

# **A Short History of Law, Norms, and Social Control in Imperial China**

Hayden Windrow<sup>1</sup>

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## **I. INTRODUCTION**

The longevity of the Imperial Chinese state has long captured the imagination of Sinologists and inspired reams of scholarship seeking to explain its development, survival for over two millennia, and continuing influence on China today. Accounts of the Imperial system's genesis in English- and Chinese-language literature track a familiar path.

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<sup>1</sup> J.D. from New York University Law School (2005); M.A. Linguistics, University of London (2000); B.A. East Asian Studies, Columbia University (1998). All translations are my own unless otherwise specified. Throughout the paper I use the pinyin Romanization system for Chinese transliterations. In cases where an author has used another system, I have retained the original spelling unless it may prove confusing.

The Qin<sup>2</sup> state's adoption of legalist policies enabled it to vanquish its enemies and unify China; however, due to the Qin's cruel policies, the dynasty soon collapsed. The following Han dynasty rejected its predecessor's legalist program, with the notable exception of its bureaucratic administration, and adopted Confucianism as its state ideology. This transformation, in turn, culminated several centuries later in the production of the Tang dynasty's legal code in 637. The Code, which employed a legalist bureaucratic apparatus to enforce Confucian norms, established an efficient, minimalist political model that governments followed until the early twentieth century.

However, this history exaggerates, and to some degree fabricates, the opposing doctrinal orthodoxies of the Qin and Han dynasties and consequently obscures the subtle, more impressive interactions between the state's policies and the society it governed. Officially, the Qin and Han respectively espoused the virtues of legalist and Confucian government, but primary legal texts from these periods discovered in recent decades reveal a political realm bound by the social norms and governing habits of the time. These constraints, usually disregarded in favor of official histories, forced both dynasties to adopt pragmatic approaches toward government and sideline ideology into a more ornamental role. Likewise, when evaluating Tang law, scholars have fixated on the (surprisingly modern) bureaucracy and again neglected the discourse between the state and broader society—the very factor that engendered the imperial system with an uncommon degree of flexibility and sustainability.

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<sup>2</sup> See, e.g., A.F.P. HULSEWÉ, 1 REMNANTS OF HAN LAW 6 (1955); LIU YONGPING, ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT 203-04, 296 (1998); GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 2-4 (1996); XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION ch. 2 (1997); Lin Jianming, *Qindai Falü Zhidu Chu Tan*, in FALÜ SHI LUNCONG 122, 122, 124 (Zhongguo Falü Shi Xue Hui ed., 1998) [*An Initial Inquiry into the Qin Dynasty Legal System*, in APPRAISALS OF CHINESE LEGAL HISTORY]; Eric. W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 51-55 (2001); John T. Boxer, Note, *China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest*, 22 SUFFOLK TRANSNAT'L L. REV. 593, 596-600 (1999). As one would suppose, much work coming out of the PRC has been shaped to adhere to official interpretations of Chinese history. See, e.g., Lin, *supra*, at 122. Some authors, though, have begun to dissect and question the traditional approaches toward early Chinese law. See LIU, *supra*, at 202, 234, 297-98. Admittedly, because of language constraints, I cannot easily access Japanese-language secondary sources.

This paper hopes to offer an alternative perspective on the development and operation of Chinese imperial law, as well as posit more nuanced explanations for its formidable success. Specifically, it will analyze how the interaction between law, state ideology, and social norms<sup>3</sup> helped “weave together a unique combination of formal and informal [governing] methods, with a strong emphasis on the latter . . . .”<sup>4</sup> The first section will narrate the rise legalism and Confucianism during the turbulent latter half of the Zhou dynasty (c. 11th century B.C.-221 B.C.) and examine the implications of each as a political model. The paper then will turn to the Qin dynasty (221-207 B.C.) and evaluate the effects and extent of its adoption of legalism as its governing creed. Likewise, the advent of the Han dynasty (206 B.C.-220 A.D.) will lead to a critical exploration of the so-called Confucianization of the law during that period. After tracing this ideological evolution and its impact on government administration and law, the next section will focus on the synthesis of Imperial Chinese law laid down in the Tang (618-907) that guided the Chinese state into modern times.

Before proceeding, a few caveats. Given the uncertain nature of this paper’s audience and individuals’ background knowledge of Chinese (legal) history, I have chosen to cover selected periods of pre-modern Chinese history more extensively, and omit others, to provide a context from which to understand the development of Imperial law in a minimally burdensome manner. More prosaically, it is important to stress the difficulty of parsing “law” from other political and administrative functions in China given the absence of a separation-of-powers tradition.

## II. POLITICAL IDEOLOGIES

Many analyses of Chinese law begin with a recital of the tenants of Confucianism and legalism. While too often a formulaic rite, Confucianism’s role as China’s state ideology for two-thousand

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<sup>3</sup> “[B]ackground norms are as important as the formal apparatus of the state in sustaining successful patterns of interactions across many spheres,” and the political interaction with these norms can have significant effects on a government’s success or failure. Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2063 (1996).

<sup>4</sup> Ronald J. Troyer & Dean G. Rojek, *Introduction to SOCIAL CONTROL IN THE PEOPLE’S REPUBLIC OF CHINA* 1, 1 (Ronald J. Troyer et al. eds., 1989).

years<sup>5</sup> and legalism's lasting influence on the structure and administration of Chinese law necessitate, for the purposes of this paper, synopses of the conceptions of social order, law, and government espoused by these philosophies. I hope to avoid pitfalls of other works, which often grotesquely mystify pre-modern Chinese legal theory and exaggerate its brutality,<sup>6</sup> without discounting its impact on elite conceptions of the universal order which guided the state.

#### A. CONFUCIANISM

From the early Han dynasty until the collapse of the Qing in 1911, Confucianism served as China's state ideology and guided the development of its law and legal thought.<sup>7</sup> Confucius (551-479 B.C.) lived during the late Spring and Autumn period (770-475 B.C.) and early Warring States period (475-221 B.C.), eras marked by the decay of the Zhou dynasty, warfare between its successor states, and the decline of the *zú*, or clan, as the principle non-governmental unit of

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<sup>5</sup> Confucian thought underwent substantial evolution during its 2,000 years of political dominance. See Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates About "Values in Asia"*, 14 IND. INT'L & COMP. L. REV. 1, 77, 79 (2003). I will elaborate on changes as they prove significant.

<sup>6</sup> See, e.g., HULSEWÉ, *supra* note 1, at 5 (unveiling supposed need to maintain "cosmic harmony" as impetus behind criminal law); Robert Bejesky, *Falun Gong & Re-Education Through Labor: Traditional Rehabilitation for the "Misdirected" to Protect Societal Stability Within China's Evolving Criminal Justice System*, 17 COLUM. J. ASIAN L. 147, 159, 158-59 (2004) (discussing China's ancient history and collectivist social behavior); Robert Bejesky, *Political Pluralism and Its Institutional Impact on Criminal Procedure Protections in China: A Philosophical Evolution from "Li" to "Fa" and from "Collectivism" to "Individualism"*, 25 LOY. L.A. INT'L & COMP. L. REV. 1, 3 (2002) (typifying China's criminal law development as "a struggle between forces of tradition and modernity"); Chin Kim, *The Modern Chinese Legal System*, 61 TUL. L. REV. 1413, 1429 (1987) ("The overriding concern for the Imperial tribunals was to maintain blatant and vociferous punishment." (citation omitted)); Orts, *supra* note 1, at 48 (musing about China's great antiquity and comparing its legal reform efforts to "the construction of the Great Wall").

<sup>7</sup> See MACCORMACK, *supra* note 1, at 7.

social organization.<sup>8</sup> Influenced by these events, Confucius espoused a conservative, even reactionary model of government that idealized the political and social environment of the early Zhou<sup>9</sup>—effectively an ideological institutionalization of early Chinese social norms.<sup>10</sup>

Confucianism envisions society as structured around individuals' "natural" relationships.<sup>11</sup> At the center of this scheme lies the relationship between father and son, characterized by "the duty of respect and submission owed by the latter to the former."<sup>12</sup> This verticality encompasses interactions between elder and younger brothers, husbands and wives—and crucially—rulers and their subjects as well.<sup>13</sup> Each hierarchical pairing carries obligations of respect and submission between its members, with political relationships paralleling those within the family.<sup>14</sup> These links

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<sup>8</sup> Cf. Susan R. Weld, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* by Liu Yongping, 30 Hong Kong L. J. 150, 160-61 (discussing effects of disintegration of *zú* in Warring States period) (2000) (book review).

<sup>9</sup> 1 SOURCES OF CHINESE TRADITION 17, 88 (Wm. Theodore de Bary ed., 1960).

<sup>10</sup> See MACCORMACK, *supra* note 1, at 6, 12; *see also* MENGZI 7:1 (4th century B.C.) ("There has never been one who has erred by following the ways of the first kings.") [hereinafter MENCIOUS]; *cf.* MACCORMACK, *supra* note 1, at 2.

<sup>11</sup> See MENCIOUS, *supra* note 10, at 13:15; Brian E. McKnight, *Punishments in Traditional China: from Family, to Group, to State*, in PERSPECTIVES ON PUNISHMENT: AN INTERDISCIPLINARY EXPLORATION 9 (Richard Mowery Andrews ed., 1997); Geoffrey MacCormack, *Religion and Law in Traditional China*, in LAW, MORALITY, AND RELIGION: GLOBAL PERSPECTIVES 95, 104, 110 (Alan Watston ed., 1996); XIN, *supra* note 1, at 20.

<sup>12</sup> GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* 26 (1990).

<sup>13</sup> See PHILIP C. C. HUANG, *CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING* 231, 234 (1996); MACCORMACK, *supra* note 1, at 7; Troyer & Rojek, *Introduction*, *supra* note 4, at 6, 8 ("The relationship of father-son became extended to master-servant and emperor-commoner."); XIN, *supra* note 1, at 20; *cf.* Geoffrey Grant, *The Family and Social Control: Traditional and Modern*, in *SOCIAL CONTROL IN THE PEOPLE'S REPUBLIC OF CHINA* 17, 17 (Ronald J. Troyer et al. eds., 1989) ("In historical China, the family provided the basis for the social order."); *id.* at 18-19.

<sup>14</sup> See XIN, *supra* note 1, at 10.

between father and son, husband and wife, and ruler and minister “bec[a]me crystallized in the concept of the ‘Three Bonds’ . . . .”<sup>15</sup>

Recognition of these relationships and fulfillment of their duties constitute Confucianism’s universal moral standard.<sup>16</sup> A person who does not behave in accordance with his social role as defined through these relationships therefore acts immorally. In one episode, for example, “Confucius said of the Li family, ‘They have eight rows of eight dancers perform in their courtyard. If this can be endured, what cannot be endured?’”<sup>17</sup> Here, taking on royal trappings approaches the most repugnant of acts.

The Confucian worldview’s emphasis on social position proved so potent—and utilitarian—that it influenced norms throughout Chinese law. Confucius foreshadowed this phenomenon when

the Governor of Shè [told him], “Our village has a man named ‘Straight Body.’ When his father stole a sheep, he testified against him.” Confucius answered, “In our village those who are straight are quite different. Fathers cover up for their sons, and sons cover up for their fathers. Straightness is to be found in such behavior.”<sup>18</sup>

At first impression, this degree of filial piety would seem a recipe for anarchy tempered only by family loyalties, and certainly not appear an attractive model around which to shape a legal order. However,

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<sup>15</sup> MACCORMACK, *supra* note 1, at 8.

<sup>16</sup> See 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 17; McKnight, *supra* note 11, at 121 (“Humans were required by Heaven to observe in their behaviour those moral values that ensured the proper functioning of the basic family and social roles (those between ruler and subject, father and son, elder and younger brother, and husband and wife).”); cf. MACCORMACK, *supra* note 1, at 7; McKnight, *supra* note 11, at 13 (“harmony . . . resulted when everyone played their roles correctly”).

<sup>17</sup> KONG ZI, LUN YU [THE ANALECTS] 3:1 (late 4th-early 3rd century B.C.) [hereinafter CONFUCIUS]. The number eight was long the ruler’s exclusive privilege.

<sup>18</sup> *Id.* at 13:18.

the relationship between a ruler and his subject falls within the Three Bonds and facilitated the diffusion of filial piety into the public arena.

Another Confucian premise, which also stems from the Three Bonds, holds that subordinates inherently view superiors as role models as a child does his parents. Consequently, filial piety mandates that in the ruler-subject relationship, the ruler behave morally to promote proper behavior among the populace. Advocacy for this politicization of the father-son mentor relationship pervades Confucian texts:

Duke Ai asked, "What will make the people look up to me?"

Confucius replied, "Raise the straight and set them over the crooked, and the people will look up to you. Raise the crooked and set them over the straight, and they will not look up to you."<sup>19</sup>

....

When a gentleman feels profound affection for his parents, then the people will rise to benevolence. When he does not forget old friends, the people then will not neglect their duties to others.<sup>20</sup>

....

To govern [zhèng] is to correct [zhèng]. If you set an example by being correct, who would dare not to be correct?<sup>21</sup>

By setting a moral example for his subjects, a ruler instills them with virtue, eliminates social evils, and ensures the stability and prosperity of the state.<sup>22</sup> In the aggregate, rulers become society's pinnacle of

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<sup>19</sup> *Id.* at 2:19.

<sup>20</sup> *Id.* at 8:2.

<sup>21</sup> *Id.* at 12:17. The words "to govern" and "to correct" are homonyms, but written with separate characters, leaving ample room for word play.

<sup>22</sup> See MACCORMACK, *supra* note 1, at 6, 30, 55; XIN, *supra* note 1, at 19-21; MacCormack, *supra* note 11, at 1031; *infra* text accompanying note 31.

moral example—the standard from which subordinates (i.e. everyone else) measure themselves.<sup>23</sup>

When individuals begin to act virtuously, the benefits of proper behavior thus diffuse throughout society and create a virtuous cycle that reinforces all relationships and strengthens the state:

If Your Majesty practices benevolent government toward the people . . . and if the able-bodied men learn . . . to have filial piety and be good younger brothers, loyal and true to their word, so that they will in the family serve their fathers and elder brothers, and outside the family serve their elders and superiors, then they can be made to defeat the strong armor and sharp weapons of Qin and Chu with nothing but clubs . . . . The benevolent man has no equal. . . .<sup>24</sup>

While undoubtedly hyperbolic, this passage nevertheless reveals Confucianism's implicit understanding that "order is maintained more through social policy than state policy."<sup>25</sup>

Conversely, large-scale disruption of proper relationships reflects a social breakdown that could engulf and destroy the political regime, which likely catalyzed such deviancy by shirking its duty as moral exemplar to its subjects.<sup>26</sup> Heaven<sup>27</sup> may then revoke its mandate and precipitate a dynasty's downfall.<sup>28</sup> "When the Way

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<sup>23</sup> CONFUCIUS, *supra* note 17, at 2:1 ("The ruler of virtue can be compared to the North Star which commands the homage of the myriad stars without moving."). This phenomenon exists on a diminished scale throughout society between people of different social rank.

<sup>24</sup> MENCIUS, *supra* note 10, at 1:5; *cf. infra* text accompanying note 39.

<sup>25</sup> Pildes, *supra* note 3, at 2062 (citation omitted).

<sup>26</sup> *See* 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 18.

<sup>27</sup> In Chinese "Heaven" does not connote the realm of God or a place the dead go after life; it more closely resembles the impersonal Deist notion of Providence. *See* CHINESE CIVILIZATION: A SOURCEBOOK 280 (Patricia Buckley Ebrey ed., 2d ed. 1993); MACCORMACK, *supra* note 1, at 41; MacCormack, *supra* note 11, at 95, 102-03, 110.

<sup>28</sup> *See* MACCORMACK, *supra* note 1, at 41; MacCormack, *supra* note 11, at 103, 111;

prevails in the world, the commoners to not express criticism” and foment rebellious activities.<sup>29</sup> As proof, Mencius<sup>30</sup> claimed that “the Three Dynasties [Xia, Shang, and Zhou] acquired the world through benevolence and lost the world through cruelty. This is why states rise and fall, survive and collapse too.”<sup>31</sup> To maintain power, the paternalistic ruler must satisfy his social position’s moral obligations to ensure the people also fulfill their moral duties.

In summary, Confucianism extends the family’s hierarchical relationships to all social relations and transforms society into a pyramid of overlapping father-son relations that culminates in the sovereign. It was not mere rhetoric when Mencius claimed that “[t]he root of the world [China] is the state; the root of the state, the family; and the root of the family, in one’s own self.”<sup>32</sup> In essence, Confucian “politics is only an extension of [Confucian] morals.”<sup>33</sup>

This socio-political model’s impact on the law emerges only in light of the Confucian belief in humanity’s capacity for moral improvement through education—what might today be labeled

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The governor exists for the sake of the governed, to give the people peace and sufficiency, and to lead them by education and example to the life of virtue. The ruler who neglects this responsibility, or worse, who misuses and oppresses the people, is no true ruler and the people are hence absolved of their fealty to him.

1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 7, 87; *see also* CHU CHENG, ON THE RECONSTRUCTION OF THE CHINESE SYSTEM OF LAW 15 (1947) (noting close relationship between law and morality in Imperial China); MENCIUS, *supra* note 10, at 7:7 (“Those who follow Heaven survive; those who oppose Heaven are destroyed.”).

<sup>29</sup> CONFUCIUS, *supra* note 17, at 16:2.

<sup>30</sup> Along with Confucius, the co-founder of Confucian thought. *See Introduction to MENCIUS* (D.C. Lau trans., 1970).

<sup>31</sup> MENCIUS, *supra* note 10, at 7:3.

<sup>32</sup> *Id.* at 7:5.

<sup>33</sup> *Preface to CONFUCIUS, ANALECTS* (D.C. Lau trans., 1970); *see* MACCORMACK, *supra* note 1, at 23, 55; MacCormack, *supra* note 11, at 121 (“Humans were required by Heaven to observe in their behaviour those moral values that ensured the proper functioning of the basic family and social roles”); XIN, *supra* note 1, at 2.

rehabilitation.<sup>34</sup> As implied earlier, inadequate education or having poor role models leads a person to stray from the social relationships that define him.<sup>35</sup> However, if taught through example, the deviant individual will again become a healthy, functioning member of society:

Lead them with edicts, keep them orderly with punishments, and the people will avoid trouble but will have no sense of shame. Lead them with virtue, keep them orderly with the rites, and they will have a sense of shame and, moreover, reform themselves.<sup>36</sup>

Consequently, then, a proper Confucian education ignores the purported “thin line between education . . . and attempted norm-change” and overtly aims to alter individuals’ values.<sup>37</sup>

Further, due to the interlocking nature of the Three Bonds, learning one’s proper role within one relationship facilitates the reform process by providing the tools to conform to other social roles.<sup>38</sup>

For a man who is a dutiful son and respectful to one’s elder brothers to want to transgress his superiors is rare; for one who does not want to transgress his superior to want to start a rebellion is unheard of. The

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<sup>34</sup> See 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 19-20, 100; MACCORMACK, *supra* note 1, at 6-7, 40; Ronald J. Troyer, *Chinese Thinking About Crime and Social Control*, in SOCIAL CONTROL IN THE PEOPLE’S REPUBLIC OF CHINA 45, 47 (Ronald J. Troyer et al. eds., 1989); XIN, *supra* note 1, at 20-21, 38.

<sup>35</sup> See McKnight, *supra* note 11, at 9 (“The traditional Chinese elite . . . frequently blamed serious, continuous deviance on failures in the educative process.”).

<sup>36</sup> CONFUCIUS, *supra* note 17, at 2:3; see MACCORMACK, *supra* note 1, at 12; XIN, *supra* note 1, at 38.

<sup>37</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 913 (1996).

<sup>38</sup> See MacCormack, *supra* note 11, at 121; cf. MENCIUS, *supra* note 10, at 1:1 (“There is no benevolent man who abandons his parents, and there is no righteous man who puts his ruler last.”).

gentleman attends to the roots, and when the roots are established, the Way will grow. Being a good son and respectful to one's elder brothers is the root of benevolence!<sup>39</sup>

All relationships continually bolster the integrity of others<sup>40</sup> and by promoting socio-political stability, function as checks on asocial behavior. Thus, ideally, "if everyone loved his parents and deferred to his elders, the world would be at peace."<sup>41</sup>

Because Confucians stress using hierarchical relations to mitigate deviancy and re-socialize individuals, they traditionally regarded laws and criminal punishment as serving little legitimate function.<sup>42</sup> Rather, they represented tools of governance employed by an imperfect regime:<sup>43</sup> "People submit to power not because they follow their heart, but because their power is not enough. When people submit to what is moral, their hearts fill with admiration and they do so sincerely."<sup>44</sup> The Confucian world had little room for codified law, punishment, and impersonal government.

## B. LEGALISM

Before Confucianism secured dominance over Chinese political theory, it faced a competitor it never fully vanquished: legalism. Also arising during the early Warring States period, it marked an alternative response to the power vacuum created by the decline of the Zhou central government and the breakdown of the *zú* structure.<sup>45</sup> Legalists reacted to these disruptions with a program in

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<sup>39</sup> CONFUCIUS, *supra* note 17, at 1:2.

<sup>40</sup> See HUANG, *supra* note 13, at 234.

<sup>41</sup> MENCIUS, *supra* note 10, at 7:11.

<sup>42</sup> See MACCORMACK, *supra* note 1, at 6-7, 30.

<sup>43</sup> See *id.*; cf. MacCormack, *supra* note 11, at 97.

<sup>44</sup> MENCIUS, *supra* note 9, at 3:3.

<sup>45</sup> See LIU, *supra* note 1, at 173-74; Weld, *supra* note 8, at 160-61.

direct conflict with Confucian ideals. They advocated centralization of authority in the ruler through the creation of a vast bureaucracy and extensive legal codes, and the use of severe, uniform punishments to ensure compliance with state policy.<sup>46</sup> Law existed exclusively to strengthen the monarch's authority and state power.<sup>47</sup> Legalists

completely rejected the traditional virtues of humanity and righteousness . . . denying that such lofty ideals had any practical relationship to the hard realities of political life. They openly advocated war as a means of strengthening the power of the ruler, expanding the state, and making the people strong, disciplined, and submissive.<sup>48</sup>

To facilitate these goals, they believed the ruler should make law "according to the political requirements of his time" and that policy should not blindly hark back to antiquity.<sup>49</sup> Lord Shang<sup>50</sup> (d. circa 338-330 B.C.) insisted that "the sage does not stick to ancient

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<sup>46</sup> See LIU, *supra* note 1, at 173; CHINESE CIVILIZATION: A SOURCEBOOK, *supra* note 27, at 32; MACCORMACK, *supra* note 1, at 4; 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 123; XIN, *supra* note 1, at 20. Some have referred to Legalism as "the ideology of bureaucracy" because of its focus on "routinized administration and regulation." HUANG, *supra* note 13, at 231; Jeremy T. Monthly, *Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC*, 33 Tex. Int'l L.J. 189, 194 (1998).

<sup>47</sup> See LIU, *supra* note 1, at 179, 182-84; 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 123.

<sup>48</sup> 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 123; *cf.* MACCORMACK, *supra* note 1, at 4;

Lord Shang held that regard for the "six lice" (that is, care for old age, living on others, beauty, love, ambition, and virtuous conduct) or the "ten evils" (that is, rites, music, odes, history, virtue, moral culture, filial piety, brotherly duty, integrity, and sophistry) will guarantee the ruin of the state.

*Id.*

<sup>49</sup> LIU, *supra* note 1, at 183; *see id.* at 179, 184; HAN FEIZI (c. 280-233 B.C.), *reprinted in* 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 130.

<sup>50</sup> Minister of the state of Qin from 375 B.C. Also known as Gongsun Yang and Shang Yang. See LIU, *supra* note 1, at 175.

laws if he can strengthen his state by changing them and does not keep ancient rituals if he can benefit the people by altering them.”<sup>51</sup> Similarly, Han Feizi<sup>52</sup> ridiculed Confucians’ fixation on the past, since “[t]o claim certainty without corroborating evidence is stupid; to refer to anything one cannot be certain of is self-deceptive. Therefore, those who explicitly refer to the ancient kings . . . must be either stupid or deceitful.”<sup>53</sup> With even more vitriol, he lambasted them, writing that

when witches and priests pray for people, they say: “May you live as long as one thousand and ten thousand years!” Even as the sounds “one thousand and ten thousand years,” are dinning upon one’s ears, there is no sign that even a single day has been added to the age of any man. That is the reason why people despise witches and priests. Likewise, when the Confucianists . . . counsel the rulers they do not discuss the way to bring about order now, but exalt the achievements of good order in the past. They neither study affairs pertaining to law and government nor observe the realities of vice and wickedness, but all exalt the reputed glories of remote antiquity and the achievements of the ancient kings. Sugar-coating their speech, the Confucianists say: “If you listen to our

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<sup>51</sup> LORD SHANG, *THE BOOK OF LORD SHANG*, reprinted in CHINESE CIVILIZATION: A SOURCEBOOK, *supra* note 27, at 33.

<sup>52</sup> Along with Lord Shang, Han Feizi was one of the two most esteemed legalists. See 1 *SOURCES OF CHINESE TRADITION*, *supra* note 9, at 122; CHINESE CIVILIZATION: A SOURCEBOOK, *supra* note 27, at 32. Ironically, Han Feizi was a protégé of the Confucian theorist Xunzi (313-238 B.C.), who was noted for his belief in humans’ inherently evil nature. See 1 *SOURCES OF CHINESE TRADITION*, *supra* note 9, at 122.

<sup>53</sup> HAN FEIZI, reprinted in 1 *SOURCES OF CHINESE TRADITION*, *supra* note 9, at 122. Han Feizi most amusingly expressed his contempt for Confucian reliance on the past in the well-known parable about the farmer of Song:

A farmer of Song who was tilling his field saw a hare run towards a tree trunk in his field, break its neck, and die. Thereupon the man left his plough and stood waiting at that tree in the hope that he would catch another hare. Yet he never caught another hare and was himself ridiculed by the people of Song.

*Id.* The people of Song themselves were renowned for their stupidity.

words, you will be able to become the leader of all feudal lords.” Such people are but witches and priests among the itinerant counselors . . . . Therefore, the intelligent ruler upholds solid facts and discards useless frills. He does not speak about deeds of humanity and righteousness, and he does not listen to the words of learned men.<sup>54</sup>

Legalists also derided the conception of government as an extension of the family structure.

[I]f you maintain that good government will always prevail whenever the ruler and the ruled act toward each other like father and son, you imply that there are never any wayward fathers or sons.<sup>55</sup>

. . .

[T]he relationship between superior and subordinate is not based on affection like that between father and son. So if one wishes to curb subordinates by acting righteously, the relationship will be flawed.<sup>56</sup>

. . .

[T]he enlightened ruler . . . depends on laws and prohibitions to control the people, not on their sense of decency . . . . Thus the ruler should concentrate on laws rather than on moral influence.<sup>57</sup>

Rather, establishing defined punishments and rewards would allow government to sculpt social norms to meet its needs.<sup>58</sup>

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<sup>54</sup> *Id.* at 128.

<sup>55</sup> *Id.* at 132.

<sup>56</sup> *Id.* at 35.

<sup>57</sup> *Id.*

<sup>58</sup> See *id.* at 35-37; 132-33; LI SI, *Memorial on Exercising Heavy Censure*, reprinted in 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 143 (“All talented

Using law to govern proved all the more necessary to legalists, since they believed individuals' greed and selfishness inevitably led them astray, irrespective of education or social pressure.<sup>59</sup> Harsh, universally enforced penal laws would lead to the greatest reduction in crime, because "[c]riminals are careful if they are likely to be discovered and stop if they are likely to be executed. But they are reckless if they will not be discovered and carry out their plans if they will not be punished."<sup>60</sup> Thus, "enlightened" legalist governance substantially consisted of "increase[ing] the guards and mak[ing] the penalties heavier."<sup>61</sup>

### III. LEGALISM APPLIED: THE STATE OF QIN & THE RISE OF THE CHINESE EMPIRE

Historians, mostly informed by Han dynasty works, traditionally portray the Qin dynasty as a tyrannical regime that exemplified the nihilistic horrors of the legalist program.<sup>62</sup> As the story goes, the adoption of legalist theories by Qin to structure its government in the fifth century B.C. and the state's unification of the Chinese world two centuries later, entrenched legalist institutions as the dominant governmental structures of Imperial China. By contrast, the dynasty's rapid disintegration after the death of its founder and the following government's abandonment of legalist ideology condemned much of the substance of Qin law to irrelevance.

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rulers should be able to oppose the world and suppress established usage, destroying what they hate and establishing what they desire."); XIN, *supra* note 1, at 20.

<sup>59</sup> XIN, *supra* note 1, at 21. The belief in a universal malignancy that tainted everyone led legalists to advocate equal application of the law to everyone, since differences in status and birth had no bearing on capacity to obey the government. *See id.*

<sup>60</sup> HAN FEIZI, *reprinted in* CHINESE CIVILIZATION: A SOURCEBOOK, *supra* note 27, at 36; *see* HAN FEIZI, *reprinted in* 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 129, 132-33.

<sup>61</sup> HAN FEIZI, *reprinted in* CHINESE CIVILIZATION: A SOURCEBOOK, *supra* note 27, at 36; MACCORMACK, *supra* note 1, at 4.

<sup>62</sup> *See infra* text accompanying notes 104-05.

However, recently discovered portions of Qin law suggest this coloring of the period amounts to a half-truth. The Qin's innovative, legalist-inspired methods of political control—the enforcement of a detailed, penal-oriented legal code through a vast, tightly regulated bureaucracy<sup>63</sup>—survived its collapse to be adopted by all successive dynasties.<sup>64</sup> Curiously, though, the Qin government seems to have never geared its legal system toward fulfilling the monarch's political goals in disregard of prevailing socio-political norms—an anomaly best exemplified by the failure of legalism to permeate successfully the substance of criminal statutes, which formed a bulk of the code.

In 357 B.C. Lord Shang became minister for Duke Xiao of Qin (361-338 B.C.) and overhauled the state according to legalist ideals.<sup>65</sup> His reforms “deployed an extensive apparatus of penal and administrative rules, together with an elaborate bureaucracy, to ensure efficient control in the hands of the ruler,”<sup>66</sup> and distorted the

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<sup>63</sup> Until recently scholars assumed that law in Imperial China covered almost only criminal and administrative law. See MACCORMACK, *supra* note 1, at 18, 27; XIN, *supra* note 1, at 40. Though recent research has demonstrated that what we today consider civil matters often found their way into magistrate offices, criminal law traditionally dominated the legal codes and legal scholarship. Cf. HUANG, *supra* note 13, at 1.

<sup>64</sup> See Lin, *supra* note 1, at 122; MACCORMACK, *supra* note 1, at 4-5, 20-22; MACCORMACK, *supra* note 12, at 39 (“Above all one sees exhibited in the codes the legalist virtues of comprehensiveness, clarity and precision.”).

<sup>65</sup> LIU, *supra* note 1, at 175.

<sup>66</sup> MacCormack, *supra* note 11, at 98 (“Ch’in [Qin] rules . . . made no claim to the incorporation of a particular morality or of particular ethical principles. On the contrary, the Ch’in rulers saw law in the form of penal rules simply as a means of ensuring good order and building a strong and efficient state.”). As Max Weber noted, “[p]recision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs . . . are raised to the optimum point in the strictly bureaucratic administration . . .” S.M. MILLER, MAX WEBER 70, 71 (1963); see FROM MAX WEBER: ESSAYS IN SOCIOLOGY 221 (H. H. Gearth & C. Wright Mills eds. & trans., 1969) (“The bureaucratic structure goes hand in hand with the concentration of the material means of management in the hands of the master.”). Though many associate the rise of bureaucracy and an administrative state with the advent of modernity in Western Europe, the Chinese imperial bureaucracy closely adhered to the characteristics Max Weber lays out in *From Max Weber*. *Id.* at 196-200, 203-04. Nevertheless, the degree to which the Chinese administrative system warrants the title of Weberian bureaucracy remains contentious. See, e.g., Dennis Grafflin, *Reinventing China: Pseudobureaucracy in the Early Southern Dynasties*, in STATE

economy to favor agricultural production and the construction of a powerful military.<sup>68</sup> These policies bolstered Qin's power so successfully that it soon dominated its neighbors. By 221 B.C. its ruler, King Zheng (246-210 B.C.), conquered his rivals, established the Chinese Empire, and declared himself Shi Huangdi (221-210 B.C.)—the first emperor.<sup>69</sup>

Testifying to the role legalism played in Qin's rise, Shi Huangdi adopted it as the empire's orthodoxy and appointed the great legalist Li Si (c. 280-208 B.C.) prime minister.<sup>70</sup> To consolidate Shi Huangdi's rule over his subjects and unmatched territory, Li abolished the feudal aristocracy and expanded the Qin bureaucracy into the newly conquered territories.<sup>71</sup> Further, to preempt the spread of noxious, anti-regime philosophies, Li mandated that

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AND SOCIETY IN EARLY MEDIEVAL CHINA 139, 144 (Albert E. Dien ed., 1990) (noting that according to some theories of bureaucracy, classical Chinese education and appointed officials as generalists reflect "anti-bureaucratic" character). Similarly, in certain periods local elite families often obtained positions within the imperial administration, which reinforced these families' local dominance. *See, e.g.,* Mao Han-Kuang, *The Evolution in the Nature of the Medieval Genteel Families*, in STATE AND SOCIETY IN EARLY MEDIEVAL CHINA 73, 81, 82-83, 106-06 (Albert E. Dien ed., 1990); *cf.* Grafflin, *supra*, at 144-51.

<sup>67</sup> When invoking Weber in the discussion of Chinese law, I have not relied on his faulty analyses of China, replete with theories such as the role of water-works management in giving rise to China's "Oriental sultanism." MAX WEBER ON CAPITALISM, BUREAUCRACY AND RELIGION: A SELECTION OF TEXTS 64, 68 (Stanislav Andreski ed. & trans., 1983); *see* MAX WEBER, THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM 31, 51-52 (Hans H. Gerth ed. & trans., 1951). Weber also partakes in the age-old European fantasy of China's being an ancient land of eternal, unchanging characteristics, *see* WEBER, THE RELIGION OF CHINA, *supra*, at 51-52, and exoticizes the Chinese language and its supposed effects on the intellectual abilities of the Chinese. FROM MAX WEBER, *supra* note 66, at 430-31 (noting how due to pictographic nature of Chinese orthography and monosyllabic nature of Chinese language—two completely false characterizations!—"[t]he power of . . . defining and reasoning[] has not been accessible to the Chinese."). Despite these defects, his examinations of bureaucracy, social dominance, and political legitimacy remain insightful.

<sup>68</sup> *See* A.F.P. HULSEWÉ, REMNANTS OF CH'IN LAW 1 (1985).

<sup>69</sup> *See* MacCormack, *supra* note 11, at 98.

<sup>70</sup> *Id.*; 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 137.

<sup>71</sup> *See* 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 137.

all books in the imperial archives, save the memoirs of Ch'in [Qin,] be burned. All persons in the empire, except members of the Academy of Learned Scholars, in possession of the *Book of Odes*, the *Book of History*, and discourses of the hundred philosophers should take them to the local governors and have them indiscriminately burned. Those who dare to talk to each other about the *Book of Odes* and the *Book of History* should be executed and their bodies exposed in the market place. Anyone referring to the past to criticize the present should, together with all members of his family, be put to death.<sup>72</sup>

Those who did not comply were sent to build the Great Wall.<sup>73</sup> In addition, the Emperor had over 460 Confucian followers buried alive.<sup>74</sup>

Apart from these infamous events, which the later Han government may have contrived as propaganda, until recently there existed no primary and few secondary sources to provide a comprehensive picture of Qin law and its underlying theory and practice. Luckily, tomb excavations in Hubei in the mid-1970s unearthed over 1,100 bamboo strips ("Yunmeng Strips") inscribed with Qin laws from the fourth and third centuries B.C.<sup>75</sup> Although they comprise only a small portion of the code (they were legal selections used by a local administrative official),<sup>76</sup> they shed light on the law's development and (in)fidelity to legalist ideals.

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<sup>72</sup> LI SI, *Memorial on the Burning of Books*, reprinted in 1 SOURCES OF CHINESE TRADITION, *supra* note 9, at 141.

<sup>73</sup> *Id.*

<sup>74</sup> XIN, *supra* note 1, at 38.

<sup>75</sup> LIU, *supra* note 1, at 201.

<sup>76</sup> See HULSEWÉ, *supra* note 68, at 1. Interestingly, the strips also reveal that the Qin never established a single, consolidated code to govern the Empire. See LIU, *supra* note 1, at 257. Successive repetitive statutes suggest that the legalist proclivity for turning the sovereign's will into law and the difficulties posed by rapid territorial expansion transformed Qin law into a messy compilation of statutes. See *id.*

Befitting a centralized state administered through bureaucrats granted little discretion, the strips reveal an attempt by the Court to regulate social conduct through meticulous legal codification, “from agriculture and war down to the number of rat holes in a granary that warranted punishment of the officials responsible.”<sup>77</sup> For example, dozens of statutes reflect the legalist emphasis on regulating agriculture and labor:<sup>78</sup>

Whenever the rain is beneficial and affects the grain in ear a report in writing is to be made concerning the favoured crop and the grain in ear, as well as the number of *ch'ing* [a unit of land measurement] of cultivated fields and areas without crops. Whenever it rains when the crop is already fully grown, also the quantity of rain and the number of *ch'ing* which were affected are to be reported in writing. Likewise, in cases of drought and violent wind or rain, floods, hordes of grasshoppers or other creatures which damage the crops, the number of *ch'ing* concerned is always to be reported in writing. Nearby prefectures have lightfooted runners deliver the letter, distant prefectures have the courier service deliver it. . . .<sup>79</sup>

. . . .

When grain in the ear is entered in a granary, 10.000 [sic] bushels make one pile; they are ranged so as to form a “house”. The Prefectural Overseer or the Assistant (Prefect) as well as the Chief of (the Bureau) of Granaries come together to seal it, whereas one “house” each is given to the Granaries Overseer as well as to the Granary Assistants of the detached settlements in charge of ration issues to use for supplies; (this “house”) they seal personally and issue

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<sup>77</sup> LIU, *supra* note 1, at 202. See, e.g., the statutes covering agriculture, grainery maintenance, and forestry regulations. HULSEWÉ, *supra* note 68, at 21-28, 30, 34-35, 38-42, 45.

<sup>78</sup> HULSEWÉ, *supra* note 68, at 9.

<sup>79</sup> *Id.* at 21 (A 1) (citations omitted).

it directly. When the remainder is exhausted [sic], another “house” is assigned to them.

When an Overseer is dismissed, the controller opens (the granary); when he observes that it has been sealed (by several persons) together, he checks it by means of the inscription, and it is again sealed by (these several persons) together; he must not measure or weigh it. Only the granaries that have been sealed personally (by the dismissed Overseer) are measured and weighed.

When issuing grain in the ear, in case the person who issues it is not the person who has entered it, it should be measured. If the measuring agrees with the inscription, it should be issued. In case there is a shortage, the person who issues it is to be charged with it. If there is a surplus, it is entered.

When (several authorities) together issue grain, there must be no change.

When entered grain is not fully ten-thousand bushels and it is desired to increase the stack thereto, it is permitted that the person who had entered (the grain) earlier, increases the stack. If somebody else increases the stack, the stackers must first measure the old stack; if (the quantity) agrees with the inscription, the grain is entered thereto. If later there is a shortage, the person who entered (grain) last will solely be charged with it. And write the name, status and place of the person who entered the grain to increase the stack in the grain-store register. When ten-thousand bushel stacks as well as those of not fully tenthousand [sic] bushels are issued in portions, one should not venture to increase the stack. . . .<sup>80</sup>

The almost absurd level of detail embedded in this typical statutory scheme underscores the twin legalist desires to regulate economic behavior for war and to prevent the imperial bureaucracy from eroding the Court’s power.<sup>81</sup>

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<sup>80</sup> *Id.* at 34-35 (A 19) (citations omitted).

<sup>81</sup> The self-sustaining, “unshatterable” power of a bureaucratic apparatus is well-attested to, as is bureaucracy’s ability to project power for the one who

Unsurprising given Qin's legalist bent, along with administrative regulations, criminal laws occupied a dominant portion of the statutes. And it is here that the Qin government's supposedly unwavering commitment to legalism comes into question. Penal law divided crimes into two overarching categories: "official denunciation[s]" and "unofficial denunciation[s]."<sup>82</sup> The former dealt with crimes outside the family, such as intentional murder or robbery, and the latter encompassed domestic disturbances, such as "[w]hen a child robs his father or mother, or when a father or mother without due authority kill [sic], mutilate [sic] or shave [sic] their children as well as their male or female slaves . . . ."<sup>83</sup> Crimes of official denunciation usually received severe penalties, while the state treated unofficial denunciation crimes as household matters or, most intrusively, would mandate a lighter penalty than for its official denunciation counterpart.<sup>84</sup> This bifurcation flies in the face of legalist tenets by abandoning equal application of the law to all individuals<sup>85</sup> and by organizing projection of state power around the family. Moreover, the state's reluctance to prosecute domestic crime is unlikely coincidental. Either the state deliberately avoided intrusion into the family unit, or other factors prevented it from doing so. The dichotomy between the punishments prescribed by Qin law and the activities deemed criminal suggests the latter.

The most egregious offenses carried a death sentence, which normally occurred according to three (or four) standardized methods:

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controls it. MILLER, *supra* note 66, at 73. Handing over discretion to members of the bureaucracy, though, effectively strips its supposed ruler of his control. *See id.* at 73-74.

<sup>82</sup> LIU, *supra* note 1, at 226.

<sup>83</sup> *Id.* (quoting *Falü Da Wen* [Answers to Questions Concerning Qin Statutes]).

<sup>84</sup> LIU, *supra* note 1, at 226-27; *see infra* p. 23 n.99. As time progressed, Qin law increasingly restricted the power of household heads to punish family members. Instead, the law often required heads of households to have the state punish family members for behavior the household head considered unacceptable. *See LIU, supra* note 1, at 232-33.

<sup>85</sup> In a similar discriminatory manner, statutes also subjected all men between the ages of fifteen and fifty-six or sixty who did not hold high aristocratic degrees to military conscription and the corvée. *See HULSEWÉ, supra* note 68, at 11.

beheading (*qì shì*, “casting away in the market place”), *zhé* (“to be torn apart by carriages,” but probably meaning “to be executed and [publicly] exposed”), *shēng lù* (“dishonouring while alive” or “first dishonouring and then cutting asunder”; possibly the same as *zhé*), and *zhǎn* (likely the Han dynasty equivalent of “cutting in two at the waist”).<sup>86</sup> Below a death sentence, there existed five degrees of hard labor, generally divided by sex as shown below, from most to least severe:<sup>87</sup>

Men	Women
<i>chéngdān</i> “wall builders”	<i>chōng</i> “grain pounders”
<i>guǐxīn</i> “gatherers of firewood for spirits”	<i>baicàn</i> “white rice sifters”
<i>lìchén</i> “bond servants”	<i>lìqiè</i> “bond women”
<i>sīkòu</i> “robber guards”	
<i>hòu</i> “watchmen”	

The duration of the hard labor punishments is unknown.<sup>88</sup>

In tandem with hard labor, one also could be sentenced to one of the four (or five) mutilations.<sup>89</sup> The mutilations, in descending severity, consisted of amputating both feet, amputating the left foot, rhinectomy, tattooing, and shaving the head.<sup>90</sup> *Chéngdān* invariably

<sup>86</sup> *Id.* at 14. Outside these standard forms of execution, lepers were often sentenced to drowning. *Id.* at 154-55 (D 101). Texts from the Han dynasty suggest the practice of collective adjudication also existed under Qin law. See HULSEWÉ, *supra* note 1, at 115; *cf. supra* text accompanying note 72. For a description of this form of execution, see *infra* text accompanying notes 140-42.

<sup>87</sup> HULSEWÉ, *supra* note 68, at 14-15.

<sup>88</sup> *Id.* at 16.

<sup>89</sup> *Id.* at 14-15. The amputation of both feet is not found in the Yunmeng Strips, but its practice is attested to before and after the Qin dynasty. See *id.*

<sup>90</sup> *Id.* at 15. In all existing statutes and cases, tattooing always accompanied cutting off of the nose. *Id.* Castration also appears in the statutes, although its usage remains unclear. *Id.* at 17-18.

received a head-shaving, while those sentenced to lesser degrees of hard labor had their beards shaved.<sup>91</sup> If sentenced to a mutilation in addition to head-shaving, *chéngdān* would also have their beards shaved.<sup>92</sup> The lowest two degrees of hard labor never received severe mutilations and only had their beards shaved.<sup>93</sup>

The punishments in Qin statutes served a variety of legalist goals. The standard execution methods all involved dismemberment of the body in contrast to most later dynasties, which also provided for strangulation.<sup>94</sup> In Chinese culture and Confucian thought, dismemberment was an offense to one's ancestors and, more grievously, prohibited rebirth in the afterlife, effectively destroying an individual's soul.<sup>95</sup> The refusal to employ a more spiritually humane form of execution would theoretically increase the law's deterrence effect. The mutilations, which like dismemberment dishonored one's ancestors, would have produced a similar deterrent effect by stigmatizing criminals with difficult-to-conceal markers of deviance.<sup>96</sup>

Notwithstanding the compatibility between these criminal punishments and legalist theory, the behaviors forbidden in surviving Qin statutes exhibit a doctrinal ambiguity that brings into question the Qin's legalist credentials. For example, the Yunmeng Strips deem that "prais[ing] the enemy in order to frighten the mind of the

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<sup>91</sup> *Id.* at 15-16.

<sup>92</sup> *Id.* at 16.

<sup>93</sup> *Id.* at 15-16.

<sup>94</sup> *See, e.g.*, TANG CODE art. 5.

<sup>95</sup> *See* THE T'ANG CODE: VOLUME 1, GENERAL PRINCIPLES 59-60 n.74 (Wallace Johnson trans., 1979) (653 ed.) [hereinafter 1 TANG CODE]; MacCormack, *supra* note 11, at 199 n.67; Stephen B. Davis, *The Death Penalty and Legal Reform in the PRC*, 1 J. CHINESE L. 303, 307 n.21 (1987). When drawing cross-cultural comparisons with penal measures in Chinese law, it is crucial to look beyond the penal act itself and recall 1) the reasons for enacting the punishment and 2) the cultural meanings underlying the form of punishment. For example, although beheading occurred in Europe, there never existed a belief that it would destroy the victim's otherwise immortal soul.

<sup>96</sup> *See* CONFUCIUS, *supra* note 17, at 8:3; *cf.* McKnight, *supra* note 11, at 10 ("A deviant can be put into a new social role which alerts future contacts to his or her deviant status . . . Deviants can be separated from the community: by execution; by isolation; by exile.").

population;<sup>97</sup> inciting a teenager to rob and kill someone and taking at least ten *qian* of cash from the booty;<sup>98</sup> killing a son adopted from one's brother to be one's successor without government permission;<sup>99</sup> being a criminal leper;<sup>100</sup> and having sex with one's half-sibling through the maternal side<sup>101</sup> warrant capital punishment. The first crime, an action that potentially threatens state survival, has legalist overtones, but such sanctions exist in nearly all legal systems.<sup>102</sup> In juxtaposition with the other law, no clear ideological pattern appears, an oddity that pervades non-capital criminal statutes as well.

These inconsistencies, be they the division of criminal statutes into official and unofficial denunciations or the content of the criminal statutes themselves, do share one overarching characteristic, however: Divergences from the otherwise-archetypical legalist scheme appear at points where the law most directly affected the general population. Though one could argue that the dissonance between legalist theory and Qin criminal law results merely from the fragmentary nature of the surviving sources, the overwhelming legalist color of extant non-criminal laws weakens such a claim.

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<sup>97</sup> HULSEWÉ, *supra* note 68, at 134 (D 41).

<sup>98</sup> *Id.* at 138 (D 54).

<sup>99</sup> *Id.* at 139 (D 57). Interestingly, statute D 56 provides for a different punishment scheme if one kills his child by birth.

Unauthorizedly to kill a child (is punished by) tattooing and being made a *ch'eng-tan* or a grain-pounder [the most severe form of hard labor for women]. When the child is newly born and has strange things on its body, as well when it is deformed, to kill it is not to be considered a crime. Now, when a child is born and the child's body is whole and there are no strange things—merely for the reason that one has (too) many children and does not wish that it should live, and consequently not to lift it up, but to kill it, how is this to be sentenced? This is (a case of) killing a child.

*Id.* (D 56). The discrepancy in treatment between these two statutes likely reflects the legal autonomy of the family witnessed in the distinction between official and unofficial denunciations—the adopted child not being considered a true family member.

<sup>100</sup> *Id.* at 154 (D 101).

<sup>101</sup> *Id.* at 169 (D 151).

<sup>102</sup> See MACCORMACK, *supra* note 1, at 8.

Rather, it seems likely that the state overestimated its ability to organize society around Qin's political goals and encountered popular resistance to the implementation of invasive statutory programs that criminalized socially acceptable (or permitted) actions and augmented the state's power over the family.

Yet while Qin governance did not match its later ultra-legalist reputation, its tempered policies probably still appeared harsh in the face of prevailing social norms. If an individual "does not believe in the values and authority from which his or her punishment derive, and therefore does not experience shame in wrong-doing, the punitive act cannot produce moral change. At best, it can produce aversion; at worst, resentment, contempt, and further alienation."<sup>103</sup> So while the succeeding Han dynasty had strong incentives to exaggerate the legalist cruelty of Qin policies to garner support for its supposedly more benevolent regime, Qin laws likely did erode the government's public legitimacy. That the dynasty fell so rapidly should prove no surprise.

#### IV. THE HAN DYNASTY: CONFUCIAN CONSOLIDATION?

Following the collapse of the Qin, the peasant rebel Liu Bang seized control of the empire and founded the Han dynasty (206 B.C.-220 A.D.). Citing the "evil and oppression" of the former regime and its discredited legalist policies,<sup>104</sup> the new government "abolished all

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<sup>103</sup> *Introduction to PERSPECTIVES ON PUNISHMENT: AN INTERDISCIPLINARY EXPLORATION* 4 (Richard Mowery Andrews ed., 1993); cf. Pildes, *supra* note 3, at 2077 ("If state law can influence social norms, the relationship can just as readily become destructive as productive. Actions of the state can destroy social capital through insufficient appreciation of the role social capital plays and the mechanics of its maintenance.").

<sup>104</sup> 1 *SOURCES OF CHINESE TRADITION*, *supra* note 9, at 139; XIN, *supra* note 1, at 22;

The First Emperor and his advisers became the symbols of evil and oppression in Chinese history, and the dynasty an example to all later rules of what happens when the people are exploited to the breaking point, when force and tyranny replace humanity and justice as the guiding principles of government.

1 *SOURCES OF CHINESE TRADITION*, *supra* note 9, at 139; see HULSEWÉ, *supra* note 68, at 1. The dynasty's reputation for harsh cruelty survives to this day. For a

laws concerning the court rites of Qin . . . and sought simplicity and ease in such manners.”<sup>105</sup> In tandem with making the Court business casual, Liu supposedly purged Qin penal laws and left criminalized only “murder, injury, and theft.”<sup>106</sup>

Soon after taking the throne, though, Liu, now Emperor Gaozu (206-194 B.C.) encountered the difficulties Qin faced in governing such a large domain, a problem exacerbated by the surviving bureaucracy’s near-paralysis and the gutting of its officialdom.<sup>107</sup> Furthermore, the complexity of Qin law ensured that the remaining Qin officials could not implement it effectively.<sup>108</sup> Nevertheless, facing tremendous pressure to consolidate his rule and wrest power from local rulers he enfeoffed during the civil war, Gaozu co-opted the Qin bureaucracy and enacted virtually identical criminal and administrative laws.<sup>109</sup>

Han emperors retained this legalist apparatus even after the government secured its position despite official derision of legalist policies, in no small part because bureaucratic efficiency permitted the Court to control China with a minimalist government in relation to the empire’s large population and territory.<sup>110</sup> Yet, ironically, through a slow accumulation of new laws created in legalist style to address

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disturbing revisionist history motivated by contemporary politics, see HERO (Miramax 2004).

<sup>105</sup> LIU, *supra* note 1, at 263-64. These accounts come from the Han historians and exemplify the state’s official version of historical events. *See id.* at 263.

<sup>106</sup> *Id.* at 265. This incident has been viewed as a propaganda device to secure public loyalty or a fiction concocted by Court historians. *See id.*

<sup>107</sup> *See id.* at 256-57.

<sup>108</sup> *See id.* at 257; *supra* p. 18 n.76.

<sup>109</sup> *See* LIU, *supra* note 1, at 256, 263, 266, 272-73; HULSEWÉ, *supra* note 1, at 5, 14, 102, 110, 124, 286; Weld, *supra* note 8, at 163. This adoption of Qin law and institutions suggests that the remnants of early Han statutes might be copies of Qin statutes not found among the Yunmeng Strips. *See* LIU, *supra* note 1, at 263.

<sup>110</sup> *See Introduction to THE T’ANG CODE: VOLUME 2, SPECIFIC ARTICLES 4 n.5* (Wallace Johnson trans., 1997) (653 ed.) (“There were only some 18,800 officials to govern a population of nearly forty million.”) [hereinafter 2 TANG CODE]; McKnight, *supra* note 11, at 14; *supra* p. 16 n.66.

immediate concerns, these same emperors haphazardly, and sometimes unintentionally infused statutes with “the ethical principles which formed the basis of Confucian morality”<sup>111</sup> and started to transform the family into “the keystone [that] served as a bridge between the state and the individual.”<sup>112</sup> Eventually, Emperor Wu (140-87 B.C.) adopted Confucianism as the official state ideology.<sup>113</sup>

#### A. IDEOLOGICAL CLASHES—ABSTRACT & CONCRETE

The doctrinal conflict in enforcing Confucian ideals by legalist means did not escape the ruling class or intelligentsia, and many attempted to reconcile the two. Jia Yi (201-168 B.C.), a Confucian scholar during the Former Han, espoused a novel relationship between Confucian *lǐ* (rites or moral code) and legalist *fǎ* (law):

With human sagacity and wisdom, we can learn things that already occurred, but we cannot be aware of things that will happen in the future. By the same token, Li can prevent sinfulness before it occurs, but law can reprimand wickedness after the wrong has occurred. Therefore, law is to be utilized for curbing evil, while Li has a difficult task that requires a lifetime to accomplish. . . . Li cultivates people, virtue and benevolence whereas punishment penalizes abominations.<sup>114</sup>

For Jia, “while *Li* . . . [was] more profound, law [was] . . . necessary . . . for the ruler to maintain his prerogatives while he pursues social harmony.”<sup>115</sup> The early Confucian rejection of penal law dissipated

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<sup>111</sup> MacCormack, *supra* note 11, at 99; see LIU, *supra* note 1, at 225, 264; MACCORMACK, *supra* note 1, at 2-3; cf. Peerenboom, *supra* note 5, at 79 (noting argument that “Confucianism was able to survive the transition to a centralized state in the Han by reinventing itself . . . as a bureaucratic ideology prepared to serve the interests of the empire”).

<sup>112</sup> Troyer & Rojek, *supra* note 4, at 8.

<sup>113</sup> See LIU, *supra* note 1, at 290.

<sup>114</sup> XIN, *supra* note 1, at 22-23 (quoting Jia Yi).

<sup>115</sup> *Id.* at 23.

before a less idealistic conception of humanity and government. Learning and moral guidance ostensibly remained paramount in compelling individuals to uphold their moral duties, and these informal methods of socialization remained the primary means of guaranteeing order in the non-governmental sphere.<sup>116</sup> However, the government, accepting humanity's fallibility, had to use laws and punishments to maintain control when informal methods failed to bear fruit; no longer were all people capable of redemption.

In a similar ideological shift, the scholar Dong Zhongshu (179-104 B.C.) overhauled the standard interpretation of the Confucian classics—the *Yi Jīng* (*Book of Changes*), *Shū Jīng* (*Book of History*), *Shí Jīng* (*Book of Odes*), *Chūn Qiū* (*Spring and Autumn Annals*), and *Lǐ Jì* (*Ritual*)—works often incorrectly attributed to Confucius<sup>117</sup>—in four crucial aspects:

- (1) combining the function of *Li* and law by emphasizing the supremacy of *Li* and the subservience of law;
- (2) emphasizing the emperor's sacrosanct power in governing the country and enacting the law;
- (3) establishing the "three authorities" [Three Bonds]—the emperor's authority over his ministers, a father's authority over his children, and a husband's authority over his wife—as the fundamental principles of law and punishment; and
- (4) officially solidifying Confucian ideology and prohibiting heretical beliefs.<sup>118</sup>

This shift in Confucian thought legitimized the use of the Qin bureaucracy and the legalist tendency to issue new laws at will, by absorbing these powers into the ruler's duties and prerogatives as laid down in the Three Bonds. Legalism no longer posed an intellectual threat to the Confucianizing state.

On the ground, those learned in the Confucian Classics (*jīngshū lǐ*) began to take on adjudicatory positions in government, and those who specialized in legal affairs (*dàobù lǐ*) increasingly studied Confucian learning. The distinction between the two groups

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<sup>116</sup> See 2 TANG CODE, *supra* note 110, at 4-5; cf. *supra* p. 16 n.63.

<sup>117</sup> Introduction to 1 SOURCES OF CHINESE TRADITION, *supra* note 9.

<sup>118</sup> XIN, *supra* note 1, at 23; see MACCORMACK, *supra* note 1, at 7.

eventually began to blur in higher governmental positions.<sup>119</sup> As students trained in Confucian thought rose in the bureaucracy, Confucian doctrine shaped its administration.<sup>120</sup> Despite imperial proclamations supporting Confucian governance, these internal bureaucratic shifts, rather than executive fiat, bore responsibility for much of this period's transformation.

Even by the end of the dynasty, though, Confucian thought did not displace legalism fully within the law. Successive generations of ostensibly Confucian emperors exhibited legalist approaches and attitudes toward law, creating "ideological distress" in its enforcement.<sup>121</sup> The Court issued new edicts as novel problems arose or new agendas came to the forefront, which caused statutes to multiply rapidly and transformed the legal code into a compilation of conflicting directives.<sup>122</sup> Repeated proclamation and revocation of laws at the caprice of the ruler's mood exacerbated this problem.<sup>123</sup> By 100 A.D. the code had ballooned to include 610 provisions for capital punishment, 1,698 for hard labor, and 2,681 carrying other penalties.<sup>124</sup>

The code's consequent lack of internal cohesion spawned rampant corruption, abuse, and malpractice within the bureaucracy, which expanded its administrative discretion to levels undesirable from the Court's perspective.<sup>125</sup> Similarly, it catalyzed disturbing sentencing disparities across the empire; economic gaps between the rich interior provinces and impoverished outlying areas opened a rift between punishments meted out for identical crimes.<sup>126</sup> Moreover, infiltration of Confucian scholars into the judicial apparatus led to the

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<sup>119</sup> See LIU, *supra* note 1, at 290.

<sup>120</sup> See *id.* at 290-91.

<sup>121</sup> See, e.g., HULSEWÉ, *supra* note 1, at 111.

<sup>122</sup> See LIU, *supra* note 1, at 291-92.

<sup>123</sup> See, e.g., HULSEWÉ, *supra* note 1, at 56, 112, 114, 116, 127; *infra* p. 33 n.145.

<sup>124</sup> See LIU, *supra* note 1, at 291.

<sup>125</sup> See *id.* at 292.

<sup>126</sup> See *id.* at 293.

application of incompatible sentencing methods. *Dàobù lì* continued to employ the practices of *dāng*, making the punishment fit the crime, and *bǐ*, sentencing by analogy, when devising sentences for transgressions not explicitly mentioned within the code.<sup>127</sup> *Jīngshū lì* meanwhile turned toward the Confucian Classics to determine difficult cases.<sup>128</sup> Exacerbating this problem, new judgments usually became incorporated into the law or served as precedent for future cases, amplifying the inconsistency in Han sentencing practices.<sup>129</sup> The incomplete transition to Confucian governance weakened the dynasty's ability to govern effectively and risked devolving the powers of government to local bureaucrats across China.<sup>130</sup>

The Court was not blind to these problems. Ministers repeatedly submitted memorials to the Throne pleading for a thorough revision of the code and an expurgation of the laws to check bureaucratic abuse.<sup>131</sup> As demonstrated by edicts of Emperor Xuan (73-49 B.C.) in 64 B.C. and Emperor Guangwu (25-57 A.D.) in 43 A.D. specifically addressing sentencing disparities, emperors attempted to ameliorate these problems.<sup>132</sup> Unfortunately, the Court never seriously attempted to deal with the code's organizational defects. Though many pressed for a complete overhaul, the government's residual legalist approach to law neutered the efficacy of such an undertaking, since the emperor would continue to issue

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<sup>127</sup> See *id.* at 292-94; HULSEWÉ, *supra* note 1, at 48. The use of *bi* as a legal tool has continued through the People's Republic and has received much criticism from the international human rights community, although the practice strongly resembles Anglo-American statutory interpretation. See MACCORMACK, *supra* note 1, at 173.

<sup>128</sup> See LIU, *supra* note 1, at 292-94.

<sup>129</sup> See *id.* at 292-93.

<sup>130</sup> This legitimate fear of the imperial bureaucracy transforming into a "Weberian" entity that threatened the emperor's position as "the ultimate source of all laws and appointments" explains the tremendous attention codes from the Qin and Han onward paid to administrative regulations, as well as why China was the first state to implement a civil service exam to populate its bureaucracy. HUANG, *supra* note 13, at 231; *cf.* MILLER, *supra* note 66, at 68-70, 73-74.

<sup>131</sup> See LIU, *supra* note 1, at 292, 294.

<sup>132</sup> See *id.* at 292-93.

new laws once the code had been revised.<sup>133</sup> Confronted with this obstacle, some blamed the entire problem on wicked bureaucrats, while yet another view held that adding detailed annotations and commentary to the code could remedy the government's difficulties.<sup>134</sup> Though promising, this last approach failed in the short-term, because many officials added commentary to the code, and nobody knew which edition to follow.<sup>135</sup>

Ultimately, the Han Court resorted to a reporting system (more bureaucracy) and punishments (more penal laws) to mitigate its administrative problems. For example, in 66 B.C. Emperor Xuan established the office of the superintendent of trials' referees to "give equity in lawsuits."<sup>136</sup> Excluding individuals from office (*jìn gù*, or *fèi gù*) was another technique for restraining the bureaucracy that the government liberally applied to criminals and their relatives, friends, colleagues, and descendants.<sup>137</sup>

## B. HAN LAW

Like its Qin predecessor, the Han Code has not survived intact; yet its remains surprisingly depict a system nearly as legalist as its predecessor and only partially influenced by Confucianism. During the 1970s archaeologists uncovered wooden strips from various provinces with laws and other legal documents from the Former and Later Han periods, and in 1985 tomb excavations in Hubei led to the discovery of over 500 strips from the earliest decades of the dynasty.<sup>138</sup> Even with these new findings, imperial memorials and case law remain the most ample sources of information about the substance and application of Han law.

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<sup>133</sup> See *id.* at 294.

<sup>134</sup> See *id.* at 293-94.

<sup>135</sup> See *id.* at 294.

<sup>136</sup> *Id.* at 294-95 (*quoting* edict of Emperor Xuan) (*quotations omitted*).

<sup>137</sup> See HULSEWÉ, *supra* note 1, at 135.

<sup>138</sup> See LIU, *supra* note 1, at 255.

As mentioned earlier, the Han government adopted large portions of Qin law and legal practice in its early years, as evidenced by the retention of gory methods of execution, sentencing criminals to various degrees of hard labor (even using the same titles as the Qin), and the practice of mutilating convicts. More specifically, crimes that directly threatened the survival of the ruling house—from treason to black magic—continued to receive the harshest punishments. For example, Han law subjected convicted traitors to *miè zú* (“extermination of the clan”).<sup>139</sup> The early ordinance for this form of capital punishment read:

Those who (have committed crimes) equivalent to (the punishment of the extermination of) the three clans, are all first tattooed, and have their nose, their left and their right foot amputated. (Then) they are killed by bastinadoing; their head is hung up and their bones and flesh are cut to pieces in the market-place. Those who (have committed the crime of) speaking evil and criticizing, or of reviling and imprecating (against the government or the emperor) moreover first have their tongue cut off.<sup>140</sup>

(In later periods mutilations were no longer performed, and instead the criminal was beheaded or cut in two at the waist.<sup>141</sup>) Along with the execution of the principal criminal, “his father, mother, wife and children, brothers and sisters, all without distinction between young and old, [were beheaded].”<sup>142</sup>

The horror of *miè zú* smacks of legalist-inspired terror to keep the populace submissive. However, as with many discreet components of Han law, the practice reflects a subtle, ad hoc evolution in Chinese law toward embracing Confucian norms. The

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<sup>139</sup> HULSEWÉ, *supra* note 1, at 112; *see id.* at 116-20. Texts also refer to this punishment as *yì zú* (“flattening out the clan”), *yì sān zú* (“flattening out the three clans”), and *zú* (“to clan”). *Id.* at 112. Application of *miè zú* often ended with the pickling of the principal criminal’s dismembered body. *See id.* at 117.

<sup>140</sup> *Id.* at 112 (quotations omitted).

<sup>141</sup> *See id.*

<sup>142</sup> *Id.* (quotations omitted).

selection of relatives executed with the culprit exemplifies this process, as those co-adjudicated coincides with those relatives encompassed within the ritualized rites of mourning (*see* fig. 1), a component of Confucian *lǐ*.<sup>143</sup> Likewise, as discussed below,<sup>144</sup> which crimes qualified as the most serious, as well as the categorical labels under which these crimes fell, hint at Confucian purposes for criminalizing such activities, rather than a blunt legalist desire to safeguard the dynasty's power.

Confucianism also made more overt headway in the law. In 167 B.C. Emperor Wen (179-157 B.C.) abolished the mutilating punishments as contradictory to the Confucian belief that criminals could reform themselves. He noted that those who suffered amputation never regained the lost member—a disfigurement that thwarted punishment's rehabilitative function—and insisted mutilation even pushed criminals toward an evil life. He also expressed concern that the irreversibility of mutilating punishments inhibited restitution for faulty verdicts.<sup>145</sup>

Code modifications likewise occurred under the pretext of Confucian benevolence and compassion. Han emperors frequently issued amnesties, and as a general policy, the Court provided a mitigated death penalty for the insane and pardons to those who voluntarily sought to be executed in place of their mother, child, or

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<sup>143</sup> The mourning rules played a key role in later Confucianized codes. *See id.* at 116; discussion of Discord *infra* text accompanying note 194. Mourning relationships served as the method for legally enshrining familial relationships between individuals.

<sup>144</sup> *See infra* text accompanying notes 157-58.

<sup>145</sup> *See* LIU, *supra* note 1, at 303. Wen therefore substituted punitive head shaving with serving as a *chéngdān* or *chòng*; tattooing with having a one's head shaved, wearing an iron collar, and serving as a *chéngdān* or *chòng*; rhinectomy with 300 strokes with a cane; amputation of the left foot with 500 strokes with a cane; and amputation of both feet with public execution. *See id.* at 302-03; *see also* McKnight, *supra* note 11, at 18 (noting that mutilation “does not seem to accord with the idea of social reintegration”). Obviously, converting sentences requiring amputation of both feet into death sentences is logically problematic in light of the Emperor's express reasoning. Demonstrative of the continuing conflicts between legalists and Confucians, after the abolition of the mutilating punishments, debates about their resurrection frequently surfaced through the end of the dynasty. *See* LIU, *supra* note 1, at 303.

brother.<sup>146</sup> In 156 B.C. and again in 144 B.C., Emperor Jing (156-141 B.C.) further reduced the punishments instituted by Emperor Wen to replace the mutilations.<sup>147</sup> To buttress the goal of individual reformation, by 122 B.C. the code contained a statute pardoning those who voluntarily confessed their crimes, though its exact content remains unknown.<sup>148</sup> Similarly, an ordinance announced in 4 A.D. exempted from co-adjudication “[w]ives and daughters who have not personally infringed the laws, and males of eighty years of age and above, and of seven years of age or less” if the crime in question did not amount to “impiety.”<sup>149</sup>

The Court also began to legally recognize Confucian norms of filial piety, encapsulated in the Three Bonds by enforcing moral duties toward family members and extra-familial superiors.<sup>150</sup> Findings of statutory violations and sentencing severity often turned on a person’s social position relative to the effected party.<sup>151</sup> For example, in 66 B.C. Emperor Xuan declared that sons, grandsons, or wives who concealed the crimes of their parents, grandparent, or husbands committed no offence.<sup>152</sup> If a son did report his father’s crime to the authorities, he would receive the same punishment as his father because the son lacked filial piety, and the father reverence

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<sup>146</sup> MACCORMACK, *supra* note 12, at 38; *see* HULSEWÉ, *supra* note 1, at 60, 109, 131, 138.

<sup>147</sup> *See* HULSEWÉ, *supra* note 1, at 102. He lightened caning from 500 strokes to 300, and 300 strokes to 200; and later from 300 strokes to 200, and 200 strokes to 100. *See id.* The second edict also standardized the dimensions of the stick used for caning, fixing its length at 23.1cm, its width at one end at one Chinese inch and at half a Chinese inch at the other. Also, all knots had to be smoothed down, and caning could only take place while the prisoner was standing. *See id.* at 128-29.

<sup>148</sup> MACCORMACK, *supra* note 12, at 162.

<sup>149</sup> HULSEWÉ, *supra* note 1, at 159.

<sup>150</sup> *Id.* at 38.

<sup>151</sup> *See id.* at 38-89; *see, e.g., supra* text accompanying note 142.

<sup>152</sup> MACCORMACK, *supra* note 12, at 163. The ideal espoused by Confucius centuries before had come to fruition. *See supra* text accompanying note 18.

toward the government.<sup>153</sup> In contrast, in capital cases where “a grandparent, parent or husband hide[s] a grandson, son or husband, the matter was to be referred to the throne for special consideration.”<sup>154</sup> Inferiors in a relationship received immunity for protecting their superiors (and were even punished for not doing so), while the Throne only exonerated those who concealed the misdeeds of their familial inferiors on a case-by-case basis. Laws also permitted a son to serve his father’s sentence, which in turn usually led to a sentence reduction to reward the son’s devotion.<sup>155</sup> A son’s duty to his parents carried such moral weight that if a condemned prisoner was his parents’ only son, his execution would be suspended until their deaths.<sup>156</sup>

More broadly, Han law began to attach Confucian meanings to terms employed to describe “crimes . . . of a particularly heinous nature,”<sup>157</sup> although in a disorganized manner that suggests no deliberate ideological transformation. This practice, though, foreshadowed the recital of the Ten Abominations among the General Objections of future dynastic codes.<sup>158</sup> These terms were:

- *bú dào* (or *wú dào*)—literally “against the Way” or “without the Way”; possibly best rendered as “impious”
- *bú jìng* —literally ‘disrespectful,’ but connoting something more forceful
- *dà nì* —literally “great contrariness”<sup>159</sup>

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<sup>153</sup> See XIN, *supra* note 1, at 25.

<sup>154</sup> MACCORMACK, *supra* note 12, at 163.

<sup>155</sup> See XIN, *supra* note 1, at 25.

<sup>156</sup> See *id.* This reprieve was not granted if the criminal had murdered the only son of another family. See *id.*

<sup>157</sup> HULSEWÉ, *supra* note 1, at 156-68.

<sup>158</sup> See *infra* text accompanying notes 192-94; see, e.g., HULSEWÉ, *supra* note 1, at 156.

<sup>159</sup> HULSEWÉ, *supra* note 1, at 156. *Da ni* appears to have been a modifier for the first two categories, and when mentioned alone, *da ni* likely indicated *da ni bu/wu dao*. See, e.g., *id.* at 168.

Generally, *bú dào* was considered much worse than *bú jìng*, but relatively insignificant crimes occasionally were labeled *bú dào* for political expediency.<sup>160</sup> For crimes deemed *dà nì bú dào*, statutes demanded that the criminal be cut in two at the waist and his family subjected to *miè zú*.<sup>161</sup> Reforms to this statute in the Wei dynasty (220-265 A.D.) indicate that grandparents and grandchildren were also co-adjudicated with the other family members during the Han, and friends of the criminal were removed from office.<sup>162</sup> Although no specific definitions existed for placing a crime under these categories,<sup>163</sup> surviving statutes and cases present a fairly coherent picture of the terms' application. Below is a list of crimes known to have been at least once categorized under one of the headings:<sup>164</sup>

<i>bú jìng</i> (disrespectful)	<i>bú/wú dào</i> (impious)	<i>dà nì bú/wú dào</i> (impious with great contrariness)
conduct unbecoming of a subject	conduct unbecoming of a subject	attempted parricide
criticizing imperial edicts and slandering the former emperor	criticizing imperial edicts and slandering the former emperor	parricide <sup>165</sup> matricide

<sup>160</sup> See *id.* at 157.

<sup>161</sup> See *id.* at 158 (quoting Han statute) (quotations omitted).

<sup>162</sup> See *id.* at 158-59.

<sup>163</sup>

For impiety there are no regular laws. The punishment is determined by the greater or lesser seriousness of the offence, (but) as subjects in applying (this rule) would fail to be correct, (the matter) is transferred to the Commandant of Justice. In case he (also) does not have any comparable precedent, he first reports it to the Emperor.

*Id.* at 160 (quoting Commandant of Justice Zhang Zengshou, 15 B.C.) (quotations omitted).

<sup>164</sup> See *id.* at 158-96 (quotations omitted).

<sup>165</sup> Though not been found among the statutes or cases, parricide's presence in the *da ni bu/wu dao* category is reasonably deduced from the confirmed presence of attempted parricide and matricide.

<i>bú jìng</i> (disrespectful)	<i>bú/wú dào</i> (impious)	<i>dà nì bú/wú dào</i> (impious with great contrariness)
refusing and locking out an imperial messenger	refusing and locking out an imperial messenger	uttering imprecations against the Emperor
slaves, commoners, rich people, and merchants using clothes and trappings reserved for emperors and empresses	sacrificing to the heavenly spirits and hoping for the emperor's death	plotting regicide
going to one's station at Court after a feudal lord's funeral	embezzlement by bureaucrats	rebellion
urinating in the palace while drunk	presenting false records to the throne	summoning and gathering villainous scoundrels, fabricating charts and oracle-texts, unauthorisedly usurping the rank of the Chancellor's office and installing feudal kings and dukes
being a minor subject and frolicking in the palace halls	killing three people in one family	performing witchcraft and uttering imprecations against pregnant women in the imperial harem
dancing the baboon dance at an imperial feast	criticizing and deceiving the emperor	
disobeying an imperial command	criticizing the government	monstrous talk and misleading the multitudes
	revealing state secrets	
	incest <sup>166</sup>	

<sup>166</sup> Custom and law required women to marry outside of their extended birth family. The notion of "incest" in Chinese law is therefore much broader than the English term.

<i>bú jìng</i> (disrespectful)	<i>bú/wú dào</i> (impious)	<i>dà nì bú/wú dào</i> (impious with great contrariness)
	digging in the imperial grave mound	
	acquiring illicit profit through theft, extortion, or corruption as a government official	

Most of these crimes concern violations against the emperor and the government in general. The most serious deal with behavior directed against the emperor's person or position (e.g., plotting regicide or rebellion), while lesser offenses include interference with government operations (disobeying an imperial command or bureaucratic malfeasance) or disrespect for the ruler's position as society's highest patriarch (frolicking in the palace as a minor subject or playing dress-up in imperial vestments). However, unlike a legalist program, the list extends beyond crimes against the regime per se. Killing one's mother or father (or merely planning to in the case of the father) earns the greatest possible rebuke. Likewise, destroying a family by slaughtering three of its members amounts to an "impious" crime.<sup>167</sup>

Though widely variable and still unsettled, these crimes point to limited incorporation of the Confucian notion of society as an extended patriarchal family into the law. (One can only conjecture how the monstrous "baboon dance" fits into this scheme.) As corroborated by the concealment laws and statutes enforcing filial piety, preserving the family structure became a priority of the reigning house. By using law to preserve the family's traditional internal power dynamics and then project the government and its bureaucracy as an extension of this structure, the government could "fortif[y] the p]revailing rules and norms" that bolstered public allegiance to the ruling elite.<sup>168</sup> To question one social superior was to question them

<sup>167</sup> The average family size in pre-modern China was five.

<sup>168</sup> Sunstein, *supra* note 37, at 923.

all.<sup>169</sup> Ultimately, this transformation marked the dawn of the legalist structure-Confucian substance model that became the political foundation of Imperial China.<sup>170</sup>

## V. INTERREGNUM: FROM THE THREE KINGDOMS THROUGH THE SUI DYNASTY

After the fall of the Han dynasty in 220 A.D., China fell into a period of disunity and turbulence until the Sui dynasty (581-618) reunified the country in 581. Despite this political chaos, successor states accelerated the legal innovations and Confucianization of the law begun under the Han. The period witnessed the formulation and standardization of the Five Punishments, Ten Abominations, Eight Deliberations, and other doctrines that remained characteristics of Chinese law into the twentieth century.<sup>171</sup>

The Three Kingdoms period (220-280) saw the proclamation of legal codes based on the Han code by the Wei dynasty (220-265) in 234 and by its successor, the Jin (265-420), in 268.<sup>172</sup> The later Northern Qi dynasty (550-577) issued its code, inspired by those of the Wei and Jin, in 564.<sup>173</sup> This code, in turn, provided the basis for the

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<sup>169</sup> Although the Han emperors held the ultimate powers of the executive and judiciary just as in the Qin, Confucian doctrine began to erode the theoretically infinite scope of imperial discretion. See HUANG, *supra* note 13, at 225; HULSEWÉ, *supra* note 1, at 14; LIU, *supra* note 1, at 295-97. Beginning in the reign of Emperor Wu, imperial edicts portrayed the emperor as the link between Heaven and Earth, and often reiterated the belief that improper implementation of the laws would bring chaos to the Empire. See LIU, *supra* note 1, at 296-97; *cf. supra* note 28 and accompanying text. While initially probably a rhetorical device, linking the acts of the sovereign to the will of Heaven would eventually place a mild check on the government's power. See MACCORMACK, *supra* note 1, at 22.

<sup>170</sup> See XIN, *supra* note 1, at 19. In an ironic twist, though the government nominally upheld the *Kong-Meng* [Confucius-Mencius] strain of Confucian thought, in practice it resembled the cynical branch of Confucianism espoused by Xunzi, the teacher of Han Feizi.

<sup>171</sup> See MACCORMACK, *supra* note 12, at 11. For elaboration on the content and function of these doctrines, see *infra* part V.

<sup>172</sup> See MACCORMACK, *supra* note 12, at 11.

<sup>173</sup> See *id.*

code produced in 581 and revised in 583 by the Sui during the reign of Emperor Wen (581-604).<sup>174</sup> Though the Sui produced another code in 607, the 583 version laid the foundation for the Tang Code.<sup>175</sup>

## VI. IMPERIAL APOGEE UNDER THE TANG

In the beginning, the three powers were established, and only then were the myriad forms divided. Among the creatures endowed with the ethers and possessing consciousness, man may be considered the chief. Never was a prime minister installed without the agreement of the masses, nor were penal laws promulgated except in accord with the moral teachings concerning government.

However, there were those whose passions were unrestrained and who acted stupidly, those whose knowledge declined and who offended criminally. If great, then they disrupted the entire world, and if small, they violated the standards for their own group. Thus it would be unheard of not to establish controls of such persons. Hence the statement: "Punishments are used to stop punishments and killing is used to stop killing."<sup>176</sup>

It is no exaggeration to call the Tang Code, first issued in 637 during the reign of the Taizong Emperor (627-649) and revised in 737, one of history's seminal legal texts.<sup>177</sup> Even after the dynasty's

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<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> *Preface to TANG CODE.*

<sup>177</sup> Unfortunately, of the several Tang legal compilations, only the Code, which deals with criminal law, remains in its entirety. Only fragments of the Statutes (*ling*), Regulations (*ge*), and Ordinances (*shi*) survive. The Statutes dealt primarily with administrative rules for the central government; the Regulations stipulated ways to introduce new provisions or rulings to supplement the Code and Statutes; and the Ordinances covered a narrow range of administrative rules. *See* 2 TANG CODE, *supra* note 110, at 5-6.

fall in 907, the Code's structure and content survived to form the basis of every Chinese government's legal system until the foundation of the Republic of China, and many of its attributes survive in contemporary Chinese law despite mass importation of Western law.<sup>178</sup> Perhaps most importantly, the Tang Code represents the final synthesis of legalist and Confucian ideals begun centuries before; it outlines a program for a remarkably stable, efficient governing system built upon and reinforced by social norms and informal hierarchies that survived for over 1,200 years.<sup>179</sup>

As the opening passage to the Code above demonstrates, the contradictions between legalism and Confucianism lay in the past; in the minds of the ruling elite, the use of penal laws to enforce Confucianism's timeless, universal moral standards stretched back to the Shang dynasty (c. 16th century-c. 11th century B.C.), if not time immemorial.<sup>180</sup> "Virtue and ritual [were] the basis of governmental teaching; punishment and chastisements [were] the instruments of government teaching."<sup>181</sup>

#### A. ADMINISTRATION OF THE CODE

Like all dynasties since the Qin, the Tang government operated through its bureaucracy, brimming with officials who had passed the imperial examinations based on the Confucian Classics.<sup>182</sup>

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<sup>178</sup> *Id.* at 13; see MACCORMACK, *supra* note 1, at 1, 4, 7, 13, 15, 33; MACCORMACK, *supra* note 12, at 12, 14; Ye Xiaoxin, *Shilun: Tangliushuyi*, in FALÜ SHI LUNCONG 179, 179-80 (Zhongguo Falü Shi Xue Hui ed., 1998) [*Examination of the Tang Code*, in APPRAISALS OF CHINESE LEGAL HISTORY].

<sup>179</sup> See HUANG, *supra* note 13, at 231 ("The imperial state . . . was neither simply Confucian nor simply Legalist . . . the very suppleness and longevity of the Chinese imperial state were the consequences of the coupling of the two."); MACCORMACK, *supra* note 1, at 3.

<sup>180</sup> See 1 TANG CODE, *supra* note 95, at 54; see MacCormack, *supra* note 11, at 105 ("the law was concerned to enforce an absolute morality, a morality that was held to be intrinsically good and compelling, irrespective of the actual conditions prevalent in society at any particular time").

<sup>181</sup> 1 TANG CODE, *supra* note 95, at 54.

<sup>182</sup> See *id.* at 5; see also *infra* p. 41-42 n.184 (detailing statute concerning recommendation of candidates for doctoral examination).

Though the deployment and oversight of its administration had become more sophisticated, the central government faced the perennial difficulty of controlling its far-flung bureaucrats. Aside from employing a censorate, an entity separated from the bureaucracy which “denounce[d] the corruption or maladministration of officials to the throne,” the government continued to enumerate in its code all conceivable criminal behavior to minimize bureaucratic discretion and produce uniform judgments throughout the empire.<sup>183</sup> Each article defined a specific crime or subset of crimes, and additional commentary and subcommentary attempted to account for all contingencies;<sup>184</sup> if all else failed, the article on Analogy provided

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<sup>183</sup> 1 TANG CODE, *supra* note 95, at 5; *see id.* at 12; *see* MACCORMACK, *supra* note 1, at 163-64.

<sup>184</sup> To get a sense of the intricacy of a statute, *see, e.g.,*

ARTICLE 92

RECOMMENDING UNWORTHY PERSONS TO THE  
EXAMINATION FOR THE DOCTORATE

ARTICLE: 92.1a—All cases of recommending unworthy persons to the examination for the doctorate or of not recommending those who are worthy are punished by one year of penal servitude for the first person, increased by one degree for each further two persons, and with a maximum punishment of three years of penal servitude.  
COMMENTARY: Unworthy persons refer to those whose virtuous conduct [a technical term] is instead perverse and dissolute so that they are not qualified to be recommended.

92.1b—If a recommended person does not pass the examination, the punishment above is reduced two degrees.

92.1c—If of five recommended persons three pass, there is no punishment.

SUBCOMMENTARY: According to the statute: “All prefectures recommend persons yearly. Examinations may also be ordered by special imperial decree, and the schools of the National College may also recommend candidates for examinations. All of those chosen must be upright and pure, and their reputation and conduct must match.” . . .

As for a person who is not qualified to be recommended, even though he should pass the

officials with comprehensive, standardized methods for determining the nature of the crime before them.<sup>185</sup> The Code also laid out intricate procedures for adjudication and imprisonment of criminals, which called for severe punishments for bureaucrats if not

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examination, his degree will be canceled and he will be arrested and punished . . . .

If of five recommended persons only two pass, there will be punishment for the three who did not pass. If of ten recommended persons only three pass, there will be punishment for the seven who did not pass. However, if a single person whose conduct instead of being virtuous is rather perverse and dissolute so that he is not qualified to be recommended passes, such perversion and dissolute behavior will be punished, and even though the number of persons who passed is in the majority the punishment will not be reduced.

ARTICLE: 92.2a—If the merit rating report of officials (*k'ao*) or the examination rankings for the doctorate are not correct, or if in the examination for the selection of officials (*hsüan* [*xuan*]) there are errors about the qualifications of a candidate, whereby the obtains the wrong position, the punishment is reduced by one degree.

COMMENTARY: 92.2b—If first (*fu*) or second penalty reports . . . were required to be attached to an official's record and were not, or were attached where they should not have been, the punishment is the same.

. . . .

ARTICLE: 92.3a—If these offenses are committed by error, the punishment is reduced three degrees in each case.

COMMENTARY: Other articles where errors occur follow this article.

ARTICLE: 92.3b—If an official has received a report and is not aware of the error, the punishment is reduced one degree further.

92.3c—If an official knows the circumstances and allows the situation to continue, he receives the same punishment as the person who committed the offense.

. . . .

TANG CODE art. 92 (citations omitted).

<sup>185</sup> See TANG CODE art. 50; 1 TANG CODE, *supra* note 95, at 13.

followed.<sup>186</sup> For example, Article 40 criminalizes inadvertent errors by officials,<sup>187</sup> and Articles 91-149 lay out punishments required for various intentional and unintentional administrative offenses.<sup>188</sup> “Once the magistrate had an understanding of all the facets of the case, he had no leeway in sentencing; the exact sentence provided by the *Code* had to be given.”<sup>189</sup> As an added layer of protection, higher-level officials reviewed cases requiring punishment greater than a beating, and implementation of the death penalty necessitated imperial review.<sup>190</sup> Underscoring the Throne’s preoccupation with restraining the bureaucracy, the Code contains approximately 205 articles on criminal acts by bureaucrats in their official capacity, compared to 243 articles on criminal behavior among the general populace.<sup>191</sup>

#### B. SOCIAL HIERARCHY WITHIN THE CODE

The Code consists of two parts: General Principles and Specific Offenses. The former expounds on the premises underlying the laws and their implementation, while the latter lays out each crime and its punishment. An examination of the General Principles best reveals the complex, interlocking relationships between the state, inter- and extra-familial relationships, and social control formalized in the Tang and employed through the end of the imperial period.

Article 6, entitled The Ten Abominations, provides the most coherent summary of the system’s ideological underpinnings, as the crimes within it constitute “the most serious of those offenses that come within the five punishments. They injure morality and destroy ceremony.”<sup>192</sup> The Abominations are:

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<sup>186</sup> See TANG CODE arts. 469-502.

<sup>187</sup> TANG CODE, art. 40.

<sup>188</sup> See TANG CODE arts. 91-149.

<sup>189</sup> 1 TANG CODE, *supra* note 95, at 11; see MACCORMACK, *supra* note 1, at 27-28.

<sup>190</sup> See 1 TANG CODE, *supra* note 95, at 12; TANG CODE art. 497.

<sup>191</sup> See 2 TANG CODE, *supra* note 110, at 4.

<sup>192</sup> TANG CODE art. 6; see MACCORMACK, *supra* note 1, at 55.

1. Rebellion (*móu fǎn*): “to plot to endanger the Altars of Soil and Grain [the ruler and his state].”
2. Plotting Great Sedition ( *móu dàni*): “to plot to destroy the ancestral temples, tombs, or palaces of the reigning house.”
3. Plotting Treason (*móu pàn*): “to plot to betray the country or to serve rebels.” This crime includes “persons who would betray the reigning house or go over to a foreign country, or who would betray a city and serve rebels, or who would want to flee the country.”
4. Contumacy (*èni*): “to beat or plot to kill (without actually killing) one’s paternal grandparents or parents; or to kill one’s paternal uncles or their wives, or one’s elder brothers or sisters, or one’s maternal grandparents, or one’s husband, or one’s husband’s paternal grandparents, or his parents.”
5. Depravity (*búdào*): “to kill three members of a single household [of an equal of higher status than the criminal] . . . who have not committed a capital crime, or to dismember someone.”
6. Great Irreverence ( *dà bújìng*): “to steal the objects of the great sacrifices to the spirits, or the carriage or possessions of the emperor.” This crime includes stealing or forging imperial seals,  
 failure to follow the correct prescription when preparing medicine for the emperor, or making a mistake in attaching the label. . . . [,] making a mistake in preparing the emperor’s food by violating dietary proscriptions . . . . [,] making mistakes in constructing boats for imperial use so that they are not sturdy. . . . [,] criticizing the emperor where the circumstances are completely reprehensible . . . . [,] resisting or driving away messengers carrying imperial decrees . . . , or lacking the proper behavior that a subject owes to his emperor.

7. Lack of Filial Piety (*búxiào*): to accuse one's parental grandparents or parents in court, curse at them, or disobey them; to possess a separate household register (*biéjī*) or separate goods (*yìcái*) before one's paternal grandparents or parents die; to fail to financially support one's elders; arrange one's marriage, play music, or wear normal (as opposed to mourning) garments during the mourning period for one's parents; and "on hearing of the death of one's paternal grandparents or parents to conceal and not mourn their death [or] to state falsely that one's paternal grandparents or parents have died."
8. Discord (*búmù*):<sup>193</sup>  
to plot to kill or also to sell relatives who are of the fifth or closer degree of mourning. . . . [as well as] beating or accusing . . . one's husband or relatives [of a crime], whether of a higher generation or of the same generation but older than one's self, of the third . . . or closer degree of mourning, or relatives of an older generation of the fourth . . . degree of mourning.
9. Unrighteousness (*búyì*): to kill the leader of one's department, prefect, or magistrate, or one's teacher; as an employee or soldier, to kill one's own section chief or commander who is of the fifth rank or above; and to hide and not mourn the death of one's husband, or to make music, wear ordinary clothing, or remarry during the mourning period.
10. Incest (*nèiluàn*): "having illicit sexual intercourse . . . with relatives who are of the fourth degree of mourning or closer," or with one's father's or paternal grandfather's concubines.<sup>194</sup>

Not all Abominations carry severe penalties, but their grouping under a specific article in the General Principles highlights their socio-

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<sup>193</sup> Because offenses under Discord primarily deal with relationships outside of the one-year mourning period, they are less serious and therefore not covered by Lack of Filial Piety. See 1 TANG CODE, *supra* note 95, at 78 n.170.

<sup>194</sup> TANG CODE art. 6.

political repugnance. They reflect the institutionalization of the elements that formed “the historical roots of Chinese social organization . . . : (1) a hierarchical family system with the father as head; (2) a centralized hierarchical government . . . ; and (3) Confucian philosophy, which guided Chinese behavior at the micro and macro level.”<sup>195</sup>

Like the code of the Han, the Tang Code vilifies behavior that threatens the state or its leaders. But in a transition only inferred by in Han jurisprudence, in the Tang preservation of the patriarchal family migrated to the heart of state policy. Contumacy, depravity, lack of filial piety, discord, and incest involve actions which undermine the stability—and even survival in the case of depravity—of the older-generation- and male-dominated family unit. The severity of criminal punishments depends explicitly upon the generation, age, sex, and mourning-period relationship between the criminal and victim.<sup>196</sup> For example, cursing at one’s parents or paternal grandparents qualifies as lack of filial piety and warrants decapitation if performed with spells,<sup>197</sup> or just strangulation if done solely with rude language.<sup>198</sup> By contrast, cursing maternal grandparents does not even fall within the Ten Abominations. A domestic violence statute exemplifies the law’s role in reinforcing this Byzantine family hierarchy:

ARTICLE 333

BEATING A WIFE’S CHILDREN BY HER FORMER HUSBAND

ARTICLE 333.1a—All cases of beating or wounding a wife’s children by her former husband are punished one degree less than for the same offense committed against a person of non-kin status.

333.1b—If those involved dwell together, the punishment is reduced one degree further.

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<sup>195</sup> Troyer & Rejek, *supra* note 4, at 8.

<sup>196</sup> See MACCORMACK, *supra* note 1, at 10, 16; Ye, *supra* note 178, at 188; cf. Grant, *supra* note 13, at 18.

<sup>197</sup> See TANG CODE art. 264.

<sup>198</sup> See TANG CODE art. 329.

333.1c—If death results, the punishment is strangulation.

SUBCOMMENTARY: Beating or wounding a wife's children by her former husband refers to a woman who has remarried and brought her children with her to the husband's home. If this second husband beats and wounds them, the punishment is one degree less than were the offense against a person of non-kin status.

Dwelling together means that if the children are dwelling together with their stepfather, they have a second-degree mourning relationship in the ancestral temple. So the punishment is reduced one degree further, that is, two degrees that for the same offense committed against a person of non-kin status.

If the stepfather beats a child so as to cause incapacitation, cuts out the child's tongue, or damages the child's sexual organs, the punishment is two and one-half years of penal servitude. If they are not dwelling together, the punishment is three years of penal servitude. If death occurs as a result, regardless of whether they are dwelling together, the punishment is strangulation.

ARTICLE: 333.2a—If one of the stepchildren beats or wounds their stepfather, the punishment is the same as for the offense against a relative of an older generation of the fifth degree of mourning.

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ARTICLE: 333.2b—Beating or wounding the teacher from which one has received one's education is punished two degrees more than the same offense committed against a person of non-kin status.

333.2c—Death is punished by decapitation in each case.

COMMENTARY: This means a teacher from whom one has received Confucian learning and not private instruction. . . .<sup>199</sup>

One only need turn to Unrighteousness to reiterate the ideological link between Abominations focusing on the state and those concerning the family. By condemning the murder of one's superior, be it in an educational, employment, or military context, as an Abomination, the Code unleashes the mutual duties required of related persons from the confines of the household. Once in the public sphere, these social/legal obligations permeate all relationships and transform society into an enormous family headed by the emperor. "The king . . . acts to shelter and support, thus serving as the father and mother of the masses. As his children, as his subjects, they must be loyal and filial."<sup>200</sup> Through enforcement of finely-graded social distinctions between individuals, the Tang actualized the socio-political vision foreshadowed by early Confucians a millennium before.<sup>201</sup>

The extra-familial hierarchy, which mirrors the domestic sphere, gains the family's nuanced social gradations under the Code's Eight Deliberations. Drawing on the *Book of Rites* for inspiration, Article 7 lists eight groups of people who, if they "commit a capital crime, [have] a memorial . . . sent up requesting authorization to consider and fix a penalty. The officials do not dare decide the case themselves."<sup>202</sup> These classes receive lighter sentences than common or lesser people for the same crimes. For offenses that usually warranted life exile or less, members of these groups automatically received a one-degree sentence reduction.<sup>203</sup> The eight groups broadly were:

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<sup>199</sup> TANG CODE art. 333 (citations omitted).

<sup>200</sup> TANG CODE art. 6 (citations omitted).

<sup>201</sup> See *supra* text accompanying notes 11-13, 32.

<sup>202</sup> TANG CODE art. 7.

<sup>203</sup> 1 TANG CODE, *supra* note 95, at 24-25; see also *id.* (listing various benefits high-ranked individuals could receive).

1. relatives of the emperor within the sixth degree of mourning or closer
2. those who had served the emperor for a long time
3. “the morally worthy . . . whose conduct is greatly virtuous”
4. persons of great ability, such as “those who are able to lead armies, manage the affairs of government, correct the course of the emperor, and serve as a model for human relationships”
5. those with great achievement and glory, such as “those who are able to kill enemy generals and carry off their flags; who are able to lead armies ten thousand *li*, or cause the multitudes to render allegiance and become civilized; who are able to bring peace to the entire age to straighten out all difficulties”
6. officials in high position
7. “military and civil officials who reverently hold office day and night occupied with public affairs, or who, when serving in distant regions, experience dangers and difficulties”
8. “guests of the state,” including descendants of previous dynasties.<sup>204</sup>

Just as family members of a higher generation or more-advanced age received legal privileges, those closest to the emperor, by blood or rank, or most devoted to the state, acquired legal benefits from their status.

Such advantages arose outside of the Eight Deliberations as well. For example, Article 17, entitled “Using Office to Replace Penal Servitude,” permitted officials to substitute bureaucratic rank for a sentence of penal servitude.<sup>205</sup> For “private offenses,” which refer to non-office-related crimes, abuses of office, or errors made in fulfilling one’s official duties *for personal gain*, “[o]ne office of the fifth rank and above replaces two years of penal servitude. One office of the ninth rank and above replaces one year of penal servitude.”<sup>206</sup> For “public offenses,” which “refer to [crimes] connected with public affairs which *do not involve secret crookedness*[.] . . . office replaces an additional year of penal servitude.”<sup>207208</sup>

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<sup>204</sup> TANG CODE art. 7.

<sup>205</sup> See TANG CODE art. 17.

<sup>206</sup> TANG CODE art. 17.1a.

<sup>207</sup> TANG CODE art. 17.1b (emphasis added); see also 1 TANG CODE, *supra* note 95, at 25-28 (describing myriad privileges reserved for government officials).

Along with recognizing these superior social classes, the Code lists inferior groups, such as personal retainers, bondsmen, and slaves.<sup>209</sup> Generally, bondsmen and personal retainers suffered punishments one degree higher for crimes against a commoner than a commoner would face for the same offense.<sup>210</sup> Likewise, a commoner's sentence would be lightened one degree if the crime was against a bondsman or personal retainer.<sup>211</sup> For slaves, the sentencing disparities were two degrees.<sup>212</sup>

### C. CODE ENFORCEMENT AND SOCIAL CONTROL

The Code enforced traditional stratifications within the Chinese household and created an elaborate web of status and privilege in the public sphere which paralleled the family structure and drew upon domestic imagery to bolster its own legitimacy. In this manner, the Tang and later governments avoided the fate of the

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<sup>208</sup> Though not categorized as elite individuals in the manner laid out in the Eight Deliberations, the elderly, young, and disabled received special treatment under the law. For example, "[a]ll cases of those who are seventy years of age or over, or fifteen years of age or less, or disabled, who commit a crime punished by life exile or less [may receive] redemption by payment of copper[,] as may those who rob or wound others. TANG CODE arts. 30.1a, 30.2b. Those over eighty, under ten, or incapacitated who partook in rebellion, sedition, or murder and therefore required a death sentence were allowed to send a petition to the emperor. See TANG CODE art. 30.2a. Persons over ninety or under seven could not receive the death penalty under most circumstances. TANG CODE art. 30.3a; see TANG CODE art. 18. Similarly, those who committed crimes before becoming "aged or infirm," but were discovered to have committed the crime after becoming aged or infirm "are sentenced according to the article on age and infirmity." TANG CODE art. 31. And "[i]f a person was a youth at the time when the offense was committed and has become older when the crime is discovered, the sentence is according to the article on youth." TANG CODE art. 31.

<sup>209</sup> See TANG CODE art. 320; 1 TANG CODE, *supra* note 95, at 68 n.128; see, e.g., TANG CODE arts. 18.1 (noting that for determining whether criminal act involving intentional killing qualifies as one of Ten Abominations, personal retainers and slaves are not taken into account), 461a (stipulating that "master need not conceal his personal retainers' or slaves' offenses, but they do conceal his.").

<sup>210</sup> See 1 TANG CODE, *supra* note 95, at 128.

<sup>211</sup> See *id.*

<sup>212</sup> See *id.*

Qin by exploiting “the expressive function of law— . . . the function of law in expressing social values and encouraging social norms to move in particular directions” to embed further these hierarchies into Chinese society and maintain their desired political order.<sup>213</sup> Due to the law’s focus on social hierarchy, crime amounted to more than “just a simple violation of law,” and signified an antisocial rebellion against authority, be it the state, one’s elders, or men.<sup>214</sup> As such, criminal behavior posed a general threat to social stability, a phenomenon referenced in the opening passage of the Tang Code.<sup>215</sup>

The danger criminal acts posed to the status quo led to an emphasis on substantive, rather than procedural, justice, since the factual truth had to be discerned so that the state could administer the appropriate punishments and restore social harmony.<sup>216</sup> Punishment served as a public tool of “ethical pedagogy” designed to re-socialize the deviant individual into the mainstream—putting him in his proper place, as it were.<sup>217</sup>

In establishing the Five Punishments meted out to criminals, the Code reflects these goals. Article 1, instituting guidelines for caning with “the Light Stick,” notes that “beating is used to shame” the criminal<sup>218</sup>—an act that serves as “a kind of tax” on undesirable behavior.<sup>219</sup> Article 2 lays out the method for beating criminals with a Heavy Stick.<sup>220</sup> Article 3 describes the use of penal servitude, which

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<sup>213</sup> Sunstein, *supra* note 37, at 953.

<sup>214</sup> XIN, *supra* note 1, at 30.

<sup>215</sup> See *supra* text accompanying note 176.

<sup>216</sup> See XIN, *supra* note 1, at 31, 38, 118.

<sup>217</sup> *Introduction*, *supra* note 117, at 4; see McKnight, *supra* note 11, at 9-10.

<sup>218</sup> TANG CODE art. 1. Interestingly, the term for the light stick, *chi*, is a homonym with the word “to shame,” *chi*. See TANG CODE art. 1.

<sup>219</sup> Sunstein, *supra* note 37, at 913; see *id.* at 915.

<sup>220</sup> TANG CODE art. 2. It has been suggested that the penal beatings resembled the beatings people endured as punishment within the household. By “recapitulate[ing] the family experience[.]” caning could prove more effective at coercing the criminal to adhere to the law. See McKnight, *supra* note 11, at 18.

again intends to “shame[] one” into behaving properly.<sup>221</sup> For more severe crimes, the Code calls for more intense punishments, since the individual may prove beyond redemption.<sup>222</sup> In this harsher category appears life exile<sup>223</sup> and execution by strangulation or decapitation.<sup>224</sup> Support for harsher punishments for the hopelessly wicked appears in the Code’s commentary on collective adjudication for the most egregious Abominable crimes, plotting rebellion and great sedition:

“Plotting rebellion and great sedition are criminal to the utmost degree of censure and extinction. Such crimes defile the whole family and the eradication of evil must reach to the roots.” The implication is that the whole family in some way has shared in the evil of the individual who has rebelled, and so all deserve to be punished.<sup>225</sup>

On the other hand, the Code’s articles on Confession promote Confucian self-rehabilitation among the redeemable.<sup>226</sup> As a general rule, “[i]n all cases where there is confession of crimes that have not

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<sup>221</sup> TANG CODE art. 3.

<sup>222</sup> Cf. McKnight, *supra* note 11, at 9 (noting that instead of changing offender’s actions to conform with society, law can instead remove offender from society).

<sup>223</sup> See TANG CODE art. 4.

<sup>224</sup> See TANG CODE art. 5.

<sup>225</sup> MACCORMACK, *supra* note 1, at 199; see TANG CODE art. 18. Collective prosecution in the Tang, a dynasty with a reputation for comparatively *lenient* penal laws, required decapitation of all persons involved in the crime, be they principles or accessories; strangulation of the criminals’ fathers and sons; enslavement of their mothers, daughters, grandfather, great-grandfather, great-great-grandfather, grandsons, great-grandsons, and great-great-grandsons in the male line, brothers and sisters, his and his sons’ wives and concubines, and any retainers and slaves owned by any of the above individuals. Furthermore, the possessions and real property of all the above people were confiscated by the state. The criminals’ paternal nephews and paternal uncles would be sentenced to life exile at a distance of 3,000 *li*, but they could retain their belongings. See 1 TANG CODE, *supra* note 95, at 18.

<sup>226</sup> See MACCORMACK, *supra* note 1, at 93.

yet been discovered, the crime will be pardoned.”<sup>227</sup> Drawing directly upon Confucius’ *Analects* 15:19, the article’s subcommentary notes that “[t]o have faults and not to correct them, this is indeed a fault.”<sup>228</sup> Mending the individual’s defects, rather than retribution, lies at the philosophical heart of this policy; confession of one’s undiscovered crimes demonstrates that the criminal has re-committed himself to live according to society’s standards:

The offender’s initiative in admitting to the facts of the crime was regarded as a personal willingness to submit to the authorities’ control. Self-confession was not only personally beneficial for the offender himself . . . , but was also socially significant because it enabled the authorities to restore power that had been challenged when the crime was committed.<sup>229</sup>

This clemency extended in certain circumstances to those whose illegal conduct had already been discovered partially. For example, “[c]ases of those who, because of a lesser offense being discovered, confess a heavier offense are exempted from the heavier punishment.”<sup>230</sup>

Confessions regarded as insincere did not merit pardon. If a third-party permitted to confess on behalf of the criminal did so, thereby qualifying the criminal for a pardon, but the criminal refused to appear in court, a pardon was not granted.<sup>231</sup> Similarly, false or incomplete confessions did not qualify.<sup>232</sup> In this case, though, the court could not administer a death sentence, since the criminal showed “a repentant heart.”<sup>233</sup> Persons who made half-hearted

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<sup>227</sup> TANG CODE art. 37.1a. In certain cases, the Code provides for pardoning errors made by bureaucrats in the course of their duties. *See* TANG CODE art. 41.

<sup>228</sup> TANG CODE art. 37.1a.

<sup>229</sup> XIN, *supra* note 1, at 30.

<sup>230</sup> TANG CODE art. 37.2a.

<sup>231</sup> *See* TANG CODE art. 37.3c.

<sup>232</sup> *See* TANG CODE art. 37.4a.

<sup>233</sup> TANG CODE art. 37.4a.

confessions “1) knowing that someone will accuse them to court, 2) after they have fled (either to avoid punishment or various duties), or 3) after treason is already underway” received a two-degree reduction in punishment.<sup>234</sup>

One last defining feature of the Code that significantly fortified the socio-political order was the concealment law, under which family integrity and hierarchy overrode the state’s interest in effectively prosecuting otherwise criminal behavior. Social relationships determine whether a person *cannot* or is *required to not* report another’s illegal activities. “All cases involving those who dwell together or relatives of the third or closer degree of mourning, including maternal grandparents, grandsons in the female line, the wives of grandchildren in the male line, and a husband’s brothers and their wives *allow* mutual concealment should one of them commit a crime.”<sup>235</sup> Also, “[p]ersonal retainers and slaves who conceal their master’s offenses will not be punished.”<sup>236</sup> However, while the subcommentary explains that the concealment obligation for personal retainers is mandatory, the master has no corresponding duty to them.<sup>237</sup> Similarly, the further the social distance between people, the less protection they receive from the concealment laws.<sup>238</sup> Even after the authorities have discovered the crime and begun to search for the perpetrator, “[i]f any of the persons [who under Article 46.1a may

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<sup>234</sup> TANG CODE art. 37.5a.

<sup>235</sup> TANG CODE art. 46.1a (emphasis added).

<sup>236</sup> TANG CODE art. 46.1a.

<sup>237</sup> See TANG CODE art. 46.1a.

<sup>238</sup> See e.g., TANG CODE art. 46.2:

If relatives of the fourth degree of mourning or less mutually conceal each others’ offenses, their punishment will be reduced three degrees below that for persons of non-kin status.

SUBCOMMENTARY: Persons unrelated to the criminal who conceal a capital offense have their punishment reduced only one degree below that of the criminal. But relatives of the fourth or fifth degree of mourning have their punishment reduced a further three degrees below that for persons of non-kin status . . . .

TANG CODE art. 46.2.

conceal another] are able to conceal the criminal or help him to flee . . . they will not be prosecuted.”<sup>239</sup>

The Court clearly understood that the Confucian Three Bonds provided it with an aura of legitimacy by projecting family values throughout society and placing the emperor on top. The concealment laws, then, fortified a person’s deference to his family—the institution with the greatest immediate oversight over him and greatest ability to force him to conform to social (legal) norms.<sup>240</sup>

## VII. CONCLUSION

Through the fortuitous interplay between Confucian ideology and legalist administration, the dynasties of Imperial China created an exceptionally stable political system that withstood over a millennium of tribulations. Seizing upon traditional norms governing domestic behavior and portraying the government as the home writ large, the imperial model became “an industrial policy for norm generation.”<sup>241</sup> Rather than simply enforcing an arbitrary set of government-defined laws, the codes reflected already-pervasive beliefs, providing legal enforcement with powerful social legitimacy.<sup>242</sup> Members of society

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<sup>239</sup> TANG CODE art. 46.1b.

<sup>240</sup> As one would expect in light of the government-buttressing function of concealment, acts directly threatening the state’s survival, such as plotting rebellion, plotting great sedition, and plotting treason, did not fall under this law. *See* TANG CODE art. 46.3.

<sup>241</sup> Pildes, *supra* note 3, at 2057; *see* McKnight, *supra* note 11, at 11 (“The kinship metaphor of association, which existed before formation of a state, continued to dominate politics throughout traditional Chinese history, and continues to influence political behavior today.”); *id.* at 15 (“The traditional family was supposed to be paternalistic, patriarchal, and hierarchical, thus the state in microcosm.”); XIN, *supra* note 1, at 10, 25 (“The head of government was the head of the extended family of the whole nation.”).

<sup>242</sup> “[N]orms often . . . receive a kind of moral grounding that is not simply reducible to an instrumental judgment about likely risks. When someone violates a norm . . . , people’s reaction is different—more stern and more deeply moralized . . .” Sunstein, *supra* note 37, at 930; *see also* MILLER, *supra* note 66, at 20-21 (noting that if regarded by “at least some . . . as exemplary or obligatory and thus as binding,” social order based on custom is endowed with “legitimacy” and therefore stronger).

that held positions of relative power over others gained an interest in maintaining the socio-political system, since convention and law had become one.<sup>243</sup>

The result in theory, and to a remarkable degree in practice, was a system designed to respond to wrongdoing in a subtly graded way, which began with the minor sanction usable by the primary group, passed to the minor but sometimes different sanctions available to intervening associations, and ended with the potential application of more severe penalties by the formal state authorities.<sup>244</sup>

This complex gradation ensured that informal, socially-based enforcement of the codes occurred continually, even without government interference.

These features, crystallized under the Tang, granted the Chinese state leeway to permeate nearly every level of society and thereby augment political stability with a comparatively skeletal

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<sup>243</sup> Weber finds an order based on “convention” where that order “is externally guaranteed by the probability that a violation will meet with the (relatively) general and practically significant *disapproval* of a determinable group of people.” MILLER, *supra* note 66, at 22. This type of social retribution “may be more effective than any legal coercion.” *Id.*; see HUANG, *supra* note 13, at 234 (“[L]aw reinforced the relations of domination in society at the same time that it applied their principles to the political domination of society by the state.”).

Stated in another manner, the conjunction of legalist and Confucian elements in the imperial system respectively lent the paradigm what Weber described as “Rational” and “Traditional” grounds for legitimacy. See MILLER, *supra* note 66, at 63 (describing “Rational” authority as “resting on a belief in the ‘legality’ of patterns of normative rules and the right of those elevated to authority under such rules to issues commands . . .” and “Traditional” authority as “resting on an established belief in the sanctity of immemorial traditions and the legitimacy of the status of those exercising authority under them . . .”).

A vivid example of the fusion of Chinese social norms with the imperial regime appears in ancestor worship among ordinary Chinese in China and Taiwan, in which Heaven is understood to be governed by a bureaucracy choked with magistrates and other officials. See EMILY MARTIN AHERN, CHINESE RITUAL AND POLITICS 1-5, 11, 22 (1981); EMILY M. AHERN, THE CULT OF THE DEAD IN A CHINESE VILLAGE 221, 223, 225, 232 (1973).

<sup>244</sup> McKnight, *supra* note 11, at 14; see *id.* at 15.

state.<sup>245</sup> By limiting state action to only egregious crimes and delegating most others to informal social enforcement,<sup>246</sup> the central government, through unrelenting fortification of traditional familial and social hierarchies, transformed the family into a de facto extension of the bureaucratic state. Family heads became the unpaid foot-soldiers of government authority, implementing its policies without direct compensation, because maintenance of the political/legal system granted them powers and privileges over their subordinates.

Under this model, the state not only plays an active role in enforcing law and upholding order against undesirable human conducts but also aggressively penetrates into every thread of the social fabric .... To the Chinese rulers, the ultimate goal of social control in Chinese society is far beyond the conventionally understood threshold—controlling human conduct.<sup>247</sup>

The government of Imperial China discreetly brought about an unmatched actualization of the administrative state by outsourcing large portions of policy enforcement to non-governmental social organizations. And through this process, which served the interests of the political elite and those in informal positions of power, the Imperial model proved astoundingly stable and thrived for centuries to come.

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<sup>245</sup> See *id.* at 19.

<sup>246</sup> See *supra* p. 16 n.63.

<sup>247</sup> McKnight, *supra* note 11, at 2.