

CONFUCIUS AND THE CHINESE LEGAL TRADITION

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More than two thousand years ago, Confucius transformed and perfected an institution for governing Chinese people, which has been religiously replicated by subsequent dynasties. Within the Confucian institution, the King, at the pinnacle of the pyramid, held absolute authority; regional lords were loyal to the King; and commoners were submissive to the privileged. Confucius held that peace and order could only be achieved when people acted according to their hierarchical worth assigned by the ruler. This article offers an overview of the transformation of Confucianism. It then examines competing schools of thought—Legalism and Taoism—and explains why Confucianism triumphed to become the official Chinese ideology. Through a series of case studies, the article theorizes that the central theme of Confucian-inspired laws was perpetuation of inequality. With the declining influence of Marxism, the Communist Party has revived the Confucian tradition to maintain its legitimacy and project its “soft power” to the world. This article concludes that, against the massive weight of tradition deeply ingrained in the people’s minds and souls, the rule of law and equality will unlikely be an important force in China.

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1. INTRODUCTION

When Mao Zedong established the People's Republic of China (PRC) in 1949, he solemnly declared that the new nation was no longer saddled with the “three mountains”—feudalism, imperialism, and bureaucrat-capitalism.¹ By embracing Marxism-Leninism as its official ideology, the new nation severed ties with the traditional cultures and institutions, which had lasted for thousands of years.² Mao poetically described the new nation as a clean canvas on which he would “compose the most elegant lyrics and draw the most beautiful pictures.”³ As a pragmatist, Mao not only offered an inspiring image of the future but also made it clear that the Confucian tradition would never return to compete with Communism.⁴

The mass campaigns for the destruction and elimination of the Chinese tradition began at the inception of the new republic and reached its climax during the Cultural Revolution.⁵ One of the objectives of the Cultural Revolution “was to wipe out the ‘four olds’—old customs, old culture, old habits, and old ideas.”⁶ The most violent act took place at Qufu, where the Red Guards desecrated Confucius's tomb, destroyed his temples, and dismembered his statues.⁷ They also defaced and smashed numerous stone carvings inscribed with calligraphy by emperors and

1. *Chinese People are Marching Towards Bright Future*, 43 PEKING REV. 24, 25 (1968), <https://www.marxists.org/subject/china/peking-review/1968/PR1968-431.htm>.

2. See Tillman Durdin, *China Transformed by Elimination of ‘Four Olds’*, N.Y. TIMES (May 19, 1971), <https://www.nytimes.com/1971/05/19/archives/china-transformed-by-elimination-of-four-olds.html> (discussing the origins of the “Cultural Revolution in China”).

3. MAO ZEDONG (毛泽东), JIESHAO YIGE HEZOU (介绍一个合作社) [INTRODUCING A CO-OPERATIVE], 2 (1975).

4. See generally A. James Gregor & Maria Hsia Chang, *Anti-Confucianism: Mao's Last Campaign*, 19 ASIAN SURVEY 1073 (1979).

5. Durdin, *supra* note 2.

6. *Id.*

7. Zhang Shunqing (张顺清), *Tan Houlan Qufu “Taokong” Jishi* (谭厚兰曲阜“讨孔”纪实) [A Factual Record of How Tan Houlan Laid Siege to Qufu], YANHUANG CHUNQIU, 2015, at 19, 19. See also Zhang Shunqing (张顺清), *The Documentary of Tan Houlan's Qufu “Discussion Hole”*, <http://www.yhcqw.com/34/9756.html> (last visited Apr. 6, 2020).

scholars from various dynasties praising Confucius.⁸ Residents looted Confucius's temples and tombs for artifacts and archives.⁹ The most culturally insulting transgression perpetrated by the Red Guards occurred when they publicly exhumed and mutilated the body of Confucius's 76th generation descendant.¹⁰ By resorting to these extreme measures, the Red Guards hoped to eradicate Confucius's influence once and for all.¹¹

However, uprooting a tradition deeply ingrained in the people's minds and souls for thousands of years was not as simple as Mao believed.¹² From generation to generation, people subconsciously carried on the Confucian tradition.¹³ With the passing of the old generation of leaders and the declining influence of Communism, Chinese political leadership has recently made a deliberate effort to revive the Confucian tradition in hopes of solidifying public support for the government and maintaining its legitimacy.¹⁴ The leadership has also openly embraced the Confucian spirit in an attempt to solve the thorny social issues caused by rapid economic expansion.¹⁵ There is no clearer official endorsement of the Chinese tradition than President Xi's signature agenda, which calls for building "a Chinese Dream of national rejuvenation."¹⁶

8. *Id.*

9. *Id.*

10. Liu Yanxun, *Kongzi My Mengnan Ji [How Confucius's Tomb Was Destroyed]*, ZHONGGUO XINWEN ZHOUKAN [CHINA NEWSWEEK], Mar. 15, 2010, at 80, 80.

11. Sang Ye & Geremie R. Barmé, *Commemorating Confucius in 1966-67: The Fate of the Confucius Temple, the Kong Mansion, and Kong Cemetery*, CHINESE HERITAGE (Dec. 2009), http://www.chinaheritagequarterly.org/scholarship.php?searchterm=020_confucius.inc&issue=020.

12. See Evan Osnos, *Confucius Comes Home: Move Over, Mao*, NEW YORKER (Jan. 5, 2014), <https://www.newyorker.com/magazine/2014/01/13/confucius-comes-home>.

13. See MARTIN JACQUES, WHEN CHINA RULES THE WORLD 273 (2009) ("Whatever democratic political system evolves in China will bear the heavy imprint of its Confucian past.").

14. See Jeremy Page, *Why China is Turning Back to Confucius*, WALL ST. J. (Sept. 20, 2015, 9:00 AM EDT), <https://www.wsj.com/articles/why-china-is-turning-back-to-confucius-1442754000>.

15. *Id.* ("Mao doesn't sell. Communism doesn't sell. But Confucianism and other traditional thinking can make sense.").

16. See Xi Jinping, General Secretary of the Communist Party of China, Report at the 19th CPC National Congress (Oct. 18, 2017).

It took fifty years for Chinese authorities to reverse course—from digging up Confucius’s tombs to promoting Confucius both at home and abroad.¹⁷ The half-century anti-Confucius detour was only a brief hiatus in a two-thousand-year-old tradition. While the “Confucius” that the Chinese government identifies with may not be the “Confucius” of the past, it is a winning strategy for the government to project its “soft power” through Confucius’s enduring legacy and publicity, especially on the world stage.¹⁸ The government has established more than 500 Confucius Institutes all over the world, some of which are on American university campuses.¹⁹ So far, the government has enlisted “Confucius” as an agent for both marketing socialist values internationally and rekindling nationalism at home.²⁰

Confucianism is a multifaceted institution that does not lend itself to a clear definition. Historically, Confucianism advocated benevolent governance but also held that a harmonious society could only be achieved when people acted according to their hierarchical worth assigned by the patriarch.²¹ It required absolute submission from the inferior to the superior.²² Confucianism promoted learning, but limited study to the classics edited by Confucius.²³ It encouraged self-cultivation and self-fulfillment, but one needed to keep one’s thoughts within the realm of Confucian teachings.²⁴ The official creed could not be

17. See ANPING CHIN, *THE AUTHENTIC CONFUCIUS: A LIFE OF THOUGHT AND POLITICS* 11–12 (2007) (discussing the slow reintegration of Confucianism in the culture).

18. James F. Paradise, *China and International Harmony: The Role of Confucius Institutes in Bolstering Beijing’s Soft Power*, 49 *ASIAN SURVEY* 647, 648 (2009).

19. *The Confucius Institute*, U. NEBRASKA-LINCOLN, <https://confuciusinstitute.unl.edu/about-us-0> (last visited Jan. 31, 2020).

20. See Eleanor Albert, *China’s Big Bet on Soft Power*, COUNCILS ON FOREIGN REL. (Feb. 9, 2018), <https://www.cfr.org/backgrounder/chinas-big-bet-soft-power>. See also Nicholas J.S. Miller, *Pragmatic Nationalism and Confucianism: The New Ideology of the CCP*, 2 *INQUIRIES* 1, 23, 32–36, 38 (2010), <http://www.inquiriesjournal.com/articles/229/pragmatic-nationalism-and-confucianism-the-new-ideology-of-the-ccp>.

21. See CHIN, *supra* note 17, at 167–69.

22. See T’UNG-TSU CH’Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* 239 (1965).

23. Fung Yu-Lan, *A Short History of Chinese Philosophy* 191 (1948) (stating that Tung Chung-Shu was “instrumental in making Confucianism the orthodox belief of the Han Dynasty, at the expense of other schools of thought.”).

24. *Id.* at 191–92.

challenged in any way.²⁵ Throughout history, intellectuals who attempted to deviate from the orthodox teachings and experiment with free-thinking, even inadvertently, faced jail terms or the death penalty.²⁶ Circumventing official censorship was a grave crime punishable by death.²⁷ The Confucian tradition attached great importance to family values and responsibilities, but it often imposed unbearable burdens on family members.²⁸ If a person committed one of the abominable crimes, such as treason or blasphemy, his relatives within nine degrees faced extermination by the death penalty or exile.²⁹

Confucian values are manifested in various aspects of current Chinese law.³⁰ For example, according to a new provision recently added to the Elderly Protection Law (EPL), failure to visit one's parents is illegal.³¹ The law also obligates companies to grant leaves of absence for employees to visit their aging parents to fulfill their legal duties.³² As natural caretakers of their elderly parents, adult children are required to provide adequate physical and mental assistance to their parents.³³ Children cannot avoid their legal duty to care for their parents by

25. See generally GUO CHENGKANG (郭成康) & LIN TIEJUN (林铁钧), QINGCHAO WENZIYU (清朝文字狱) [THE LITERARY INQUISITION IN THE QING DYNASTY] 3, 7–8 (1990).

26. *Id.*

27. CHIN, *supra* note 17, at 158.

28. SIMA QIAN (司马迁), SHIJI (史记) [HISTORICAL RECORD] 139 (1959). The following account is mainly based on Sima Qian's work supplemented by modern biographers' findings. This article cites the version by SIMA QIAN (司马迁), SHIJI (史记) [HISTORICAL RECORD] (Tian Wen (文天) trans. 2016) [*hereinafter* Wen].

29. *Id.*

30. See generally Du Yimei, *Rujia Sixiang Dui Dangdai Zhongguo Fazhi Wenhua de Yingxiang* [Confucian Influence on Modern Chinese Law], TAIYUAN CHENGSHI ZHIYE JISHU XUEYUAN XUEBAO [J. OF TAIYUAN URB. VOCATIONAL C.] 2011. See also Cheng Jishan (程计山), "Xiaodao:" Xuyao Falv Lai Baohu? ("孝道": 需要法律来保护?) [Filial Piety: In Need of the Protection of Law?], INST. OF L., <http://www.iolaw.org.cn/showNews.asp?id=9381> (last visited Jan. 30, 2020).

31. Laonian Ren Quanyi Baozhang Fa (老年人权益保障法) [Law on Protection of the Rights and Interests of the Elderly] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2018, effective Dec. 29, 2018), art. 18, 2019 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 167 (China).

32. *Id.*

33. *Id.* art. 14.

relinquishing their inheritance.³⁴ Under Chinese estate law, children who have failed to care for their parents have no right to receive a share of their parents' estates.³⁵ Those who have lived with and cared for their parents receive a larger share of the estates than those who have not fulfilled their familial duties.³⁶

The Chinese government often utilizes family collective responsibility, a hallmark of traditional law, to achieve its particular goals. During the 2008 earthquake in Sichuan, thousands of schoolchildren died because poorly constructed school buildings collapsed.³⁷ A group of parents planned to protest the government for its failure to hold the developers of the shoddy buildings accountable.³⁸ Fearing that a full investigation could reveal official corruption and cause social unrest, the government directed the local police to apprehend the leader of the planned protest.³⁹ To maximize the pressure on the fleeing leader, the police arrested his relatives along with his eight-year-old son.⁴⁰ Similarly, the government recently detained two American citizens, Victor and Cynthia Liu, who were visiting their ailing grandparents in China.⁴¹ The government defended the action by claiming that the two siblings' father was a fugitive living in the United States.⁴² By detaining his children, the government intended to force the father to return to China to face an ongoing criminal investigation. There

34. *Id.* art. 19.

35. Jicheng Fa (继承法) [Law of Succession], (promulgated by the Nat'l People's Cong., Apr. 10, 1984, effective Oct. 1, 1985), art. 13, 1985 FAGUI HUIBIAN 18 (China).

36. *Id.*

37. See Chenglin Liu, *Socialized Liability in Chinese Tort Law*, 59 HARVARD INT'L L. J. 16, 40–41 (2018), <https://harvardilj.org/2018/03/understanding-socialized-liability-under-chinese-tort-law/>.

38. *See id.* at 42.

39. *See id.*

40. *See id.*

41. Jennifer Hansler, *Young American Held in China Makes Plea to Come Home*, CNN (May 9, 2019, 3:35 PM EDT), <https://www.cnn.com/2019/05/09/politics/cynthia-liu-plea/index.html>.

42. *Id.*

is no evidence that the two children were involved in their father's alleged crime.⁴³

This Article first offers an overview of both the Zhou Dynasty—during which Confucius lived—and the transformation of Confucianism. Then it examines competing schools of thought, Legalism and Taoism, and explains why Confucianism triumphed to become official Chinese ideology. It subsequently explores the influence of Confucianism on the legal tradition. Confucius did not think the law was an indispensable institution, rather merely a last resort when moral teachings failed.⁴⁴ Rulers of later dynasties codified Confucius's teaching into law, which included the death penalty for violation of the Confucian norms.⁴⁵ Through a series of case studies, this Article provides a detailed analysis of family relations and inequality before the law—two key concepts of Confucianism, which heavily influenced the Chinese legal tradition. This Article concludes with an assessment of Confucius's life and his legacy, many aspects of which endure today.

2. THE DYNASTIC CYCLE

About 4,000 years ago, China began its civilization,⁴⁶ producing “the longest and the most continuous historical record[s] of any existing nation.”⁴⁷ These records show a clear pattern of dynastic cycles that punctuated Chinese history.⁴⁸ Despite the sacrifices that accompanied

43. See Edward Wong & Michael Forsythe, *China's Tactic to Catch a Fugitive Official: Hold His Two American Children*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/us/politics/china-exit-ban.html>.

44. See JAMES LEGGE, THE LIFE AND TEACHINGS OF CONFUCIUS WITH EXPLANATORY NOTES 122 (1867) [hereinafter CONFUCIUS ANALECTS].

45. See *infra* p. 45.

46. Milton W. Meyer, *China: A Concise History* 23 (2d ed. 1994) (stating that Xia, the first Chinese dynasty, ruled either from 22501-1766 B.C. or 1994-1523 B.C.). See also WANG HANCHANG & LIN DAIZHAO, ZHONGGUO GUDAI ZHENGZHI ZHIDU SHILUE [A BRIEF HISTORY OF THE POLITICAL SYSTEMS OF ANCIENT CHINA] 1 (1985) (citing Mao Zedong that the Chinese history dated back to 4,000 years ago.).

47. Walter T. Swingle, *Chinese Historical Sources*, 26 AM. HIST. REV. 717, 717 (1921).

48. See PETER C. PERDUE, CHINA MARCHES WEST: THE QING CONQUEST OF CENTRAL EURASIA 6 (2005). See also EILEEN H. TAMURA ET AL., CHINA: UNDERSTANDING ITS PAST 127 (1997). See generally FREDERIC WAKEMAN, JR., THE FALL OF IMPERIAL CHINA 55–70 (1975).

the establishment of a new reign, each dynasty failed almost in the same way as did its predecessor.⁴⁹ It began with a courageous leader who led a rebellion to overthrow a corrupt dynasty ruled by an incompetent emperor.⁵⁰ To justify the uprising, the leader would make his followers believe that the emperor had lost the Mandate of Heaven to rule the country.⁵¹ The leader would then declare himself emperor, and begin a new dynasty.⁵² In the beginning, the new emperor would abolish harsh laws, reduce taxes, revive the economy, and achieve a period of prosperity.⁵³ Several generations into the dynasty, the successors became reluctant to carry out their founding emperor's policies.⁵⁴ Instead of maintaining a benevolent way of governance, they would increase taxes, impose draconian laws, and persecute intellectuals.⁵⁵ In the end, rebellions would break out.⁵⁶ Any emergencies, such as foreign invasions or natural disasters, would push the already weakened dynasty to its breaking point.⁵⁷ Later, another ambitious leader would emerge and start a new cycle.⁵⁸

3. THE ZHOU DYNASTY

The Zhou Dynasty holds a special place in the study of Chinese legal history not only because Confucius lived then, but also because the major legal principles of traditional Chinese law took shape during that time.⁵⁹ The Duke of Zhou first articulated the theory of benevolent governance, which became a basis for Confucianism and a model for subsequent dynasties.⁶⁰ After drawing lessons from the failures of the previous

49. TAMURA ET AL., *supra* note 48, at 127.

50. *Id.*

51. See WAKEMAN, JR., *SUPRA* NOTE 48.

52. See TAMURA ET AL., *supra* note 48, at 127.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See WAKEMAN, JR., *SUPRA* NOTE 48.

58. See J.M. ROBERTS & O.A WESTAD, *THE PENGUIN HISTORY OF THE WORLD* 130–31 (2013).

59. See MA XIAOHONG (马小红), *ZHONGGUO GUDAI FALV SHIXIANG SHI* (中国古代法律思想史) [HISTORY OF ANCIENT CHINA'S LEGAL THOUGHTS] 24–27 (2004).

60. *Id.* at 27.

dynasties, the Duke warned that when a king fell from the favor of Heaven, he would lose the mandate to govern the country.⁶¹ To stay in Heaven's grace, a king must feel compassion for people's living conditions, especially for the widowed, orphaned, and disabled.⁶² The Duke advised that the king must use punishment as a last resort and administer the law judiciously to avoid harming innocent people.⁶³ Those who committed crimes should have a chance to modify their behaviors before sanctioned with penalties.⁶⁴

The king was expected to set an example for his subjects by fulfilling his fiduciary duty to Heaven with utmost care.⁶⁵ To maintain full support, the king must treat royal relatives and nobilities (the privileged class) differently from commoners.⁶⁶ The privileged should not be subject to harsh criminal penalties except in egregious cases.⁶⁷ The principle of inequality before the law was well summarized as the following: "[the] rules of polite behavior (*li*) do not reach down to the common people; the punishments (*hsing*) do not reach up to the great dignitaries."⁶⁸ Subsequent dynasties codified the principle of inequality in the penal code to exempt the privileged class from the legal system.⁶⁹ Therefore, the dynastic governance, including the legal system that matured in the Qin Dynasty, remained in its original form without substantial changes.⁷⁰

a. The Origin of the Zhou Dynasty

The origin of the Zhou people is uncertain.⁷¹ While some speculate that the Zhou tribe was from the western frontier of the Shang Dynasty,⁷²

61. *Id.* at 24–25.

62. *Id.* at 25.

63. *Id.* at 25–26.

64. *Id.*

65. *Id.* at 25.

66. *Id.*

67. *Id.*

68. Derk Bodde & Clarence Morris, *Law in Imperial China Exemplified by 190 Ch'ing Dynasty Cases* 23 (1973).

69. See *The Great Qing Code* 36 (WILLIAM C. JONES ET AL. TRANS., 1994); *The T'ang Code* 83 (WALLACE JOHNSON TRANS., 1997).

70. See A.F.P. HULSEWÉ, *REMNANTS OF HAN LAW* 7 (1955).

71. J.A.G. Roberts, *A Concise History of China* 7 (1999).

72. *Id.*

others believe that the Zhou tribe migrated from the central plain of present-day Shanxi province.⁷³ Mencius once called the Zhou King “a man of the western barbarians,” a derogatory term for people who were not culturally Chinese.⁷⁴

Historians attribute the emergence and survival of the Zhou tribe to its openness and adaptive nature. The Zhou people were receptive to people of different cultures and beliefs.⁷⁵ Through interacting with proto-Tibetan Qiang people, Zhou rulers built a strong coalition, which set the basis for its subsequent expansion.⁷⁶ By the 12th century B.C., the Zhou tribe settled in the Wei valley, to the west of present-day Xi’an.⁷⁷ The Zhou people learned the culture and administrative skills from the Shang Dynasty and eventually became its vassals.⁷⁸

In 1045 B.C., King Wu, the Zhou King, commanded 45,000 troops and waged an attack on the Shang.⁷⁹ Even though the Shang sent 700,000 men to battle, it suffered a total defeat because many refused to fight for the Shang King, who was cruel and oppressive to his people.⁸⁰ Unwilling to confront the humiliation, the Shang King committed suicide by setting himself on fire, marking the end of the Shang Dynasty.⁸¹

b. Mandate of Heaven

Conquering a nation is one thing but asserting sovereignty over that nation is quite another. Following the surprise victory in 1045 B.C., the Zhou King⁸² was anxious about how to govern the Shang people, who

73. The Cambridge History of Ancient China—From the Origins of Civilization to 221 B.C., at 303 (Michael Loewe & Edward L. Shaughnessy eds., 1999) [hereinafter A Cambridge History].

74. Herrlee G. Creel, *The Origins of Statecraft in China* 59 (1970).

75. John King Fairbank & Merle Goldman, *China: A New History* 39 (1998).

76. *Id.*

77. *Id.*

78. *Id.*

79. A Cambridge History, *supra* note 73, at 309.

80. CREEL, *supra* note 74, at 57.

81. *The History of the Zhou Dynasty*, SUTORI, <https://www.sutori.com/item/di-xin-was-the-last-king-of-the-shang-dynasty-1075-1046bce-in-his-early-year> (last visited Mar. 7, 2020).

82. See TONY JAQUES, *DICTIONARY OF BATTLES AND SIEGES: A GUIDE TO 8,500 BATTLES FROM ANTIQUITY THROUGH THE TWENTY-FIRST CENTURY* 700 (2007).

were advanced in culture and tradition.⁸³ Despite the conquest, the Shang people still regarded the Zhou as an uncivilized tribe incapable of replacing the Shang.⁸⁴ In response, the Zhou King offered an ingenious argument, purportedly made for the first time in Chinese history.⁸⁵ It was Heaven's intention that made the Zhou unstoppable in its conquest because the Shang King had already lost the Mandate of Heaven and the Zhou King merely acted upon Heaven's direction to save the Shang people from their oppressive King.⁸⁶ Therefore, the conquest was not a predatory act, but a "benevolent undertaking" to rescue the people in misery.⁸⁷ With the Mandate of Heaven bestowed onto the Zhou King, it was legitimate for him to rule the Shang people.⁸⁸ Thereafter, the Zhou Kings called themselves *tyanzi*, or Son of Heaven, which was used by all subsequent emperors until the fall of Qing in 1912.⁸⁹

The doctrine of the Mandate of Heaven was not just a propaganda tool for the conqueror to justify a new regime. It also imposed enormous responsibility on the ruler to hold onto the Mandate. Realizing the boundless anxiety that the Mandate brought to the King,⁹⁰ the Duke of Zhou warned that if the King failed to respect Heaven, he would lose the Mandate the same way as did the Shang King did.⁹¹ It seemed that the King's focus was on Heaven, but his true focus was on the people.⁹² The reactions of the people were the bellwether for the King to judge the mood of Heaven. Therefore, King Wu claimed, "[m]en should not mirror themselves in water, but in the people . . . I am concerned only about Heaven and people."⁹³ While there is not an exhaustive list of duties for a King to fulfill, he must avoid the following:

1. Failure to punish crimes and demonstrate clemency;

83. *Shang Dynasty – China's First Recorded History*, U.S. HISTORY, <https://www.ushistory.org/CIV/9B.ASP> (last visited Mar. 18, 2020).

84. *See id.* at 60.

85. *Id.* at 82 ("We cannot tell how early the doctrine of the Mandate of Heaven was in existence, but it is mentioned repeatedly in the speeches of King Wu.").

86. *See id.*

87. *Id.* at 85.

88. *Id.* at 84.

89. *See* FRANK M. FLANAGAN, CONFUCIUS, THE ANALECTS AND WESTERN EDUCATION 115 (2011).

90. *See* CREEL, *supra* note 74, at 98.

91. *See id.*

92. *See id.*

93. *Id.*

2. Failure to show respect for god and ancestors;
3. Failure to treat the tasks of government with respect;
4. Failure to stay sober;
5. Failure to promote the welfare of the people.⁹⁴

In the Han Dynasty, Confucians refined the doctrine of the Mandate of Heaven based on the *Yin-Yang* theory.⁹⁵ The signs of losing the Mandate included natural disasters, such as earthquakes, floods, famine, and droughts.⁹⁶

c. Enfeoffment

Following its sudden military victory, the Zhou King urgently needed to exert effective control over the vast land once ruled by the Shang, and pacify the wrath of the Shang people, who deemed the Zhou people as rustic and “without culture.”⁹⁷ King Wu sent royal relatives to defend various strategic regions across the country.⁹⁸ In addition, the King permitted the son of the Shang King to become a vassal to “continue the sacrifices to the Shang Kings.”⁹⁹ By doing so, the Zhou King intended to portray himself as a benevolent ruler to ease tensions with the Shang people.¹⁰⁰ During this process, Zhou invented a set of rules to govern the relationships between the King and the newly enfeoffed lords.¹⁰¹

94. *See id.* at 94–97 (discussing the various duties that a King should not avoid when serving the people).

95. YU-LAN, *supra* note 23, at 192.

96. *Id.* at 198.

97. CREEL, *supra* note 74, at 60, 70.

98. A Cambridge History, *supra* note 73, at 311.

99. CREEL, *supra* note 74, at 70.

100. *Id.*

101. CHIN, *supra* note 17, at 43. Professor Anping Chin recreated the scene of a typical enfeoffment ceremony:

Whenever [the Zhou King] appointed a member of the imperial family to create a colony elsewhere, they would hold an audience in the capital, and the ceremony that followed would include a feast and libation, and a display of archery. Court scribes would be present on such occasions. They would prepare a record of the royal command and of the words exchanged, and they would include a description of the rituals. At the conclusion of the investiture, the conferee would depart with a copy of the record, and often he would have it inscribed on a bronze vessel to commemorate this important moment in his life. *Id.*

Following the royal order, the enfeoffed lords established various states across the country.¹⁰² One such state was Lu, which was founded by Duke Zhou's elder son.¹⁰³ Five-hundred years later, Confucius was born in the State of Lu. Confucius was proud of being a cultural descendant of the Duke of Zhou, whom he admired for his bravery, integrity, and wisdom.¹⁰⁴ At the end of his life, Confucius sighed, "Extreme is my decay. For a long time, I have not dreamed . . . that I saw the duke of Chow."¹⁰⁵

d. The Fall of the Feudal Order and Confucius's Ideals

Even though the Zhou Dynasty lasted 800–900 years, the longest dynasty in Chinese history,¹⁰⁶ it did not exert actual control over the enfeoffed states for a large part of its reign.¹⁰⁷ The states were far away from the King and the communication between the King and his subjects was sparse.¹⁰⁸ According to the enfeoffment covenants, the states were obligated to be loyal to the King and to come to the dynasty's defense when called for.¹⁰⁹

In the beginning, the enfeoffed lords identified themselves as part of Zhou; thus, they had a sense of duty to the dynasty.¹¹⁰ However, as time went by both the legal bonds and consanguineous ties to the King faded

102. See A CAMBRIDGE HISTORY, *supra* note 73, at 311–12, for a complete list of states established by enfeoffed lords.

103. Yang Chaoming (杨朝明), *Kongzi "Meng Zhougong" de Lishi Jiedu – Kongzi Yanjiu Yuan, Jining Ribao She Lianhe Juban "Chunqiu Jiangtan" Zhailu (孔子"梦周公"的历史解读) [Historical Interpretation of Confucius's "Dreaming of Duke of Zhou" – An Excerpt from "Chunqiu Forum" Jointly Hosted by the Institute of Confucius and Jining Daily]*, JINING RIBAO [JINING DAILY], May 13, 2011.

104. *Id.*

105. CONFUCIUS ANALECTS, *supra* note 44, at 196.

106. Meyer, *supra* note 46, at 129 (stating the Zhou Dynasty lasted from 1122 or 1027–221 B.C.).

107. *Id.* at 130 ("[The Zhou] kings reigned but did not rule.").

108. *Id.* at 129 ("[B]ecause of extended periods of warfare and the existence of strong city-states, the central authority was often only a hollow name.").

109. Qizhi Zhang, *An Introduction to Chinese History and Culture* 141 (2015).

110. CREEL, *supra* note 74, at 100. "At the beginning of Western Chou, feudalism . . . was a new institution. The feudal lords were instruments of the King; they had not yet achieved a degree of independence that could impair the essentially centralized character of the government."

away.¹¹¹ At the same time, the states grew both in size and wealth due to the development of agricultural techniques, commercial transactions, and administrative measures.¹¹² The lords of younger generations no longer felt the same attachment to the King as did their predecessors. The lords viewed their states as their sovereign territories and saw no obligation to the King sitting afar.¹¹³

Within each state, the same pattern continued. The state lord sub-eneffed cities and towns to his close relatives.¹¹⁴ After several generations, the sub-eneffed relatives—also called hereditary families—grew independent from the lord.¹¹⁵ Thus, they lost their sense of loyalty and respect for the lord of the states. In the State of Lu, for example, each of the three hereditary families had a fortified city of its own.¹¹⁶ Each family had a strong army that only answered to the hereditary lord.¹¹⁷ Most of the state's wealth was concentrated within the three families.¹¹⁸ Furthermore, the three families controlled the state's political, social, and military affairs.¹¹⁹

During Confucius's lifetime, the feudal system established by the Zhou King began to unravel.¹²⁰ Conflicts developed not only between states and the Zhou King but also among states themselves.¹²¹ Within each state, the tension between the lords and the hereditary families was

111. Chin, *supra* note 17, at 43–44.

112. BODDE & MORRIS, *supra* note 68, at 15–16.

113. Meyer, *supra* note 46, at 130 (“[K]ings reigned, but did not rule. The aristocracy became more independent and in the continual wars and strife, feudalism rose. Monarchs were manipulated by a league of vassals headed by an overlord.”).

114. *See* Chin, *supra* note 17, at 50 (discussing how the descendants of Zhou were the rulers of Lu starting with the son of the Duke of Zhou who was first enfeoffed).

115. *Id.* Confucius was concerned about the growing power of the hereditary families. *Id.* (“‘Their wealth [the hereditary family’s wealth] is greater than that of [the descendants of] the Duke of Zhou’; ‘They have eight rows of eight dancers, [sixty-four in all,] to perform in their courtyard. If this can be tolerated, what cannot be tolerated?’”).

116. *See id.* at 29 (discussing the rebel attacks on the cities controlled by the hereditary families).

117. *See id.*

118. *See id.* at 28–30.

119. *See id.* at 42–43.

120. *See id.* at 47.

121. *See id.* at 49–50.

equally intense.¹²² Confucius's time was a period of disorder and struggle.¹²³

What Confucius envisioned was far divorced from the reality he lived in. He vividly described a utopia, which he firmly believed to have existed during the peak of the Zhou Dynasty:

When the rule of propriety prevailed, the power belonged to all people. The able and talented administrated state affairs. People were sincere and friendly to each other. They treated other people's parents and children with the same love and affection as they did their own. The elderly had abundant resources to enjoy their lives until death. Young people had the means to live up to their full potential. The able-bodied retained employment. The widowed, orphaned, and disabled were treated with kindness and compassion and provided with adequate support. While men worked outside, women kept homes in order. People strived to harness natural resources not for their own profits, but for the common good. Since there were no conspiracies, rebellions, thefts, or any other crimes, people did not lock their doors at night. It was a world in unity.¹²⁴

Confucius prescribed the path to realizing the harmonious society he conjured: people must restrain themselves and return to the rites of Zhou (keji fuli or 克己复礼).¹²⁵ “To subdue one's self and return to propriety, is perfect virtue. If a man can for one day subdue himself and return to propriety, all under heaven will ascribe perfect virtue to him.”¹²⁶ When people restrained themselves and acted upon the rule of propriety, the world would be in the right order just like the early Zhou experienced—the King at the pinnacle of the social pyramid held the absolute authority; regional lords demonstrated utmost respect for and loyalty to the King; hereditary families within each state were subordinate to the state lords; and commoners were submissive to the nobles.¹²⁷

122. *See id.* at 28–30.

123. *See id.* at 42–43.

124. SUN XIDAN, LIJI JIJIE [ANNOTATED BOOK OF RITES] 581–83 (Shen Xiaohuan & Wang Xingxian eds., 1989).

125. CHIN, *supra* note 17, at 167.

126. CONFUCIUS ANALECTS, *supra* note 44, at 250.

127. BODDE & MORRIS, *supra* note 68, at 15.

4. THE LIFE OF CONFUCIUS¹²⁸

Confucius was born in 551 B.C. in the State of Lu, southwest of modern-day Shandong Province in China.¹²⁹ His ancestry traced back to the King of Song, a state in the Spring and Autumn period.¹³⁰ The birth of Confucius was a result of his father's second marriage with a young woman from the Yan family.¹³¹ When Confucius was three, his father died.¹³² Since an early age, Confucius demonstrated a keen interest in learning rules of proper conduct for sacrificial offerings.¹³³

When Confucius was seventeen years old, Baron Meng Li of the State of Lu was near the end of his life.¹³⁴ The Baron praised Confucius for his noble roots and his ancestors' humble character, and contribution to the

128. There have been numerous versions of biographical sketches for Confucius during the past two millennia. Historians generally agree that Confucius's biography in Sima Qian's *Shiji* may be more reliable than others. See Wen, *supra* note 28, at 139. Supplemental recourses include JAMES LEGGE, *THE CHINESE CLASSICS: WITH A TRANSLATION, CRITICAL AND EXEGETICAL NOTES, PROLEGOMENA, AND COPIOUS INDEXES* (1861); SU WANG (王肃), *KONGZI JIAYU (孔子家语) [FAMILY SAYINGS OF CONFUCIUS]* (There have been numerous editions of this book. The sources that this article relied is from the edition by Deming Wang (王德明), *KONGZI JIAYU YIZHU (孔子家语译注) [ANNOTATION AND INTERPRETATION OF FAMILY SAYINGS OF CONFUCIUS]* (1998) [hereinafter *KJ 1998*].

129. Wen, *supra* note 28, at 139.

130. *Id.* at 139, 141. The period started in 771 B.C. and ended in 476 B.C. See *The Warring States Period in China (475-221 BC)*, CHINA HIGHLIGHTS, <https://www.chinahighlights.com/travelguide/china-history/warring-states-period.htm> (last visited Mar. 18, 2020) [hereinafter *The Warring States Period*].

131. *Id.* at 139. Sima Qian used the word “野合”, which means engaging an intercourse in the wild. See *id.* Legge offered a more elaborated account about Confucius's birth: Confucius's father Shuh-leang Heih married twice. During his first marriage, his wife bore him only nine daughters. A concubine finally gave him a crippled son. Already in his 70s, Shuh-leang Heih sought a second marriage in the Yan's family, which had three daughters, the youngest being Ching-tsaie who become his wife and gave birth to Confucius. LEGGE, *supra* note 128, at 58.

132. Wen, *supra* note 28, at 140. See also, QIAN MU (钱穆), *孔子传 [BIOGRAPHY OF CONFUCIUS]* (2002).

133. *Id.* at 140. By adding the details about Confucius children, Sima Qian probably wanted to show that Confucius was precocious in understanding, “Li” the ritual that became the center piece of Confucianism. *Li 禮 [Ritual Propriety]*, KURTIS HAGEN, <https://kurtishagen.com/confucianism/li/> (last visited Mar. 11, 2020) (discussing how one should “act with attention and care characteristic of the performance of a sacred rite”).

134. *Id.* at 141.

State of Song.¹³⁵ He prophesied that Confucius would be a magnificent scholar and asked his son to study Chinese classics with him.¹³⁶ Either because of the Baron's prediction or his promotion, Confucius was soon put in charge of a local granary.¹³⁷ He managed the granary successfully, setting an example for other managers.¹³⁸ Then, Confucius catapulted into stardom in Lu's political circle. In a few years, Confucius experienced a meteoric rise in his political career from being the Minister of Construction to the Minister of Justice, and then acting Prime Minister.¹³⁹

During his tenure as an acting Prime Minister, Confucius quickly restored peace and order to Lu: marketers no longer swindled shoppers, men and women took separate roads in public (the social norm at the time), crime disappeared, and people received foreign guests warmly at their homes without a request from the State.¹⁴⁰

With Confucius's increasing role in the state affairs of Lu, the Duke of Qi, a rival neighbor of Lu, was concerned that Confucius would make Lu a strong state and conquer Qi in the future.¹⁴¹ The Duke of Qi invited the Duke of Lu to negotiate a peace treaty in a valley on the border between the two states.¹⁴² In fact, the invitation was Qi's ruse to kill the Duke of Lu during the conference.¹⁴³ The Duke of Lu naively believed that Qi's invitation was a friendly overture, thus he did not plan to bring his military entourage.¹⁴⁴ Only upon Confucius's urging did the Duke agree to bring his guards in case of emergency.¹⁴⁵

During the conference, the Duke of Qi entertained the guests from Lu with a dance by a group of barbarians armed with sharp weapons.¹⁴⁶ When the men approached dangerously close to the Duke of Lu, Confucius hurried to the stage of the meeting and exclaimed that the

135. *See id.*

136. *See id.*

137. *See id.* at 143.

138. *Id.*

139. *Id.* at 143–148.

140. *Id.* at 147–48.

141. *Id.* 143.

142. *Id.*

143. *See id.* At 143–44.

144. *See id.* at 143.

145. *See id.*

146. *See id.*

armed barbarians dancing in front of Duke of Lu violated *Li*, the rule of proper conduct that governed state relations.¹⁴⁷ He requested that all the barbarian dancers be evicted.¹⁴⁸ The Duke of Qi was embarrassed that his plot was foiled and ordered the evacuation of all the dancers.¹⁴⁹ After the encounter, the Duke of Qi was even more fearful of Confucius for his wisdom and courage.¹⁵⁰ To mend the rift, the Duke of Qi returned the towns that he seized in previous battles back to Lu.¹⁵¹

Under Confucius's tutelage, Lu became prosperous and peaceful.¹⁵² The Duke of Qi once again felt threatened by the prospect that Lu would soon prevail in the battle for hegemony among the warring states.¹⁵³ To avoid annihilation, the Duke of Qi sent 80 female dancers and 120 horses as a gift to the Duke of Lu.¹⁵⁴ Over Confucius's objection, the Duke of Lu accepted the gift.¹⁵⁵ As the Duke of Lu indulged in the dancers, he neglected his official duties.¹⁵⁶ Thus, Confucius lost confidence in the Duke of Lu and left the kingdom with his students.¹⁵⁷ The Duke later regretted that he alienated Confucius by refusing to follow his advice.¹⁵⁸

Other sources offered a different account regarding the cause of Confucius's exile,¹⁵⁹ suggesting he was simply forced out of Lu after his

147. *See id.* *Li* governed individual conduct as well as international relations. The peacetime and wartime *li* is analogous to today's international law. *See* YU-LAN, *supra* note 23, at 178.

148. Wen, *supra* note 28, at 143.

149. *Id.*

150. *See id.* at 144.

151. *Id.* Musheng Li gave a different account on Qi returning the seized territories to Lu: At the end of the negotiation, Qi demanded Lu to contribute 300 chariots when Qi was on a war with the enemy, LI MUSHENG, KONGZI ZHUAN (孔子传) [A BIOGRAPHY OF CONFUCIUS] 104 (2016). Failure to do so, Lu would be in breach of the alliance treaty. *Id.* Confucius realized that it was impractical for Lu to refuse the term because Qi was a bigger state, but it was humiliating for Lu to accept it without having anything in return. *Id.* He requested Qi to return the three towns that it seized during a previous war as a condition for Lu to accept Qi's term. *Id.*

152. *See* Wen, *supra* note 28, at 147.

153. *Id.* at 146.

154. *See id.*

155. *See id.*

156. *Id.*

157. *See id.*

158. *Id.*

159. *See* CHIN, *supra* note 17, at 28–30.

failed attempt to curb the influence of the three hereditary families.¹⁶⁰ After gaining the high office at the Lu court, Confucius thought it was time to mold Lu according to his ideals.¹⁶¹ In a perfect Confucian world, the Duke is on the top of the hierarchical structure and everyone else is submissive to the Duke.¹⁶² In reality, however, the three hereditary families held the real political, economic, and military power of Lu.¹⁶³ They had their fortified cities to their own guarded by their own troops.¹⁶⁴ They defied the Duke's orders, appropriated the State financial resources for their own use.¹⁶⁵ The families demonstrated neither respect for nor loyalty to the Duke.¹⁶⁶ To change the status quo, Confucius conspired with military strongmen to destroy the three families' compounds and restore the Duke's supremacy, but his plot ended disastrously.¹⁶⁷ Confucius and his students had no choice but to flee Lu for their lives.¹⁶⁸

Confucius roamed with his students from one state to another hoping to be a state counselor, but he never managed to convince anyone to apply his teaching.¹⁶⁹ Some states respected him as a scholar, but they all declined to appoint him to a key political post.¹⁷⁰ Confucius once complained that his talent was wasted lamenting, "[i]f there were any of the princes who would employ me, in the course of twelve months, I should have done something considerable. In three years, the government

160. *See id.*

161. CONFUCIUS ANALECTS, *supra* note 44, at 184 ("If any one employ me, may I not make an eastern Chow [Zhou]?"). This passage revealed Confucius's goal was to restore the hierarchical structure according to rule of propriety or "Li" *See* YU-LAN, *supra* note 23, at 178.

162. CONFUCIUS ANALECTS, *supra* note 44, at 184.

163. *See* CHIN, *supra* note 17, at 28–30.

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.* at 30–31.

168. *See id.* at 28–30.

169. *Id.* at 91–92 (explaining that "[a]fter his return to Wei, Confucius became anxious about finding a job there." And that "[H]e was desperate for a position in Duke of Liang's government[.]").

170. *Id.* at 92 ("Why do you worry about [Confucius] not having an office? The world has long been without a moral way. Heaven is about to use your master as the wooden tongue for a bronze bell.").

would be perfected.”¹⁷¹ These states rejected Confucius because his teaching set too high a moral bar for them to uphold.¹⁷² At the same time, each individual state feared that their intimidating neighbors might retain Confucius and make them even more threatening.¹⁷³ To prevent giving advantage to their rivals, one state plotted to besiege,¹⁷⁴ or even attempted to assassinate Confucius, albeit not successfully.¹⁷⁵

Despite repeated rejections and occasional sieges, Confucius stayed calm and focused on the study of classics during his arduous journey.¹⁷⁶ When his students asked him why he did not worry about his safety, he replied, “If the Heaven ignores moral values, it would have its own way to prohibit me from studying classics. [In fact], the Heaven promotes the moral values, how can these hostile states bother me?”¹⁷⁷ Since the Heaven allows me to study and bestows moral values to me, why should I be [worried] about these attacks?”¹⁷⁸ Finally, Confucius went back to Lu after fourteen years of exile.¹⁷⁹ No longer interested in working for the Duke of Lu, Confucius devoted his heart and soul to teaching and editing classics, until his death in 479 B.C.¹⁸⁰

a. The Case of Shaozheng Mao

Confucius’s biographical sketch in *Shiji*, the Historical Record, seems impeccable. However, the biography omitted an event that Confucius’s followers have vigorously tried to deny as truth for thousands of years: On his seventh day as the Minister of Justice, Confucius ordered the

171. CONFUCIUS ANALECTS, *supra* note 44, at 131.

172. See CHIN, *supra* note 17, at 89. For example, while seeking a job from the State of Wei, he openly talked about the moral depravity of the Duke of Wei. *Id.*

173. Wen, *supra* note 28, at 156–57.

174. *Id.*

175. *Id.* When Confucius and his students were practicing rituals under a big tree, an agent from the State of Song cut the tree. The falling tree trunk barely missed Confucius. *Id.* Sima Qian did not say why the agent did not kill Confucius directly. *Id.* A reasonable guess would be that no one wanted to bear the guilt for murdering the sage. *Id.* If Confucius died as a result of a falling tree, the State of Song could claim it an accident for which no one was responsible. *Id.*

176. See *id.* at 153.

177. *Id.* at 152–53.

178. *Id.* at 153.

179. *Id.* at 159.

180. *Id.* at 165–68, 172.

execution of Shaozheng Mao for the crime of perverted speech. This punishment was viewed as disproportionately severe even by Confucius's contemporaries.¹⁸¹ When a student asked him if he regretted his decision, Confucius replied:

Sit down, and I will tell you the reasons. Now there are five odious predilections humans can possess, and robbing and thieving are not amongst them. The first is having a penetrating but pernicious mind. the second is being partial yet stubborn in conduct the third is speaking falsehood and loving disputation. The fourth is having the capacity of a fine memory but retaining only the bad and the ugly. The fifth is being inclined to wrongdoing yet never short of justifications. A person with just one of these tendencies would inevitably end up being executed by a gentleman. Yet Shaozheng Mao had all five. Moreover, wherever he happened to be residing, he had enough appeal to draw a crowd of followers around him; and whenever he opened his mouth, he had enough slickness to disguise his depraved nature and to hoodwink his audience. This man was so powerful that when he turned right and wrong on their heads, no one could call his bluff and bring him down. He was a hero to petty men and so he had to be put to death.¹⁸²

To justify Confucius's action, Xunzi cited seven early cases where highly revered state counselors sentenced evil-minded men to death for the same crime committed by Shaozheng Mao.¹⁸³ One of them was Deng Xi, who was a lawyer representing clients in their private interests.¹⁸⁴ He "charged his clients a long robe for a major case and a short robe for a lesser one."¹⁸⁵ Zichan, the counselor of Zheng, accused Deng Xi of being so driven by profit that he destroyed "any standard of right and wrong."¹⁸⁶ One account vividly recorded how Deng Xi interfered with the counselor's official functions:

In the state of Zheng, many people liked to post their writings [along the main routes and byways]. Zichan ordered the posts to be stopped.

181. Wang Xianqian et al., *Xunzi Jijie* (荀子宥坐) [XUNZI ANNOTATED] 520 (1988).

182. See CHIN, *supra* note 17, at 156.

183. *Id.* at 157.

184. *Id.*

185. *Id.* at 158.

186. *Id.*

Deng Xi began to pass out slips of his writings. Zichan again ordered it to be stopped. Deng Xi then began to attach his writings to other things he sent out. The infinite number of ordinances was matched by Deng Xi's infinite number of attempts to circumvent them.¹⁸⁷

It was a crime for Deng Xi to argue against the government.¹⁸⁸ It was another crime for him to represent a client for profit as he argued against the government.¹⁸⁹ It was yet another, far more serious crime for him to circumvent the government's "firewall" which was designed to censor public opinions.¹⁹⁰ If there had been a way, Zichan would have put Deng Xi to death three times. Deng Xi caused confusion and sowed the seed of discord.¹⁹¹ He would have been executed in any of the subsequent dynasties. Therefore, the execution of Deng Xi did not in any way taint Zichan's legacy as a righteous statesman because he did what any dutiful state counselor would have done.¹⁹² In fact, the execution may have contributed to his reputation as a diligent caretaker of the State's interests.

Compared with Deng Xi, Shaozheng Mao was less culpable because he did not obstruct State censorship. Yet, Confucius put him to death. Imagine what would happen if a lawyer spoke to the media after making a legal argument for his client in Confucius's court. The result would be terrifying. Two millennia later, this fear persists.¹⁹³

187. *Id.*

188. See Zhao Jinkai (赵金慨), "*Qiangui Guibian Diyi Ren*" *Dengxi* ("千古诡辩第一人" 邓析) [The Pioneer of Sophism, Dengxi], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT. DAILY], June 22, 2018, sec. 5. See also ZHAO XIAOGENG (赵晓耕), ZHONGGUA FAZHI SHI [HISTORY OF CHINESE LEGAL SYSTEM] (2004); Han Xing (韩星), *Dengxi Yu Mingjia, Fajia* (邓析与明家·法家) [*Dengxi, School of Names, and Legalism*], SHAN'XI SHIFAN DAXUE JIXU JIAOYU XUEBAO (陕西师范大学继续教育学院学报) [J. OF FURTHER EDUC. OF SHAANXI NORMAL U.], Sept. 2006, at 32.

189. Zhao *supra* note 188.

190. *Id.*

191. *Id.*

192. See WANG DEMING (王肃), KONGZI JIAYU YIZHU (孔子家语 译注) [FAMILY SAYINGS OF CONFUCIUS ANNOTATED] 163 (1998) (explaining how Confucius praised Zichan's devotion to his home state).

193. SIDA LIU & TERENCE C. HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK 18 (2016) ("The legislative history of China's criminal law dates back to Western Zhou (ca.1100-771 BCE) . . . but until a draft of Great Qing

Another explanation for Shaozheng Mao's execution is that Confucius was furious after discovering that his students had left him for Shaozheng Mao.¹⁹⁴ If this account were true, it would have been the first unfair competition case in Chinese legal history.

b. Confucius : The Eternal Patriarch

At the end of his life, Confucius marveled, “[e]verything passes on like the river . . . [d]ay and night, it never ceases.”¹⁹⁵ He may have regretted that he could not accomplish his ideals before his passing. However, he failed to see the enduring legacy he left behind—a perpetual institutional framework that has been governing one-quarter of the world that persists today. Metaphysically, the river that he referred to may have never come back, but the track of the river that meandered through the Chinese souls remains eternal.

Confucius did not consider himself a god.¹⁹⁶ He did not even believe that he could create a new idea, not to mention a world.¹⁹⁷ As he saw it, he was a mere transmitter through which the Duke of Zhou's ideals were carried.¹⁹⁸ He had no intent to be a theorist or a deity.¹⁹⁹ Brought up by

Criminal Procedure Code was finished in 1910, there had never been a separate criminal procedure law in Imperial China.”) A lawyer sent a SOS message from his hideout place in April 8, 2004 stating: “We [lawyers] strictly obeyed the relevant laws, rules and regulations, not even taking half a step to the bombing area [meaning politically sensitive area of law], but now the result it that one of us is in jail and the other is fleeing.” *Id.* at 44–45.

194. CHIN, *supra* note 17, at 155.

195. *Id.* at 181.

196. CONFUCIUS ANALECTS, *supra* note 44, at 39 (“XIX. The Master said, ‘I am not one who was born in the possession of knowledge; I am one who is fond of antiquity, and earnest in seeking it *there*.’”); *Id.* (“XX. The subjects on which the Master did not talk, were—extraordinary things, feats of strength, disorder, and spiritual beings.”). *See also id.* at 41 (“XXXIII. The Master said, ‘The sage and the man of perfect virtue;—how dare I *rank myself with them*? It may say simply be said of me, that I strive to become such without satiety, and teach others without weariness.’”).

197. CHIN, *supra* note 17, at 149 (“Confucius told others that he was a transmitter, not an innovator. . . .”).

198. *Id.* at 167. (“Confucius told others that he was a transmitter, not an innovator—that he ‘was found of antiquity and had faith in it.’”).

his mother alone, which was extremely rare in his time, he witnessed the sufferings of his class.²⁰⁰ As an ordinary person, he strived to climb the social ladder to be above the commoners.²⁰¹ Confucius studied Chinese classics hoping one day to become a counselor in a royal court.²⁰² This was reflected in his work in politics where he dedicated himself to understanding the rules and procedures to properly instruct the rulers in order to fulfill his mission to rejuvenate the glory the Duke of Zhou once experienced.²⁰³ In fact, he did succeed in politics as a minister of justice.²⁰⁴ When he found politics did not work for him, he devoted himself to teaching students and editing the classics.²⁰⁵ Unlike other religious founders, Confucius's focus was solely on the past and present, not at all on the future.²⁰⁶ He firmly believed that the present should be exactly like the past.²⁰⁷ Confucius had no intent to establish a religion, but the proper rule of conduct he vigorously advocated has regulated the behaviors of a large swath of the world population for two millennia.²⁰⁸ In a sense, Confucius is an accidental divinity, whose future was the past.

199. CONFUCIUS ANALECTS, *supra* note 44, at 37 (“I. The Master said, ‘A transmitter and not a maker, believing in and loving the ancients, I venture to compare myself with our old P’ang.’”).

200. *Id.* at 47 (“[W]hen I was young, my condition was low, and therefore I acquired my ability in many things, but they were mean matters. Must the superior man have such variety of ability? He does not need variety of ability.”).

201. See Sun Jingtian (孙景坛), *Kongzi de Jiating Chushen Wenti Xintan (孔子的家庭出身问题新探) [New Studies of Confucius's Family Background]*, ZHONGGONG NANJING SHIWEI DANGXIAO NANJING SHI XINGZHENG XUEYUAN XUEBAO [J. OF NANJING PARTY INST. OF CPC & NANJING ADMIN. INST.] 2015, at 83.

202. Wen, *supra* note 28, at 164–165.

203. CHIN, *supra* note 17, at 166.

204. *Id.* at 26.

205. See *id.* at 161–171.

206. See *id.* at 167.

207. See *id.*

208. Larry A. Samovar et al., *Communication Between Cultures* 146 (2010); C.K. YANG, *RELIGION IN CHINESE SOCIETY: A STUDIES OF CONTEMPORARY SOCIAL FUNCTIONS OF RELIGION AND SOME OF THEIR HISTORICAL FACTORS* 244 (1961).

5. LET A HUNDRED SCHOOLS OF THOUGHT CONTEND

During Confucius's time,²⁰⁹ the rising of independent states reduced the Zhou Dynasty to only a symbolic figurehead with its power confined to the capital.²¹⁰ With diminishing control from the central government, states competed for territories, resources and influence.²¹¹ Either for survival or expansion, each state felt an urgent need to recruit deep-thinkers to help it gain a competitive edge over its rivals.²¹² The intense demand for new ideas stimulated the supply of unique talents. Like Confucius, other great thinkers were devoted to constructing innovative theories.²¹³ More importantly, the unfettered discourse among the thinkers enriched their thoughts and sharpened their views. It was an unprecedented golden age in Chinese history for the market of ideas to flourish.²¹⁴ Thanks to this rare window of freedom, hundreds of schools of thought emerged to contend in an open arena.²¹⁵ It is paradoxical that Confucius's dream was to return to Zhou's glory when the King was in control of every aspect of society, which would have rendered his free-thinking impossible. As a result, Confucius might not regret that he did not live to see his thoughts adopted as the official ideology. An official endorsement was not necessarily based on merit, but on whether a school of thought was suitable to the ruler's taste. In that regard, Confucianism prevailed.²¹⁶

a. Confucianism

The core concept of Confucianism is *Li*, or rules of conduct, which has been subject to a wide range of explanations.²¹⁷ Generally, *Li* had two meanings: first, it meant rites—a set of protocols the Zhou Kings

209. The time of Confucius is often referred to as the Spring and Autumn and Warring States Period (771 B.C.-221 B.C.). See *The Warring States Period*, *supra* note 130.

210. J.A.G. ROBERTS, *supra* note 71, at 11.

211. MA, *supra* note 59, at 27.

212. *Id.*

213. *See id.*

214. *See id.*

215. *Id.*

216. *Id.* at 142.

217. *See* MA, *supra* note 59, at 86; CH'Ü, *supra* note 22, at 230–31 n. 11.

followed in performing sacrificial offerings to spirit and ancestors.²¹⁸ It also included rules for conducting traditional ceremonial functions, such as weddings, funerals, and official ceremonies.²¹⁹ Second, *Li* meant rules of proper conduct (propriety).²²⁰ Confucians maintained that “[i]f [people] be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.”²²¹ *Li* was also used to distinguish the superior from the inferior and the noble from the humble.²²² By observing *Li*, no one would deviate from his place on the social ladder, and society would be in peace and order.²²³ Through studying history, Confucius concluded that when the Emperor, not his subjects, determined state affairs, his reign would maintain its prosperity and longevity.²²⁴ However, if inferiors acted against the Emperor, the State would not survive more than a few generations.²²⁵

Another key concept in Confucianism is *Ren* (love or benevolence), which is the basic principle concerning various social relations.²²⁶ Within a family, a father should be benevolent, sons filial, elder brothers fraternal, and younger brothers subordinate.²²⁷ In the government, “[a] prince should employ his minister according to the rule of propriety; ministers should serve their prince with faithfulness.”²²⁸ When dealing with others, the guiding principle should be “not to do to others as you would not wish done to yourself.”²²⁹ “[T]he man of perfect virtue, wishing to be established himself, seeks also to establish others; wishing to [grow] himself, he seeks also to [grow] others.”²³⁰

Confucius believed that coercive means, such as law and punishment, were unnecessary because social order would be maintained by *Li* and

218. BODDE & MORRIS, *supra* note 68, at 19.

219. CH’Ü, *supra* note 22, at 230–31 n. 11.

220. *Id.*

221. CONFUCIUS ANALECTS, *supra* note 44, at 16.

222. Ch’ü, *supra* note 2222, at 233.

223. *Id.*

224. CHIN, *supra* note 17, at 42.

225. *Id.*

226. MA, *supra* note 59, at 86.

227. *Id.*

228. CONFUCIUS ANALECTS, *supra* note 44, at 25.

229. *Id.* at 115.

230. *Id.* at 58.

Ren.²³¹ In an ideal society, there should be no need for litigation.²³² Confucius explained that “[i]f people be led by laws . . . they will try to avoid the punishment, but have no sense of shame. ‘If they be led by virtue . . . they will have the sense of shame, and moreover will become good.’”²³³

Nevertheless, under some special circumstances, Confucius did not completely negate the role of law and punishment.²³⁴ For example, the Duke of Zheng advised his successor to take a strong approach in combating crimes, but his successor, Taishu, did not heed the advice.²³⁵ As a result, a great number of thieves stole from local people.²³⁶ Taishu regretted his lenient approach and decided to use force to eliminate the criminals. During a battle, government troops killed all of the criminals.²³⁷ Upon hearing the news, Confucius²³⁸ praised Taishu and explained why harsh laws were necessary in this instance:

When the [government] is mild, the people despise it. When they despise it, severity must take its place. When the [government] is severe, the people are slaughtered. When this takes place, they must be dealt with mildly. Mildness serves to temper severity, and severity to regulate mildness; —it is in this way that the administration of government is brought to harmony.²³⁹

While *Li* and *Ren* were superior to the law, they could not completely replace it. Confucius cautioned that law must only be used proportionately to deal with crimes and maintain social order.²⁴⁰

231. Gouji Qin, *The Thinking Way of Confucianism and the Rule of Law*, 1 J. POL. & L. 68, 68–69 (2008).

232. CONFUCIUS ANALECTS, *supra* note 44, at 121. (“The Master said, ‘[i]n hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations.’”).

233. *Id.* at 10.

234. CHUNQIU ZHUOZHUAN (春秋左传) [SPRING AND AUTUMN ANNALS WITH THE COMMENTARY OF ZUO] (University of Washington Press 2017). *See also* MA, *supra* note 59, at 95–96.

235. *See* CHUNQIU ZHUOZHUAN, *supra* note 234, at 95–96.

236. *See id.*

237. *See id.*

238. *Id.* (noting that Confucius was referred to as “Zhongni”).

239. *Id.*

240. *See* MA, *supra* note 59, at 96.

Disproportional use of the law would lead the people to resent the government.²⁴¹

b. Legalism

Contrary to Confucianism, the Legalists ardently advocated for the law.²⁴² The Legalists were not concerned about protecting human rights or limiting indulgence of the ruler; instead, they believed that the law was the most efficient tool to create a formidable “political and military apparatus.”²⁴³ Therefore, it is important to know that the “law” that the Legalists promoted is not the same as the “rule of law” in the West that protects human rights.²⁴⁴ “Law” is merely a convenient tool for the ruler to maintain social order. Even though the Legalists believed in equality before the law, the ruler was above the law.²⁴⁵

During the Warring States period,²⁴⁶ each individual state looked to overpower its rivals and unify China.²⁴⁷ To achieve this goal, the Legalists suggested that a ruler should promulgate stern punishments for even small offenses.²⁴⁸ They believed that most people were born selfish and greedy and could not be induced to behave by good virtue alone as Confucians assumed.²⁴⁹ Fearing severe punishments, the people would do as the State desired.²⁵⁰ The Legalists downplayed the cruelty that the law would bring by arguing that enforcing the seemingly harsh rules may never be needed because their mere existence would suffice to deter violations.²⁵¹ “When punishments are heavy, the people dare not transgress, and therefore there will be no punishments.”²⁵²

241. *See id.* at 95 (discussing that virtuous politics is to avoid tyranny from rulers).

242. BODDE & MORRIS, *supra* note 68, at 18.

243. *Id.*

244. *Id.*

245. MA, *supra* note 59, at 105.

246. *See generally* Leigh K. Jenco, “Rule by Man” and “Rule by Law” in *Early Republican China: Contributions to a Theoretical Debate*, 69 J ASIAN STUD. 181, 181 (2010).

247. *Id.*

248. MA, *supra* note 59, at 110.

249. *Id.* at 109.

250. *Id.*

251. *Id.* at 110.

252. BODDE & MORRIS, *supra* note 68, at 26.

In addition, the Legalists believed that these harsh laws must be accompanied by a reward system.²⁵³ This is consistent with their underlying assumption that most people would naturally seek profit and avoid punishment.²⁵⁴ Regardless, an award system would create an incentive for people to follow the ruler's orders. In the long run, the combination of reward and punishment would reduce the size of the government and prevent social disorder.²⁵⁵ Legalists believed that when a system of law was in place, individual capabilities became less relevant.²⁵⁶ By relying on laws, even an incapable ruler could govern the state efficiently.²⁵⁷

Even though Legalism did not have the same influence as Confucianism, several of its unique features are still relevant today. First, the Legalists believed in uniformity before the law.²⁵⁸ Except for the ruler himself, everyone should be subject to the same legal punishment for violating the law.²⁵⁹ Even the feudal lords must be subjected to the same rules to ensure uniformity in enforcing the law. The Lord of Shang concisely explained the meaning of equality before the law:

What I mean by the unification of punishments is that punishments should know no degree or grade, but that from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king's commands, violates the interdicts of the state, or rebels against the statutes fixed by the ruler, should be guilty of death and should not be pardoned.²⁶⁰

Han Fei tzu agreed that "[t]he law does not favor the nobles However, the law is applied, the wise have no way of avoiding [punishment] To punish a fault does not exempt the great officials. To award merit does not exclude the commoners."²⁶¹

253. MA, *supra* note 59, at 110.

254. *Id.* at 118.

255. *See id.* at 109–110.

256. *See id.*

257. BODDE & MORRIS, *supra* note 68, at 24.

258. *Id.* at 25.

259. *Id.* at 25.

260. CH'Ü, *supra* note 22, at 243.

261. *Id.*

Only the short-lived Qin Dynasty abided by this principle.²⁶² After its demise, the principle of equality before the law faded in subsequent dynasties.²⁶³ It was not until the fall of the last dynasty that it resurfaced to become a noble goal for revolutionaries.²⁶⁴

Second, the law should be clear. To achieve efficiency and stability, the Legalists emphasized that the consequences of breaking the law must be well-defined and universally known.²⁶⁵ Thus, the government must issue unambiguous laws, openly announce them, and enforce them consistently.²⁶⁶ By doing so, the government would send a clear message to the people as to what conduct was not permissible.²⁶⁷ After Qin, subsequent dynasties went to great lengths to preserve and enact clear legal codes.²⁶⁸ The Tang Code served as a model of precision and clarity for all the subsequent dynasties.²⁶⁹

Third, in order to smoothly administer the system of punishment, it was crucial for the ruler to delegate the power of enforcing the law to officials. In doing so, however, there was a risk that the officials may not enforce the law consistently and uniformly.²⁷⁰ To avoid this result, the Legalists suggested that the ruler should either reward or punish the officials depending on whether they applied the law according to the responsibilities required by their positions.²⁷¹ The rules for these awards and punishments must be equally clear so that the officials knew exactly what to follow. While this system ensured uniform application of the law, it did not leave any room for officials to inject their own creativity in solving complex cases. One commentator pointed out that this system

262. BODDE & MORRIS, *supra* note 68, at 27 (noted as another common name “Ch’in” in the book) (“Yet the Legalist triumph was amazingly short-lived.”).

263. *Id.*

264. *See* Jenco, *supra* note 246, at 181.

265. *See* BODDE & MORRIS, *supra* note 68, at 26.

266. *See id.* at 25.

267. *See id.*

268. *See generally* THE GREAT QING CODE, *supra* note 69; THE T’ANG CODE, *supra* note 69.

269. *See* Zhangsun Wuji, *Selections from The Great Tang Code: Article 6, “The Abominations”* http://afe.easia.columbia.edu/ps/cup/zhangsun_wuji_great_tang_code.pdf (last visited Feb. 11, 2020).

270. *See* BODDE & MORRIS, *supra* note 68, at 24.

271. *Id.*

effectively created an “impregnable barrier to the growth and application of forensic genius.”²⁷²

Fourth, people should be held responsible as a group. The Legalists believed that the government should endorse group accountability because people were inherently bad.²⁷³ They recommended the government divide the entire state population into small groups of five to ten families.²⁷⁴ Within the group, if one individual violated a law, every member was punished for the offense.²⁷⁵ Therefore, each member of the group was held responsible for preventing any transgressions against the state.

In the Han Dynasty, an offender who committed heinous crimes or demonstrated impiety was punishable by being cut in half at the waist.²⁷⁶ In addition, the offender’s parents, spouse, children, and siblings were all publicly executed.²⁷⁷

Group responsibility had a long-lasting impact on the Chinese legal system—since Qin, dynasties used various methods of collective responsibility to maintain social order. For example, the first Han Dynasty’s legal codes provided that if an individual committed one of the serious crimes, especially against the State, the State would not only execute the offender, but also “three lines of the offender’s families, including both parent’s families, the offender’s brothers’ families, and the offender’s wife’s families.”²⁷⁸ Other dynasties extended the penalty to “five lines of the offender by including his uncles’ families and sisters’ families.”²⁷⁹ Even though later dynasties reduced the execution to exile, this collective punishment method was commonly implemented until the end of the Imperialism period in China.²⁸⁰

272. Ernest Alabaster, *NOTES AND COMMENTARIES ON CHINESE CRIMINAL LAW LXIII* (Andesite Press 2015) (1899).

273. MA, *supra* note 59, at 108–09.

274. *Id.* at 108.

275. *Id.*

276. HULSEWÉ, *supra* note 70, at 158.

277. *Id.*

278. XIN REN, *TRADITION OF THE LAW AND LAW OF THE TRADITION* 41 (1997). *See also* MARK CSIKSZENTMIHALYI (ED.), *READINGS IN HAN CHINESE THOUGHT* 46 n. 28 (2006).

279. REN, *supra* note 278, at 43 n. 18.

280. *Id.*

c. Burning Books and Burying Scholars Alive

Through a series of reforms, the Legalists helped Qin build a strong State with ruthless efficiency. As a result, the State of Qin quashed all other rival states, unified China and established the first Dynasty in 221 B.C.²⁸¹ Qin Shi Huang, who claimed himself as the First Emperor of China, carried out a series of reforms and campaigns to strengthen his authority.²⁸² He wholeheartedly endorsed the Legalist principles for his dynasty. In 213 B.C., with the approval of the First Emperor, Prime Minister Li Si instigated the infamous “Burning Books and Burying the Scholars Alive” campaign to root out non-Legalist ideas.²⁸³

To justify his campaign, Minister Li argued that Emperor Qin should ban outdated laws made by ancient rulers because the change of circumstances made them inapplicable in Qin.²⁸⁴ Even though hundreds of schools of thought had once contributed to the nation-building in other states, they became meaningless to Qin, who accomplished unification solely by relying on Legalism.²⁸⁵ Minister Li praised the First Emperor for setting an exemplary precedent of creating his own laws rather than following tradition.²⁸⁶

Minister Li further argued that the non-Legalist scholars, in fact, posed a grave threat to the current regime because they often criticized Qin’s policies by invoking classical teachings.²⁸⁷ Some officials lauded the First Emperor at the royal court but slandered Qin’s policies when they privately convened.²⁸⁸ It was extremely dangerous for Qin to allow non-Legalist scholars to speak their minds freely because they could form an opposition and undermine the First Emperor’s authority.²⁸⁹ The First Emperor should be the only authority in deciding right and

281. *See* Wen, *supra* note 28, at 235.

282. *See id.* at 254–55.

283. *See id.* at 253–55.

284. *See id.* at 254–55.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See id.*

289. *See id.*

wrong.²⁹⁰ Therefore, the government had to take draconian measures to eliminate the influence of non-Legalist scholars.²⁹¹

The Legalists convinced the First Emperor that military aggression would merely conquer rival states' territories, but not the people's minds. To achieve true unity, the First Emperor needed to eradicate dissenting literature and scholars.²⁹² Punishing people who disobeyed was the most efficient means to unify people's thoughts.²⁹³ Scholars who survived the brutal campaign would certainly remold themselves to abide by Qin's rules. As an old Chinese saying goes: "Killing a chicken to scare monkeys." Legalists maintained that the government must preemptively suppress dissent.²⁹⁴ As a result, Minister Li promulgated the following laws:

1. Except for Qin's, all historical records of other states shall be burned.
2. Except for the official scholars who work for the Qin Dynasty, anyone in China who possesses copies of the *Classic of Poetry*, the *Classic of History*, or the writings of the hundred schools of thought shall surrender them to the local governors for burning.
3. Anyone who discusses the *Classic of Poetry* or the *Classic of History* privately in small groups shall be publicly executed.
4. Anyone who caricatures Qin's present policies by quoting the classics shall have his family executed.
5. Officials who have failed to report a violation of the above rules are equally guilty.

290. *See id.*

291. FUNG YU-LAN, *supra* note 23, at 204 ("[T]he world was scattered and in confusion . . . Men valued what they have themselves privately studied, thus casting into disrepute what their superiors had established. At present, Your Majesty has united the world . . . Yet there are those who with their private teachings mutually abet each other, and discredit the institutions of laws and institutions If such conditions are not prohibited, the imperial power will decline above and partisanships will for below.").

292. *See* Wen, *supra* note 28, at 254–55.

293. *See id.*

294. *See id.*

6. After thirty days of this announcement, those who have failed to burn the books shall be defaced with dark ink and banished to labor camps, where they will defend Qin by day and build the Great Wall by night.
7. Books on medicine, divination, agriculture, and forestry are exempted from burning.
8. Anyone interested in the law shall only learn from Qin's officials, not from historical or other sources.²⁹⁵

The government mercilessly enforced these laws. Between 213 B.C. and 212 B.C., the Qin government burned all non-Legalist literature that it could find and executed 460 scholars by burying them alive for violation of Li's laws.²⁹⁶

The "Burning Books and Burying the Scholars Alive" campaign enabled the First Emperor to consolidate power. However, the horrendous atrocities that Qin committed upon Confucian scholars and traditional culture galvanized resentment against the inhumane rules across the new country.²⁹⁷ Historians postulate that the brutal campaign hastened Qin's demise.²⁹⁸ After the death of the First Emperor in 210 B.C., the State of Qin quickly dissolved into rebellion and chaos.²⁹⁹

With the fall of Qin, Legalism lost its dominance in the ideological contest with Confucianism for the rest of China's long history. However, the chilling effect of the brutal campaign not only traumatized scholars during the Qin Dynasty, but all intellectuals for centuries to come. In 1958, Mao Zedong commented on the "Burning Books and Burying the Scholars Alive" campaign as stating:

Was it impressive for what First Emperor did? He only buried 468 Confucian scholars, but we buried 46,000 [anti-revolutionary scholars during the revolution]. We have debated with the Democrats over the justification of the mass executions. They blamed us for being as cruel

295. See *id.* The author has translated and summarized the provisions in Minister Li Si's proposed law, which was approved by the first Emperor.

296. See Carrie Gracie, *Qin Shi Huang: The Ruthless Emperor Who Burned Books*, BBC NEWS (Oct. 12, 2012), <https://www.bbc.com/news/magazine-19922863>.

297. MA, *supra* note 59, at 135.

298. *Id.*

299. BODDE & MORRIS, *supra* note 68, at 27.

as the First Emperor. They were wrong. We were 100 times as cruel as the First Emperor. The Democrats likened us to either the First Emperor or dictator. Yes, we absolutely accept that. Unfortunately, what they accused of us is not enough. We must supplement their argument. (*Mao laughed*.)³⁰⁰

d. Taoism as Transition

The fall of Qin did not send China back into a prolonged period of warring states. Among competing rebel forces, Liu Bang quickly consolidated power, and established the Han Dynasty in 202 BC.³⁰¹ Mindful of how the brutal punishments brought down the first dynasty, the Han Emperor commanded his advisors to study the root causes of Qin's quick demise from an almighty empire to rubble and identify what Han could do to avoid the same fate.³⁰²

Drawing ideas from the classics, the Emperor's trusted counselors urged the government to follow the wisdom of Taoism, a non-action approach, relying on upright rules of nature to allow the people themselves to work out conflicts in society.³⁰³ After persistent wars, cruel oppression, and the chaotic reign of the short-lived Qin, both the ruler and the people longed for peace and prosperity, a desire that Taoism could meet.³⁰⁴ Chapter 57 of *Tao De Jing* captured the basic tenets of Taoism:

The country must be based on the upright rules,

Just like deploying troops with unconventional tactics.

Those who refrain from assertive actions will win the world

300. Sun Yancheng, *1958 Nian Mao Zhuxi Daxiao, Ma Women Shi Qinshihuang, Women Vigai Chengren* (1958 年毛主席大笑：骂我们是秦始皇，我们一概承认) [*In 1958, Chairman Mao Laughed and Admitted CPC is the First Emperor of Qin.*], 50–58 in LISHI XUEJIA CHAZUO (历史学家茶座) [TEAHOUSE FOR HISTORIANS] (Zhaocheng Wang (王兆成) et al. eds. 2009)).

301. ZHONGGUO FAZHI SHI (中国法制史) [THE LEGAL HISTORY OF CHINA] 73 (Xianyi Zeng (曾宪义) et al. eds., 5th ed. 2016).

302. *Id.*

303. *Id.* at 72–73.

304. *Id.*

The more prohibitions there are, the more destitute the people will be;

The deadlier weapons the people possess, the more chaotic the world will be;

The more trickery the people engage in, the more bizarre the society will be;

The more laws there are, the more flourishing the robbers and thieves will become.

Therefore, the sage says:
I take no action, and the people transform themselves;
I stay quiet, and the people correct themselves;
I refrain from interfering with the people, and they improve themselves;

I have no desires, and the people return to primitive simplicity.³⁰⁵

Taoism is different from both Confucianism, which emphasized the leading role of the government to educate the people with virtues, and Legalism, which advocated for harsh punishments.³⁰⁶ A Taoist government should do nothing but let nature run its course.³⁰⁷ Any interference by the government would upset the balance of Tao, the rule of nature and thus hurt the people. Taoism is a Chinese version of *laissez-faire*.³⁰⁸

Taoism reached its peak during the first seventy years of the Han Dynasty.³⁰⁹ During this period, the Emperor made it his priority to abolish Qin's harsh rules.³¹⁰ This was exemplified in several ways. First, the Han government substantially reduced criminal penalties and made the law clear and understandable to ordinary people.³¹¹ During Qin's

305. LAOZI (老子), *LAOZI DAODE JING ZHU JIAO SHI* (老子道德经注校释) [THE BOOK OF TAO AND ITS VIRTUE ANNOTATED] 149–50 (Bi Wang (王弼) & Yulie Lou (楼宇烈) eds., 2008).

306. See *infra* Sections 5 (a)–(b).

307. MA, *supra* note 59, at 138.

308. See generally Ken McCormick, *The Tao of Laissez-Faire*, 25 E. ECON. J. 331, 334–35 (1999).

309. MA, *supra* note 59, at 141.

310. *Id.*

311. *Id.* at 138–39.

time, because there were too many laws backed by brutal punishments, the people often broke the laws unknowingly.³¹² The disproportional punishments aroused public anger and distrust.³¹³ Therefore, it was necessary not only to simplify the laws but also reduce the punishments.³¹⁴ For example, the Han government repealed collective penalties, penalties for slander, and cruel punishments, such as limb cutting, and various other cruel forms of the death penalty.³¹⁵ Additionally, the early Han government substantially reduced taxes for peasants.³¹⁶ Moreover, the most importantly, the government emphasized that they would rather acquit a guilty person than convict an innocent one.³¹⁷ If any doubt of guilt existed, a person would not be subject to the death penalty.³¹⁸

The Taoist approach helped the early Han overcome insurmountable challenges in the first seventy years of the empire. The shattered economy recovered, the living standards improved, and the people enjoyed unprecedented peace and stability.³¹⁹ The economic prosperity made the central government more self-assured and less dependent on local lords to maintain social order.³²⁰ However, the Emperor disliked the hands-off approach advocated by Taoists because it limited the central government's ability to take control of the local affairs dominated by their native lords.³²¹ In addition, the hands-off policy hampered the central government's ability to collect taxes from local people.³²² As a result, the new Han Emperor began doubting whether Taoism was the right ideology for the dynasty.³²³ Essentially, Taoism was probably better suited for a federal or confederal style government, but definitely not for the Han, which had the same ambition of building a centralized, top-down empire as that of Qin's.

312. *Id.* at 140.

313. ZHONGGUO FAZHI SHI (中国法制史), *supra* note 301, at 72–73.

314. *Id.*

315. *See* MA, *supra* note 59, at 140–41.

316. ZHONGGUO FAZHI SHI (中国法制史), *supra* note 301, at 72–73.

317. MA, *supra* note 59, at 140.

318. *Id.*

319. ZHONGGUO FAZHI SHI (中国法制史), *supra* note 301, at 73.

320. *See id.*

321. *Id.*

322. *Id.*

323. *See id.*

e. Confucianism as the Official Ideology

During Emperor Wu of Han Han Wudi's reign, Han abandoned Taoism and endorsed Confucianism as the official ideology.³²⁴ In addition, he eliminated other schools of thought.³²⁵ By this time, traditional Confucianism had evolved into an extremely wide-ranging ideology that borrowed heavily from the classics, including Legalism.³²⁶

6. THE CORE VALUE OF CONFUCIANISM: INEQUALITY

The notion of equality before the law never developed in traditional China.³²⁷ Confucianism claimed that men were endowed with different levels of intelligence and virtues.³²⁸ Therefore, the intelligent ones, "big men" or "gentlemen," were better suited for mental work—to acquire virtues, gain knowledge, and govern other people.³²⁹ According to Confucius, those without intelligence were destined to do physical labor serving the ruling class.³³⁰ Mencius summed up the relationship between gentlemen and laborers as follows:

Great men [gentlemen] have their proper business, and little men have their proper business . . . [s]ome who labor with their minds, and some labor with their strength. Those who labor with their minds govern others; those who labor with their strength are governed by others. Those who are governed by others support them; those who govern others are supported by them. This is a principle universally recognized.³³¹

According to Confucianism, the foundation of good governance was *Li*, a hierarchical social order derived from family relationships.³³² When the Duke of Qi asked Confucius to define a good government, he replied, "[Government excels] when the prince is prince, and the minister is

324. MA, *supra* note 59, at 142.

325. FUNG YU-LAN, *supra* note 23, at 191.

326. BODDE & MORRIS, *supra* note 68, at 28.

327. Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* 5-6 (1996).
See also XIN REN, *supra* note 278, at 39; CH'Ü, *supra* note 22, at 226.

328. CH'Ü, *supra* note 22, at 226.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

minister; when the father is father, and the son is son.”³³³ He meant that when each member of the population remained in one’s own position and faithfully carried out his or her assigned duties, then society was harmonious.³³⁴

Xunzi (Hsuntze), a prominent Confucian, took the defense of inequality to a new level. He argued that inequality in social status was the fundamental nature of the world.³³⁵ Unity and social harmony could only be achieved when people were unequal.³³⁶ The principle of inequality made the inferior willing to work for the superior. Equality, however, would create confusion and cause chaos because it discouraged people from obeying orders while serving the superior.³³⁷ People of equal social status could not serve each other, obey each other’s orders, or provide each other resources.³³⁸

Furthermore, Xunzi argued that if everyone desired the same thing, there would not be enough reserves left for the superior since the resources in the world were so limited.³³⁹ In the world of inequality, the inferior would learn to control their desires to ensure that the superior would have sufficient assets to live a life befitting of his high social status.³⁴⁰ If everyone equally pursued the same goods, there would not only be a shortage of supply but also a disorder that threatened social harmony.³⁴¹ A world in disorder would then lead to poverty.³⁴² Xunzi cited the sage’s saying to support his argument: “They are only uniform in that they are not uniform.”³⁴³ While Confucians generally disdained commerce and wealth, Xunzi was probably the first economics-minded defender of inequality.

333. See CONFUCIUS ANALECTS, *supra* note 44, at 256.

334. CH’Ü, *supra* 22, at 230 (“A society in which honorableness and humbleness, superiority and inferiority, seniority and juniority, nearness and remoteness were clearly defined constituted the ideal society; and conversely, a lack of distinction between these various features was extremely repugnant to the Confucianists.”).

335. HOMER H. DUBS, THE WORKS OF HSUNTZE 124 (1928).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* 123–24.

340. *Id.* 124.

341. *Id.* at 123–24.

342. *Id.* at 124.

343. *Id.*

7. THE CONFUCIANIZATION OF LAW³⁴⁴

Since the core of Confucianism was inequality, the Confucian-inspired laws offered the protection of inequality as the top priority to ensure that the royal family members, officials, and nobles were not subject to the same punishments prescribed in the criminal code as would a commoner.³⁴⁵ Throughout the imperial history, the differential treatment of the privileged and nobles remained the most important provision in the law codes until the last dynasty.³⁴⁶

Article 7 of the Tang Code provided special treatment to eight categories of people who enjoyed higher social status than commoners because of royal connections either by blood or marriage, high virtue and learning, or distinguished service to the dynasty.³⁴⁷ The justification for the differential treatment came from the *Rites of Zhou*:³⁴⁸ “Punishments do not extend up to the great officers. If they commit offenses, they are judged under the eight deliberations, and the weight of the sentence is not governed by the books of punishment.”³⁴⁹

Under Article 7, persons who were subject to special deliberations were:

1. The relatives of the emperor: this category extends to the fifth degree of the Emperor’s blood relatives, as far as to the brothers of Emperor’s paternal great-great-grandfather and their descendants, as well as the Emperor’s paternal grandmother’s and his mother’s relatives up to the fifth-degree.³⁵⁰
2. The old retainers of the Emperor: this category refers to those who have served the Emperor for a long period of time. The Qing Code also

344. This term was first used by Professor Ch’ü. See CH’Ü, *supra* note 22, at 267.

345. CH’Ü, *supra* note 22, at 278 (“The noble and the mean were subject to different punishments, and the officials were permitted to use their rank to cancel their punishments.”).

346. See generally THE T’ANG CODE, *supra* note 69; THE GREAT QING CODE, *supra* note 69.

347. THE T’ANG CODE, *supra* note 69, at 83.

348. *Id.*

349. *Id.*

350. *Id.* at 84.

required that the servant had ready access to the Emperor and received the Emperor's special favor.³⁵¹

3. Persons of high moral character: this includes those of great learning and virtue, also called worthy men or gentlemen. Their virtuous words and action set an example for the entire country to emulate.³⁵²

4. Persons of great talent: this category includes military leaders, state counselors, and managers, whose exemplary deeds improve human relations.³⁵³

5. Persons of great achievement and glory: this refers to decorated national heroes and strategists upon whom the Emperor depends to lead the army, build alliances, and maintain peace and prosperity in the country.³⁵⁴

6. Persons of high position in the government: this category includes active duty official[s] of the third rank or above and nobilities of the first rank.³⁵⁵

7. Persons of great diligence in their work: this category includes military and civil officials who served the country in remote areas under difficult circumstances.³⁵⁶

8. Guests of the state: this category includes the descendants of the preceding dynasties who have been received as guests.³⁵⁷

Closely following the Tang Code, the Qing Code prescribed privileges in Article 3, entitled: the "Eight [Categories of Persons Whose Cases are to be Especially] *Considered*."³⁵⁸ The categories of persons who were entitled to special deliberation remained the same as provided

351. THE GREAT QING CODE, *supra* note 69, at 37.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 36.

in Article 7 of the Tang Code, only with minor changes to the orders of the categories.

[Article 3] is a provision whereby the nation treats with special favour relatives of the Emperor, the virtuous, the industrious, and those of long service, who must be treated *outside the law*, with forgiveness. Therefore, when they have committed offenses, the decision will be prepared and considered *outside* the normal provisions of the law. Thus, the persons entitled to have their cases especially considered will be made to be conscious of their dignity and not lightly to commit offenses.³⁵⁹

a. Family Relations and Criminal Penalties

Confucianist scholars in the Ming (1368-1644) and Qing dynasties (1644-1911) condensed the social relations to Five Relations and Three Bonds, which provided the ethical and legal grounds for the whole society.³⁶⁰ Five Relations: relationships between rulers and subject, father and son, husband and wife, younger and elder brothers, and friend and friend.³⁶¹ The first three were called three bonds, which were the most important relationships for the family and society in ancient China.³⁶²

Furthermore, the scholars developed mourning regulations based on family relations between a mourner and the deceased.³⁶³ There were five categories or grades of genealogical distance, each of which required distinctive clothing that a mourner must wear during the mourning period.³⁶⁴ The closer the genealogical distance the mourner was from the deceased, the more demonstrative the clothing would be and the longer the mourner was obligated to grieve.³⁶⁵ The impact of mourning regulations went far beyond conducting mourning rituals. In fact, the

359. *Id.* at 36 (alteration in original) (emphasis added).

360. *See* MACCORMACK, *supra* note 327, at 73.

361. *Id.*

362. *Id.*

363. David Jordan, *Wúfú 五服: The Traditional Chinese Mourning Categories*, <https://pages.ucsd.edu/~dkjordan/chin/MourningGrades.html> (last updated Jan. 1, 2019).

364. *Id.*

365. *Id.*

regulations delineated the duties and obligations of living members among the family.³⁶⁶

The mourning regulations served as a basis for the penal code to weigh criminal penalties in cases involving crimes committed against one's relatives.³⁶⁷ When a senior committed a crime against a junior, the senior was entitled to leniency.³⁶⁸ Conversely, if a junior injured or killed a senior even without intent, the junior usually received severe penalties.³⁶⁹ The chart below illustrates how the judiciary board applied the mourning regulation in sentencing.

366. *Id.*

367. MACCORMACK, *supra* note 327, at 75.

368. *Id.*

369. *Id.* at 76.

Mourning Regulations	Implications on Criminal Penalty
A son mourned his parents for three years. ³⁷⁰	If a son killed his father, even accidentally, the son would receive the most severe penalty. ³⁷¹
Parents mourned their son for only one year. ³⁷²	If a father intentionally killed his son, the father would only receive 60 blows and penal servitude for one year. ³⁷³
Parents mourned their unmarried daughter for one year. ³⁷⁴	If an <i>unmarried</i> daughter's immoral conduct caused her father to commit suicide out of shame, the unmarried daughter would be sentenced to immediate death. ³⁷⁵
The parents mourned their married daughter for only nine months. ³⁷⁶	If a <i>married</i> daughter's illicit sexual conduct caused her father to commit suicide out of shame, the married daughter received the death penalty with delay. ³⁷⁷
A wife mourned her husband's death for three years. ³⁷⁸	If a wife intentionally killed her husband, she was to be sentenced to death by slicing. If a wife accidentally killed the husband, she was to be sentenced from three years of penal servitude, exile, to immediate strangulations. ³⁷⁹
A husband mourned his wife for only one year. ³⁸⁰	If a husband intentionally killed his wife, the husband was to be

370. *Id.* at 75.

371. *Id.* at 79.

372. *Id.* at 75.

373. *Id.* at 79.

374. *Id.* at 75.

375. BODDE & MORRIS, *supra* note 68, at 359–60.

376. MACCORMACK, *supra* note 327, at 75.

377. BODDE & MORRIS, *supra* note 68, at 359–362.

378. MACCORMACK, *supra* note 327, at 75.

379. *Id.* at 92.

380. *Id.* at 75.

	sentenced to strangulation after the assizes (meaning that it was possible for the sentence to be reduced.) If the husband accidentally killed his wife, there was no penalty. ³⁸¹
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Killing a parent was the most heinous crime which was punished by the most severe penalty.³⁸² In such cases, the court did not differentiate between killing intentionally or by mistake.³⁸³ To show mercy, the Emperor occasionally considered extenuating circumstances, but he usually merely changed the sentence to a more humane form of execution.³⁸⁴ The law focused on the fact of a parent's death, but not always on the reason for the death. The following cases illustrate how offenders were punished under the Qing Codes.

b. The Case of Jao (Mother Ordered Son to Purchase Poison for Her Suicide.)³⁸⁵

The case of Jao demonstrated how the principle of filial piety could place a junior member of the family in an impossible situation.³⁸⁶ After being harassed by a creditor, Mrs. Jao decided to commit suicide so that she could incriminate the creditor for her death. To accomplish her plan, Jao ordered her son to buy poison. For the son, if he resisted his mother's order, he would commit the crime of impiety. Following his mother's order meant that he would assist in killing his mother, which was the most heinous crime.³⁸⁷ After failing to persuade Jao to give up her plan, the son bought the poison. With the poison in his hand, the son

381. *Id.* at 92–93.

382. *Id.* at 79.

383. CH'Ü, *supra* 22, at 47.

384. MACCORMACK, *supra* note 327, at 80.

385. *See id.* at 82–83.

386. *Id.*

387. *Id.*

continued to advise her not to commit suicide. But Jao snatched the poison, swallowed it, and died.³⁸⁸

The provincial court applied the law of plotting to kill a parent by analogy and sentenced the son to death by slicing, the most severe form of the death penalty.³⁸⁹ In rejecting the sentence, the Board reasoned that the son did not have the intent to kill his mother.³⁹⁰ He had no choice but to obey his mother's order to obtain the poison.³⁹¹ For the authorities, however, the lack of intent was not enough to change the matricidal nature of the case. With the approval of the Emperor, the Board reduced the provincial court's sentence to death by immediate beheading, a less severe form of the death penalty.³⁹²

c. The Case of Chen née Chang (Married Daughter's Obligation to Her Parents)³⁹³

Mrs. Chen née Chang committed adultery with a man who later abducted her.³⁹⁴ Out of shame and indignation, Chen's father committed suicide.³⁹⁵ The governor of Henan sentenced Chen to strangulation after assizes (death penalty with a delay for possible commutation) and referred the case to the Imperial Board in Beijing for review.³⁹⁶ There were two provisions of the Qing Code, which dealt with parents' suicide caused by their offspring's adultery: if an unmarried daughter's illicit sexual relationship with a man caused her father to commit suicide out of shame and indignation, the unmarried daughter would face immediate strangulation (death penalty without delay).³⁹⁷ However, if a married daughter caused her father to commit suicide for the same reason, she would face a reduced sentence—strangulation after assizes (death penalty with delay, with a possibility of commutation).³⁹⁸

388. *Id.* at 82.

389. *Id.* at 83.

390. *See id.*

391. *Id.*

392. *Id.*

393. *See* BODDE & MORRIS, *supra* note 68, at 359.

394. *Id.*

395. *Id.* at 360.

396. *Id.* at 360–61.

397. *Id.*

398. *Id.*

In this case, the governor reasoned that Chen's marriage made her no longer a member of her parents' family.³⁹⁹ Since the bond between Chen and her biological father weakened after the marriage, the legal penalties should also be changed accordingly. Therefore, Chen should receive the death penalty with delay, rather than immediate death. The Imperial Board affirmed the governor's decision.⁴⁰⁰ Bodde and Morris offered additional support for the governor's analysis.⁴⁰¹ First, the mourning regulation required a married daughter to mourn her biological parent's death for a much shorter period than it required an unmarried daughter to mourn.⁴⁰² As a result, the married daughter should have "a lesser sentence for an offense committed against" her parents.⁴⁰³ Second, another provision of the Qing Code treated a married daughter and an unmarried one differently in treason cases.⁴⁰⁴ There, a married daughter of her father, who was guilty of treason, received no punishment even though the father's family members, including all unmarried daughters, were subject to extermination, i.e., death or exile.⁴⁰⁵ It seems that the law was clear and consistent regarding the reduced legal obligation of married daughters to their biological parents.

However, the Emperor overruled the Board's affirmation of the governor's decision by citing the *Documents of Classic* (Shu Jing), which was not in the Qing Code.⁴⁰⁶ The Emperor reasoned: "Because the child's relationship to the parents derives from Heaven, no differentiation in that relationship should be made with respect to a daughter simply on the basis of whether or not she happens to be married."⁴⁰⁷ The Board sentenced Chen to immediate strangulation according to the Emperor's decision.⁴⁰⁸

399. *Id.* at 360

400. *Id.*

401. *Id.* at 360–61.

402. *Id.* at 361.

403. *Id.*

404. *See id.*

405. *See id.*

406. *See id.*

407. *Id.*

408. *Id.* at 361–62.

d. The Case of Chen (Daughter-In-Law's Obligation to Her Father-In-Law)⁴⁰⁹

Mrs. Chen did not respond to her father-in-law's call for food because she was away from home washing clothes by the well.⁴¹⁰ The father-in-law was angry and attempted to beat her. In the process, the father-in-law fell to his death.⁴¹¹ The Provincial Court reasoned that Mrs. Chen did not intend to disobey her father-in-law and sentenced her to exile, one degree reduced from the death penalty.⁴¹² The Board affirmed the Court's decision. When the Emperor received the case for the final review, however, he did not agree with the reduced sentence.⁴¹³ He believed that Mrs. Chen violated filial piety by not heeding the patriarch's call, and thus, she deserved the death penalty.⁴¹⁴ Nonetheless, the Emperor reduced her sentence to exile on the grounds of compassion. Through this case, the Emperor tried to demonstrate that it was intolerable for any breach of filial piety, but it was in his discretion to avoid capital punishment to show mercy to his subjects.⁴¹⁵ Mrs. Chen was spared not by her lack of intent, but by the Emperor's benevolence.

e. The Case of Hsing Hai (An Official's Immunity After Killing His Son)⁴¹⁶

Hsing Hai was an official writer—a position he obtained by passing the civil service examination.⁴¹⁷ One day, Hai learned that his son had misappropriated public funds for sacrificial services. In addition, the son had beaten a service boy to death.⁴¹⁸ During a private interrogation, Hai

409. See MACCORMACK, *supra* note 327, at 80.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. See BODDE & MORRIS, *supra* note 68, at 214.

417. *Id.*

418. *Id.*

beat his son to death.⁴¹⁹ Without reporting the case to the government, he secretly buried his son's body.⁴²⁰

The provincial board of punishment asked the Imperial Board if Hai's punishment could be reduced from eighty blows of the heavy bamboo to deprivation of official status or simple payment of a fine. The commutation request was based on Article 8 of the Qing Code, which provided that government officials were entitled to special deliberations.⁴²¹

The punishment of eighty blows was not for Hai's killing his son, but his failure to report the case to the authority. In the absence of applicable provision from the code, the provincial board concluded that Hai's killing of his son was justified because the son committed a capital crime.⁴²² Therefore, the remaining issue for the provincial board was how to punish Hai for his failure to report the killing to the government. If a commoner committed the same crime, the board would have sentenced the commoner to eighty blows with heavy bamboo. Since Hai was an official writer, he should receive special treatment under the law. The provincial board did not know how much leniency Hsing Hai deserved.⁴²³

For the killing, the board contemplated two provisions of the Qing Code: (1) if a father killed his son for disobedience, the father received 100 blows with heavy bamboo; or⁴²⁴ (2) if a father killed his child because the child has struck or reviled the father, the father was not guilty of the killing.⁴²⁵ However, the board was not ready to rely on either of the two provisions most likely due to lack of supporting evidence.⁴²⁶ So even without directly applicable law, the board ruled that Hsing Hai was justified in killing of his son.⁴²⁷

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.* at 214–15.

424. *Id.*

425. *Id.* at 215.

426. *Id.*

427. *Id.*

Reviewing the decision, the Imperial Board upheld the provincial board's decision.⁴²⁸ On the issue of how his corporal punishment should be commuted, the Imperial Board reasoned: "[T]he father holds the position of official writer, and his penalty of 80 blows is not severe enough to call for removal from civil service, . . . he [shall] be permitted to pay a monetary redemption."⁴²⁹

f. A Sense of Proportionality

Stealing objects from the Emperor's ancestral temple was a serious crime punishable by the death penalty.⁴³⁰ Once, after catching a man for taking a jade ring from late Emperor Kao's temple, the Commandant of Justice (called the Minister of Justice in later dynasties) sentenced him to public execution and referred the case to Emperor Wen for final approval.⁴³¹ The Emperor was so furious about the man's act of desecration that he asked the Commandant to exterminate (i.e., to kill) the man's entire family.⁴³² Surprisingly, the Commandant declined to follow the Emperor's recommendation, reasoning that the punishment should be proportional to the seriousness of the crime. In this case, it was sufficient to punish the man by public execution. The Commandant further explained: "If for stealing objects from the ancestral temples [y]ou would exterminate [the man's family], how would [y]ou apply this law . . . in the extraordinary and suppositious case that somebody [dug up the late Emperor's coffin]?"⁴³³ The Commandant's salient analysis recorded in 160 B.C. would certainly delight Judge Posner. In his well-known article *An Economic Theory of Criminal Law*, Judge Posner had almost the same thought:

If robbery is punished as severely as murder, the robber might as well kill his victim to eliminate a witness. Thus, one cost of making the

428. *Id.* In fact, the Board did not even bother to elaborate why the king was justifiable even though that was no applicable provision in the code. *See id.*

429. *Id.*

430. HULSEWÉ, *supra* note 70, at 161.

431. *Id.*

432. *Id.*

433. *Id.*

punishment of a crime more severe is that it reduces the criminal's incentive to substitute that crime for a more serious one.⁴³⁴

The record did not show whether the Emperor took the Commandant's advice. If the Emperor was as economics-minded as Judge Posner, he should have forgiven the Commandant who spoke against him.⁴³⁵ The Commandant's fate hinged on the Emperor's intelligence, education, and experience. So did the entire nation of China for two millennia, because no one was allowed to be wiser than the Emperor.

8. ADMINISTRATION OF JUSTICE

In ancient China, there was no division of power.⁴³⁶ At the central level, the Judiciary Board was one of the six ministries under the Emperor.⁴³⁷ The Board officials were civil servants who passed the national exams on the Chinese classics—of which law was unlikely a subject.⁴³⁸ Career clerks at the Judicial Board assisted the officials in trying and reviewing cases.⁴³⁹ Beneath the central government was three levels of governments in ascending order: the district (or the county), the prefecture, and the provincial governments.⁴⁴⁰ Magistrates at the district, county, and prefecture levels personally handled legal cases.⁴⁴¹ Except for minor cases punishable by bambooning, the magistrates had no power to try cases.⁴⁴² At the provincial level, the judiciary commission—which was separate but not independent of other departments—handled legal cases.⁴⁴³ The provincial governor made the final decisions on these cases.⁴⁴⁴ Magistrates were responsible for investigating and transferring

434. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1207 (1985).

435. *Id.*

436. BODDE & MORRIS, *supra* note 68, at 113.

437. *Id.* at 116.

438. *Id.* at 114.

439. *Id.* at 113.

440. ALABASTER, *supra* note 272, at 8.

441. *Id.* at 8–9.

442. BODDE & MORRIS, *supra* note 68, at 115.

443. *Id.*

444. *Id.*

cases to higher levels of government.⁴⁴⁵ The provincial judicial commission was responsible for trying capital cases and other cases punishable by exile or penal servitude.⁴⁴⁶ All death penalty cases were to be sent to the Emperor for final review and approval.⁴⁴⁷

a. Lawyers as Litigation Tricksters

As a profession, lawyers rarely existed throughout ancient Chinese history.⁴⁴⁸ In China's top-down political structure, the government viewed any legal representation "as a dangerous source of trouble,"⁴⁴⁹ which eroded the governor's sole power to administer justice.⁴⁵⁰ While the government occasionally permitted legal representation of one's relatives in rural areas, it generally regarded lawyers as "troublemakers and corruptors."⁴⁵¹ Therefore, the Qing Code permitted legal representation under limited circumstances:

1. A lawyer could represent his close relative or in a case in which the lawyer had a legitimate personal interest.
2. In ancient China, the extremely low rate of literacy made it impossible for people in rural areas to access justice. Therefore, the code permitted a lawyer to prepare legal documents for illiterate people if the lawyer did not attempt to fabricate causes of action.

445. *Id.*

446. *Id.* at 116.

447. *Id.*

448. ALABASTER, *supra* note 272, at LVIII–LXI ("[T]he Chinese system does not seem favourable to the growth of a professional class trained in the law—indeed it seems to be the policy to discourage any such result. No counsel appear[s] in a Chinese Court."). *See also* MACCORMACK, *supra* note 268, at 11 ("[T]he development of a legal profession . . . was actively discouraged by the state.").

449. MACCORMACK, *supra* note 268, at 11.

450. BODDE & MORRIS, *supra* note 68, at 113–14 ("[T]he judicial system of imperial China, like the governmental system as a whole, was a centralized monolith with no division of powers."). *See also* THE GREAT QING CODE, *supra* note 69, at 6 ("[A] highly centralized government headed by an absolute ruler who ruled by means of a bureaucracy. The primary obligation of every Chinese was to fulfil the duties assigned him by the Emperor.").

451. BODDE & MORRIS, *supra* note 68, at 413.

3. If “a habitual litigation trickster[] who conspire[d] with government clerks, trick[ed] ignorant country folk, or practice[d] intimidation or fraud[,]” the trickster was to be punished “by military exile at the most distant malarial regions of Yunnan or Kueichow.”⁴⁵²

In practice, however, the governor had various ways to penalize lawyers without relying on any code provision. In a Henan case, Hsia Fang-chueh petitioned the governor to apprehend the murderer of his clansman, who was beyond five degrees of mourning.⁴⁵³ Hsia took two ounces of silver for the legal work from the clansman’s family.⁴⁵⁴ The governor held that Hsia was guilty of the illegal practice of law because he was not legally related to the clansman.⁴⁵⁵ To be related, the clansman had to be within five degrees of mourning, i.e., Hsia’s third cousin or closer.⁴⁵⁶

Technically, Hsia could have argued that the clansman’s family members were illiterate, and the law did not prohibit a lawyer from receiving legal fees.⁴⁵⁷

In sentencing, the governor did not find a code provision directly applicable for Hsia’s crime. By analogy, the governor referenced a provision regarding habitual litigation tricksters: whoever “conspired with [a] government clerk[] trick[] ignorant country folk, or practice intimidation or fraud[,]” was to be sentenced to military exile to a remote region.⁴⁵⁸ The governor sentenced Hsia to three years of penal servitude, one degree less than the punishment for habitual litigation tricksters.⁴⁵⁹ Why did the governor mitigate the punishment from military exile to a three-year servitude? Is it because the governor wanted to show benevolence? Or is it because he was unsure of the legality of the judgment? Or both? It would take another litigation trickster to find out.

To prevent legal representation, a provincial government issued an edict warning local magistrates of vicious law practices by tricksters:

452. *Id.* at 413–15.

453. *Id.* at 414.

454. *Id.*

455. *See id.* at 414–15.

456. *Id.* at 414.

457. *Id.*

458. *Id.* at 415–16.

459. *Id.* at 416.

[The litigation tricksters] entrap people for the sake of profit. They fabricate empty words and heap up false charges. At their bidding, plaintiffs are induced to bring up stupid nonsense in their accusations whose empty falsity, when exposed at the trial, brings blame upon the plaintiffs themselves while the litigation tricksters stand to one side.

Victims of these false accusations, once they have been dragged in, remain entrapped and their livelihood is gone. Even should they have the luck to be completely exonerated as a result of the trial, their families will by then have become ruined All these devilish doings certainly deserve our bitter detestation.⁴⁶⁰

The edict required the magistrates to question the petitioners whether tricksters had instigated, advised, and published their petitions.⁴⁶¹ Once confirmed, the magistrates must immediately arrest the tricksters.⁴⁶² The edict also requested magistrates to compare the complaints with the petitioner's own handwriting.⁴⁶³ If the handwriting didn't match, the magistrate must compel the petitioner to reveal the trickster's name and apprehend the trickster.⁴⁶⁴ The magistrate must strictly investigate and punish the trickster and treat the *bona fide* petitioner with leniency.⁴⁶⁵

b. Death Penalty

In 631, the Emperor of T'ang Dynasty ordered the execution of a high official for his defense of an insane man who uttered improper remarks.⁴⁶⁶ Deeply regretting his order, the Emperor exclaimed: "Human life is of the utmost importance, for once dead, a man cannot live again."⁴⁶⁷ From then on, the Emperor mandated that all decisions concerning the death penalty be reported two days in advance to the Emperor for a final review and that no death penalty be carried out

460. *Id.* at 416–17.

461. *Id.* at 417.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.* at 132.

467. *Id.*

without the Emperor's approval.⁴⁶⁸ Emperors in the subsequent dynasties followed the same practice.

However, the review process, which took place in autumn, "was complex and over[-]refined; perhaps it was unduly ritualized."⁴⁶⁹ The Board presented the Emperor with two lists of names.⁴⁷⁰ The first list carried the names of criminals to be executed and the second list provided the names of those who deserved commutation.⁴⁷¹ The Board wrote the first list of names on a large piece of paper with the names of those deemed to be less guilty than others "placed either at the corners or in the [center]."⁴⁷² Then, the Board submitted the first list to the Emperor for review.⁴⁷³ The Emperor, "with a brush dipped in vermilion, [made] a circle on it at seeming, and to some extent real, hazard, and criminals whose names [were] traversed by the red line [were] ordered for execution."⁴⁷⁴ Those who luckily dodged the Emperor's red circle would survive for another year until the next review ensued.⁴⁷⁵

9. CONCLUSION: THE APPLE DOESN'T FALL FAR FROM THE TREE.⁴⁷⁶

Through his ingenuity and hard work, Confucius transformed and perfected an institution for governing Chinese people, which has been religiously replicated since 50 B.C. Confucius conjured a utopia and prescribed a path to achieve it: when people restrained themselves and act upon the rule of propriety, the world was in the proper order just as experienced in the early Zhou dynasty. According to that order, the King, at the pinnacle of the pyramid, held absolute authority; regional lords were loyal to the King; and commoners were submissive to the

468. *Id.*

469. *Id.* at 142.

470. ALABASTER, *supra* note 272, at 28.

471. *Id.*

472. *Id.* at 28–29.

473. *Id.* at 29.

474. *Id.*

475. *Id.*

476. See *The Apple Doesn't Fall Far from the Tree*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/apple-doesn-t-fall-far-from-the-tree> (last visited Jan. 24, 2020) (An English proverb, which means "a child usually has a similar character or similar qualities to his or her parents.").

privileged. If people acted according to their hierarchical worth assigned by the authority, there would be peace and order.

Inequality is the core of Confucianism. Confucians claimed that men were endowed with different levels of intelligence and virtues. Therefore, the intelligent “gentlemen” were suited for governing those without intelligence, who were destined to do physical labor serving the ruling class. The central theme of the Confucian-inspired laws was the perpetuation of inequality. According to Rites of Zhou, “[p]unishments do not extend up to the great officers.”⁴⁷⁷ Throughout the imperial history, the differential treatment of the privileged and nobles remained the first provision in the legal codes.

The Communist Party of China (CPC) has had a love-hate relationship with Confucius. Initially, Mao Zedong viewed Confucius as a threat to Communism, and thus his followers burned Confucius’s books and desecrated his tomb. However, it proved impossible to uproot the Confucian traditions that had been deeply ingrained in people’s minds and souls. Mao’s anti-Confucius detour was only a brief hiatus in a two-thousand-year-old tradition. With the declining influence of Communism, President Xi has revived the Confucian tradition to maintain the CPC’s legitimacy. Under the banner of “building a Chinese dream of national rejuvenation,” China has established Confucius Institutes throughout the world promoting Chinese values abroad and rekindle nationalism at home. Confucius’s spirit lives on. Unless the power is decentralized and the Confucian hierarchy is rejected, the rule of law will unlikely take root in China.

477. THE T’ANG CODE, *supra* note 69, at 83.