything associated with them. If even their residences were cast aside, how much more so were people? I humbly request that they be dealt with according to the statutes, their posts removed and they themselves be demoted to commoners.

---

[673] "Throughout history used as a prefix to titles indicating appointees beyond the authorized quota for the position; in [Tang] such appointees received half the standard stiped of a regular [*zheng*] appointee." *DOTIC* entry 8250.
[674] Issued in 513 CE after droughts and floods had caused mass deaths and criminal activity rose sharply among those struggling to survive. *GC* 164n4.
[675] I.e., they would be allowed to hold office again. *TU* 218n7.
[676] Roughly equivalent to Zhuozhou 琢州 and Hejian 河間 in present-day Hebei.

詔曰：

「死者既在赦前，又員外非在正侍之限，便可悉聽復仕。」

The emperor ordered:

> The condemned were put to death before the amnesty was issued. Moreover, supernumerary posts[677] are not subject to the restrictions on regular officials, so these men can all be employed as officials again.

[677] Like that held by Zhong Xian, one of the men under discussion here.

三年，尚書李平奏：

「冀州阜城民費羊皮母亡，家貧無以葬，賣七歲子與同城人張回為婢。回轉賣於鄗縣民梁定之，而不言良狀。案盜律『掠人、掠賣人、和賣人為奴婢者，死』。回故買羊皮女，謀以轉賣。依律處絞刑。」

詔曰：

「律稱和賣人者，謂兩人詐取他財。今羊皮賣女，告回稱良，張回利賤，知良公買。誠於律俱乖，而兩各非詐。此女雖父賣為婢，體本是良。回轉賣之日，應有遲疑，而決從真賣。於情不可。更推例以為永式。」

Case: Bi Yangpi's Daughter

In the third year [514], Ministry Chief Li Ping memorialized:

> When the mother of Bi Yangpi, a man from Fucheng County in Jizhou, died, his family was poor and had no means to bury her, so he sold his seven-year-old daughter to Zhang Hui, a fellow townsman, to become a servant. Zhang Hui re-sold her to Liang Dingzhi from Shu County, but he did not mention her situation: that her status was good.[678] According to the statutes on theft: "Those who kidnap others, who kidnap to sell them, or who collude to sell people[679] into servitude must die." Zhang Hui intentionally bought Bi Yangpi's daughter with the intention of reselling her. According to the statute, he should be executed by strangulation.

An edict was issued:

> What the statute calls *hemai ren* refers to two people who collude to acquire another's property. In this case, when Bi Yangpi sold his daughter, he told Zhang Hui that she was of a good status. Zhang Hui believed it would be advantageous for her to have a servile status and, knowing her status was good, bought her openly. This is indeed in complete contravention of the statute, but the two did not collude. Although this daughter was sold by her father into servitude, she originally had a good status and, on the day Zhang Hui resold her, that should have held him back. But he resolutely followed [as if] making a true sale.[680] This was impermissible in the circumstances. Let this case be thoroughly examined, so that it may become a model for all time.

---

[678] I follow Scott Pearce in this translation: "The term *liang* is difficult to translate. It could be rendered as 'free,' in imitation of western categories of 'slave and free.' This would be misleading, however, because during the Han and the T'ang base status was not confined to slaves. Thus, although it is somewhat clumsy, I translate *liang* as 'good.'" Pearce, "Status, Labor, and Law," 108n54.

[679] Although there is very little work on the meaning of this phrase in the Northern Wei, the Tang Code explains that *hemai* 和賣 means that a person willingly sells themselves without being coerced and was punished more lightly than *lüemai* 掠/略賣 (kidnapping and selling, usually involving women or children). Shwu-Yuan Lee 李淑媛, "Tangdai de 'Dianmai Qinü' Xianxiang: Yi Lüling Wei Zhongxin 唐代的「典賣妻女」現象－以律令為中心 [A Study the Phenomenon of Wife and Daughter Pawning and Selling in the Tang Dynasty: Focusing on the Statutes and Edicts]," *Taiwan Shida Lishi Xuebao* 臺灣師大歷史學報, no. 42 (December 1, 2009): 54, https://doi.org/10.6243/BHR.2009.042.051. Here, it seems to indicate collusion between seller and buyer, rather than the willingness of the person being sold.

[680] I.e., permanently converting her status. This also means that she could not be redeemed later by her family. Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯, "On Debt and Human Trafficking during the Northern Wei Dynasty," 16.

廷尉少卿楊鈞議曰：

「謹詳盜律『掠人、掠賣人為奴婢者，皆死』，別條『賣子孫者，一歲刑』。賣良是一，而刑死懸殊者，由緣情制罰，則致罪有差。又詳『群盜強盜，首從皆同』，和掠之罪，固應不異。及『知人掠盜之物，而故買者，以隨從論』。然五服相賣，皆有明條，買者之罪，律所不載。竊謂同凡從法，其緣服相減者，宜有差。買者之罪，不得過於賣者之咎也。

但羊皮賣女為婢，不言追贖，張回真買，謂同家財，至於轉鬻之日，不復疑慮。緣其買之於女父，便賣之於他人，准其和掠，此有因緣之類也。又詳恐喝條注：『尊長與之已決，恐喝幼賤求之。』然恐喝體同，而不受恐喝之罪者，以尊長與之已決故也。而張回本買婢於羊皮，乃真賣於定之。准此條例，得先有由；推之因緣，理頗相類。即狀准條，處流為允。」

Vice Minister of Justice Yang Jun opined:

> According to a careful examination of the statutes on theft, "those who kidnap others or kidnap and sell them into servitude will all be executed." Another article reads: "Selling one's children or grandchildren shall be punished by one year of hard labor." Selling someone of good status is a single offense, but the punishments of labor and death are wildly different. The fact that these penalties were set according to the circumstances of the crimes has resulted in this difference in sentences. Going into further detail: "For crimes of banditry or robbery, leaders and accomplices are all treated alike." The crimes of selling a willing person and selling someone without their consent should certainly be no different. There is also: "Someone who knows that another has stolen goods by force and nevertheless knowingly buys them is punished as an accomplice." But while there are clear articles on relatives within the five degrees of mourning *selling* one another, about the crime of *purchasing*, the statutes record nothing. My humble opinion is that the purchaser should be treated according to the general model of accomplices. There may be reductions in punishment according to the degree of familial closeness as appropriate. Still, the crime of the buyer cannot exceed the blame of the seller.
>
> But when Bi Yangpi sold his daughter into servitude, he did not say that he would be seeking to redeem her. Zhang Hui truly purchased her, regarding her as his own family's property. When he came to the day on which he resold her, he had no further doubts or reflections. Because Zhang Hui bought her from her father and then immediately sold her to someone else, if we judge based on the rules regarding conspiring to sell or forced sales of people, his behavior is of the type that has a fundamental cause. I also examined the commentary to the articles on intimidation, which state: "If a person of high status or an elder has already decided to give something to someone and then that person threatens a child or a person of low status to get the item," although the form of the action is the same as that of intimidation, it is not punished as intimidation, because the one of higher status had already decided to give it to them.[681] Zhang Hui originally bought the bondservant from Bi Yangpi, and only then made a true sale to Liang Dingzhi. If we judge according to these articles and examples, Zhang Hui's acquisition of Bi Yangpi's daughter had an initial reason; if we investigate the fundamental cause, the principals involved are quite similar [to those found in the articles on intimidation]. Since the circumstances accord with these articles, sentencing Zhang Hui to exile is proper.

[681] The principle embodied by the statute on threatening is that an action that has the same form as a crime will not be considered as egregious if it is aimed at producing an effect that was already going to occur anyway as the result of others' behavior. So Yang Jun is saying that Zhang Hui's culpability is less because Bi Yangpi (like the elder in the threatening statute) had already made the decision to sell his daughter, and Zhang Hui is simply the instrument of an event that was already going to happen.

三公郎中崔鴻議曰：

「案律

『賣子有一歲刑；賣五服內親屬，在尊長者死，期親及妾與子婦流』。

唯買者無罪文。然賣者既以有罪，買者不得不坐。但賣者以天性難奪，支屬易遺，尊卑不同，故罪有異。買者知良故買，又於彼無親。若無同賣者，即理不可。何者？『賣五服內親屬，在尊長者死』，此亦非掠，從其真買，暨於致罪，刑死大殊。明知買者之坐，自應一例，不得全如鈞議，雲買者之罪，不過賣者之咎也。且買者於彼無天性支屬之義，何故得有差等之理？

Palace Attendant to the Three Lords Cui Hong opined:

> According to the statutes,
>
> > Selling one's children is punished with a year of forced labor. For selling relatives within the five degrees of mourning, those who sell their people of high status or elders are to be put to death, while those who sell relatives requiring only a year of mourning, their concubines, or their daughters-in-law are to be exiled.
>
> Only buyers are not the subject of a text on sentencing. But since the seller here has already been found guilty, the buyer cannot go unpunished. However, with sellers, because it is difficult to part with those for whom we feel an innate bond and easier to leave behind those to whom we are more distantly related, family members are not all accorded the same respect and so punishments for selling them are also different. In this case, the buyer [Zhang Hui] knew the seller's daughter was of a good status and so he bought her intentionally. Moreover, he had no familial relationship with her. If the buyer's punishment was completely different from the seller's, this would not be reasonable. Why is that? "For selling relatives within the five degrees of mourning, those who sell their respected elders are to be put to death." This case also does not involve coercion: Zhang Hui followed [the rules for] a "true purchase" of Bi Yangpi's daughter. As for the sentences, there is a large difference between the one-year labor punishment and the death penalty. So we can clearly see that a conviction for purchasing should have its own ruling, and it cannot be entirely as Yang Jun argued, when he claimed that "the crime of purchasing cannot exceed the blame of selling." In addition, the buyer owed the girl neither the duties of Heaven-sent instinct nor of more distant familial ties, so why would there be a principle of differing degrees of punishment?

又案別條：『知人掠盜之物而故賣者，以隨從論。』依此律文，知人掠良，從其真買，罪止於流。然其親屬相賣，坐殊凡掠。至於買者，亦宜不等。若處同流坐，於法為深。準律斟降，合刑五歲。至如買者，知是良人，決從真賣，不語前人得之由緒。前人謂真奴婢，更或轉賣，因此流漂，罔知所在，家人追贖，求訪無處，永沉賤隸，無復良期。案其罪狀，與掠無異。且法嚴而奸易息，政寬而民多犯，水火之喻，先典明文。今謂買人親屬而復決賣，不告前人良狀由緒，處同掠罪。」

According to another article: “Someone who knows that another has stolen goods by force and nevertheless buys them is sentenced as an accomplice.” According to the text of this statute, if one knows that someone is selling another of good status into servitude against her will, and truly purchases that person from them, the punishment should stop at exile. However, when family members sell one another, the punishment is different from ordinary crimes of forced selling. As for the buyer of those family members, he should be punished differently. If his punishment is (like the seller’s) also exile, this would make the law too severe. Gauging by statutes and considering mitigation, an appropriate punishment is five years of hard labor. But as for the buyer in this particular case, he knew he was buying someone of good status and he resolved to purchase her in a “true sale” without explaining the means by which she had come to her former owner.[682] Because this former owner claimed she was a true bondservant, she was immediately sold yet again. Because of this, she drifted through the world, her whereabouts entirely unknown. Should her family seek to redeem her, there will be nowhere they can inquire after her. She will be forever submerged in base servitude with no hope of reviving her good status. According to the circumstances of this offense, it is no different from forcible sale. Moreover, ill-deeds are easily stopped when the law is strict. The people commit many crimes when the policy is magnanimous. The ancient canons have clear language comparing these kinds of policies and laws to floods and fires. In this case, my opinion is that buying another person’s family member and then persisting in reselling her without explaining her good origins should be punished like a forcible sale.[683]

[682] I.e., how Zhang Hui had come to own Bi Yangpi’s daughter.

[683] In other words, executed by strangulation. Chen Dengwu 陳登武 and Yu Xiaowen 于曉雯, “On Debt and Human Trafficking during the Northern Wei Dynasty,” 11.

太保、高陽王雍議曰：

「州處張回，專引盜律，檢回所犯，本非和掠，保證明然，去盜遠矣。今引以盜律之條，處以和掠之罪，原情究律，實為乖當。如臣鈞之議，知買掠良人者，本無罪文。何以言之？

『群盜強盜，無首從皆同』，和掠之罪，故應不異。

明此自無正條，引類以結罪。臣鴻以轉賣流漂，罪與掠等，可謂『罪人斯得』。案《賊律》云：

『謀殺人而發覺者流，從者五歲刑；已傷及殺而還蘇者死，從者流；已殺者斬，從而加功者死，不加者流。』

詳沉賤之與身死，流漂之與腐骨，一存一亡，為害孰甚？然賊律殺人，有首從之科，盜人賣買，無唱和差等。謀殺之與和掠，同是良人，應為準例。所以不引殺人減之，降從強盜之一科。縱令謀殺之與強盜，俱得為例，而似從輕。其義安在？

The Grand Protector and King of Gaoyang Yuan Yong opined:

> When the province punished Zhang Hui, they relied only on the statutes on theft. Upon further investigation of Zhang Hui's crime, it was not originally either conspiring to sell or forced sale. The testimony was clear that this was very far from theft. To now cite articles from the statutes on theft to sentence him for the crimes of conspiring to sell or forced sale is, if we trace back the original situation and examine the statutes, truly inappropriate. According to Minister Yang Jun's statement, for those who knowingly buy people of good status who are being forcibly sold, there is nothing in the text of the penal laws. Why does he say this?
>
> > "For crimes of banditry or robbery, principals and accomplices are all treated alike." The crimes of conspiring to sell and selling someone against their will should certainly be no different.
>
> Clearly, Yang Jun's conclusion itself is without foundation in the articles, so he pulls out analogies to come to this conviction. Minister Cui Hong relies on Zhang Hui's reselling of the daughter to drift along to sentence him as if the crime were equivalent to selling someone against their will. This might be called "letting no criminal escape."[684] According to the statutes on violence,
>
> > Someone who plots a murder and is discovered will be exiled, and his accomplices will be sentenced to five years of labor. Someone who has already mortally injured another will be executed, even if the victim is revived, and his accomplices will be exiled. Someone who has already killed another will be decapitated, and his accomplices will be executed if they actively assisted in the crime, and exiled if they did not.[685]
>
> When one considers whether to be sunk in debased servitude or to die, to drift or to rot to the bone, to live or to be gone, which harm is greater? However, in the statutes on violence, the section on murder has rules on principals and accomplices, while the section on kidnapping and sale contains no differences in degree between the soloist and the chorus. In the cases of plotting murder or conspiring to sell or forcible sale, the victims are all of good status, and these matters should be dealt with according to a standard rule. Yang Jun did not cite the provision on murder to reduce Zhang Hui's sentence; rather, he lowered it according to the rule in the statutes on robbery.[686] Even though both plotting to kill and robbery can be rules in Zhang Hui's case, it seems that the more lenient one was followed. Where is the sense in that?

---

[684] A *Documents* quotation. *Shangshu*, "Metal-Bound Coffer" 金縢. Qu Wanli 屈萬里, 尚書今註今譯 [New Annotation and Translation of the *Shangshu*] (Taipei: Taiwan Shangwu 臺灣商務, 2021), 122. See also Kuan-yun Huang, "Poetry, 'The Metal-Bound Coffer,' and the Duke of Zhou," *Early China* 41 (2018): 87-148, 118.

[685] This distinction is preserved in Tang law. *GC* 168n6.

[686] I.e., Yang Jun is citing a statute which says, "For crimes of banditry or robbery, the leaders and followers are all punished the same." (群盜強盜, 首從皆同.) *TU* 226n7.

又云：

『知人掠盜之物而故買者，以隨從論。』

此明禁暴掠之原，遏奸盜之本，非謂市之於親尊之手，而同之於盜掠之刑。竊謂五服相賣，俱是良人，所以容有差等之罪者，明去掠盜理遠，故從親疏為差級，尊卑為輕重。依律：

『諸共犯罪，皆以發意為首。』

明賣買之元有由，魁末之坐宜定。若羊皮不云賣，則回無買心，則羊皮為元首，張回為從坐。首有活刑之科，從有極默之戾，推之憲律，法刑無據。

買者之罪，宜各從賣者之坐。又詳臣鴻之議，有從他親屬買得良人，而復真賣，不語後人由狀者，處同掠罪。既一為婢，賣與不賣，俱非良人。何必以不賣為可原，轉賣為難恕。

張回之愆，宜鞭一百。賣子葬親，孝誠可美，而表賞之議未聞，刑罰之科已降。恐非敦風厲俗，以德導民之謂。請免羊皮之罪，公酬賣直。」

詔曰：「羊皮賣女葬母，孝誠可嘉，便可特原。張回雖買之於父，不應轉賣，可刑五歲。」

It is also said in the statutes that,

> Someone who knows that another has stolen goods by force and nevertheless intentionally buys them is punished as an accomplice.

This clearly restrains the origins of violence and pillaging and obstructs the roots of treachery and robbery, but it does not say that buying something from the hand of a respected elder is to be punished the same as robbing and pillaging. In my humble opinion, in cases where family members within the five degrees sell one another, if they are all of good status, this is a basis for allowing different gradations of punishment. These cases are clearly far from the principles concerning pillaging and robbing, so their different degrees should come from relations of familial closeness: the gravity of the crime will depend on his honor or lack thereof. According to the statutes:

> For all jointly committed crimes, all those who came up with the idea will be treated as leaders.

Clearly, this selling and buying originated from somewhere and so it is appropriate to determine sentences according to who was the leader and who was secondary. If Bi Yangpi had not talked of selling, then Zhang Hui would have had no thought of buying. Bi Yangpi, therefore, is the leader, and Zhang Hui should be punished as an accomplice. If we search the regulations and statutes, it is without basis in any penal laws for a leader to have a ruling allowing him a punishment that preserves his life while an accessory suffers the cruelty of the most extreme punishment.

The punishment of each buyer should accord with that of the convicted seller. In addition, according to Minister Cui Hong's opinion, buying a someone of good status from another family and then making a subsequent true sale without informing the second purchaser of the original situation should be punished as if it were a forced sale. But since the person had already become a bondservant, whether or not she was resold, she was no longer of good status either way. In that case, why should *refraining* from selling be considered forgivable, but reselling her be hard to pardon?

Zhang Hui's transgression deserves one hundred blows of the lash. He was selling his child to bury his near relation, a filial act that truly may be considered beautiful, but I have heard no discussions of praise or reward; instead, rulings on punishment have already come down. I fear this cannot be deemed encouraging manners and honing mores, or guiding the people with virtue. I humbly request that you commute Bi Yangpi's sentence and publicly repay him the purchase price of his daughter.

An edict was issued, ordering:

> Bi Yangpi sold his daughter in order to bury his mother. His filiality was truly laudable and he may thus receive an exceptional pardon. Although Zhang Hui bought her from her father, he should not have resold her, so he may be sentenced to five years' labor.

先是，皇族有譴，皆不持訊。時有宗士元顯富，犯罪須鞫，宗正約以舊制。尚書李平奏：

「以帝宗磐固，周布於天下，其屬籍疏遠，蔭官卑末，無良犯憲，理須推究。請立限斷，以為定式。」

詔曰：

「雲來綿遠，繁衍世滋，植籍宗氏，而為不善，量亦多矣。先朝既無不訊之格，而空相矯恃，以長違暴。諸在議請之外，可悉依常法。」

Issue: Interrogating Imperial Family Members

Before this, when members of the imperial family committed reprehensible acts, none of them was held for investigation.[687] During that time, Preceptor Yuan Xianfu committed a crime requiring interrogation, and the Chamberlain of the Imperial Clan dealt with him according to this old ruling. Ministry Chief Li Ping memorialized:

> To make the imperial clan as sturdy as stone, proclaim it all around the realm that even distant members of the imperial household registers, down to the humblest officials who received their posts due to their familial connections, will naturally always be subject to thorough investigation when they act without virtue and violate the regulations. I humbly request that you establish restrictions on the imperial clan in order to create a definitive model.

An edict was issued, ordering:

> Our descendants to the sixth and ninth generations stretch into the distance like drawn out silk, in a copious profusion that multiplies with each age. Of those in the registers of the imperial clan who engage in wrongdoing, the number has likewise grown. Since the previous emperor did not have a regulation against investigating members of the imperial family, they relied on this omission to lord it over one another, to increase their disobedience and violence. For those outside the special categories who may request clemency,[688] their cases are all to be treated according to the ordinary laws.

[687] *TU* 230n1 points out that it's not exactly clear what *chixun* 持訊 refers to but speculates that it has something to do with bodily seizure for the purposes of criminal investigation.

[688] *Yiqing* 議請. Various special statuses (including age, meritorious service, rank, etc.) that could allow people to escape punishment if they submitted memorials requesting clemency. *TU* 230n6.

其年六月，兼廷尉卿元志、監王靖等上言：

「檢除名之例，依律文，『獄成』謂處罪案成者。是為犯罪逕彈後，使復檢鞫證定刑，罪狀彰露，案署分明，獄理是成。若使案雖成，雖已申省，事下廷尉，或寺以情狀未盡，或邀駕撾鼓，或門下立疑，更付別使者，可從未成之條。

其家人陳訴，信其專辭，而阻成斷，便是曲遂於私，有乖公體。何者？五詐既窮，六備已立，僥幸之輩，更起異端，進求延罪於漏刻，退希不測之恩宥，辯以惑正，曲以亂直，長民奸於下，隳國法於上，竊所未安。」

Issue: Complete Cases

In the sixth month of that year [514], Concurrent[689] Minister of Justice Yuan Zhi, Inspector of Judical Affairs Wang Jing,[690] and others submitted a memorial, saying:

> If one investigates the rules on removal of posts, according to the text of the statutes, a "complete" criminal proceeding means that a sentence has been decided and the case documents have been finalized.[691] This means that after a crime has been committed and an accusation has been made, appointees[692] have undertaken further investigation, interrogation, and verification in order to determine a sentence, the circumstances of the crime are plainly laid out and the case dossiers are all clear, then the examination of a case is complete. Even after the appointee's case dossiers are completed and have been presented to the Department of State Affairs,[693] the case will again be turned over to another appointee, who may follow the articles on incomplete cases if: 1) the matter is sent back down to the Ministry of Justice and the Ministry believes that the facts of the case were not fully investigated; or 2) someone intercepts the imperial carriage or bangs the petition drum; or 3) the Imperial Chancellery establishes that there is some doubt in the case.
>
> If the offender's family members lay out their complaint and their one-sided testimony is believed, thereby blocking a complete judgement, this is twisting the process to comply with private interests and contravenes the common good of the law. Why is this? Since the Five Frauds[694] have been fully considered and the Six Precautions[695] already established,[696] a series of these people gambling on luck will again raise strange arguments. Advancing, they seek to put off punishment by a notch of the water clock; retreating, they hope for the favor of an unexpected pardon. They make arguments to delude the impartial; they twist facts to confuse the upright. They develop treacheries among the people below and overthrow the state's laws above. This, we venture to say, is why we are not yet secure.

---

[689] I.e., he held another post at the same time.
[690] An aid to the Minister of Justice.
[691] This distinction became important for officials being prosecuted near the time an amnesty was issued. If a sentence included both a loss of status and another punishment (labor, exile, death, etc.), an offender would be excused from both sanctions under the amnesty if the case had not yet been completed. If the case *was* considered complete, offenders would be excused from the other punishments, but would still suffer the loss of status. *TU* 231n11.
[692] Selected by the central government to review cases. *TU* 231n12.
[693] *GC* 171; *TU* 229.
[694] *TU* 231n14 says that this refers to the Five Hearings *wuting* 五聽 of the Zhou system, i.e., the five investigative procedures for determining whether a defendant was lying (fraudulent) or not. *GC* 171n7, while noting the Japanese interpretation, nevertheless asserts that the meaning of this phrase is unclear.
[695] Both *TU* 231n15 and *GC* 171n8 say that the meaning is unclear, though the Japanese edition suggests that this may refer to six elements for establishing a defendant's guilt.
[696] Whatever the exact referent of these terms, the idea here seems to be that presumptuous litigants will continue to make meritless claims even once the normal procedures of judicial investigation have been fully carried out.

大理正崔纂、評楊機、丞甲休、律博士劉安元以為:

> 「律文，獄已成及決竟，經所綰，而疑有奸欺，不直於法，及訴冤枉者，得攝訊復治之。檢使處罪者，雖已案成，御史風彈，以痛誣伏；或拷不承引，依證而科；或有私嫌，強逼成罪；家人訴枉，辭案相背。刑憲不輕，理須訊鞫。既為公正，豈疑於私。如謂規不測之澤，抑絕訟端，則枉滯之徒，終無申理。若從其案成，便乖復治之律。然未判經赦，及復治理狀，真偽未分。承前以來，如此例皆得復職。愚謂經奏遇赦，及已復治，得為獄成。」

Assistant to the Minister of Justice Cui Zuan, Arbiter for the Minister of Justice Yang Ji, Aid to the Minister of Justice Jia Xiu, and Judicial Expert Liu Anyuan believed:

> According to the text of the statutes, when cases have already reached a final decision and have passed through the office charged with overseeing them, they can nevertheless be taken up for interrogation and redecision where there are suspicions of fraud, error, or deviation from the law, or when someone complains of a false accusation.
>
> If we investigate proceedings in which appointees have determined punishments, even though their cases are already complete, the Censors can raise accusations based on rumors[697] and elicit false confessions through torture. Either they flog those who have not confessed and rely on the evidence they extract to convict them, or, due to private resentments, they force others to commit crimes. Then, when family members of the accused complain, their testimonies and the case dossiers contradict one another. Regulations on punishments must not be treated lightly, and they naturally require investigation and interrogation. Since the disposition of family complaints is public and impartial, why should there be any doubts about private corruption?[698]
>
> If we view these families as seeking a bounty that the regulations do not anticipate and therefore suppress and cut off the roots of their petitions, then these perversions of justice piling up will in the end never be straightened out. If we accept that these cases are completed, then we are deviating from the statutes on readjudication. Thus, regarding those who have not yet been sentenced but have gone through an amnesty and those whose cases have been retried but in which it was impossible to separate truth from falsehood: since former times, people in cases like these have all been allowed to resume government posts. Our humble opinion is that cases which have been memorialized and have encountered an amnesty or those which have already been redecided may be considered complete.

[697] During the Northern and Southern Dynasties period, the Censorate *yushi tai* 御史台 was the central government organ (under the emperor's direct control) responsible for inspecting affairs throughout the empire. Their remit even extended to investigating all levels of government officials without the need for solid proof, a power referred to as "rumor accusation" *fengtan* 風彈. Wang Hongbin 王宏彬, "Woguo Gudai Xingzheng Jiancha Zhidu de Lishi Shanbian 我国古代行政监察制度的历史嬗变 [The History and Evolution of China's Ancient Administrative Inspection System]," *Heilongjiang Shehui Kexue* 黑龙江社会科学, no. 3 (2002): 63.

[698] *TU* 233n7 points out that this a response to Wang Jing's point above that the efforts of a defendant's family members to delay or mitigate a sentence will deform the legal system.

尚書李韶奏:

> 「使雖結案，處上廷尉，解送至省，及家人訴枉，尚書納辭，連解下鞫，未檢遇宥者，不得為案成之獄。推之情理，謂崔纂等議為允。」

詔從之。

Ministry Chief Li Shao memorialized:

> Even when an appointee has wrapped up a case, adjudicated it, and submitted it upward to the Minister of Justice, and that case has been delivered to the Department of State Affairs, if the offender's family members make a claim of false accusation, the Ministry Chief accepts this testimony, puts it with the dossier, and sends it back down for interrogation. If at that point, before the investigation is complete, the offender should meet with an amnesty, this cannot be considered a criminal process that has been completed.
>
> Examining the principles of the situation, I consider the opinion of Cui Zuan and the others correct.

An edict granted this.

熙平中，有冀州妖賊延陵王買，負罪逃亡，赦書斷限之後，不自歸首。廷尉卿裴延俊上言：

> 「《法例律》：『諸逃亡，赦書斷限之後，不自歸首者，復罪如初。』依《賊律》，謀反大逆，處置梟首。其延陵法權等所謂月光童子劉景暉者，妖言惑眾，事在赦後，亦合死坐。」

Case: Liu Jinghui

In the middle of the Xiping era [516-518], in Jizhou, there was the baleful bandit[699] Wang Mai[700] from Yanling, who absconded while bearing his guilt. After the deadline of the amnesty decree,[701] he did not return to give himself up. Chief Minister for Law Enforcement Pei Yanjun wrote to the emperor, saying:

> The statutes on applying the law say: "For all those who abscond and do not return to give themselves up before the deadline of the amnesty decree, their punishments will be as they were to begin with." According to the statutes on violence, those who plot rebellion and commit high treason are sentenced to decapitation and exposure of the head. The person who Faquan and others from Yanling call "the moonlight child," Liu Jinghui, misled the masses with his bewitching tales.[702] That affair took place after the amnesty, and it is likewise fitting that he be condemned to death.

[699] A term for rebel leaders who motivated their followers with religious ideas. *TU* 235n2.
[700] An otherwise completely obscure figure.
[701] This amnesty was issued specifically "to encourage surviving Mahayana rebels to turn themselves in." Yang Shao-yun, "Making Sense of Messianism," 25. Shao-yun Yang, "Making Sense of Messianism: Buddhist Political Ideology in the Mahayana Rebellion and the Moonlight Child Incident of Early Sixth-Century China," n.d., 25, https://d1wqtxts1xzle7.cloudfront.net/32186357/Making_Sense_of_Messianism-libre.pdf?1391539525=&response-content-disposition=inline%3B+filename%3DMaking_Sense_of_Messianism_Buddhist_Poli.pdf&Expires=1701749593&Signature=QdvxvXtdRSUajIRLZlH7NdjC-GYvM3y4Bxy5QWsCbz8OtEgOTELRbWkq2e~Y06J6gcVsPsHfZ0n8zz18S0zpiTYb~M7xAJLHZjCUwFr7Q-yaF4XHXNywjvz~QhyBeQt1V2PaXnXindvX2Qz1VwFN4N3Ks-DF67Vq5ny0y4GGxzSa2MYtMdy-Sjm0ShrW7ybx~qVN9tBzfZB1UcdnaduMC4HrbEohwxNtLxtqC9nFhN2XK9vUx4h-c~ugMlD5Tbh8K-AE3x7stiPnve8kFN4B3pkSo-Gcr0iB6aLaoh585X3Thrfkc4Tqfa46G7mI8~-NpHcg1Ah771pinwxH~N6sQw__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA.
[702] "Toward the end of 516, another sect was discovered by local authorities in Yanling (a county or commandery of Jizhou). A man named Fa Quan and his associates were claiming that an eight-year-old child named Liu Jinghui was a Bodhisattva called the Moonlight Child (yueguang tongzi), and that he could transform into a snake or a pheasant. They were arrested and sentenced to death on suspicion of seditious intent, but Jinghui had his sentence commuted to banishment on account of his youth and ignorance." Yang, 2.

正崔纂以為：

> 「景暉云能變為蛇雉，此乃傍人之言。雖殺暉為無理，恐赦暉復惑眾。是以依違，不敢專執。當今不諱之朝，不應行無罪之戮。景暉九歲小兒，口尚乳臭，舉動云為，並不關己，『月光』之稱，不出其口。皆奸吏無端，橫生粉墨，所謂為之者巧，殺之者能。若以妖言惑眾，據律應死，然更不破[闕]惑眾。赦令之後方顯其。律令之外，更求其罪，赦律何以取信於天下。天下焉得不疑於赦律乎！《書》曰：與殺無辜，寧失有罪。又案《法例律》：『八十已上，八歲已下，殺傷論坐者上請。』議者謂悖耄之罪，不用此律。愚以老智如尚父，少惠如甘羅，此非常之士，可如其議，景暉愚小，自依凡律。」

靈太后令曰：

> 「景暉既經恩宥，何得議加橫罪，可謫略陽民。餘如奏。」

Assistant to the Minister of Justice Cui Zuan believed:

> Liu Jinghui, it was said, could turn into a snake and a pheasant. These, to be sure, were the words of his sidekicks. Although there is no particular reason to kill Liu Jinghui, I feared that if he were pardoned, he would again mislead the masses. This is why I hesitated and did not dare decide the matter on my own. But in our current age when nothing is taboo to say, we should not carry out the slaughter of innocents. Liu Jinghui is a small boy of nine years old, his mouth still stinking of his mother's milk. All the actions and words of those around him were nothing to do with him; the epithet of "moonlight" did not come from his mouth. It was all corrupt officials who baselessly spread these dressed-up charges everywhere. As they say, those who act are clever, those who kill are able.[703] If his case is treated according to the statutory crime of "misleading the masses through fables," this merits death, but he will not again break [missing character] and mislead the masses. This case was not brought to light until just after the amnesty edict. If we now seek to punish him again, outside of the statutes and ordinances, how can amnesties and statutes gain the realm's trust? Indeed, how could the realm not doubt the amnesties and statutes?
>
> As the *Documents* says: "Rather than kill an innocent person, it is better to let a guilty one go free." And according to the statutes on applying the law: "For those over eighty years old or under eight, those who mortally wound others shall have their cases appealed." Some debaters[704] believe that, for the crimes of the young and the old, this statute should not be used. They foolishly believe that all old people are as wise as Shang Fu and all young people are as perspicacious as Gan Luo. For such extraordinary gentlemen, we can follow these debaters' opinion. Liu Jinghui, however, was an ignorant child, so he should naturally be treated according to the ordinary statute.

Empress Dowager Ling issued an order, saying:

> Since Liu Jinghui already received the grace of an amnesty, how can you advise baseless additional punishments? He can be exiled among the people of Lüeyang. The rest will follow Cui Zuan's memorial.

[703] I can find no other instance of this expression, which is somewhat ambiguous. *GC* 173 renders it simply as "people who do things are clever and people who kill others are able," while *TU* 234 has "those who commit crimes are clever, while those who kill criminals are able officials."
[704] I.e., Pei Yanjun, above.

時司州表：

「河東郡民李憐生行毒藥，案以死坐。其母訴稱：『一身年老，更無期親。』例合上請。檢籍不謬，未及判申，憐母身喪。州斷三年服終後乃行決。」

司徒法曹參軍許琰謂州判為允。主簿李瑒駁曰：

「案《法例律》：

『諸犯死罪，若祖父母、父母年七十已上，無成人子孫，旁無期親者，具狀上請。流者鞭笞，留養其親，終則從流。不在原赦之例。』

檢上請之言，非應府州所決。毒殺人者斬，妻子流，計其所犯，實重餘憲。準之情律，所虧不淺。且憐既懷鴆毒之心，謂不可參鄰人任。計其母在，猶宜闔門投畀，況今死也，引以三年之禮乎？且給假殯葬，足示仁寬，今已卒哭，不合更延。可依法處斬，流其妻子。實足誡彼氓庶，肅是刑章。」

尚書蕭寶夤奏從瑒執，詔從之。

Case: Li Lian

At that time, the Metropolitan Commandant presented this:

> Li Lian, a commoner of Hedong Commandery, created and circulated poisonous medicines, and was condemned to death. His mother made an appeal, saying: "I am alone and old, and have no other close relations." This is the kind of case that should be appealed for review. The family registers were investigated to make sure there were no mistakes. Before a judgment had been reported upward, Lian's mother died. The judgment of this office is that the sentence cannot be carried out until after the conclusion of the three-year mourning period.

Legal and Military Counselor in the Ministry of the Masses Xu Yan judged the Metropolitan Commandant's decision permissible. Registrar Li Yang rejected it, saying:

> According to the statutes on applying the law:
>
> > For all those who commit capital crimes, if their grandparents or parents are more than seventy years old, have no adult sons or grandsons, or no close relations near them,[705] the charges shall be laid out and appealed for review. Those who are sentenced to exile shall be whipped or caned, then left free to care for their grandparents or parents. Once those relations die, the offenders will be banished. These sentences are not subject to the amnesty rules.
>
> If we investigate the language of "appealing for review," it does not accord with the Metropolitan Commandant's decision. Those who fatally poison others are to be decapitated and their wives and children are to be exiled. If we assess the extent of the offenses such people commit, they are truly heavier than those prohibited by the other regulations. Gauging by both the facts of the case and the statutes, the damage Li Lian has caused is substantial. Moreover, once Li Lian has harbored these intentions to poison others, I say that he cannot be allowed to live side by side with his neighbors.[706] Suppose that his mother were still alive: it would still be appropriate to exile his whole family. How much less should we, now that she is dead, stretch it out to a ritually proper three years? In addition, providing a furlough to lay out and bury his mother is enough to demonstrate humanity and magnanimity. Now that the period of weeping is over,[707] it is inappropriate to extend it further. Li Lian can be sentenced to decapitation according to the laws and his wife and children banished. This will suffice to warn the common people and make them respect this section of the penal laws.

Ministry Chief Xiao Baoyin submitted a memorial according to Yang's handling of the case, and an edict granted this.

---

[705] While the technical meaning of "near them" 旁 is unclear, there are other provisions in the "Names and Applications" 名例 section of the *Tang Code* calling for the appeal of cases in which offenders are the only adult children of infirm parents or grandparents. *TU* 238n7. See also *GC* 174n4 for numerous other similar references.
[706] Both *GC* 174 and *TU* 237 textual note 3 read 任 as 伍.
[707] A period of ritually prescribed length after the burial of a family member. *TU* 238n9.

舊制，直閣、直後、直齋，武官隊主、隊副等，以比視官，至於犯譴，不得除罪。尚書令、任城王澄奏：

> 「案諸州中正，亦非品令所載，又無祿恤，先朝已來，皆得當刑。直閣等禁直上下，有宿衛之勤，理不應異。」

靈太后令準中正。

Issue: Sentence Redemption with Irregular Rank

Under the old rulings, those who held offices such as *zhige*, *zhihou*, and *zhizhai*[708], as well as the chief and secondary military officers, were for the most part treated like officials. However, when they committed offenses, they could not redeem their punishments in exchange for rank. Director of the Department of State Affairs and King of Rencheng Yuan Cheng memorialized:

> Consider that all Regional Rectifiers[709] are also not recorded in the ordinances on official grades, nor do they have official salaries. Yet since the previous dynasties, they have all been able to give up their rank to match their sentences. The *zhige* and the others serve in the palace in high and low offices. They have the arduous task of serving as guards in the imperial apartments. By rights, they should not be treated differently.

Empress Dowager Ling ordered by edict that they be treated according to the model of the Rectifiers.

[708] Likely military posts whose occupants attended the emperor closely. Yu Lunian 俞鹿年, *Big Dictionary of Chinese Bureaucracy*, 438.

[709] In 495, "the local *zhongzheng*, the 'Impartial and Just' or 'Equitable Rectifer,' was still responsible for recommending candidates for office. This function was incorporated in the new system; but apparently the target of judgment was shifted from the individual to the lineage, for the *zhongzheng* were ordered at this time to evaluate the *xingzu* of their respective areas as a basis for recruitment and appointment." Dien, "Elite Lineages and the T'o-Pa Accommodation," 83.

神龜中，蘭陵公主駙馬都尉劉輝，坐與河陰縣民張智壽妹容妃、陳慶和妹慧猛，奸亂耽惑，毆主傷胎。輝懼罪逃亡。門下處奏：

「各入死刑，智壽、慶和並以知情不加防限，處以流坐。」

詔曰：

「容妃、慧猛恕死，髡鞭付宮，餘如奏。」

Case: Liu Hui

In the middle of the Shengui era [518-520], the Commandant-Escort to the Princess Lanling, Liu Hui, along with Rong Fei (the younger sister of Zhang Zhishou from Heyin County) and Hui Meng (the younger sister of Chen Qinghe) engaged in debaucherous riots and were addicted to delusions.[710] Liu Hui struck the princess and injured the fetus she was carrying.[711] Liu Hui fled the scene in terror of punishment. The Imperial Chancellery judged the case and memorialized it:

> They should each be put to death. Because Zhishou and Qinghe, aware of the situation, imposed no restrictions on their younger sisters, they should be sentenced to exile.

An edict was issued, saying:

> Rong Fei and Hui Meng are to be spared death. They are to have their heads shaved, be whipped, and be turned over to the palace as bondservants. The rest shall be sentenced as per the memorial.

[710] This was not the first time that Liu Hui had been unfaithful to his wife, Lanling. "According to Liu Hui's biography in the [*History of Wei*], the princess is said to have been very jealous and once even killed a maid whom Hui had impregnated. When that did not calm her fury, the princess aborted and mutilated the unborn child, stuffed the maid with straw, and showed her naked to Hui. Appalled and angered by the princess's behavior, Hui decided to ignore her. The situation was reported to Empress Dowager Ling 靈太后 (r. 516-528), the princess's sister-in-law and the reigning regent of the Northern Wei government at that time. After an investigation, Hui was divested of his noble title and was divorced. One year later, however, the princess asked to be reunited with him. At first, the empress dowager was reluctant to grant her request, for fear that the princess had not changed her behavior, but after repeated pleas, she eventually agreed. It is said that the empress dowager not only escorted the princess out of the imperial palace personally, but also asked her to exercise more discretion in the future." Jen-Der Lee, "Crime and Punishment: The Case of Liu Hui in the Wei Shu," in *Early Medieval China: A Sourcebook*, ed. Wendy Swartz et al. (Columbia University Press, 2014), 157, https://doi.org/10.7312/swar15986-015.

[711] "According to Liu Hui's biography, the princess changed her tactics and kept her temper under control. But after being provoked by her female relatives, she started fighting with Hui again. Hui thereupon pushed her out of bed, beat her, and stamped on her, causing a miscarriage." Lee, 157–58.

尚書三公郎中崔纂執曰：

「伏見旨募若獲劉輝者，職人賞二階，白民聽出身進一階，廝役免役，奴婢為良。案輝無叛逆之罪，賞同反人劉宣明之格。又尋門下處奏，以

『容妃、慧猛與輝私奸，兩情耽惑，令輝挾忿，毆主傷胎。雖律無正條，罪合極法，並處入死。其智壽等二家，配敦煌為兵』。

Cui Zuan, Palace Attendant to the Three Lords in the Department of State Affairs, insisted:

> Allow me to express a humble opinion: Your majesty's command was to levy troops to capture Liu Hui. If they caught him, officials were to be rewarded with a promotion of two ranks; commoners were to be allowed leave to enter government service and to be promoted by one rank; menial conscripts[712] were to be released from service; and bondservants were to be given good status. In my view, Liu Hui has committed no crime of rebellion but the rewards offered for his capture are like those offered in the case of the rebel Liu Xuanming. Let us also examine the fact that the Imperial Chancellery, in adjudicating and memorializing the case, did so on this basis:
>
> > Rong Fei and Hui Meng had illicit relations with Liu Hui. Both groups were addicted to delusions. It was they who made Liu Hui nurture his resentments, so that he struck the princess and harmed her fetus. Although the statutes have no explicit official articles on this matter, their crime merits the most extreme punishment and both should be condemned to death. The two families of Zhishou and Qinghe should be banished to Dunhuang as military conscripts.

[712] A station in between good status and bondservants, sentenced to perform hard labor for the state for a fixed term. *TU* 242n7.

天慈廣被，不即施行，雖恕其命，竊謂未可。夫律令，高皇帝所以治天下，不為喜怒增減，不由親疏改易。

案《鬥律》：

> 『祖父母、父母忿怒，以兵刃殺子孫者五歲刑，毆殺者四歲刑，若心有愛憎而故殺者，各加一等。』

雖王姬下降，貴殊常妻，然人婦之孕，不得非子，又依永平四年先朝舊格：

> 『諸刑流及死，皆首罪判定，後決從者。』

事必因本以求支，獄若以輝逃避，便應懸處，未有捨其首罪而成其末愆。流死參差，或時未允。

As your majesty's benevolence extends far and wide, you have not immediately put this order into effect. But though it spares their lives, I humbly submit that this would not be proper. Now, it was through the statutes and ordinances that Emperor Gaozu made the realm well-ordered. He neither acted from delight or anger in increasing or reducing their sentences. Nor did he alter them due to the degree of kinship he had to the offenders they affected. According to the statutes on brawling:

> Those grandparents or parents who in their rage use weapons to kill their children and grandchildren are to be sentenced to five years of hard labor. Those who beat them to death are to be sentenced to four years. If they have love or hate in their hearts and murder intentionally, the punishment is increased by one level.

Although the princess was married, the status of such aristocrats differs from that of ordinary wives. However, when a man's wife gets pregnant, the child must be considered his.[713] Moreover, according to an old regulation of the former emperor from the fourth year of the Yongping era [512]:

> For all punishments of banishment and death, the sentences of the leaders are all determined first, after which the cases of accomplices are decided.

Matters must rely on the roots to seek the branches. In this case, given that Liu Hui has fled, sentencing in the case should be suspended, lest we set aside the crimes of leaders while completing the cases against the secondary parties. Otherwise, the differences between exile and death may at a future time become impermissible.

[713] In other words, the provision from the statutes on fighting quoted above should be applied to Liu Hui, who killed his own child.

門下中禁大臣，職在敷奏。昔丙吉為相，不存鬬斃，而問牛喘，豈不以司別故也。

The responsibility of the senior officials of the Imperial Chancellery who attend the imperial palace is to lay out memorials. A long time ago, when Bing Ji was chief minister,[714] he did not inquire into fighting and death. Instead, he asked whether the oxen were wheezing.[715] Was this not because different offices have different responsibilities?[716]

[714] An important Western Han official, who served as prime minister under Emperor Xuan 漢宣帝 (r. 74-49 BCE). According to a famous story in the *History of Han*, he ignored a violent fight in order to inquire about some oxen who he saw breathing heavily in what he took to be an indication of unseasonably hot weather. His action was interpreted as a reflection of a senior official's proper focus on large issues affecting the whole realm—such as the climate, which might disturb the harvest—rather than apparently urgent but small-scale crises.

[715] This was "because he believed that the prime minister was responsible for watching the climate that affected agriculture and people's welfare and that the police should be responsible for street fights." Lee, "Crime and Punishment," 164n9.

[716] The implication being that the Imperial Chancellery shouldn't be in charge of Liu Hui's case. *TU* 244n2.

案容妃等，罪止於奸私。若擒之穢席，眾證分明，即律科處，不越刑坐。何得同宮掖之罪，齊奚官之役。

案智壽口訴，妹適司士曹參軍羅顯貴，已生二女於其夫，則他家之母。《禮》云婦人不二夫，猶曰不二天。若私門失度，罪在於夫，釁非兄弟。昔魏晉未除五族之刑，有免子戮母之坐。何曾諍之，謂：『在室之女，從父母之刑；已醮之婦，從夫家之刑。』斯乃不刊之令軌，古今之通議。《律》，『期親相隱』之謂凡罪。況奸私之醜，豈得以同氣相證。論刑過其所犯，語情又乖律憲。案《律》，奸罪無相緣之坐。不可借輝之忿，加兄弟之刑。夫刑人於市，與眾棄之，爵人於朝，與眾共之，明不私於天下，無欺於耳目。何得以非正刑書，施行四海。刑名一失，駟馬不追。既有詔旨，依即行下，非律之案，理宜更請。」

As for the case of Rong Fei and the others, the punishment should be limited to their illicit adultery. If they had been apprehended amongst the mats of their licentiousness,[717] with many clear proofs, then they would have been judged according to the statutes to sentences that do not exceed forced labor. How can they be treated as if they had committed a crime in the palace apartments, like those meriting a sentence of forced labor within the palace?[718]

By Zhang Zhishou's oral testimony, his younger sister [Rong Fei] is married to the Manager of Requisitioned Labor[719] Luo Xiangui and has already given birth to two daughters with her husband. Thus she is a mother in another family. The *Rites* says that a wife does not have two husbands, just as people do not have two Heavens.[720] If there are transgressions within a family, the fault lies with the husband; the offense is not the brother's. In the past, the Cao-Wei and Jin did not eliminate the punishments extending to five types of relations,[721] yet there were punishments that spared children who killed their mothers. He Zeng contested this, saying: "Women living in their natal homes should share in the punishments of their parents, and married women should share in those of their husbands."[722] This, then, is a rule that can never be excised, a conclusion common to ancient and present times alike. When the statutes say that "close family members may cover up for each other," this is for all ordinary crimes. How much more must this be true for the shame of adultery! How could siblings share *qi* and yet testify against each other? The sentence exceeds the crimes they have committed, and both the statements and facts of the case also diverge from the statutory framework. By the statutes, the crime of adultery has no guilt-by-association clause. One may not rely on fury at Liu Hui to impose punishment on Rong Fei and Hui Meng's brothers. When we punish someone in the marketplace, we join with the masses to abandon the criminal; when we grant someone rank in the court, we join with the masses to honor them. This makes it clear that the realm is not subject to private interest and the eyes and ears of the people are not deceived. How can such incorrect penal provisions be promulgated within the Four Seas? Once punishments lose their reputation, a team of horses will not get it back. Since there is already an imperial order, it should be carried out immediately. However, when the crime and its name are misaligned, it is reasonable and appropriate that they should be appealed again.

---

[717] I.e., caught in the act.

[718] A system in place since the end of the Eastern Han, according to which these palace servants were responsible for working for palace ladies in times of illness or death. *TU* 244n3.

[719] Lee, "Crime and Punishment," 162. *TU* 244n4 points out that the office of *sishi canjun* 司士參軍 is described in the *Tang Administration*, in an entry largely concerned with the management of forced laborers, as Lee's translation suggests.

[720] A quotation from the Mourning Garments chapter of the *Ceremonies and Rites* 儀禮 喪服. *GC* 177n18.

[721] Grandparents, parents, spouses, siblings, and children. *TU* 245n6 gives a detailed account of the question.

[722] This memorial is quoted at greater length in the *History of Jin* legal treatise. Gao Chao 高潮 and Ma Jinshi 马建石, *Annotations and Translations of Chinese Historical Treatises on Law and Punishment*, 86.

尚書元修義以為：

> 「昔哀姜悖禮於魯，齊侯取而殺之，《春秋》所譏。又夏姬罪濫於陳國，但責徵舒，而不非父母。明婦人外成，犯禮之愆，無關本屬。況出適之妹，釁及兄弟乎？」

右僕射游肇奏言：

> 「臣等謬參樞轄，獻替是司，門下出納，謨明常則。至於無良犯法，職有司存，劾罪結案，本非其事。容妃等奸狀，罪止於刑，並處極法，準律未當。出適之女，坐及其兄，推據典憲，理實為猛。又輝雖逃刑，罪非孥戮，募同大逆，亦謂加重。乖律之案，理宜陳請。乞付有司，重更詳議。」

Ministry Chief Yuan Xiuyi believed:

> A long time ago, Ai Jiang contravened ritual propriety in the state of Lu, so the ruler of Qi captured and killed her, and she is criticized in the *Annals*.[723] There was also Xia Ji whose crimes overflowed in the state of Chen, but the blame fell on Zhengshu [her son], not her parents.[724] Clearly, when wives marry out of their natal families and then commit transgressions against ritual propriety, that has nothing to do with their original kin. How much more must this be true for a married sister's offense extending to her brothers?

You Zhao, Right Vice-Director of the Department for State Affairs, wrote a memorial saying:

> Your ministers do their humble best to take part in pivotal affairs of government; their duty is to present to you what is good and so reject the bad. The Imperial Chancellery transmits the emperor's decrees and reports back to him. Its proposals are to clarify the constant norms. When it comes to malefactors, there are officials specifically tasked with dealing with them. The work of charging crimes and resolving cases did not originally belong to the Chancellery. As for the adultery committed by Rong Fei and the others, the punishment should be limited to hard labor. To go further to sentence them to the most extreme punishment does not fit the crime. As for punishing the brothers of married women, if we are to examine the matter according to the entire corpus of the laws, this reasoning is truly savage. Moreover, although Liu Hui fled, this is not a crime whose punishment extends to killing his wife and children, and, as for recruiting the populace to capture him as if he were a traitor, I would also deem that excessive. When cases depart from the statutes, it is fit and proper that they should be appealed. I humbly request that this case be turned over to those officials responsible for it so that they may debate its details once again.

[723] *Zuozhuan*, Lord Min, Year 2.
[724] *Zuozhuan*, Lord Xuan, Year 9.

詔曰：

「輝悖法者之，罪不可縱。厚賞懸募，必望擒獲。容妃、慧猛與輝私亂，因此耽惑，主致非常。此而不誅，將何懲肅！且已醮之女，不應坐及昆弟，但智壽、慶和知妹奸情，初不防禦，招引劉輝，共成淫醜，敗風穢化，理深其罰，特敕門下結獄，不拘恆司，豈得一同常例，以為通準。且古有詔獄，寧復一歸大理。而尚書治本，納言所屬。弗究悖理之淺深，不詳損化之多少，違彼義途，苟存執憲，殊乖任寄，深合罪責。崔纂可免郎，都坐尚書，悉奪祿一時。」

The edict read:

> As for Liu Hui's contravening of the laws, it is a crime that cannot be forgiven. We are offering such generous rewards and levying troops in the hopes that it will ensure his capture. The debauchery in which Rong Fei, Hui Meng, and Liu Hui participated led to their addiction to delusion and brought the princess to this extraordinary pass. If *this* is not punished with execution, what *will* be punished with due seriousness? Moreover, although the crimes of married women should not extend to their brothers, Zhang Zhishou and Chen Qinghe knew the facts of their younger sisters' adultery and initially did nothing to prevent them. In fact, they drew Liu Hui on and thus completed his foul licentiousness, ruining mores and befouling civilizing influences. It is reasonable to make their punishment more severe. That is why I gave a special order to the Imperial Chancellery to resolve these cases, free of interference by those officials ordinarily in charge. How could they all be decided according to an ordinary regulation or made a common standard? Furthermore, in ancient times, there were criminal trials ordered by imperial edicts. Should all these cases have been returned to the Ministry of Justice? Also, the Department of State Affairs deals with those matters fundamental to governing the state, and officials charged with transmitting imperial orders and reporting to the emperor lie under its jurisdiction. The Department did not probe the seriousness of the transgression, nor did it detail the extent of its harm to the government's suasive influence. In this, it has turned away from the path of duty: to maintain its grip on the laws[725] greatly perverts its mission and deeply merits criminal responsibility. Cui Zuan may be dismissed from his post as Palace Attendant, and all those who work in the Department[726] should have their salaries docked for one season.

[725] I.e., rather than allowing the different procedure ordered by the emperor in this exceptional case.
[726] Bo Juncai 柏俊才, "Investigation into the Great Officials of the Three Areas of the Northern Wei," 96.

孝昌已後，天下淆亂，法令不恆，或寬或猛。及爾朱擅權，輕重肆意，在官者，多以深酷為能。至遷鄴，京畿群盜頗起。有司奏立嚴制：諸強盜殺人者，首從皆斬，妻子同籍，配為樂戶；其不殺人，及贓不滿五匹，魁首斬，從者死，妻子亦為樂戶；小盜贓滿十匹已上，魁首死，妻子配驛，從者流。

After the Northern Wei

After the Xiaochang era [525-527], the land roiled with disorder. The laws and ordinances were inconsistent: some were magnanimous and some savage. Down to the Erzhu family's[727] usurpation, the weight of sentences followed the whims of the officials. Among the officials, many took severity and cruelty to be a sign of ability. When the capital was moved to Ye,[728] the city and its environs saw frequent uprisings of bands of brigands. The officials memorialized to advocate for the establishment of strict rulings: in all cases in which robbers killed people, both principals and accomplices would be decapitated. Their wives, children, and anyone else on their family registers would be made to serve as musicians in government offices.[729] If they had not killed anyone, and if the value of what they had stolen was less than five bolts, the leaders would be decapitated and the accomplices would die, while their wives and children would be forced to work as musicians. In cases of non-violent theft in which the value of the stolen goods was ten bolts or more, leaders would be killed and their wives and children would be sent to work in government post-horse relay stations; the accomplices would then be banished.

[727] A powerful ethnically Xiongnu family of the end of the Northern Wei who became embroiled in various battles against the ruling house.
[728] This move was part of the establishment of the Eastern Wei 東魏 (534-550 CE), whose short-lived rule followed the collapse of the Northern Wei.
[729] Or entertainers generally. Often code for prostitutes. *GC* 180n4.

侍中孫騰上言：

> 「謹詳，法若畫一，理尚不二，不可喜怒由情，而致輕重。案《律》，公私劫盜，罪止流刑。而比執事苦違，好為穿鑿，律令之外，更立餘條，通相糾之路，班捉獲之賞。斯乃刑書徒設，獄訟更煩，法令滋彰，盜賊多有。非所謂不嚴而治，遵守典故者矣。臣以為升平之美，義在省刑；陵遲之弊，必由峻法。是以漢約三章，天下歸德；秦酷五刑，率土瓦解。禮訓君子，律禁小人，舉罪定名，國有常闢。至如『眚災肆赦，怙終賊刑』，經典垂言，國朝成範。隨時所用，各有司存。不宜巨細滋煩，令民預備。恐防之彌堅，攻之彌甚。請諸犯盜之人，悉準律令，以明恆憲。庶使刑殺折衷，不得棄本從末。」

詔從之。

Palace Attendant Sun Teng wrote to the emperor, saying:

> My considered opinion is that if laws are written in a unified way, their reasoning is not contradictory, so it is impermissible to decide the weight of sentences on the basis of delight or anger derived from the facts of any particular case. By the statutes, in cases of the pillage or robbery of public or private goods, the sentence for the crime goes no further than banishment. But those handling matters by seeking out comparable cases make the rules harsher, preferring to bore and chisel their way to a conclusion outside the statutes and ordinances to establish other articles so that they can open the route to mutual denunciation and distribute rewards for the arrest and capture of criminals. This, then, is vainly setting out criminal articles while criminal cases and complaints proliferate; laws and edicts become increasingly elegant while theft and violence increase. This is surely not what is called "achieving good order without strictness and observing the old regulations and precedents." I believe that, in order to achieve the excellence of an era of "rising peace,"[730] our duty lies in reducing punishments, while the slippery slope to ruin inevitably comes from harsh laws. Thus, when the Han simplified the laws into the Three Articles, all the realm acknowledged its virtuous rule. By contrast, when the Qin cruelly employed the Five Mutilating Punishments, the land within its borders fell apart like roof tiles. While the wise man is guided by ritual propriety, the statutes restrain the petty man. That is why, when denouncing crimes and determining charges, the state must be governed with constancy. This is like "those who persisted in doing harm were punished, while those whose crimes were unfortunate accidents were spared."[731] The classics let fall these words to us, and they are a perfect template for our court. They can be used at any moment and each has officials to preserve it. It is inappropriate to let all the laws, great and small, become ever more numerous and irksome, so that the people prepare to resist them. I fear that the more rigid the laws' defenses, the more intensely they will be attacked. I request that all thieves be dealt with by the statutes and ordinances, in order to make the constant body of laws clear. It is my hope to make punishments and executions appropriate. This cannot be achieved by abandoning the root and following the branches.

An edict granted this.

---

[730] "He Xiu 何休 (129–182 CE) in his elaboration on the *Gongyang Commentary to the Springs and Autumns* incorporated his vision of *taiping* into an exposition of Chinese history in the Chunqiu period, which was divided into three epochs (*sanshi* 三世). The first of these (the years 722–627 BCE) was the time of decay and chaos (*shuai-luan* 衰亂), which corresponded with what Confucius knew, based on the records of his native state of Lu. The second one, the epoch of rising peace (*shengping* 升平; 626–542 BCE), represents what Confucius knew from what he had heard, particularly with regard to the differences between the inhabitants of Central States (Zhongguo 中國) and barbarians. Finally, the last epoch—that of supreme peace (*taiping*; 541–481 BCE)—ran parallel to the times witnessed by Confucius himself, which were to be a period of blurring the lines between the Chinese and barbarians." Dawid Rogacz, "The Idea of Supreme Peace (Taiping) in Premodern Chinese Philosophies of History," *Asian Studies* 10, no. 1 (January 19, 2022): 409, https://doi.org/10.4312/as.2022.10.1.401-424.

[731] A reiteration of the *Documents* quotation from the treatise's opening. Here, Sun Teng seems to be using it to say that it is better to operate according to such general principles, tending towards leniency and forgiveness, than to allow precise but harsh laws to proliferate.

天平後，遷移草創，百司多不奉法，貨賄公行。興和初，齊文襄王入輔朝政，以公平肅物，大改其風。至武定中，法令嚴明，四海知治矣。

After the Tianping era [534-537],[732] when the capital had just been relocated, many officials did not uphold the laws and bribery was practiced openly. At the beginning of the Xinghe era [539-542], King Wenxiang of Qi entered the court to assist its governance. Employing an impartial and serious manner, he greatly reformed the land's atmosphere. By the middle of the Wuding era [543-550],[733] the laws and ordinances were strict and clear, and all within the Four Seas knew good order.

[732] The first reign period of the Eastern Wei.
[733] The final period of the Eastern Wei.