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Norman P. Ho

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CONFUCIAN JURISPRUDENCE IN PRACTICE: PRE-TANG DYNASTY *PANWEN* (WRITTEN LEGAL JUDGMENTS)

Norman P. Ho[†]

Abstract: Most scholarship on Chinese legal philosophy has neglected the study of Confucian jurisprudence in practice. As a result of this incomplete portrayal, scholars predominantly view the premodern Chinese Confucian legal tradition as lacking a rule of law system, which has led to blaming Confucianism for much of China's modern and historical rule of law problems. This article seeks to complicate this view by examining Confucian jurisprudence in practice: specifically, the development of pre-Tang dynasty *panwen* (written legal judgments). Through analysis of specific *panwen* from various Chinese primary sources—many of which have never been translated into English—this article will show that even in Chinese antiquity the legal system was not solely marked by codification or the lack of the rule of law, but was far more complex and diverse than most scholars have portrayed. For example, elements of case law played an important role in Chinese legal history. Indeed, it is an especially good time to build our understanding of the use of cases and the role of *panwen*, in China's legal past given the Supreme People's Court's recent emphasis on the role of case law in contemporary Chinese jurisprudence.

I. INTRODUCTION

The Chinese legal tradition is among the oldest and most enduring in the world; yet, it has also been blamed for many of China's current rule of law woes. Indeed, the very story of Chinese legal history maintains that China lacked a rule of law system in its premodern past. Confucianism, the predominant state ideology and philosophical and ethical system that pervaded all sectors of life, is often generalized as a school of thought completely antithetical to law. This stereotypical narrative of Confucianism and the premodern Chinese legal system in much of Chinese and English scholarship¹ has been summarized as follows:

[†] Morrison & Foerster LLP (Hong Kong Office); Research Fellow, Netherlands China Law Ctr.; J.D., New York Univ.; A.M., A.B., Harvard Univ. The author would like to thank Professor William Nelson and the NYU Legal History Colloquium, as well as Professor Mahdev Mohan, the Asian Peace-Building and Rule of Law Program at Singapore Management Univ. School of Law, and Prof. Andrew Harding for their helpful comments. Author's email contact: nho@post.harvard.edu.

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¹ For representative works that advance this narrative, see, e.g., STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 15-16 (2000); Lucie Cheng et al., *Finding a Role for Law in Asian Development*, in EAST ASIAN LAW – UNIVERSAL NORMS AND LOCAL CULTURES 1, 5 (Arthur Rosett et al. eds., 2003) (noting that the “popular assumption is that law has had a limited role in Asian cultures

In the standard view widely held by Chinese and others, China lacked the rule of law throughout its long history for many reasons. First, the dominant intellectual tradition of China was “Confucianism” . . . that valued the rule by men During the Han, Chinese emperors ruled by will or whim over a hierarchical society. That “imperial society” subsequently grew in size and sophistication over two millennia without significant change . . . [o]nly with the decline of China's last dynasty, the Qing (1644-1911 [A.D.]), and the arrival of Western ideas and institutions did the Chinese state really change. Finally, in the first half of the twentieth century, the Chinese transformed their inherited, traditional, feudal empire into a modern, capitalist nation state . . .²

In other words, many have described China's legal past as a sort of historical baggage that hinders China's current unprecedented and monumental effort to build a new, modern rule of law system.

These views are not limited to the academic sphere, however; the current Chinese Communist Party (“CCP”) and China's leading human rights activists also adhere to such stances. For example, taking two completely opposing yet pivotally important documents—on one side the recent CCP-released National Human Rights Action Plan of China 2009-2010 (“NHRAP”) which promised to improve human rights in China through greater rule of law, and on the other side Charter 08, written by dissidents and intellectuals calling for government reform³—we see that

and economics”); JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA 39 (2005); GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 11 (1996); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 32-33 (2002); XUE MEIQING (薛梅卿), XIN BIAN ZHONGGUO FAZHI SHI JIAOCHENG (新編中國法制史教程) [CHINESE LEGAL HISTORY: A TEXTBOOK] 43 (1995); T'UNG-TSU CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA 280-281 (1961) (arguing that after law “was crystallized by the Confucianists, there were no fundamental changes in it throughout the history of China, as far as family law and class differences are concerned. In other words, the law retained its general characteristics for centuries, until the promulgation of modern law.”). Scholarship on contemporary Chinese legal reform also dangerously continues to use such generalizations when attempting to draw a sharp divide between traditional and modern China. See, e.g., Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 121 (2005) (generalizing that “for thousands of years, the Chinese lived not under the rule of law but under the rule of man”).

² Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law: Toward a Theory of the Rule of Law in China from Early Times to 1949 C.E.*, 44 STAN. J. INT'L L. 101, 103-104 (2006).

³ Charter 08 was a landmark document prepared and signed by a group of 303 Chinese citizens in December 2008 which proposed transformative policies to China's political, administrative, and legal structure. The Chinese authorities arrested several of Charter 08's authors and signatories after it was released. The most notable author of Charter 08 currently in custody is Nobel Peace Prize recipient, Liu Xiaobo (劉曉波). *Over 300 Sign “Charter 08,” a Manifesto for Human Rights in China, but Some are*

despite the two documents' differing conceptions of human rights and the role of law in promoting such rights, they actually share one similarity: a distrust of China's legal past. The NHRAP, for example, dates the "long-pursued goal" of the "realization of human rights" back only to the "founding of the People's Republic of China in 1949,"⁴ in effect portraying everything pre-1949 as a society that lacked basic individual rights. Charter 08 also criticizes China's past, arguing that since the late nineteenth century, the Chinese people have suffered under the hands of a "traditional Chinese despotic system," and later suffered under the CCP.⁵ Despite being the equivalent of sworn enemies, both documents ignore the true complexity of the Chinese legal tradition, construing history as merely a burden to the realization of China's march toward rule of law.⁶

In addition to the substantive problems in the existing, prevalent narrative of Chinese legal history, there is also a temporal imbalance in Chinese legal historical research. While more work has been done on the Qing dynasty (1644-1911 A.D.) (the attractiveness of the Qing to scholars is probably enhanced due to the influx of Western ideas which occurred in the nineteenth century), scholars have paid less attention to law in more ancient dynasties.⁷ A dearth of scholarship is even more pronounced in the Western world. To date, there still exists no comprehensive book in English surveying Chinese legal history from antiquity to the present.⁸

Already Arrested, ASIANEWS, Dec. 10, 2009, available at <http://www.asianews.it/index.php?l=en&art=13971&size=A>.

⁴ INFO. OFF. ST. COUNCIL OF THE P.R.C., NATIONAL HUMAN RIGHTS ACTION PLAN OF CHINA (2009-2010 [hereinafter NHRAP]), available at http://www.china.org.cn/archive/2009-04/13/content_17595407.htm. The full-text of the document is available on this website, separated by links to the various sections of the document. For the ease of the reader, rather than cite each section separately, I have indicated the relevant section of the document from which I quote in the footnotes. That section can then be easily accessed through the main website given above.

⁵ Charter 08, HUMAN RIGHTS IN CHINA (Human Rights in China trans., 2008), available at http://www.hrichina.org/public/contents/press?revision_id=89851&item_id=85717.

⁶ For a more in-depth discussion of the NHRAP and Charter 08 and ways in which reconciliation between the documents can be reached through the use of the Chinese legal past as a reference and resource for mutual reform, see Norman P. Ho, *The Reconciliatory Power of History and Language on Debates on China's Rule of Law*, 10 CHINA L. DIG., Oct. 2009, available at <http://www.chinalawdigest.com/Index.asp?Sid=61>.

⁷ William P. Alford, *Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say About its Law*, 23 MOD. CHINA 398, 411 (No. 4, 1997).

⁸ For a discussion of this temporal imbalance in the research of America-based scholars of Chinese law, see Norman P. Ho (published under author's Chinese name: 侯孟沅), *Ying Jiang Gudai Chuantong Falü Shiwei Zhengui Ziyuan—Meiguo de Zhongguo Falü Yanjiu* (應將古代傳統法律視為珍貴資源—美國的中國法律研究) [*The Chinese Legal Tradition as a Resource for Modern Chinese Legal Reform and the State of Scholarship on Chinese Law in the United States*], ZHONGGUO SHEHUI KEXUEBAO (中國社會科學報) [CHINA SOC. SCIENCES TODAY], Mar. 1., 2011, available at <http://sspress.cass.cn/news/18152.htm>.

This article attempts, as its broadest goal, to complicate the predominant portrayal of the Chinese legal tradition and Chinese Confucian legal philosophy by exploring the development of pre-Tang dynasty *panwen* (判文) (written legal judgments).⁹ These include both oral judgments that were later recorded in writing and judgments that were immediately written down. *Panwen* would also eventually become an established literary form in its own right.¹⁰ As an examination of pre-Tang *panwen* will show, even in Chinese antiquity, before the *panwen* genre reached its height in the Tang dynasty, the legal system in premodern China was far more complex and diverse than most scholars have portrayed. In fact, Chinese jurisprudence throughout history drew on varied sources of law, ranging from codes, extra-legal institutions, custom, and what legal scholars might even identify today as “common law” elements, like precedent and case law. Further, *panwen* can show us just how much ancient Chinese government officials actually valued legal reasoning, using the law to solve social problems, and the careful application of law to facts. Put simply, by offering a glimpse into how premodern Chinese officials addressed legal issues and problems, *panwen* can serve as a useful corrective to the predominant narrative of the Chinese legal tradition and Confucianism’s influence on Chinese law.

Yet despite *panwen*’s immense potential as a historical means of understanding premodern Chinese law, Western scholarly literature on *panwen* is virtually non-existent.¹¹ Additionally, some of the most comprehensive English-language histories of Chinese literature do not even mention *panwen*, or refer to it only in passing despite its established status as a premodern Chinese literary form.¹² This scholarly deficit carries over from secondary sources into primary source collections as well—prominent English-language translation anthologies of Chinese literature and sources

⁹ The Tang Dynasty lasted from 618-907 C.E.

¹⁰ The words *panwen* and “judgment” will be used interchangeably throughout this article.

¹¹ For example, there is only one other scholarly investigation of Chinese premodern *panwen* in English that this author is aware of. See Norman P. Ho, *Law, Literature, and Gender in Tang China: An Exploration of Bai Juyi’s Selected Panwen on Women*, 1 TSINGHUA CHINA L. REV. 62 (2009). There are some recent scholarly works that deal with the broad subject of law and writing in China, but they tend to deal with the late imperial period and do not discuss premodern *panwen*. See, e.g., *WRITING AND LAW IN LATE IMPERIAL CHINA: CRIME, CONFLICT, AND JUDGMENT* (Robert E. Hegel & Katherine Carlitz eds., 2007).

¹² See, e.g., *THE COLUMBIA HISTORY OF CHINESE LITERATURE* (Victor H. Mair ed., 1994) and *WILT IDEMA & LLOYD HAFT, GUIDE TO CHINESE LITERATURE* (1997) (neither of these sources mentions *panwen*). The most recent comprehensive history of Chinese literature written in English mentions *panwen* in a few sentences. See 1 *THE CAMBRIDGE HISTORY OF CHINESE LITERATURE* 301 (Kang-i Sun Chang & Stephen Owen eds., 2010) (acknowledging that *panwen* was the “most difficult literary form in the [Chinese] language in which decisions on legal and ritual matters are tersely presented in elliptical parallel lines”).

also do not include renderings of *panwen*.¹³ Chinese and Japanese scholarship on *panwen* is more plentiful but consists of mostly small scale or purely literary studies.¹⁴ Thus, in addition to the broad aims mentioned earlier, this article also strives to be the first analysis of Chinese pre-Tang *panwen* in the English language.

This article has the following principal aims: 1) to recount the legal history of *panwen*'s development from antiquity to the Tang dynasty, 2) to provide complete (wherever possible) translation and analysis of important selected *panwen* in order to introduce readers to primary sources and facilitate future research, and 3) to argue that *panwen* demonstrates

¹³ For example, see COLUMBIA ANTHOLOGY OF TRADITIONAL CHINESE LITERATURE (Victor H. Mair ed., 1994) and STEPHEN OWEN, ANTHOLOGY OF CHINESE LITERATURE: BEGINNINGS TO 1911 (1996), neither of which give any translations of *panwen*.

¹⁴ See, e.g., WU CHENGXUE (吳承學), ZHONGGUO GUDAI WENTI XINGTAI YANJIU (中國古代文體形態研究) [A STUDY ON LITERARY FORMS IN THE CHINESE LITERARY TRADITION] 112-36 (1997) (specifically looking at Tang dynasty *panwen* and *panwen* collections from a literary perspective); WANG SHIRONG (汪世榮), ZHONGGUO GUDAI PANCI YANJIU (中國古代判詞研究) [A STUDY ON WRITTEN JUDGMENTS IN PRE-MODERN CHINA] (2000) (one of the few book-length studies on *panwen*, but examining *panwen* mostly from the literary, theoretical, and conceptual level rather than a legal historical level); Fu Xinglin (付興林), *Lun Bai Juyi Bao Dao Pan de Wenxue Jiazhi* (論白居易《百道判》的文學價值) [*The Literary Value of Bai Juyi's Panwen*], 3 NANJING SHIFAN DAXUE WENXUEYUAN XUEBAO (南京師範大學文學院學報) [NANJING NORMAL U. J. OF THE SCH. OF CHINESE LANGUAGE AND CULTURE] (Dec. 2005) (specifically examining Tang poet Bai Juyi's *panwen*); Masajirō Takikawa (瀧川政次郎), *Lun Long Jin Feng Sui Pan* (論龍筋鳳髓判) [*A Discussion on Zhang Zuo's Long Jin Feng Sui Panwen Collection*], 10 SHEHUI JINGJI SHIXUE (社會經濟史學) [J. ON SOC. AND ECON. HIST. STUD.] (1940) (specifically examining Tang dynasty author Zhang Zuo's celebrated *panwen*). There is very little secondary scholarship on pre-Tang *panwen*; this is unfortunate given the importance of understanding the roots of the *panwen* form and how it may have impacted and was a reflection of pre-Tang legal development. For one of the few articles that briefly examines pre-Tang *panwen*, see Chen Qin'na (陳勤娜), *Tang Qian Panwen de Yanjiu* (唐前判文的沿革) [*Evolution of Written Verdicts before Tang Dynasty*], 6 LUOYANG SHIFAN DAXUE XUEBAO (洛陽師範大學學報) [J. OF LUOYANG NORMAL U.] (2008). For an excellent overview of existing secondary Chinese scholarship on *panwen*, see Tan Shujuan (譚淑娟), *Tang Dai Panwen Yanjiu* (唐代判文研究) [*A Study on the Panwen of the Tang Dynasty*], 2-8 (May 2009) (unpublished Ph.D. dissertation, Northwest Normal Univ. (西北師範大學)) and Tan Shujuan (譚淑娟), *Tang Dai Panwen Wenxue Yanjiu Zongshu* (唐代判文文學研究綜述) [*A Summary of the State of Literary Research on Tang Dynasty Panwen*], GUANGXI SHEHUI KEXUE BAO (廣西社會科學報) [GUANGXI J. OF SOC. SCIENCES] (No. 9, 2008). Dr. Tan's dissertation is one of the few book-length studies of *panwen*, but it is primarily a literary examination of *panwen*. Modern Chinese legal history survey books and textbooks also do not discuss *panwen* in great depth; for example, see ZHONGGUO FAZHI SHI YUANLI YU ANLI JIAOCHENG (中國法制史原理與案例教程) [A SURVEY OF CHINESE LEGAL HISTORY: ORIGINS, PRINCIPLES, AND EXAMPLE CASES] (Zhao Xiaogeng (趙曉耕) ed., 2009) and NIIDA NOBORU (仁井田陸), CHŪGOKU HŌSEISHI KENKYŪ: KEIHŌ (中國法制史研究: 刑法) [HISTORY OF THE CHINESE LEGAL SYSTEM: CRIMINAL LAW] (1959). For a helpful overview of both Niida's and Japanese scholars' contributions to the Chinese legal history field, see Denis Twitchett, *Niida Noboru and Chinese Legal History*, 14 ASIA MAJOR 218-228 (1967), available at <http://www.ihp.sinica.edu.tw/~asiamajor/pdf/1967/1967-218.pdf>. The closest book to a survey history of Chinese legal history in English (although its focus is almost exclusively on codification) is JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA* (2005), which also does not discuss *panwen* and its implications to Chinese legal historical development.

premodern China took the law and legal reasoning seriously, utilized law and legal reasoning in various sectors of society, and valued legal training and sound legal judgments which were premised in the law.

Before undertaking this historical analysis, however, it is important to note that the enterprise of studying premodern *panwen* may have some useful applications in modern Chinese legal reform. Indeed, one of the major obstacles in China's pursuit of a modern rule of law system is poorly written *panwen* (known as *panjue shu* (判決書) or "trial judgments" in modern Chinese jurisprudence). There have been many cases where judges craft their opinions in order to shroud their own corrupt behavior. Such written judgments often "ignor[e] the major issues raised by the parties and usually lack clear legal reasoning or analysis."¹⁵ The low quality of such judgments is due in large part "to the lack of customary or codified requirements to produce well-reasoned opinions based on relevant facts and legal principles."¹⁶ Pre-Tang *panwen*—with their emphasis on standardized style, reference to legal authority, legal reasoning, Chinese legal and cultural traditions, and the issues of the case at hand—can serve as a resource for modern Chinese legal judgment reform and therefore contribute, at least in part, to China's legal reform project.¹⁷

Another reason for *panwen*'s heightened potential contributive worth is due to the recent interest in the role of case law in Chinese contemporary jurisprudence. After the Supreme People's Court promulgated procedural rules in November 2010 to recognize certain "guiding cases" for Chinese courts to refer to and follow,¹⁸ and the subsequent publication of the first batch of guiding cases in December 2011,¹⁹ *panwen* may serve as an

¹⁵ Nanping Liu & Michelle Xiao Liu, *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, 34 N.C.J. INT'L L. & COM. REG. 179, 186 (2008).

¹⁶ *Id.*

¹⁷ Indeed, some modern-day Chinese legal scholars do not view the Chinese legal tradition as a threat to contemporary Chinese legal reform, but rather as a resource on which reform can draw. See, e.g., WU SHUCHEN ET AL. (吳樹臣等), *ZHONGGUO CHUANTONG FALÜ WENHUA* (中國傳統法律文化) [TRADITIONAL CHINESE LEGAL CULTURE] (1993).

¹⁸ See ZUIGAO RENMIN FAYUAN GUANYU ANLI ZHIDAO GONGZUO DE GUIDING (最高人民法院关于案例指导工作的规定) [Provisions of the Sup. People's Ct. Concerning Work on Guiding Cases] (promulgated by the Sup. People's Ct., Nov. 26, 2010), Fa Fa (法发), No. 51, available at <http://cgc.law.stanford.edu/supreme-peoples-court-concerning-work-on-guiding-cases/> (Stanford Law School China Guiding Cases Project, translated by Garret Anderson et al.).

¹⁹ For excellent translations of the guiding cases that have so far been released, see Stanford Law School China Guiding Cases Project's website, available at <http://cgc.law.stanford.edu/guiding-cases/>. The China Guiding Cases Project is an excellent resource in general and includes primary and secondary materials, as well as commentary by Chinese legal scholars and practitioners on the importance of the Supreme People's Court's guiding cases to contemporary Chinese jurisprudence. The Project is directed by Dr. Mei Gechlik.

interesting lens from which to understand the possibilities of case law development in modern-day China.

II. PRE-TANG DYNASTY *PANWEN*

There is one major challenge in studying pre-Tang *panwen*: not many have survived to the present day. As a result, most scholars agree that it is impossible to pinpoint with complete certainty the exact time when *panwen* emerged.²⁰ Nevertheless, we can anchor our narrative of the development of pre-Tang *panwen* in the writings of Ming dynasty literary scholar and intellectual, Xu Shizeng (徐師曾, 1517-1580 A.D.),²¹ namely, his *Wenti Mingbian Xushuo* (*A Study of Different Literary Forms: Introductory Remarks*), which counted *panwen* as among 127 primary genres of Chinese traditional literature. Xu provides a helpful, brief chronology of *panwen*'s development:

Analyzing from dictionaries the structure of the character *pan* (判), [we can see that] it means 'to break.'²² When deciding and judging cases in pre-Qin China, judges²³ relied on the *wusheng* (五聲)²⁴ method to hear cases, and extended this method to criminal matters [and judgments] as well. The Qin had . . . dedicated officials who were responsible for handling criminal legal cases. In the subsequent Han dynasty, Confucius scholars advanced to court and emphasized the utilization of the Confucian Classics²⁵ to decide legal cases. This method was

²⁰ See, e.g., Tan Shujuan (譚淑娟), *supra* note 14, at 21.

²¹ Xu Shizeng's birth and death dates are a matter of debate among scholars. The dates provided here are based on Zhong Xiaoting (仲曉婷), *Xu Shizeng Sheng Zu Nian Kao* (徐師曾生卒年考) [*An Investigation into the Birth and Death Dates of Xu Shizeng*], 23 SUZHOU JIAOYU XUEYUAN XUEBAO (蘇州教育學院學報) [J. OF SUZHOU COLL. OF EDUC.] (No.1, 2006).

²² Xu was probably relying on Xu Shen's (許慎) (circa 58-147A.D.) *Shuowen Jiezi* (說文解字) [*Explaining Simple and Analyzing Compound Characters*], one of China's first and most important and enduring comprehensive dictionaries. The *Shuowen Jiezi* provides this definition for *pan*: "pan means to split or break. Its radical is 'knife' and its phonetic component is *ban*." Xu Shen's dictionary is conveniently available on a searchable website named CHINESE ETYMOLOGY, compiled by Richard Sears, available at <http://www.internationalscientific.org/>.

²³ The author is aware of the potential problems with using the term "judges" here, as there was no independent judiciary in premodern China. Cases and trials were conducted by prefects, magistrates, or other officials that were also often responsible for other administrative tasks apart from just judging cases. However, the author has consciously chosen to use the term "judge" here to describe such officials involved in judging cases simply for ease of reading and comprehension.

²⁴ The *wusheng* method will be discussed in-depth in the section dealing with Zhou dynasty *panwen*.

²⁵ The Confucian Classics were among the most important texts in all of premodern Chinese history. They formed the basis of education and were used as guides for daily behavior and local and national governance. Under the administration of Emperor Wu (漢武帝) of the Han dynasty (156-87 B.C.),

very close to the system of the ancient sage-kings and the punishment system of the *Spring and Autumn Annals*. It is from the Han forth that *panwen* [as an established, formalized literary genre] emerged. In the Tang dynasty, testing *panwen* on the imperial examinations served as one method to select scholar-officials. As a result, *panwen* grew in importance.²⁶

As we can see, Xu traced the roots of *panwen* back to Chinese high antiquity (pre-Qin China, before 221 B.C.) and emphasized that it was only after the Han Dynasty (206 B.C.-220 A.D.) when *panwen* emerged as a defined, set literary genre that was consciously labeled by its authors as *panwen* (or *pan* for short). This article follows Xu's basic chronology and explores *panwen*'s development prior to its flourishing and institutionalization in the Tang dynasty.

Our historical story begins in the Western Zhou period (1046-771 B.C.) where we can identify the roots of *panwen* in legal judgments of the time. At that time, the salient features and components of *panwen* emerged, namely, laying out the case's facts, parties, disputed legal issue(s), relevant law, and ultimately, applying the law to the facts and pronouncing a final judgment. Many of the earliest *panwen* were oral judgments that were later written down and recorded in transmitted or excavated texts.

The next major development period of *panwen* occurred in the Han dynasty, when scholar officials began to clearly write down judgments, referring to them as *panwen*, with some even writing model judgments based on hypothetical situations for use as precedents in future cases (a form of premodern Chinese *stare decisis*, if you will).²⁷ These model judgments

Confucianism was made the official, orthodox state doctrine. Throughout Chinese history, numerous texts were added to the canon known today as the Confucian Classics, which grew to thirteen classics in the Song dynasty. Confucius himself referred to the "Six Classics" (THE CLASSIC OF POETRY (詩經), THE BOOK OF DOCUMENTS (尚書 or 書經), THE BOOK OF RITES (禮記), THE BOOK OF CHANGE (易經), THE SPRING-AUTUMN ANNALS (春秋), and THE CLASSIC OF MUSIC (樂經). THE CLASSIC OF MUSIC was lost when the first emperor of the Qin dynasty ordered the infamous burning of the books; the remaining five texts were collectively known as the *Five Classics* in the early Han dynasty. Later on in the Eastern Han dynasty (25-220 A.D.), two more texts were added (THE CLASSIC OF FILIAL PIETY (孝經) and THE ANALECTS (論語) to create the "Seven Classics." In the Tang dynasty, the number rose to twelve, until the Song dynasty, which with the addition of the MENCIOUS (孟子), brought the total to thirteen. For more discussion of the Confucian Classics, see ENDYMION WILKINSON, CHINESE HISTORY: A MANUAL 475-76 (2000).

²⁶ XU SHIZENG (徐師曾) (circa 1517-1580), WENTI, MINGBIAN XUSHUO (文體明辨序說) [A STUDY OF DIFFERENT LITERARY FORMS: INTRODUCTORY REMARKS] 127-128 (Zhonghua Book Co., 1998).

²⁷ Obviously, the term "*stare decisis*" was not used in ancient China. However, in this article, the use of modern legal concepts and terms can more clearly explain and analogize the legal reasoning utilized in pre-modern China. The argument is not that these specific legal terms actually existed semantically in

would be known as the *nipan* (擬判) in the Tang dynasty. In between the Han and Tang dynasties, *panwen* continued to develop, often growing in both length and complexity.

Throughout the entire period of pre-Tang development, *panwen* also dealt with a wide range of legal matters—civil suits, family law, crime, and even legislative policy. These matters highlighted the steadily growing pervasiveness of *panwen* and legal thinking in Chinese society, ultimately culminating in the *panwen* genre's peak of development in the Tang dynasty.

A. *The Western Zhou (1046-771 B.C.)*

As a threshold matter, there are three common-sense preconditions for *panwen* to exist in a society: 1) there must be a written language so *panwen* can be recorded, 2) there must be a developed legal system, complete with structure and processes, to handle legal disputes that may arise, and 3) society must be developed to the point where disputes and crimes actually occur and can be legally defined.²⁸

The Western Zhou (1046-771 B.C.), the first part of the Zhou dynasty, was a period that fulfilled all of these conditions. The Zhou came into being after King Wu of Zhou (周武王) defeated the last king of the Shang dynasty, the evil Zhou (紂) (not to be confused with the character for Zhou (周), as in the Zhou dynasty), in the famous Battle of Muye (牧野之戰) in 1046 B.C. Western Zhou society is often described as feudal, as lands were divided into various fiefdoms, each ruled by a duke which served the central Zhou king. While there is much we do not know about Western Zhou law due to scarcity of sources, there did exist a stable legal system. The principal sources of Western Zhou law were historical tradition (for example, attempting to emulate the actions of the ancient sage kings) and *li* (禮), often translated in English as “ritual propriety,” but perhaps more accurately rendered in the Chinese legal historical context as a code of aristocratic, chivalric, and civically responsible behavior.²⁹

There is also evidence that some codes existed in the Western Zhou, although it is not possible to say how widespread they were or how they

premodern China, but rather that similar concepts existed, highlighting the diversity and complexity of ancient Chinese law and legal thought.

²⁸ Lu Xinhui (陸新淮) & Zheng Liming (鄭黎明), *Shilun Zhongguo Gudai Sifa Wenshu de Fazhan Jieduan* (試論中國古代司法文書的發展階段) [*A Preliminary Inquiry into the Development Period of Premodern China's Legal Documents*], 5 ZHONGZHOU XUEKAN (中州學刊) [ACAD. J. OF ZHONGZHOU] 203 (2004).

²⁹ Herrlee Glessner Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 26, 28-29 (Jerome A. Cohen et al. eds., 1980).

functioned in practice.³⁰ For example, King Mu of Zhou³¹ (周穆王) ordered one of his vassals surnamed Lü to put together a book of criminal laws, known as the *Lü Xing* (呂刑) or *Lü's Criminal Code*.³² We also know there was some sort of trial procedure in the Western Zhou that emphasized the careful consideration of evidence in cases dealing with civil and criminal matters.³³ Officials judging cases most likely had to follow specific instructions for deciding those cases. The Confucian Classic *The Rites of Zhou* (周禮)³⁴ ordered judges to utilize the *wu sheng* (五聲), or *The Five Observations* method, highlighting the importance the Zhou government placed on reaching correct decisions grounded in evidence:

[W]hen deciding a case, judges should rely on the *wu sheng* method in order to reach a decision and get an understanding of the true facts of the case: first, it is important to listen carefully to the words and testimonies of the parties and to inspect their utterances to see if they make sense and accord with the evidence; second, it is important to study the faces and expressions of the parties to see if there are any [sudden and weird] changes; third, it is important to pay attention to the breathing of the parties, to see if their breaths are constant; fourth, it is important to take note if the parties are able to understand and satisfactorily respond to interrogation or other forms of question; and fifth, it is important to pay attention to their eyes, to see if there is any sudden or rapid blinking.³⁵

³⁰ *Id.* at 29.

³¹ Reign dates circa 976-922 B.C.

³² ZHONGGUO FAZHI SHI YUANLI YU ANLI JIAOCHENG (中國法制史原理與案例教程) [A SURVEY OF CHINESE LEGAL HISTORY: ORIGINS, PRINCIPLES, AND EXAMPLE CASES] 27 (Zhao Xiaogeng (趙曉耕) ed., 2009). The *Lü Xing* is no longer extant. Portions, however, have been preserved in the BOOK OF DOCUMENTS (尚書), a Confucian Classic.

³³ Herrlee Glessner Creel, *Legal Institutions and Procedures During the Chou Dynasty*, in ESSAYS ON CHINA'S LEGAL TRADITION 31-33 (Jerome A. Cohen et al. eds., 1980).

³⁴ THE RITES OF ZHOU is often dated back to about the third century B.C. It is an important primary source text that provides information on the political and administrative system of the Zhou dynasty. The text discusses various officials in Zhou government and details their responsibilities and how they should perform their duties.

³⁵ Unless otherwise indicated, all translations in this article are the author's. ZHOU LI (周禮) [THE RITES OF ZHOU], in DUANJI SHISANJING JINGWEN (斷句十三經經文) [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 55 (Taipei Kaiming Book Co. (台北開明書店) ed., 1991).

The Zhou dynasty also had a prescribed process for the high-ranking Minister of Justice (*sikou*, 司寇)³⁶ in rendering legal judgments. According to the *Classic of Rites* (禮記):³⁷

The responsibilities of the Minister of Justice are to enforce the criminal law, accurately and effectively prosecute crime, and to handle and rule on suits. When hearing and deciding [civil] suits, the Minister must seek comments and opinions from his fellow ministers, lower officials and bureaucrats, and also finally the common people. Additionally, if there exists only a motive for a crime but no actual crime, the case cannot be pursued. When pronouncing sentence, if there is a choice between being merciful and being more punitive, the Minister should always choose to be merciful. When deciding on which cases to bestow amnesty or sentence commutation, the Minister should first choose those cases with harsher sentences to which to apply amnesty. Furthermore, when the law requires that the Minister apply the Five Great Punishments,³⁸ he must do so in accordance with the Principles of Heaven and ensure the sentence matches the crime . . . Cases should be decided based on evidence that can be heard by ears or seen with eyes, and rooted in the principles of loyalty between ruler and minister, and love among relatives. The Minister should do his best with his heart. If there is a particular case that is ambiguous or doubtful and cannot be decided, then the case should be heard along with the participation and counsel of the common people. If the people cannot reach a decision either, then the defendant should be pardoned. In conclusion, the Minister must

³⁶ The Minister of Justice was one of the six ministers in the Zhou central government. He was responsible for the enforcement of law in the Zhou realm. The other five ministers in the Zhou administration were the minister of education, the minister of rites, the minister of war, the minister of works, and the minister of state (akin to a prime minister). This general organizational format was followed in many of the Zhou's vassal states. As the best known example in Chinese history, Confucius served as minister of justice in his state of Lu (魯).

³⁷ The BOOK OF RITES was, for much of Chinese history, thought to have been compiled by Confucius. Today, most scholars agree that the text was most likely compiled and edited by Han dynasty scholars. Regardless, the BOOK OF RITES is one of the Chinese Confucian Classics that describes the government system and rites of the Zhou Dynasty.

³⁸ In Chinese antiquity (the Xia, Shang, and Zhou dynasties), the Five Punishments (*wu xing*, 五刑) were the *mo* (墨, tattooing the criminal with permanent ink), *yi* (劓, cutting off the nose), *yue* (剕, cutting off the leg or other limbs), *gong* (宮, castration), and *da pi* (大辟, death sentences).

cautiously examine each case and apply sentences and punishments according to the law.³⁹

The Minister of Justice also had certain rules to follow in producing the actual *panwen*, which was subject to further appellate review and subsequent dissemination (most likely for use as a reference and precedent by local judicial officials):

After the legal judgment is rendered, the official in charge of the trial records must take the written judgment and give it to the *zheng* (正) (the judicial officials in the six *xiang* (鄉) outside the capital city). The *zheng* then reviews the case, and then sends it to the Grand Minister of Justice. The Grand Minister of Justice then publicly reviews the case and reports the judgment to the King. The King then orders the Three Dukes⁴⁰ to participate and review the case; they then report the results to the Emperor,⁴¹ and the Emperor then [has discretion] to pardon three kinds of people. If no one is to be pardoned, then the Emperor publicly announces the punishment. However, if someone is ultimately found guilty and sentenced, his crime—no matter how minor it is—cannot be pardoned. Because all judgments are final and cannot be changed, the ruler must even more use all of his heart, mind, and energy to hear [properly] all types of cases.⁴²

Now that we have established some context for Western Zhou legal history, we can proceed to an example of *panwen* from that period and see how it reflects the trial and judgment processes discussed above. Most scholars believe the earliest extant precursor of *panwen* is in an ancient Chinese Western Zhou *mingwen* (銘文), or inscription.⁴³ Discovered on

³⁹ LI JI (禮記) [THE CLASSIC OF RITES], in DUANJU SHISANJING JINGWEN (斷句十三經經文) [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 26 (Taipei Kaiming Book Co. (台北開明書店) ed., 1991).[hereinafter THE CLASSIC OF RITES].

⁴⁰ The “Three Dukes” (*San Gong*, 三公) were comprised of the Grand Preceptor, the Grand Mentor, and the Grand Guardian. They were separate from the ministers and were among the Zhou King’s closest and most trusted personal advisers.

⁴¹ The distinction between “king” and “emperor” can be confusing. Most likely, “king” refers to the heads of each vassal state, whereas “emperor” here refers to the central Zhou Emperor, who oversaw all the vassal states and their individual rulers.

⁴² THE CLASSIC OF RITES, *supra* note 39.

⁴³ For scholarship that advances this view, see WANG SHIRONG (汪世榮), ZHONGGUO GUDAI PANCI YANJIU (中國古代判詞研究) [A STUDY ON WRITTEN JUDGMENTS IN PRE-MODERN CHINA] 26 (2000); Chen Qin’na (陳勤娜), *Tang Qian Panwen de Yange* (唐前判文的沿革) [Evolution of Written Verdicts

February 2, 1975 in Dongjia Village (董家), Qishan County (岐山),⁴⁴ Shaanxi Province (陝西), the inscription containing the *panwen* was made on a *yi* (匜), a common bronze vessel container often used in the Western Zhou for pouring wine.⁴⁵ Scholars estimate this particular *yi* most likely dates back to the reign of King Xuan of the Zhou (周宣王), probably around the early ninth century B.C.⁴⁶ Six lines of the inscription can be found on the actual vessel, while seven lines can be found on the cap, for a total of 157 characters.⁴⁷ The full translated inscription follows below:

The King of Zhou was in the royal ancestral temple in Fang city. [Adviser and official] Bo Yang Fu (伯陽父) accompanied him and rendered this judgment [against Mu Niu]: “Mu Niu (牧牛)! You have been condemned and denounced for bringing a false accusation. You have dared to accuse and bring a suit against Zhen (朕) the commander of the local armed forces and overseer of the granary (and hence your superior). [Through these actions], you have violated your oath. You are hereby ordered to go to the granary to see him and give him five slaves. After all, since you originally made an oath to him, you should honor it. As for your punishment, originally [according to the law], I was supposed to order you to be whipped one-thousand times and tattooed (specifically, the punishment of using a knife to cut your cheekbone and squeezing ink in the wound, as well as putting an ink-soaked rag on top of your head). Now, if I lightly commute your sentence, you would still be subject to being whipped one-thousand times and also having your cheekbone tattooed (but without the ink rag). But today, I

Before the Tang Dynasty], 6 LUOYANG SHIFAN DAXUE XUEBAO (洛陽師範大學學報) [J. OF LUOYANG NORMAL U.] 91 (2008).

⁴⁴ Qishan County is an important historical site in China. Because it was the first capital of the Zhou Dynasty, many important relics and artifacts have been discovered there.

⁴⁵ Pang Huaiqing et al. (龐懷清等), *Shaanxi Sheng Qishan Xian Dongjia Cun Xi Zhou Tongqi Jiaoxue Fajue Jianbao* (陝西省岐山縣董家村西周銅器窖穴發掘簡報) [*A Brief Report on Unearthed Western Zhou Bronze Vessels from a Cellar-Den in Dongjia Village, Qishan County, Shaanxi Province*], 5 WENWU (文物) [CULTURAL RELICS] 26, 31-32 (1976).

⁴⁶ Cheng Wu (程武), *Yi Pian Zhongyao de Falü Shi Wenxian—Du Zhen Yi Mingwen Zaji* (一篇重要法律文獻—讀朕匜銘文札記) [*An Important Source for Legal History: Some Notes After Reading the Inscription on Zhen's Yi*], 5 WENWU (文物) [CULTURAL RELICS] 50 (1976).

⁴⁷ Tang Lan (唐蘭), *Shaanxi Sheng Qishan Xian Dongjia Cun Xinchu Xi Zhou Zhongyao Tongqi Mingci de Yiwen he Zhushi* (陝西省岐山縣董家村新出西周重要銅器銘辭的譯文和注釋) [*Modern Chinese Annotations and Translations of Inscriptions from Newly Discovered Bronze Vessels in Dongjia Village, Qishan County, Shaanxi Province*], 5 WENWU (文物) [CULTURAL RELICS] 58 (1976).

commute your sentence even more mercifully and order that you be whipped only five-hundred times; furthermore, you must pay a fine of three-hundred *lue* (𥝿) of bronze.”⁴⁸ Bo Yang Fu then ordered Mu Niu to agree to the following oath to Zhen: “From today henceforth, regardless of whether matters are large or small, I will not dare to disturb you.” Bo Yang Fu also ordered and told Mu Niu that “should your master decide to pursue a case against you,⁴⁹ you will then be subject to the original punishment of being whipped one-thousand times and tattooing on the cheekbone and the ink-rag on the forehead.” After Mu Niu made the oath and agreed to these terms, Bo Yang Fu informed the other officials who had been involved in the case about the final judgment and results. [Then, since] Mu Niu’s case was now finalized and his oath confirmed, he was fined the necessary amount of bronze. His superior, Zhen, took the bronze and then made a bronze vessel to honor his clan.⁵⁰

We first see that this *panwen* seems to adhere to many of the rules spelled out in the *Rites of Zhou* and the *Classic of Rites*.⁵¹ For example, Bo Yang Fu had a choice to levy a harsher punishment or pronounce amnesty, and he opted for the latter. In his judgment, Bo Yang Fu was also very mindful of class distinctions and hierarchies in society, pointing out on numerous occasions that Mu Niu’s crime was bad not just because of the false accusation, but because the very target of that accusation was an authority figure. As such, in addition to punishing Mu Niu for his crime (the whipping and the fine in bronze), he ordered Mu Niu to swear a new and even more absolute oath to Zhen that that he would never bother him again, in an effort to reaffirm Zhen’s higher stature. This oath seems to echo the exhortation for deciding cases while taking social relationships into consideration, as articulated in both the *Rites of Zhou* and the *Classic of Rites*.

This early *panwen* already contains some features we might associate with modern written court judgments and verdicts. There is a recitation of

⁴⁸ In ancient China, the character *lue* (𥝿) was used interchangeably with (銖). *Lue* was a unit of weight measurement in pre-Qin China. One *lue* was roughly equivalent to fifty grams.

⁴⁹ Presumably, Zhen could now bring another new civil case against Mu Niu for his slanderous accusation.

⁵⁰ The original text of the inscription can be found in Pang, *supra* note 45, at 31-32, and LIDAI PANLI PANDU (歷代判例判牘) [COMPILATION OF WRITTEN JUDGMENTS THROUGHOUT CHINESE HISTORY] 5-6 (Yang Yifan (楊一凡) et al. eds., 2005).

⁵¹ See *supra* notes 35 and 39.

facts (although there are many things we do not know, such as the exact nature of the false accusation Mu Niu made), a clear enunciation of the dispute and crime (bringing a false suit against a superior), reference to the law (although admittedly, the specific legal source is not identified, and unfortunately, no complete legal codes from the period are extant) and an assigned penalty according to law. What seems to be missing, however, is a clear explanation of the law's application to the facts. Furthermore, the judgment here was fully and publicly announced both by Mu Niu making his new oath and Bo Yang Fu's informing the other relevant officials. Still, at the very least, this early *panwen* shows and confirms that there was, indeed, some form of structure and process to litigation even in this early period in Chinese history.

B. Eastern Zhou (770-221 B.C.)

The historical period which came after the Western Zhou is the Eastern Zhou, which began in 770 B.C. after the Quanrong (犬戎) (a non-Han ethnic group in Northwest China at the time) forces, along with the Marquess of Shen (申侯), defeated King You of Zhou (周幽王) and destroyed the western Zhou capital of Haojing (鎬京). This forced the Zhou court to move their government east to a new capital, Chengzhou (成周). Hence, this period is known as the *Eastern Zhou*. This period in Chinese history was marked by a gradual decline of the influence of the Zhou central kings and the rise of power of vassal states. It is also a period frequently referred to as the "Hundred Schools of Thought," a time of intense cultural and intellectual flowering. Many of the leading schools of thought, such as Confucianism, Mohism, Legalism, and Daoism, developed during this time and attempted to influence scholarly and political activities. The Eastern Zhou itself can be divided into roughly two chronological periods: the first part is known as the Spring and Autumn period (770–476 B.C.); the second part is frequently referred to as the Warring States period (c. 475–221 B.C.), where the Zhou kings effectively lost power and became rulers only in name. During the Warring States period, power was concentrated among seven principal states: Qin (秦), Chu (楚), Qi (齊), Yan (燕), Han (韓), Wei (魏), and Zhao (趙).⁵²

As for the legal history of the era, we know more about the Eastern Zhou legal system than we do the Western Zhou. Legal codes were utilized

⁵² See generally XUEQIN LI & KWANG-CHIH CHANG, *EASTERN ZHOU AND QIN CIVILIZATIONS* (Yale Univ. Press 1985).

throughout the Spring and Autumn period in various states, and *li* (proprietary rituals), tradition, and history persevered as sources of law.⁵³ Some scholars also believe a seminal work in Chinese law was written around 400 B.C.: the *Fajing* (法經) or *The Classic of Law*, which laid the foundation for codification activities.⁵⁴ Lawsuits were also plentiful, dealing with various civil matters. Legal officials included ministers of justice in various states as well as lower-level administrators that also decided cases and sent particularly difficult cases up to the capital for review by the chief minister (a practice also found in the Western Zhou).⁵⁵ Additionally, with the growing influence and status of vassal states, there was a flourishing of interstate diplomacy. With this flourishing, certain international law norms also developed to govern conduct between states.⁵⁶

We are also blessed with more precursors of *panwen* from this period that have been preserved in two particularly important texts that have survived to this day: the *Spring and Autumn Annals* (春秋) and the *Zuozhuan* (左傳) [*Commentary of Zuo*]. The *Spring and Autumn Annals* is essentially a history of the twelve dukes of the ancient Chinese state of Lu (魯) from roughly 722 to 481 B.C. Its structure is akin to that of a historical outline or timeline, reporting facts in a chronological and succinct fashion. Authorship was traditionally attributed to Confucius. As for the *Zuozhuan*, it is regarded as the earliest work of narrative history in China and was traditionally attributed to Zuo Qiuming (左丘明), a writer who lived in the fifth century B.C. in the state of Lu. It runs chronologically parallel with the *Spring and Autumn Annals*, expounds on numerous events, and is filled with rich accounts and stories. It was originally thought that it was a commentary written by Zuo for the *Spring and Autumn Annals*, but many scholars in China now believe it is a free-standing work that was later inserted into the *Annals*. The *Zuozhuan* is now thought to date to the late fifth-century B.C. and is considered one of the most important primary sources for the period as it augments the basic information provided in the *Spring and Autumn*

⁵³ Creel, *supra* note 29, at 34.

⁵⁴ *Id.* at 37.

⁵⁵ *Id.* at 40.

⁵⁶ There is good scholarship exploring international legal norms during this period. See, e.g., W.A.P. Martin, *Traces of International Law in Ancient China*, 14 INT'L REV. (1883); Shih-Tsai Chen, *Equality of States in Ancient China*, 35 AM. J. INT'L L. 641, 641-42 (1941) (arguing that "intercourse among Chinese feudal states involved a great number of rules, under the name of *li*, strikingly similar to, if not identical with, the rules of modern international law"). For an excellent discussion from a political science perspective of international politics in ancient China along with a comparative analysis with early modern Europe, see VICTORIA TIN-BOR HUI, *WAR AND STATE FORMATION IN ANCIENT CHINA AND EARLY MODERN EUROPE* (2005).

Annals.⁵⁷ The two texts are frequently referred to together in Chinese as the *Chunqiu Zuozhuan* (春秋左傳), or simply *Zuozhuan* for short.⁵⁸

We begin with one *panwen* whose background story involves violent competition for a beautiful bride in the state of Zheng (鄭), complete with the requisite flair on the part of the male suitor-hopefuls. The *Zuozhuan* first records the factual background. Given the drama of the original text, I have chosen not to paraphrase, but to provide a full translation below:

The younger sister of Xu Wufan (徐吾犯) of Zheng was very beautiful. Gongsun Chu (公孫楚) (a Zheng official) was engaged to marry her, but then Gongsun Hei (公孫黑) (another Zheng official) dispatched someone who persistently desired to present her with a fowl for betrothal. Xu Wufan was very disturbed and told Zichan (子產).⁵⁹ Zichan replied, “This happened because the state lacks good and effective governance; it is not your fault. You should choose whichever man you desire.” Thus, Wufan requested of Gongsun Chu and Gongsun Hei that they allow his sister to choose between them exactly whom she wanted to marry; they agreed to this. Gongsun Hei came forth in exquisitely decorated and dapper clothes, laid out gifts, and then left [the room]. Gongsun Chu came in clad in his military garb, fired arrows to the left and right, jumped into his chariot and exited. Xu Wufan’s sister was watching all this from her bedroom, and said: “Gongsun Hei is indeed handsome, but Gongsun Chu is more masculine. For the husband to be masculine and the wife to be feminine: this is what is meant by having a good match marriage.” In the end, she opted to marry Gongsun Chu. [After learning her choice], Gongsun Hei was furious. He then went to see Gongsun Chu, but secretly wore armor [underneath his clothes], planning to kill him and take his wife. Gongsun Chu, however, could see through this plan, and ran after Gongsun Hei with an ax. When they reached a fork in the road, Gongsun Chu hit

⁵⁷ See, Eric Henry, “Junzi Yue” Versus “Zhongni Yue” in *Zuozhuan*, 59 HARVARD J. OF ASIATIC STUDIES 125, 125 (1999).

⁵⁸ *Id.*

⁵⁹ Zichan (子產) (died approximately 522 B.C.) was one of the most celebrated figures in the Spring-Autumn period. An accomplished prime minister of the state of Zheng, his realist reforms emphasized the rule of law (during his years of service, codes of law were cast on bronzes in Zheng and publicly made available, a move that drew much criticism) and strengthened the Zheng state.

Gongsun Hei with the ax. Gongsun Hei retreated, injured, and told the Grand Masters, “I went to see him with good intentions and did not know he harbored other intentions. Hence, I was wounded.”⁶⁰

From a modern perspective, it would seem that Gongsun Hei is at fault here; after all, he not only reneged on his previous agreement to honor Xu Wufan’s sister’s decision, but also attempted to kill Gongsun Chu. However, the resulting judgment was quite different from what one might have expected:

The Grand Masters all discussed this affair. Zichan set forth his opinion on what the judgment should be: “When both have equal reason and justification in their actions, the younger, inferior one is guilty. Thus, Gongsun Chu is guilty.” Zichan therefore apprehended and arrested Gongsun Chu and clearly listed his crimes: “There are five governing principles for the state, and you have violated all of them. The five principles that rulers adhere to in governing the state are as follows: first, one must honor the authority of the ruler; second, one must follow his governance; third, one must respect those elite and superior in hierarchy; fourth, one must serve one’s elders; and fifth, one must take care of his kin. Now, when the ruler was inside the borders of the state, you used weapons, and therefore you did not honor his authority. Second, you violated the laws and regulations of the state, and therefore did not follow his governance. Third, Gongsun Hei is a superior higher officer to your inferior rank, yet you did not submit to his authority, and therefore did not respect those elite and superior in hierarchy. Fourth, you are younger but did not act in a respectful manner, and therefore did not properly serve your elders. Fifth, you took up a weapon against an older kinsman, and therefore did not take care of your kin.⁶¹ Now, the ruler has said: ‘I cannot bear to execute you, and so I commute your sentence to exile.’

⁶⁰ CHUNQIU ZUOZHUAN (春秋左傳) [THE ZUOZHUAN], in DUANJU SHISANJING JINGWEN (斷句十三經經文) [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 170-71 (Taipei Kaiming Book Co. (台北開明書店) ed., 1991).

⁶¹ Gongsun Chu and Gongsun Hei were from the same clan (the Gongsun clan) and thus were kinsmen.

Thus, quickly get out; do not make your offense even more serious [by delaying].”⁶²

Despite most modern readers’ likely normative disagreement with the end result, it is undeniable that this *panwen* is far more developed than the Western Zhou example discussed earlier, but they also share some features. Here, the facts and background are far more complete. This is perhaps due to the thoroughness of the *Zuozhuan* text itself. Further, like in the Mu Niu case, the crimes are clearly enumerated. In this example, however, Zichan’s *panwen* lays out more clearly the legal standard being applied—the so-called “five governing principles.” Unfortunately, there is no way to determine which specific code these principles were derived from. They seem to be a form of natural law, however, as they express traditional Confucian ethics, such as honoring one’s elders and rulers. We must remember that Confucian *li* (proprietary rituals) and tradition carried the force of law during the Zhou dynasty. In addition, Zichan made a clearer effort to apply the law to the facts—indeed, he systematically considered each of the five principles, clearly articulating which of Gongsun Chu’s actions violated each principle. This is far more detailed than the Mu Niu case, where Bo Yang Fu’s application of law to facts was not very clear. Additionally, Zichan’s *panwen*, from a linguistic perspective, has more formal structure. For example, the language of the section where he correlates Gongsun Chu’s actions to each of the violated five principles is quite parallel.⁶³ Finally, the sentence pronounced is clear and the entire *panwen* is announced publicly, which adds to its authority and lasting quality.

Another *panwen* from the period—as recorded in the *Zuozhuan*—chronicles the judgment rendered by Shuxiang (叔向),⁶⁴ a noted official of the state of Jin (晉), a leading diplomat and politician of the period, and also a contemporary of Zheng adviser Zichan. Despite the fact that his own son, Yang Shefu (羊舌鮒), also known as Shuyu (叔魚) (580-531 B.C.), had been murdered (Yang Shefu was a Jin official who incidentally now has the unenviable reputation in all of Chinese history as one of the Middle Kingdom’s first bureaucrats to be punished for corruption;⁶⁵ among his responsibilities, he had acted on behalf of the Jin official responsible for

⁶² CHUNQIU ZUOZHUAN, *supra* note 60, at 170-71.

⁶³ In other words, it is written out in many four character structures in the original Chinese. I have tried to preserve some of this parallelism in my translation above.

⁶⁴ Shuxiang died around 528 B.C.

⁶⁵ See SHAN XING (善行), ZHONGGUO LIDAI TANGUAN ZHUAN (中國歷代貪官傳) [BIOGRAPHIES OF CORRUPT OFFICIALS IN CHINESE HISTORY] (2004), where Yang Shefu is listed as the first corrupt official in the list of biographies.

handling cases), Shuxiang was able to remain objective in his legal judgment:

There was a dispute between the Prince of Xing and the Chief of Yong over lands in Chu. A lot of time passed, and the dispute was still not settled. When Jin official Shijing Bo (士景伯) went on a trip to the state of Chu, Shuyu (otherwise known as Yang Shefu)⁶⁶ took over his place and his responsibilities [until his return]. Han Xuanzi (韓宣子) (the chief administrator of Jin) then commanded Shuyu to decide old and pending cases, and Shuyu found that the Chief of Yong's actions were illegal. But then, the Chief of Yong gave his daughter to Shuyu, and Shuyu [changed his judgment] and instead found the Prince of Xing to be guilty. The Prince of Xing was enraged and killed Shuyu and the Chief of Yong at court. Han Xuanzi then asked Shuyu's father, Shuxiang, how the Prince of Xing should be prosecuted. Shuxiang replied, "[T]hese three men were all guilty of the same crime; it is correct to execute the one out of the three that is still living and then display his and the other two dead ones' corpses to the public. The Chief of Yong was aware that he was committing a crime, but still proceeded to bribe Shuyu to [get what he wanted] while creating the illusion of propriety. With regards to Shuyu, he sold his judgment, and the Prince of Xing committed murder. All of their offenses were the same.⁶⁷ To put on the guise of a good appearance when one is really evil inside is deceptive and disorderly behavior (*hun*, 昏); to neglect one's duties of office in pursuit of greed is corruption (*mo*, 墨); to kill others without any pangs of guilt is evil (*zei*, 賊). The *Xia Documents*⁶⁸ provide that:

⁶⁶ One of the challenges of reading the *Zuozhuan* is that one person can have multiple names derived from numerous sources, such as their lineage, clans, birthplace, official titles, and the like.

⁶⁷ Here, Shuxiang obviously does not mean the actual crimes are the same—but all three in his view are the same in terms of severity, and all three are inextricably linked (one crime led to another). All three also receive the same penalty of execution under the *Xia Documents* and Gao Yao's code.

⁶⁸ The *Xia Documents* comprises part of the *BOOK OF DOCUMENTS* (known in Chinese as both the *Shujing* (書經), translated also as the *Classic of History*, as well as the *Shang Shu* (尚書)) was elevated as one of the Five Confucian Classics in the Han dynasty and records the various actions and speeches of China's ancient sage kings, such as Yao and Shun. Throughout Chinese history, it has been venerated as a foundational text in Chinese political philosophy and used as a model handbook for governance. For a scholarly introduction to the *Book of Documents* and its scholarly history, see Edward L. Shaughnessy, *Shang Shu (Shu Ching)*, in *EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE* 376-89 (Michael Loewe ed., 1993). For a convenient edition of the original Chinese text (which includes helpful annotations and

“Those who commit Deceptive and Disorderly Behavior (*hun*), Corruption (*mo*), and Evil (*zei*) must be executed.”⁶⁹ This was Gao Yao’s⁷⁰ code; I humbly request that it be followed. The authorities thus executed the Prince of Xing, exposing his corpse to the public in the local market, along with the corpses of the Chief of Yong and Shuyu.⁷¹

What is most striking in this *panwen* is the contrast between Shuxiang’s objectivity and commitment to the dispassionate, consistent application of law (even sentencing his own son to death) and Shuyu’s disregard of the law and jurisprudence. Here, Shuxiang bases his decision on a passage clearly from the *Book of Documents* and the legal tradition of preceding dynasties, quoting word-for-word the specific legal provision from Gao Yao’s code with a specificity not seen in the two previous *panwen* we have examined. Like the previous judgment on Gongsun Chu, parallel language is used in the application of facts to the law. Here, Shuxiang equates and matches each specific act by the defendants with the specific three crimes (*hun*, *mo*, and *zei*). Thus, we can view Shuxiang’s *panwen* as more developed in terms of legal reasoning in form compared to other *panwen* in the period.

Indeed, Shuxiang’s commitment to the consistent application of law was lauded by Confucius himself, who believed such dedication to rule of law would strengthen the Jin state:

[Confucius said:] . . . As for the judgment of the Prince of Xing, Shuxiang spoke of Shuyu’s greed [and eventually pronounced the sentence] in order to rectify the criminal codes of Jin and also to ensure that the state of Jin did not act with

commentary in modern Chinese), see SHANGSHU JIAOZHU (尚書校注) [THE BOOK OF DOCUMENTS: WITH ANNOTATIONS] (Chen Shuguo (陳戍國) annot., Yuelu Shushe (岳麓書社) (2004)).

⁶⁹ This passage is not in the extant BOOK OF DOCUMENTS that has been transmitted to the present-day. I believe, however, we can take Shuxiang at his word that there was such a passage.

⁷⁰ Gao Yao (皋陶) who lived in the 21st century B.C., was an important legal and political adviser to the Xia dynasty sage kings, Shun (舜) and Yu the Great (大禹), Shun’s successor. During Shun’s administration, Gao Yao served as minister of justice and was thus the leading legal official in the realm. According to the BOOK OF DOCUMENTS, Shun had said to Gao Yao: “Gao-Yao, the barbarous tribes trouble our great land. There are (also) robbers, murderers, insurgents, and traitors. It is yours, as the Minister of [Justice], to use the Five Punishments to deal with their offenses . . . [p]erform your duties with intelligence, and you will secure a sincere (submission).” The author used James Legge’s translation for this line (with a slight modification). *Shangshu* (The Book of Documents), in SACRED BOOKS OF THE EAST, (James Legge trans., vol. 3, 1861), available at <http://ctext.org/shang-shu/canon-of-shun> [hereinafter SACRED BOOKS OF THE EAST]. This website is the home of the Chinese Text Project, a valuable online depository of numerous Chinese classical texts and historical sources; the website is administered by Donald Sturgeon of the Univ. of Hong Kong).

⁷¹ CHUNQIU ZUOZHUAN, *supra* note 60, at 201-02.

subjectivity . . . through executing his own kinsman, Shuxiang increased his own authority and glory. He indeed acted righteously in fulfillment of his official duties.⁷²

One of this article's fundamental arguments is that *panwen* can ultimately show us a premodern China that utilized law and legal reasoning in various sectors of society to deal with a variety of legal and administrative matters, highlighting the pervasiveness of law in governance.

Thus far, we have seen *panwen* dealing with questions of criminal law. However, in the Eastern Zhou, our next example shows that *panwen* were also used to render judgments involving military law during times of war, with military oaths and orders serving as sources of law.

Some historical context must be provided before delving into the actual *panwen*. During the reign of Duke Hui of Jin (晉惠公) (reign dates 650-637 B.C.), war broke out between the state of Qin⁷³ and the state of Jin in Hanyuan (韓原) (located in modern day Shanxi (山西) province). Duke Hui of Jin and his adviser, Qing Zheng (慶鄭) all participated in the battle. Qing Zheng was not satisfied with the Duke's foreign policies, however, and in the midst of battle, he advanced and retreated his troops without the Duke's authorization. As a result, he fell behind in battle with his troops, breaking the law, and eventually even caused Duke Hui's troops to be surrounded by the Qin army. Qing Zheng at that point did not go to relieve Duke Hui, but instead even taunted the Duke's perilous situation. Duke Hui was eventually taken prisoner by Qin, and in the end, Jin was defeated. After being a prisoner of Qin for three months, Duke Hui was eventually released after peace was declared and certain territory was divided pursuant to the peace plan. After he returned to his home state of Jin, the Duke's first action was to order Sima Shuo, a military legal officer, to arrest and execute Qing Zheng.⁷⁴

Sima Shuo then gathered all the soldiers of the battle and proceeded to publicly announce his judgment, before carrying out the appropriate sentence:

⁷² *Id.*

⁷³ Qin would eventually subdue all the other states, unify China, and establish the Qin dynasty in 221 B.C.

⁷⁴ This background story is recorded in chapters 30 and 31 of DONG ZHOU LIEGUO ZHI (東周列國志) [STORIES FROM THE EASTERN ZHOU STATES], available at <http://open-lit.com/bookindex.php?gbid=20>. It is a Qing dynasty novel which records various happenings, characters, and stories from the Eastern Zhou. The novel was compiled by Qing dynasty scholar Cai Yuanfang (蔡元放). See also WANG SHIRONG (汪世榮), ZHONGGUO GUDAI PANCI YANJIU (中國古代判詞研究) [A STUDY ON WRITTEN JUDGMENTS IN PREMODERN CHINA] 29 (2000) (providing a discussion of these background facts).

The oath [taken in war by troops] and military orders provide the following [rules]: If you break formation and disobey military orders, you are to be executed; if the lead general is taken prisoner but your subordinates' faces bear no injury, you are to be executed; if you lie and cause soldiers under your command to make mistakes in battle, you are to be executed. Qing Zheng, your first offense was the following: you broke formation and disobeyed military orders. Your second offense: you issued your own false, deceitful, and contradictory commands without prior authorization. Your third offense: you caused Liang Youmi [a Jin general] to lose a good opportunity in battle, resulting in the Qin ruler's being able to extricate himself from danger. Your fourth offense: our ruler, Duke Hui, was snatched away, but your face shows no wounds. Qing Zheng, you therefore must be punished!⁷⁵

This trial judgment—akin to a military tribunal of sorts—shares much in common with the other Eastern Zhou *panwen* we have examined. Here, however, the *panwen* starts immediately with the legal rule and proceeds to apply, in a clear, reasoned order, the law to Qing Zheng's various actions. We also see the theme of “publicity” again—this *panwen* was announced publicly in front of the soldiers of the battle. This was probably done for pedagogical and preventative purposes, so the soldiers would not be tempted to commit the same crimes. Again, this *panwen* illustrates that there was at least a culture of making judgments rationally and grounded in law.

At this point, it should be noted that not all *panwen* in the Zhou dynasty were necessarily fair, nor did they all have the same commitment to sound legal reasoning as some of the *panwen* previously detailed in this section. To be sure, there must have been judgments that seemed quite arbitrary and subjective. However, even these seemingly random *panwen* illustrate some grounding in legal reasoning, reference to a legal authority, and application of law to facts. Take, for example, this famous judgment rendered by Confucius himself against one of his associates, Shaozheng Mao (少正卯),⁷⁶ which has been criticized by many—especially during the

⁷⁵ GUO YU (國語) [DISCOURSES OF THE VARIOUS STATES] 332 (Shanghai Normal Univ. Ancient Texts Div. ed., Shanghai Guji Publishing Co. (上海古籍) 1978). The *Discourses of the Various States* is an important text that contains numerous historical records of the various states from the Western Zhou into about the 5th century B.C. The text probably was first compiled in the late 5th-4th century B.C.

⁷⁶ Shaozheng Mao was a Lu scholar-official and contemporary of Confucius. A fellow teacher and lecturer, it is said that Shaozheng Mao in fact lured many of Confucius's students away, causing Confucius's classes to be empty.

Cultural Revolution.⁷⁷ The necessary background before the actual portion where Confucius explains his judgment has also been translated:

Seven days after Confucius began serving as acting prime minister for the state of Lu (in around 496 B.C.), he executed Shaozheng Mao. His disciples and students went to find him and asked him, “Shaozheng Mao was a famous person in Lu. You had him executed [shortly] after you took up service as acting minister—was this a mistake?” Confucius replied: “Sit down now! I will tell you my reason. There are five great evil types of behavior which do not include stealing and plundering. The first is those who are educated and intelligent, but who [use their intellects] to commit evil; the second is those who do evil but yet are also stubborn; the third is those who speak lies but who are persuasive, tempting speakers; the fourth is those who have plenty but only remember the bad side about everything and hold grudges; the fifth are those who make mistakes and follow errors but yet embellish them. If a person has just only one of these evil behaviors in him, he will not be able to escape execution. Now, Shaozheng Mao has all five! If he remains alive, he will be able to amass a large group of followers, his words will be sufficiently threatening to cover up evil and tempt and mislead the populace, his strength will be enough to stand up on its own against righteousness—he is indeed the shining example of the petty person; it is not possible to not execute him.” [Confucius then proceeds to list seven examples where famous, righteous rulers in Chinese history had to execute individuals that, in his view, had similar evils as Shaozheng Mao.] “*The Classic of Poetry* says: ‘My anxious

⁷⁷ The following story was used by the CCP, for example, to denounce Confucius as a jealous, evil person. Obviously, the Party no longer harbors these feelings toward Confucius. On the contrary, Confucius has been resurrected by Beijing and now serves as an unofficial cultural ambassador of China to the world. For a discussion on the resurgence of Confucianism and *guoxue* (national learning, or interest in traditional Chinese culture and civilization) in China, see Norman Ho, *Unlikely Bedfellows? Confucius, the CCP, and the Resurgence of Guoxue*, HARVARD INT’L REV. 28-31 (Summer 2009). It should also be noted here that the veracity of the Shaozheng Mao story, especially the question as to whether or not a person named Shaozheng Mao ever existed, is a topic of scholarly debate. See, e.g., ANALECTS 190 (D.C. Lau trans., Penguin Classics 1979) (Lau speculating that the character Shaozheng Mao may be “totally fictitious.”).

heart is full of trouble.⁷⁸ When a petty person [like Shaozheng Mao] forms a group, this is worrying.”⁷⁹

Compared to some of the *panwen* previously examined, Confucius’s judgment seems somewhat arbitrary and less staunchly anchored in law. The main sources of law in the judgment are what he calls the “five great evil types of behavior” and seven historical examples. But we do not know where he derived the “five great evil types” from or whether this was his own distillation or formulation. This can create obvious problems as judges can simply create their own legal standards or norms without any disclosed basis in law. Indeed, the arbitrary nature of Confucius’s judgment is even more pronounced and apparent in a second century A.D. version of the same story:

Shaozheng Mao lived in Lu and was a contemporary of Confucius. The disciples of Confucius came in droves and left in droves. Only Yan Hui (顏回)⁸⁰ refused to go near [Shaozheng Mao’s gate] because he alone knew that Confucius was a sage. But all his other disciples had abandoned him for Shaozheng Mao, whose instructions they now sought. A person could not know that Confucius was a sage and Shaozheng Mao was a specious man if he had not followed Confucius and apprenticed with him for a long time. For this reason, even Confucius’ own disciples were muddled. [Sometime later], Zigong (子貢)⁸¹ said to Confucius, “Shaozheng Mao was a famous man in Lu. So why did you have him executed as soon as you were put in charge of government?” Confucius snapped

⁷⁸ For this line from the Classic of Poetry the author used James Legge’s translation. See THE CHINESE CLASSICS (James Legge trans., 1898), available at <http://ctext.org/book-of-poetry/odes-of-bei>.

⁷⁹ XUNZI (荀子) 640 (Li Disheng (李滌生) ed., Taiwan Xuesheng Book Co. (臺灣學生書店 1979). The Xunzi is a collection of the writings of Chinese Warring States period philosopher, Xunzi (circa 312-230 B.C.). Xunzi is most famous for his belief that man was innately evil and needed to be controlled and reformed through pedagogical molding, as opposed to the Mencian belief that people were innately good. A similar story is also recorded in the Kongzi Jiayan (孔子家語), a collection of statements by Confucius compiled by Wang Su (王肅) (195-256 B.C.), a scholar in the Wei (魏) period (220-265 B.C.). See KONGZI JIAYAN (孔子家語) [THE SAYINGS OF THE CONFUCIAN SCHOOL] 2-3 (Wang Su (王肅) comp., Shijie Book Co. (世界書局) 1991).

⁸⁰ Yan Hui (521-490 B.C.) was one of Confucius’s most prominent and devoted disciples.

⁸¹ This was another disciple (also known as Duanmu Ci (端木賜) of Confucius. He was one of the most upfront talkers among Confucius’s students.

him short. “Go away!” he said. “This is not something you are able to understand.”⁸²

Reading this passage along with the version on the previous page, for all we know, the previously translated version suggests that Confucius may have been motivated to punish Shaozheng Mao out of jealousy that his students were being lured away. However, even though Confucius’s *panwen* and the explanation and rationale he offered for executing Shaozheng Mao were unclear (at least, much less clear on legal issues than the previous *panwen* we have examined), there is still an attempt to explain the facts, apply some sort of legal standard—albeit one derived from moral notions of good and evil and from history—and reach a judgment.

We now reach the end of our exploration of pre-Qin *panwen*. As we can see, the roots of *panwen* arguably came into being in the Western Zhou with the *yi* inscription, which laid out the basic components of a judgment: facts, applicable law, an application of law to facts, and a judgment. *Panwen* steadily became more sophisticated in the Eastern Zhou, with even clearer references to sources of law and more precise application of law to facts. Linguistically speaking, we arguably see the beginning of a set form of *panwen* in terms of the use of parallel language in the *Zuozhuan* judgments. We also see that *panwen* were used to deal with a variety of legal disputes, spanning criminal, civil, and military matters.

However, we still see that the *panwen* of the pre-Qin era were largely oral judgments that were later meticulously recorded in text. During the Han dynasty, the next major stage of development of *panwen*, we will see authors of *panwen* writing down model legal judgments and consciously referring to them as *panwen*.

C. *The Qin (221-206 B.C.) and Han (206B.C.-220 A.D.) Dynasties*

In 221 B.C., the state of Qin successfully subjugated all the states from the Warring States period and unified China under its rule, ushering in the Qin dynasty. Although one of China’s shortest imperial dynasties at just under twenty years duration, the Qin influence on all of Chinese history cannot be overstated. The first Emperor of Qin standardized the writing system and weights and measures, and created a political and administrative structure that would persevere throughout later dynasties. Most germane to our exploration of *panwen*, the Qin was the first truly Legalist dynasty in Chinese history. The Legalists believed very strongly in the use of law to

⁸² ANN-PING CHIN, THE AUTHENTIC CONFUCIUS: A LIFE OF THOUGHT AND POLITICS 159 (2007).

govern and rectify society. In their view, all people were to be treated the same under the law, and harsh penalties would be meted out to protect against any sort of social unrest.⁸³ The Qin benefitted from strong Legalist advisers both before and after it accomplished unification, notably Shang Yang (商鞅) (390-338 B.C.), who is credited with creating a legal code for the Qin state, and Li Si (里斯) (circa 280-208 B.C.), a student of Xunzi who was an adviser to the first Emperor of the Qin.⁸⁴

Unfortunately, we still know very little about the Qin legal codes due to lack of sources. However, in the mid-1970s, bamboo slips were unearthed near the city of Wuhan (武漢) in central China that offer some clues.⁸⁵ Out of 1,155 discovered strips, 612 full and 13 partial strips contain legal and administrative material which have been dated to around 217 B.C.⁸⁶ Unfortunately, because of source shortages, there are no extant Qin *panwen*.⁸⁷ However at the very least, we can say that there was a defined judicial process in the Qin, especially for criminal cases. For example, we know that a criminal case proceeded in the following steps: detective work, detailed reports on the evidence, interrogation, and some sort of judgment. After the trial, the defendant could ask for another review of his case. Precedents were also most likely collected by the Qin state and promulgated with the codes.⁸⁸

The next important stage of *panwen* development occurred in the Han dynasty, often divided into three periods: the Western Han (206 B.C.-8 A.D.), the brief Xin period (9-23 A.D.), and the Eastern Han (23-220 A.D.). The Qin dynasty collapsed violently, toppled by peasant rebellions against brutal Qin policies. The rebel leader Liu Bang (劉邦), who died in 195 B.C.,

⁸³ ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 12 (2011).

⁸⁴ HEAD & WANG, *supra* note 1, at 64.

⁸⁵ *Id.* at 73.

⁸⁶ A.F.P. HULSEWE, REMNANTS OF CH'IN LAW: AN ANNOTATED TRANSLATION OF THE CH'IN LEGAL AND ADMINISTRATIVE RULES OF THE 3RD CENTURY B.C. DISCOVERED IN YUN-MENG PREFECTURE, HU-PEI PROVINCE, IN 1975, 2 (1985). Hulsewe provides, in this book, a detailed translation of the bamboo slip texts.

⁸⁷ Tan, *supra* note 14, at 22. The closest extant Qin legal source we have to a legal judgment is a group of strips called the *Qin Lü Da Wen* (秦律答問) [*Answers to Questions about the Qin Statutes*], a group of bamboo strips comprised of hypothetical legal questions and short answers. These were most likely used to help officials decide cases. However, they are not very helpful as possible *panwen* to analyze because of their extreme brevity (often, one strip contains a single question and a single answer of just a few words. For example, take this particular entry: "A steals money and uses it to buy silk. He entrusts this to B, and B accepts it, not knowing that it was stolen. How is B to be sentenced? Do not sentence him." I use Hulsewe's translation in this footnote. See HULSEWE, *supra* note 86, at 120, 123.

⁸⁸ HULSEWE, *supra* note 86, at 6-7.

emerged victorious from civil war and proclaimed himself emperor and founder of the Han dynasty, establishing his capital at Chang'an (長安).⁸⁹

The most important Han emperor was indisputably Emperor Wu of Han (漢武帝) (156-87 B.C.). During his reign, China enjoyed prosperity and peace, extending her borders and effectively defending against attacks from the Xiongnu (匈奴) "barbarians" in the north. Most importantly for the purposes of this article, at the urging of imperial scholar Dong Zhongshu (董仲舒) (179-104 B.C.), Emperor Wu adopted Confucianism as the imperial state ideology. Posts were created for individuals to study the Chinese Confucian classics, which became the basis of imperial education. For example, *bo shi* (博士), or erudites, were appointed to the Han Imperial Academy (太學), a training school for hopeful government officials who would be tested on Chinese classical knowledge. The erudites themselves were specialists on the Five Chinese Classics responsible for the transmission of orthodox Confucian texts.⁹⁰ Confucian texts enjoyed imperial sponsorship, while other schools of thought lost ground.⁹¹ The impact of Emperor Wu's decision cannot be overstated, as Confucianism would remain the grounding, fundamental doctrine that held the imperial government together until 1911.⁹²

In terms of Han legal history, we know the Han quickly adopted a legal code after destroying the Qin, likely around 200 B.C. Unfortunately, the Han Code is no longer extant. The Code survives only in bits and pieces, scattered about in numerous sources.⁹³ Still, the Han Code most likely was comprised of four categories: the *lü* (律) (statutes which contained, in part, statutes on robbery, arrest, banditry, and transgression of the palace); the *ling* (令) (ordinances which were rules on a variety of subjects, including taxes, the distribution of foods, and driving on the imperial highway); and the *ge* (格) and *bi* (比) (other forms of legislation and precedents), which were most likely of less importance than statutes and ordinances.⁹⁴

⁸⁹ See generally DENIS CRISPIN TWITCHETT, ET AL., THE CAMBRIDGE HISTORY OF CHINA (Cambridge Univ. Press, vol. 1 2009).

⁹⁰ BENJAMIN ELMAN, A CULTURAL HISTORY OF CIVIL EXAMINATIONS IN LATE IMPERIAL CHINA 5 (2000).

⁹¹ ZHANG FAN (張帆), ZHONGGUO GUDAI JIANSHI (中國古代簡史) [A SHORT HISTORY OF ANCIENT CHINA] 80-81 (2001).

⁹² TWITCHETT, ET AL., *supra* note 89.

⁹³ A.F.P. Hulsewe has attempted valiantly to piece together parts of the Han code. See A.F.P. HULSEWE, REMNANTS OF HAN LAW (1955) [hereinafter REMNANTS OF HAN LAW].

⁹⁴ HEAD & WANG, *supra* note 1, at 92-95.

With regards to the administration of justice, again our knowledge is limited due to lack of sources. We do know, however, there was a set framework for how criminal trials proceeded: accusation, arrest, detention, and recorded interrogation. This process was overseen by local prefects, who had power to judge cases and impose sentences in their jurisdictions.⁹⁵ We can gain insight into the Han litigation process in an extant Han dynasty *panwen* from an ancient Chinese legal prodigy:

Zhang Tang (張湯) (who died in 115 B.C.) was originally from Du County (杜縣).⁹⁶ His father served as the assistant to the Chang'an magistrate. One day, his father went out. As the son, Zhang Tang was to keep an eye on the home. When his father returned, he discovered that some meat had been stolen by a rat. Extremely angry, he used a stick to beat Zhang Tang. [Unperturbed], Zhang Tang then discovered the mouse hole and the offending rat, as well as the uneaten, remaining pilfered meat. He then proceeded to announce and report on the rat's crime [of theft], and then beat and interrogated the creature. He was also keeping a record of the interrogation, writing down and reporting on the judgment. He then took the rat and the remaining meat, and sentenced the rat to death by pulling apart in the room. He then carried out the sentence by splitting apart the [foul] creature's corpse. When his father had seen all of this and the written judgment and records—which were just as well-written and accomplished as ones done by a professional legal official—he was shocked and impressed. Thereafter, he let Zhang Tang focus [his studies and attention] on legal reasoning and writing judgments. After his father died, Zhang Tang became an official in Chang'an and enjoyed a long tenure.⁹⁷

⁹⁵ *Id.* at 101-02. For further discussion of trial procedure, see MICHAEL LOEWE, EVERYDAY LIFE IN EARLY IMPERIAL CHINA: DURING THE HAN PERIOD (202 B.C. - 220 A.D.) 68 (2005).

⁹⁶ Du County is located near present day Xi'an (西安).

⁹⁷ BAN GU (班固) (circa 32-92A.D.), HAN SHU (漢書) [THE BOOK OF HAN] 3137 (Taipei Dingwen Book Co. (鼎文書局) 1986). The Book of Han is part of the dynastic histories, or official histories, known in Chinese as the "Zheng Shi" (正史). The preservation of the past and the writing of history have both been very serious enterprises in Chinese civilization. Among the most important historical works that were produced are these twenty-four *zheng shi*. They cover important events, people, and institutions of the various dynasties. One dynasty's history was usually written by the dynasty that followed it. The Book of Han covers the history of China from 206 B.C. to 25 A.D. The *Zheng Shi* are generally speaking the most important written primary source for the study of China's imperial dynasties.

Zhang Tang may have just been a child, but the entire criminal trial process to which he subjected the unfortunate rat and the documents and records produced were similar to those done by professional legal officials. Thus, it seems fair to conclude that the story reflects the Han criminal prosecution process: arrest, a clear articulation of the crime (here, although it is not verbalized by Zhang Tang, the crime is clearly theft), interrogation, application of the law to the facts, and a sentence.

Another *panwen* from the Later Han also involves a case against animals, which nevertheless shows the wisdom of officials judging cases during the time. To provide some historical context, this judgment was rendered by Tong Hui (童恢), a Han official who served in the imperial court in the late 2nd century A.D. By all accounts, he was an excellent official who was loyal to and stood up for his colleagues.⁹⁸ Due to his excellent reputation, he was called into service in the capital. Whenever lower officials or the common people would break laws, “he immediately educated and helped reform them.”⁹⁹ If the common people performed good deeds, he would reward them in order to encourage them. As a result of his leadership, agricultural production and economic production blossomed, and there was order. In addition, the natural environment in his jurisdiction was clean and not polluted, and “the jails were empty year to year.”¹⁰⁰ Even hooligans from neighboring counties submitted themselves willingly under Tong Hui’s authority.¹⁰¹

One day, a case arose from a problem that had been plaguing Tong Hui’s people—they were often attacked and harmed by tigers. In response, he prepared a fence in order to catch the offending animals. Consequently, two were ensnared alive. Tong Hui scolded the tigers, pronouncing his judgment, or *panwen*:¹⁰²

Among all the creatures and things in our world, only humans are the most precious. Tigers and wolves should eat only horses, cows, lamb, chicken, dogs, and pigs. But you tigers [have the gall] to actually attack and harm humans. It is the law of the land: killing a person is punishable by death; injuring another merits [strict] punishment. If you tigers killed

⁹⁸ FAN YE (范曄) (398-445 A.D.), HOU HAN SHU (後漢書) [THE HISTORY OF THE LATER HAN] 2481 (Taipei Dingwen Book Co. (鼎文書局) 1981). The History of the Later Han is also one of the official dynastic histories. It covers the history of the Eastern Han from roughly 25 to 220 A.D.

⁹⁹ *Id.* at 2482.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

somebody, you should lower your heads and admit your crime. If you did not kill someone, you should instead call out that you have been accused wrongly, protesting your innocence.” One tiger proceeded to lower his head and close his eyes; a look of terror and submission swept across his countenance. This tiger was immediately ordered to be killed. The other tiger, however, gazed at Tong Hui and then called out, jumping up and down; Tong Hui subsequently ordered this tiger released. The county officials and common people all praised Tong Hui [for his wisdom].¹⁰³

Tong Hui, in this judgment, clearly laid out the applicable law—murder and assault are both punishable—and implemented an almost Solomonic form of determining the guilty party. Although the reader may think Tong Hui’s actions here are facetious, the fact that officials at the high stature of Tong Hui would take the time to craft and record a *panwen* premised in law—even for animal defendants—shows the pervasiveness of law and legal thinking in society, and emphasizes that law was taken seriously by government officials.

Besides the Han Code, statutes, regulations, and ordinances, Confucianist teachings also became a formal source of law, as reflected in *panwen*. This concept is not necessarily new. We similarly saw in the pre-Qin, for example, that history and tradition (representing Confucian values) were cited in *panwen* as legal standards. In the Han, a specific text—the *Spring and Autumn Annals*—became an important source of law from which legal rules were deduced, most notably reflected in the *panwen* of Dong Zhongshu.¹⁰⁴

Dong was the principal proponent of Confucianism in the Han court and the person perhaps most responsible for Emperor Wu’s decision to establish Confucianism as the imperial orthodox doctrine. This fascinating and extremely important judicial practice of utilizing the *Spring and Autumn Annals* is known as the *Chunqiu Jueyu* (春秋決獄) (“using the *Spring and Autumn Annals* to decide legal cases”).¹⁰⁵ Despite its importance in Chinese legal history and development of *panwen*, the *Chunqiu Jueyu* practice has

¹⁰³ *Id.*

¹⁰⁴ REMNANTS OF HAN LAW, *supra* note 93, at 51.

¹⁰⁵ Norman P. Ho, *Stare Decisis in Han China? Dong Zhongshu, the Chunqiu, and the Systematization of Law*, 3 TUFTS HIST. REV. 153-69 (2010).

been scarcely studied in English.¹⁰⁶ Most germane to this article, Dong Zhongshu wrote a collection of model *panwen* intended to be used by officials when using the *Chunqiu Jueyu* to decide legal cases.

We must first discuss the necessary historical background and details of the *Chunqiu Jueyu* practice. Near the end of Dong's life, he became ill but was still being consulted by the court on matters of state. In order to provide a guide for future officials to solve problems, he authored the *Chunqiu Jueyu*,¹⁰⁷ a text of 232 *panwen* of hypothetical cases with fact patterns and judgments, illustrating the way to apply the *Spring and Autumn Annals* to solve a host of particular legal and administrative problems.¹⁰⁸ These cases, again, were fictional, with generic names given for the parties (such as Mr. A, Mr. B, etc.). Magistrates, prefects, and other officials were to follow and apply their principles to cases on their own dockets.¹⁰⁹ The *Chunqiu Jueyu* text unfortunately has been lost, but a total of six cases still survive today, preserved in numerous premodern sources.¹¹⁰ The name of the text (*Chunqiu Jueyu*) gradually became the term describing the general practice of utilizing the principles and precedents from the *Spring and Autumn Annals* to reason analogously to contemporary cases in order to reach a solution that adhered to the moral codes and lessons of the *Annals*.¹¹¹ While we cannot say with any certainty just how widespread this practice was, it was used at least until the Song dynasty (960-1279 A.D.), having reached the height of its popularity in the pre-Sui and pre-Tang periods.¹¹² Interestingly, the *Chunqiu Jueyu* practice was not only utilized by officials

¹⁰⁶ Hulsewe only devotes a few paragraphs to the practice in his book. For the only full-length article in English that specifically examines this practice, see *id.* This section on the *Chunqiu Jueyu* draws and builds on my article.

¹⁰⁷ I will try to clearly distinguish between the actual *Chunqiu Jueyu* text, written by Dong, and the broader practice of *Chunqiu Jueyu* for deciding cases.

¹⁰⁸ MA DUANLIN (馬端臨) (1254-1323), WENXIAN TONGKAO (文獻通考) [GENERAL HISTORY OF INSTITUTIONS AND CRITICAL EXAMINATION OF DOCUMENTS AND STUDIES] 12.1423-1 (Taipei Shangwu Publishing Co. (商務) 1987). The *Wenxian Tongkao* is an important primary source of the history of Chinese institutions. It is part of the a collection of texts known as the *Shitong* (十通) [*The Ten Encyclopedic Histories of Institutions*] which were written as guides and references to the political institutions and structures of former dynasties. They cover a wide array of topics and are invaluable to the historian; for example, the *Wenxian Tongkao* consists of sections on land taxes, population, customs and tolls, examinations and promotions, schools, geography, court rites, the army, just to name a few. See WILKINSON, *supra* note 25, at 524-25.

¹⁰⁹ REMNANTS OF HAN LAW, *supra* note 93, at 51-52.

¹¹⁰ MA YONG (馬勇), DONG ZHONGSHU (董仲舒) [DONG ZHONGSHU: A BIOGRAPHY] 124 (2000).

¹¹¹ ZHONGGUO FALÜ SIXIANG SHI (中國法律思想史) [A HISTORY OF CHINESE LEGAL THOUGHT] 106 (Wang Limin (王立民) ed., 2007).

¹¹² HEAD & WANG, *supra* note 1, at 96.

in their judicial decision-making, but also evoked by defendants in their defense advocacy.¹¹³

Why did Dong formulate the practice of *Chunqiu Jueyu* and why was he so committed to it? First, Dong believed that the *Spring and Autumn Annals* and the Confucian philosophy and principles it contained provided a superb blueprint for governance, as it heralded back to the glorious time of Chinese antiquity. The *Spring and Autumn Annals* could help standardize government and make it more consistent as it contained constant principles of “Heaven and earth” and could specifically deal with incessantly changing laws and subjective applications of the law.¹¹⁴ One of his stated goals for employing the *Chunqiu Jueyu* method was to ensure that punishments were being applied fairly and that they fit the particular crime being adjudicated. In his words:

The process of using the Spring-Autumn Annals to decide cases must be rooted in and take full consideration of the facts of the case and the motive/intent behind the alleged criminal actions. For those who acted with bad intentions or motives, do not allow them to commit more crimes—at their offense, pronounce a severe punishment. But for those individuals whose intentions were originally upright, assign a lighter punishment.¹¹⁵

For Dong it was critical not to mechanically or automatically apply punishments as provided for by statutes or codes. Dong’s views were also adopted and supported by other Confucian scholar-officials in the Han government, even after his death. For example, during the famous state debate organized by Emperor Zhao of the Han (漢昭帝), who lived from 94-74 B.C., on government monopolies and other policies in 81 B.C., the Confucian-literati side of the debate expressed their views against a harsh and overly obtrusive central government:

Law is established to promote harmonious relationships, not just to simply apply punishments to trap people. Thus, when

¹¹³ Zhou Jianying (周建英), *Dong Zhongshu Yu Chunqiu Jueyu* (董仲舒與春秋決獄) [*Dong Zhongshu and the Practice of Chunqiu Jueyu*], 3 HENGSHUI XUEYUAN XUEBAO (衡水學院學報) [J. OF HENGSHUI UNIV.] 32 (2007).

¹¹⁴ BAN GU, *supra* note 97, at 2526.

¹¹⁵ DONG ZHONGSHU (董仲舒) (179-104 B.C.), *CHUNQIU FANLU* (春秋繁露) [LUXURIANT DEW OF THE SPRING AND AUTUMN ANNALS] 3.79-80 (Taipei Shangwu Publishing Co. (商務) 1987). The *Chunqiu Fanlu* is one of Dong’s most important philosophical works, laying out his vision of Confucianism and cosmology.

using the *Spring and Autumn Annals* to decide cases, you must assign punishment based on the defendant's motives for his crime. For those who had good intentions but broke the law, you should nevertheless absolve them. For those who had evil intentions but who acted in accordance to the law, you must nevertheless punish them.¹¹⁶

Thus, it was the responsibility of the magistrate to take into account perhaps exceptional circumstances in particular cases, and to inquire into the precise nature of the defendant's conduct.

Further, this inquiry was not to be simply a subjective one, but grounded in the principles of the *Spring and Autumn Annals*. The extra effort required to study the nature of the crime in question would have increased the burden of the official judging the case and, simultaneously, elevated the importance of his job. Indeed, Dong stressed the importance of these judicial officials:

When judges are upright, the case-deciding principles and method [of the *Chunqiu Jueyu* practice] become clearer and more refined, encouraging the moral education of the people. But when judges themselves are not upright or ignore Confucian principles, this will lead the people astray and hinder the valuable inculcation of the populace. Moral education is the foundation of government. Deciding cases is indeed the fullest, most palpable and mature exposition and expression of a government. Although education and the judicial process technically occupy different spheres of the government [bureaucracy], their importance to society is one and the same—it is not possible to ignore one at the expense of the other, or to pursue them independently. As a result, a ruler must

¹¹⁶ HUAN KUAN (桓寬) (circa first century B.C.), YAN TIE LUN (鹽鐵論) [DISCOURSES ON SALT AND IRON] 10.567 (Wang Liqi (王利器) ed., Zhonghua Publishing Co. (中華書局) 1992). The Discourses on Salt and Iron is a record, prepared by Huan Kuan, of a major debate on state monopoly policy in 81 B.C. The debate was coordinated by Huo Guang (霍光), who lived until 68 B.C., regent to Emperor Zhao. The debate revolved around the question of whether Emperor Wu's strong state-interventionist policies were effective (for example, his monopolies on salt and iron, capital taxes, and the like), or whether a more *laissez-faire* style of management was more suitable. The debate was split between two opposing sides—one side, led by Sang Hongyang (桑弘羊) (circa 152-80 B.C.), who had implemented the strong state interventionist economic policies under Emperor Wu; and the other side, consisting of Confucian scholar-officials, who supported smaller government and rule based on Confucian moral principles.

always stress both moral education and reasoned, upright jurisprudence.¹¹⁷

Thus, in Dong's eyes, the danger of subjectivity or inconsistency in verdicts or judgments would be minimized by the symbiosis between moral education (including the Confucian education that ensured judge-officials would be brought up, trained, and ultimately act responsibly and morally) and the judicial process.

Indeed, Dong's *Chunqiu Jueyu* collection of *panwen* is of extreme importance to our narrative of the development of *panwen* for a few reasons: 1) these *panwen* were model *panwen* of hypothetical cases, a precursor to the Tang dynasty *nipan* (擬判) (model *panwen*) that were written as practice by individuals preparing for the civil service examinations, 2) they were immediately written down, not proclaimed orally and later recorded (as was the case in the *panwen* we have examined previously), 3) Dong consciously titled his model judgments "*pan*," thus arguably creating the genre of the written *panwen* literary form as Xu Shizeng also had argued, and 4) as will be shown when we examine the specific *panwen*, Dong's judgments show more sophistication in legal reasoning, with more objectivity and application of inductive legal reasoning to produce legal rules that could be systematically applied in future cases with similar fact patterns. This use of analogical reasoning to compare fact patterns in cases with events recorded in the *Spring and Autumn Annals* could also be seen as a premodern awareness for what we might refer to today as *stare decisis*—the legal doctrine that "like cases by treated alike."¹¹⁸

Let us now proceed to look at all six of Dong's surviving cases from his *Chunqiu Jueyu* text, which reveal that he was using inductive and deductive "case law" reasoning to figure out legal rules—with precedential value¹¹⁹—from the *Spring and Autumn Annals* and applying them to specific

¹¹⁷ *Id.*

¹¹⁸ KRISTEN KONRAD ROBBINS-TISCIONE, RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION 137 (2009).

¹¹⁹ We know that the practice of using precedent in judicial judgments existed in the Han. In one case *panwen* dating to the reign of Liu Bang, a local official was ordered to escort a vassal woman back to the capital. However, unexpectedly on route, they fell in love and after they arrived, got married. They then tried to escape the capital, but the official was arrested, as it was illegal for provincial persons to enter the capital for "the purpose of enticement." Different opinions as to the proper judgment arose; some said the official was innocent because his original purpose was to enter the capital for the performance of an official duty. Others evoked case precedents where a woman who entered a region to pursue a duty, but then later fled, was sentenced under of the law against "fugitives to a provincial region," notwithstanding her original intent. Thus, by analogy, the official was also subject to the law regarding enticement, regardless of his initially lawful arrival in the capital. Zhiqiang Wang, *Case Precedent in Qing China: Rethinking Traditional Case Law*, 19 COLUM. J. ASIAN L. 323-24 (2005). For the original Chinese text for this particular *panwen*, see LIDAI PANLI PANDU (歷代判例判牘) [COMPILATION OF WRITTEN JUDGMENTS

fact patterns; the whole goal was to move away from subjectivity and urge any future official faced with a similar fact pattern to apply the same legal reasoning as the model case in Dong's work. There is an emphasis also on paying close attention to the facts and circumstances of each case, not just blindly applying law. This is all certainly a development and not inconsequential heightening in the sophistication in the *panwen* form from pre-Qin judgments. Take, for example, the *panwen*, entitled "A *Pan* concerning a Mr. A who had no son and an abandoned child" (note the presence of the term *pan* in the title):

Mr. A did not have a son. One day, he found an abandoned infant (named B) on the side of the road and raised him as his own son. After B grew up, he killed someone; he told Mr. A of his act. Mr. A proceeded to hide B [from the authorities]. How should we judge Mr. A's action of the concealment [of B's crime]? I, Dong Zhongshu, would rule this way: Mr. A did not have a son, but he raised and provided for B. Although B was not his biological son, who can ignore or [even] take lightly the relationship between Mr. A and B? The *Book of Poetry* says: "The mulberry insect has young ones, and the sphex carries them away."¹²⁰ Now, [in the] *Spring and Autumn Annals*, we see a principle [where it is righteous] for a father to conceal the misconduct of his son. Therefore, in this case, Mr. A's concealment of B was proper, and thus he should not be punished.¹²¹

THROUGHOUT CHINESE HISTORY] 27-28 (Yang Yifan (楊一凡), et al. eds., 2005). This *panwen* was found on one of the Zhangjiashan (張家山) bamboo slips. The Zhangjiashan bamboo texts date back to the late 3rd century B.C., and are an important primary source to supplement transmitted texts. The bamboo texts were discovered in 1983 by archaeologists digging up the no. 247 tomb (a tomb of an early Han official) at Mt. Zhangjia in Hubei province. The bamboo slips contain texts on mathematics, military strategy, and legal case precedents, just to name a few.

¹²⁰ *Xiao Wan* (小宛), in THE CLASSIC OF POETRY (SHIJING, 詩經), as discussed in note 25, is one of the ancient Chinese Confucian Classics. The poem quoted here is from the "*Xiao Wan*" (小宛). I use James Legge's translation for this quote from the SHIJING; see THE CHINESE CLASSICS, *supra* note 78.

¹²¹ DU YOU (杜佑) (735-812A.D.), TONGDIAN (通典) [ENCYCLOPEDIA OF INSTITUTIONS] 69.1911 (Taipei Shangwu Publishing Co. (商務) 1987). The Tongdian, like the Wenxian Tongkao, is one of the Shitong (the ten encyclopedic histories of institutions). Du You's Tongdian (completed in 801) is the earliest of the Shitong; Du You served as a chancellor in the Tang dynasty, and thus the Tongdian provides a wealth of source material on government administration. The text's various sections include: food and money, the examination system, official titles, rites, punishments, and provincial administration. See WILKINSON, *supra* note 25, at 525-26. The surviving cases in Dong's Chunqiu Jueyu are also conveniently compiled in CHENG SHUDE (程樹德), JIU CHAO LÜ KAO (九朝律考) [AN INVESTIGATION OF THE CRIMINAL LAWS OF NINE DYNASTIES] 161-62 (2002).

As mentioned earlier, while the Han legal code is no longer fully extant, during Dong's time, the Han probably would have continued the Qin practice of punishing anyone who concealed a criminal.¹²² However, Dong here created an exception for Mr. A., extrapolating from the *Spring and Autumn Annals* text a clear rule that is upright for parents to conceal the wrongdoings of their children. Indeed, while not expressly quoted here,¹²³ this case also seems to adhere to one of Confucius' teachings in the *Analects* (not surprisingly as it was commonly believed during Dong's time that Confucius was the author and compiler of the *Spring and Autumn Annals*): "the father conceals the wrongdoings of the son, and the son likewise conceals the wrongdoings of his father. Moral correctness can be found in this situation."¹²⁴ This case represents a more simple application of a rule from the *Spring and Autumn Annals*'s sense of Confucian morality, but nevertheless, this rule is meant to be binding on any future cases involving the simple fact pattern where any father conceals his son's misconduct. Indeed, it is significant that there are not many fact details given by Dong in his *panwen* here. For example, we do not know the father's background or whether he was a righteous man, nor do we know the exact nature of his son's crime, other than the fact he killed someone (it could have been a very heinous murder). Dong's point here, though, seems to be that no matter what, even if the crime is that of murder (one of the most serious crimes), the legal rule applied in this fictional case must be applied to future cases. Furthermore, we can see in this *panwen* Dong's emphasis on and commitment to the importance of parent-child relationships, a pivotally important Confucian virtue. Dong's reading of "father" was not narrow and was not limited to just biological fathers, but to anybody who had the heart of a father and cared for a child as if he was his own son.

Similarly, in Dong's view, a biological father who did not truly have the heart of a father lost the title of "father" and any privileges in a father-son relationship. A second *panwen*, titled "A *Panwen* involving Mr. A's

¹²² Jiang Dongmei (將冬梅) & Huang Chuanni (黃川倪), *Lun 'Chunqiu Jueyu' Dui Zhongguo Falü Chuantong de Yingxiang* (論'春秋決獄'對中國法律傳統的影響) [*A Discussion of the Chunqiu Jueyu's Influence on the Chinese Legal Tradition*], 4 HUADONG LIGONG DAXUE XUEBAO (華東理工大學學報) [J. OF E. CHINA UNIV. OF TECH.] 91 (2007).

¹²³ The most likely explanation for Dong's decision not to quote a specific passage in the *Spring and Autumn Annals* text is that the principle of father and son not reporting on each other was quite pervasive throughout the *Spring and Autumn Annals*. Also, Dong would have assumed his audience (government officials, magistrates, and the like) would have been intimately familiar with the *Spring and Autumn Annals* as it would have formed a component of their pre-government service Confucian education.

¹²⁴ LUN YÜ (論語) [THE ANALECTS], in DUANJU SHISANJING JINGWEN (斷句十三經經文) [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 14 (Taipei Kaiming Book Co. (台北開明書) ed., 1991) [hereinafter THE ANALECTS].

giving away of his son to Mr. B” involves a son striking his biological father:

Mr. A gave his son to Mr. B. His son grew up, raised by Mr. B. One day, an inebriated Mr. A. revealed to his son that he was actually his true father. His son did not believe this and got angry, hitting Mr. A with 20 strokes. Mr. A indeed was the original father—he was extremely angry at his son’s reaction and personally informed the county magistrate. I, Dong Zhongshu, decide the following: Mr. A was the biological father, but could not raise his son, and so he gave him to Mr. B. Through this, Mr. A’s relationship with his son was broken. Although his son beat him, he should not be punished.¹²⁵

Although this *panwen* does not specifically refer to the *Spring and Autumn Annals*, it surely evokes the Confucian emphasis on the father-son relationship and also shows Dong’s willingness to make the law more flexible. In other words—although Mr. A may have been the biological father, the reality was his sole contribution to his son was only genetic and there was no affection or care a father usually bestows on his son. Dong was not constrained by Mr. A’s identity as biological father (just as he was not constrained in the first *panwen* by Mr. A’s identity as a non-biological father), instead rendering a decision based on actual circumstances.

A third *panwen* entitled “A *Panwen* on A’s husband, Mr. B., captaining a boat” has a more complicated fact pattern. Nevertheless, in this case, Dong also used inductive reasoning to extrapolate a legal rule from a specific (this time actually quoted) story in the *Spring and Autumn Annals*, and then systematically used deductive, analogical reasoning to apply it to his case. Again, the emphasis here is on systemization and consistency, with the hope that the legal rule is applied in future cases and that the present case has some precedential value:

A’s husband B was out captaining a boat. Unfortunately, there were great winds on the sea, causing the boat to sink and B to drown. His corpse could not be located, and thus he could not be given a proper ritual burial. After four months, A’s mother remarried her to a new husband. How should we judge all of this? Some may say, A’s husband died but was never buried;

¹²⁵ GUDAI PANCI SANBAI PIAN (古代判詞三百篇) [A COLLECTION OF THREE HUNDRED *PANWEN* FROM CHINESE HISTORY] 2-3 (Chen Tongye, 陳童業 ed., 2009).

Han law prohibits remarriage under these circumstances, yet A presumptively remarried. Thus, she should be publicly executed. I, Dong Zhongshu, however, rule: The *Spring-Autumn Annals* has the story and precedent of a wife who returned (*gui*, 歸) to Qi (齊),¹²⁶ the *Annals* report that her husband died without any sons, and thus she had the option and ability to remarry. [After all, the character] *gui* (歸) [also] means to remarry.¹²⁷ Here in our case, A's actions were not selfish or arbitrary — she was [only] listening to her parents. She (A) did not have a heart of lust, nor did she remarry presumptively for selfish, personal reasons. Thus . . . she is not guilty of any crimes and thus should not be punished.¹²⁸

According to Han law, the wife (A) should have been executed.¹²⁹ But Dong eschewed this blind application of punishment, inquiring into the motives and reasons for A's remarriage. He based his decision on the well-established historical precedent of Lady Jiang's¹³⁰ returning permanently to her home in Qi after her husband died without children, as recorded in the *Spring and Autumn Annals*, this time quoting directly from a specific story in the text. Further, in his analogical reasoning, Dong even had an interesting linguistic analysis. To prove that A's remarrying was further justified by the precedent of Lady Jiang, he examined the character *gui* (歸), which as used in the *Spring and Autumn Annals* text portion dealing with Lady Jiang, meant to "return home." Here in the present case, however, A did not "return home" but "remarried." Dong pointed out that *gui* (歸) can also mean to "remarry." This attention to linguistic detail—to the point of

¹²⁶ Here, Dong quotes a specific story and event from the Spring and Autumn Annals. The "wife" he is referring to is Lady Jiang, also known as "Mournful Lady Jiang" (哀姜) (died in 659) (although Dong does not specifically mention Lady Jiang by name, his audience would have known almost immediately that he was referring to her). A princess from the state of Qi (齊), she married Duke Zhuang of Lu (魯莊公) (706-662 B.C.) and together they had no sons. After Duke Zhuang died, Lady Jiang returned to Qi permanently. Both the *Spring and Autumn Annals* text and the Zuo zhuan commentary record her return in several places. See, e.g., ZUOZHUAN, *supra* note 60, at 72-73.

¹²⁷ Dong here makes clear that the character "歸" can mean "to return" (as it did in the story of Lady Jiang and the text of the *Spring and Autumn Annals*) and "to remarry." He most likely relied on the Han dynasty compiled *Shuowen Jiezi* dictionary, which provides the definition for "歸" as "woman [re]marrying." See *Shuowen Jiezi*, *supra* note 22.

¹²⁸ TAIPING YULAN (太平御覽) [IMPERIAL ENCYCLOPEDIA OF THE TAIPING ERA] 640.2998 (Li Fang (李昉) et al. comps., Taipei Shangwu Publishing Co. (商務) 1980). The Taiping Yulan is an incredibly important primary source for Tang history. Li Fang and 10 other court scholars compiled the encyclopedia, which, most significantly, contains quotations from many complete source texts which have now been since lost.

¹²⁹ Ho, *supra* note 105, at 159.

¹³⁰ See Jiang & Huang, *supra* note 126.

one character—shows Dong’s use of what we might today call statutory interpretation to further justify his use of the Lady Jiang story as an analogical case.

In this *panwen*, Dong therefore arguably produced the rule that a woman can remarry if her husband died without any sons and her reasons for doing so are not selfish or dishonorable. Specifically, if her parents tell her to remarry, she should obey them. Note from a language perspective that these legal rules above are framed generally, giving the sense that they can be applied in various situations where someone’s husband passes away. There is also an emphasis here on the intent of the woman involved (just as Lady Jiang harbored no malicious intent in returning to her home state of Qi).

The fourth *panwen* titled “A *Panwen* Involving an Altercation between A’s father B, and C” similarly takes into consideration the intentions of a defendant, this time a child who hit his father:

A’s father, B, had a quarrel with C. C had a sword and stabbed B. A then hit C with a stick, but accidentally hit his father in the process. What should we say about A’s conduct? Some would say, A hit his father, and thus he should be beheaded [in accordance with Han law]. I believe, however, that the father-son relationship is the closest of all human relationships. After hearing of this tragic event, there is no one who does not feel sadness and sorrow. The son here used the stick [with the full intention] of saving his father and since has humbly served his father; he did not desire to hurt his father. The *Spring and Autumn Annals* tells us: once, a man (named Zhi (止)) was dedicated to curing his father’s illness and gave some medicine to his father. But, [unexpectedly], his father died as a result. The enlightened ruler was able to see the son’s good heart, forgave him, and did not punish him. Likewise, in this case, A here did not commit the crime of battery and assault against his father, and thus he should not be punished.¹³¹

Dong again used analogical reasoning, comparing the current case to the Zhi story in the *Spring and Autumn Annals*. During one summer during the reign of Lord Zhao of Lu (魯昭公), who lived from 541-510 B.C., Zhi’s father, the Lord Dao of Xu (許悼公)¹³² was afflicted with malaria. He later

¹³¹ *Id.*

¹³² Xu was a vassal state during the Spring-Autumn period, located in present-day Henan Province (河南).

provided his father with medicine; his father took the medicine but later died. Afraid, Zhi ran away to the state of Jin. While some may have said that Zhi “killed his ruler,” the *Spring and Autumn Annals* and *Zuozhuan* commentary argued instead that the noble man would say that: “if you sincerely exert your heart and efforts to serve your ruler, it is appropriate and allowed to dispense with medication.” Therefore, the *Zuozhuan* indicates that it is Zhi’s faithfulness and heart for service that should be stressed and lauded, not the unfortunate unintended side effect associated with Lord Dao’s ingestion of the drug.¹³³ Further, in this *panwen*, Dong set forth two broad legal rules. First, the father-son relationship is paramount. Second, in accordance with the Zhi story in the *Spring and Autumn Annals*, if a son accidentally harms his father while attempting to save him, the son should not be punished. Again, the emphasis here is on establishing rules to create future precedent and also to systemize the law by making the black-white codes more wary and respectful of possible exceptions and human relationships. In Dong’s view, this would strengthen the law, not weaken it, by making it part of the Confucian universe and by giving it more subtlety and flexibility to deal with the complexity of daily life.

The final two remaining *panwen* do not specifically quote from the *Spring and Autumn Annals*, although I would argue they still draw on the basic Confucian principles of righteousness and humanness that are pervasive throughout the *Spring and Autumn Annals*, but they nevertheless show sophisticated legal reasoning and a desire to not blindly apply the law. In both cases, Dong emphasizes the importance of humaneness and looking at the offender’s intentions. These final two *panwen* are also noteworthy because they involve cases outside normal family life (the previous four all dealt with family relationships, for example), namely ruler-minister relations and military discipline. Here, we have a *panwen* rendered by Dong on a minister’s disobeying his ruler. The *panwen* is titled “A *Pan* Involving a Prince’s Capturing a Fawn”:

A prince was hunting and captured a fawn. He ordered his minister to take up the fawn and return with it. On the way home, the minister noticed that the fawn’s mother was following him and whining. He was moved to release the fawn. [Upon discovering this] the ruler was angered. The [minister’s] crime was under discussion and had not yet been determined when the ruler fell ill. Fearing that he would die, the ruler wished to entrust his young son [to someone’s care]. He

¹³³ ZUOZHUAN, *supra* note 60, at 207-08.

recalled the minister and exclaimed: “How humane is the minister! He encountered a fawn and treated it with compassion, how much more is this the case with regard to other human beings.” He released the minister and entrusted his son to him. What opinion should be upheld? Dong Zhongshu stated: “The noble man does not take young animals or eggs. The minister did not protest when ordered to take the fawn home. This would have been contrary to rightness [and the law]. Nevertheless, in the midst of carrying out his orders, he was moved by the fawn’s mother and demonstrated his compassion. Although he [ultimately] disregarded his ruler’s order, it is possible that he be transferred.”¹³⁴

Interestingly, we have here another case inspired by an animal (similar to Tong Hui’s rendering of justice on the two tigers). Dong here rejected a blind of application of law, which would have subjected the minister to punishment for disobeying the prince’s rule. Instead, he pointed out extenuating circumstances (the crying fawn’s mother’s appearance). He also noted that the minister still technically obeyed his prince’s orders by agreeing initially to bring the fawn back. This *panwen* is also instructive because it arguably shows, in Dong’s view, the true power of just case decisions on governance and the realm—here, because a fair and just decision was rendered, the prince was able to truly understand the minister’s intention and even entrusted his heir to him (which was quite a big deal at the time). We can see that the prince wanted the minister’s humaneness to influence and educate his own son in the next generation. Thus, in Dong’s view, judgments based on principles and events in the *Spring and Autumn Annals* not only could render justice in the case at hand, but positively influence governance for years to come. The cases could not only be precedents for future cases, but precedents for good, ethical governance.

The final surviving *panwen*, “A *Panwen* Involving an Armory Soldier,” draws on Confucian values in the *Analects* and punishes the possession of evil intentions, despite the fact that the crime itself was not fully realized:

A was a soldier in the armory. One day, he went to steal the spring of a crossbow and the crossbow, but at that time, the spring and the actual crossbow were in different locations [and

¹³⁴ SOURCES OF CHINESE TRADITION 310 (William deBary et al. eds., 1999). I have made some slight changes to the translation.

hence his robbery was not successful]. How should A be punished? Some argue the following: first, we must remember that the weapons are stored not far from the outer entrances to the emperor's places. [This is restricted territory], and anyone that dares trespass has their head shaved as punishment. Indeed, the weapons storage area is important territory . . . now, the crossbow and spring were separated [and so A's robbery did not work out], and thus, he should not be guilty of the crime of stealing weapons from the armory. Indeed, the *Analects* say: "How can a large carriage be made to go without the crossbar for yoking the oxen to, or a small carriage without the arrangement for yoking the horses?"¹³⁵ Thus, if A went to steal weapons, should he still be publicly executed and his body displayed to the public? I, Dong Zhongshu say: "[A]lthough the spring and crossbow were in different places and thus the spring was not stolen, if a crossbow is without a spring, it is no longer really a crossbow; [this is the same principle] as if an arrow does not hit its target properly, it is just as if one does not have an arrow. Likewise, if the arrow does not penetrate its target, it is just as if one does not have an arrowhead; [these are all the same logical principles]. The Han law says: he should be executed, but for the crime of concealing booty and weapons . . .¹³⁶

Here, the side opposing execution essentially argued it made no sense to punish A because he was not able to fully realize his robbery. Quoting from the *Analects*, they argued that a crossbow without a spring was just like a chariot with a crossbar or without a yoke. Thus, without the spring, there was no real threat as A would not have been able to utilize the crossbow for whatever purposes he had in mind. Dong, however, turned the argument around and said that even if A was only able to rob the spring and not the crossbow, this would have rendered the crossbow useless and have caused greater harm, perhaps to troops who intended to use the weapon in battle. The end of the judgment is quite confusing, but nonetheless shows an awareness of prosecuting someone for the correct, applicable crime, even though the ultimate punishment may still be same. At the very least, this *panwen* is consistent with the other five in terms of a more defined and sophisticated form and reliance on Confucian principles.

¹³⁵ SACRED BOOKS OF THE EAST, *supra* note 70.

¹³⁶ GUDAI PANCI SANBAI PIAN, *supra* note 125, at 3-4.

At this point, it might be helpful to step back and evaluate all six *panwen* and *Chunqiu Jueyu* more generally. Many modern-day legal scholars of the *Chunqiu Jueyu* practice (predominantly based in China, as very few researchers in the West have written on the topic) argue that it is ultimately subjective and unsuitable for a rule of law system. Specifically, they argue the practice confuses both legal process and morality, combining them in a haphazard way.¹³⁷ Furthermore, some scholars maintain Dong found the practice to be attractive because the *Spring and Autumn Annals* text itself was very terse and so well-suited for subjective interpretation, allowing the official to “make connections that are not related” to pending cases, thereby affording more power to the authorities (a view that can be analogized to Justice Scalia’s criticism of the use of legislative history as akin to picking out your friends in a cocktail party).¹³⁸ Others argue that the *Chunqiu Jueyu* method actually harmed judicial operations because of the inability to decide what conduct is truly good or truly evil.¹³⁹ Does it therefore follow that Dong’s *Chunqiu Jueyu* practice actually runs against the thesis advanced in this article?

I believe it does not. While there is no doubt that subjectivity must have been (and still is, in any modern court system) a problem when determining motives of intentions of defendants in a judicial proceeding, I think one needs to situate Dong’s *Chunqiu Jueyu Panwen* and practice in historical context. Dong was not trying to inject more subjectivity in judicial proceedings in order to give more flexibility and authority to judges or to the government — rather, if we analyze the *Chunqiu Jueyu Panwen* in the context of Dong’s larger Confucian program (such as his other principal, seminal text, the *Chunqiu fanlu* (春秋繁露), or the *Luxuriant Dew of the Spring and Autumn Annals*, we see that Dong was arguably trying to systematize the law. More importantly, Dong was also attempting to systematize the *application* of law, bringing it into line with the prevailing Confucian orthodoxy of his time.

For example, in the *Chunqiu Fanlu*, Dong attempted to analyze and lay out moral and political lessons from the *Spring and Autumn Annals*, believing that the text recorded Confucius’s great wisdom and could be a guide to future sage kings.¹⁴⁰ In Dong’s eyes, one could deduce models and

¹³⁷ ZHONGGUO FAZHI SHI YUANLI YU ANLI JIAOCHENG, *supra* note 32, at 121. Many leading Chinese legal history textbooks also adopt such a view.

¹³⁸ ZHONGGUO FALÜ SIXIANG SHI, *supra* note 111, at 106.

¹³⁹ YANG HEGAO (楊鶴皋), DONG ZHONGSHU DE FALÜ SIXIANG (董仲舒的法律思想) [THE LEGAL THOUGHT OF DONG ZHONGSHU] 59 (1985).

¹⁴⁰ Steve Davidson & Michael Loewe, *Ch’un ch’iu fan lu*, in EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE 78 (Michael Loewe ed., 1993).

precedents from specific example or parts of the *Spring and Autumn Annals* and utilize “comparative analysis” to apply them to problems in government.¹⁴¹ Indeed, the very thoroughness of the topical range of the *Chunqiu Fanlu*—including a discussion of the rectification of names, the rise and fall of ancient states, lawlessness, and the general concerns of the central government—is a testament to Dong’s belief that the *Spring and Autumn Annals* contained a viable blueprint and a total, permanent system that could bring current government into line with the way of Heaven and the cosmological order.¹⁴² The *Chunqiu Jueyu Panwen* should therefore be interpreted as being part of Dong’s vision of a total, unified Confucian system and should be viewed from his perspective as a way to bring this vision directly into the Chinese judicial sphere.

As for the counter-argument that officials could have had varying interpretation of the *Spring and Autumn Annals* text thus leading to more subjectivity in the deciding of cases, this likely would not have been a significant problem. After Confucian moral and philosophical orthodoxy was established by Emperor Wu of the Han, officials and prefects—those who would have been making the judicial decisions—received an education of standardized, orthodox interpretations of the Confucian Classics, such as the *Spring and Autumn Annals*.¹⁴³ Thus, it would be highly unlikely for an official to utilize radically different interpretations.

To quickly summarize, Dong’s six surviving *Chunqiu Jueyu panwen* push forth our narrative of pre-Tang *panwen*, highlighting growing sophistication in legal reasoning (especially analogical reasoning) and a desire to formulate permanent legal rules and precedents for future cases. Also very important are the developments in form. His *panwen* were immediately written down, referred to as *panwen*, and stylistically utilized concise yet powerful language, often in parallel construction. They also reveal the importance placed on law and its proper functioning in society; Dong’s *panwen* dealt with family relationships, criminal matters, marriage, military affairs, and ruler-minister administrative relationships. All of the above features would play into the period of *panwen*’s flourishing in the Tang.

We must of course remember that Dong’s *Chunqiu Jueyu* judgments were hypothetical cases—one question may thus remain in the reader’s mind—do we see such use of the *Spring and Autumn Annals* and concern for *stare*

¹⁴¹ *Id.*

¹⁴² *Id.* at 78-79.

¹⁴³ CHARLES O. HUCKER, A DICTIONARY OF OFFICIAL TITLES IN IMPERIAL CHINA 15-16 (Stanford Univ. Press 1985).

decisis in practice? The answer is yes, as we actually have some records of real-life cases that applied the *Chunqiu Jueyu* method in judicial decision-making. These cases reveal the systematic legal reasoning involved in the decisions and are further evidence of the idea of *stare decisis* imbuing and entering into legal discussions during the Han. Furthermore, we know that Emperor Wu, in his quest to further entrench Confucianism as the state orthodoxy, ordered Confucian scholars to closely study the *Spring and Autumn Annals* and evaluate statutes and ambiguous areas of law based on their knowledge of the *Annals*.¹⁴⁴ According to Emperor Wu's orders, whenever legal officials reported on particularly difficult cases, they were first required to present to the emperor an analysis of the case, and if he believed the judgment was correct, the officials would accept it and disseminate it across the realm.¹⁴⁵ The *Book of Han* records an event during the reign of Emperor Zhao of the Han (漢昭帝), who lived from 94-74 B.C. Because the event itself and the case that followed are both exciting and complicated, I have provided a complete translation below:

In 82 A.D., a man rode in on an ox-driven yellow carriage with a yellow flag (painted with a tortoise and snake), wearing a long yellow dress and yellow hat. He arrived at the northern palace gate in order to gain an audience with the Emperor, calling himself the Prince of Wei.¹⁴⁶ The receiving official commanded that this matter be reported to the Emperor. The Emperor then commanded the high ministers to order . . . army officials to see this man and decide if he was telling the truth or lying. Thousands of Chang'an residents and officials crowded around to view this spectacle. Troops were also brought near the palace in order to prevent any incidents and preserve order. Those officials responsible for judging the veracity of the man's statements were all afraid to speak and express their opinions. The Chang'an mayor, Juan Buyi (雋不疑) arrived later, and then immediately ordered the man to be arrested. An onlooker then suggested: "It's still not clear whether or not this man is indeed the Prince of Wei. Perhaps therefore we should wait for

¹⁴⁴ BAN GU, *supra* note 97, at 3139.

¹⁴⁵ *Id.*

¹⁴⁶ The Prince of Wei here refers to Liu Ju (劉據) (128-91 B.C.), crown prince and son of his father, Emperor Wu of the Han dynasty. Liu Ju was born to Empress Wei Zifu (衛子夫) (died in 91 B.C.), who was Emperor Wu's second wife and thus also called the Prince of Wei. Liu Ju had rebelled against his father and fled the capital. Here, this man is entering the capital, claiming to be the returning Liu Ju.

confirmation.” Juan Buyi replied, “Why should you all be concerned about whether this man is indeed the Prince of Wei? During ancient times, the prince of Wei, Kuai Kui, disobeyed and betrayed his father Duke Ling of Wei and had to escape, dying outside the Wei borders. After Duke Ling of Wei died, Kuai Kui’s son, Kuai Zhe, came to power. After his ascendancy to the throne, Kuai Kui requested to return to Wei, but Kuai Zhe maintained the orders and will of Duke Ling and rejected his request for entry. The *Spring and Autumn Annals* approved of Kuai Zhe’s decision.¹⁴⁷ This Prince of Wei who has come to the palace now has also in the past offended a previous king. Like Kuai Kui, he fled out of the country and was not punished with death. Today he comes back to Chang’an; he also is a criminal of the imperial court.” Juan Buyi then sent this man to prison. After hearing of this entire affair, Emperor Zhao of the Han and the great general Huo Guang praised Juan Buyi’s judgment, saying: “All ministers and officials should understand how to apply the teachings of the Classics to preserve their principles [in our society].¹⁴⁸”

Here, Juan Buyi analogically reasoned between a similar event in the *Spring and Autumn Annals* and the present situation. Juan’s point here is that since antiquity, as recorded in the *Spring and Autumn Annals*, the “Prince of Wei” has been a disloyal figure who disrespected his father, just as the current Prince of Wei, Liu Ju, did. Ultimately, it does not matter whether or not this man really is Liu Ju—he himself has claimed it with pride, riding into the city in a noticeable way. This reasoning also shows that Juan did not blindly apply the *Spring and Autumn Annals* events, but also actively proposed a legal principle or rule: individuals who return to the capital after escaping from punishment and who have previously offended the king or ruler-figure must be punished. Further, the principles in the *Spring and Autumn Annals* here were applied methodically and systematically with consideration of the facts of the case—indeed, during the time of the event narrated above, the court was trying to find and capture Liu Ju. Thus, no matter if the man in

¹⁴⁷ CHUNQIU GONGYANGZHUAN (春秋公羊傳) [SPRING AND AUTUMN ANNALS: GONGYANG COMMENTARY], in DUANJU SHISANJING JINGWEN (斷句十三經經文) [THE THIRTEEN CHINESE CONFUCIAN CLASSICS: PUNCTUATED] 65 (Taipei Kaiming Book Co. (台北開明書店) ed., 1991). During the Han, the Gongyang commentary (with the Zuo zhuan commentary) was regarded as an authoritative commentary on the *Spring and Autumn Annals*.

¹⁴⁸ BAN GU, *supra* note 97, at 71.3037. For an overview of the Chunqiu Gongyangzhuan and its bibliographic history, see Anne Cheng, *Ch’un ch’iu, Kung yang, Ku liang and Tso chuan*, in EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE 68 (Michael Loewe ed., Univ. of Calif., Berkeley Press 1993).

the story was really Liu Ju or not, he was bold enough to publicly say he was (and would have been aware of the consequences of doing so) and therefore must be punished. Last, it appears that Juan Buyi was also concerned about precedent. Specifically, ensuring that subjects were obedient to their rulers and that like the event recorded in the *Spring and Autumn Annals*, individuals who escape punishment must be prosecuted upon their return or recapture.

A second real-life case is presented here to further illustrate the *Chunqiu Jueyu* method in action. While a rather lengthy case and *panwen*, it is one of the best expositions of the practice:

The Empress Dowager wanted to establish the Prince of Liang¹⁴⁹ as the Crown Prince. Emperor Jing asked the reason for this, and Yuan Ang¹⁵⁰ replied: The Shang rulers were very close with their brothers, and so passed their thrones onto them. The Zhou rulers respected their ancestral lines, and so passed on their thrones to their sons. The Shang strove to be unpretentious and simple, and so attempted to model and pattern their conduct according to Heaven. Thus, they cherished their relatives and so transmitted their thrones to brothers. The Zhou strove for resplendence and magnificence, and so followed the ways of the Earth. They respected their roots and hereditary lineage, and so passed on their thrones to the eldest sons. In the Zhou system, if the crown prince dies, then the eldest grandson of the wife is raised to the throne. Under the Shang system, if the crown prince dies, the younger brother ascends to the throne.” Emperor Jing replied [to his ministers]: “What do you think?” Everyone replied: “Today, the Han dynasty follows the traditions of the Zhou. According to the Zhou system, sons—not brothers—should be elevated to the throne. This is why the *Spring Autumn Annals* criticized Duke Huan of Song. After Duke Huan’s death, he did not pass the throne to his son, but rather to his younger brother. After his younger brother died, he then passed the throne onto his older brother (Duke Huan)’s son. However, his younger brother’s son fought for the throne, believing that he should take his

¹⁴⁹ The Prince of Liang (梁孝王), or Liu Wu 劉武 (died in 144 B.C.) was Emperor Jing’s (漢景帝) powerful brother.

¹⁵⁰ Yuan Ang (袁盎) (died in 148 B.C.) was a minister who served Emperor Jing of the Han and who was later assassinated by Liu Wu.

father's place and rise to the throne. As a result, he killed Duke Huan's son, and the state of Song descended into turmoil and disasters followed one after the next. Thus, the *Spring and Autumn Annals* says: "The ruler must follow and act in accordance to the correct Way; the disasters that befell the state of Song were the doing of Duke Huan."¹⁵¹ We ministers humbly request to have an audience with the Empress Dowager in order to share this principle and tradition with her." Yuan Ang and the others then went and saw the Empress Dowager and said: "Her Majesty has said she wishes to establish King Liang to the throne. Now if King Liang dies, whom does her Majesty wish to elevate?" The Empress Dowager responded, "I will then raise the Emperor's son to the throne." Yuan Ang and the others [then proceeded to tell the Empress Dowager about the story of Duke Huan of Song. They explained how Duke Huan did not raise his wife's eldest grandson to the throne (as he should have done). As a result, this brought chaos to the state, chaos that continued for five generations. [They also explained one of the key lessons of the story]—not stopping the seemingly minor temptations and wants of a selfish heart will in fact harm society's great moral stability. After the Empress Dowager heard this, she understood this principle and became happy. She then allowed Prince Liang to return to his fiefdom. But news of Yuan Ang's influential remarks to the Empress Dowager reached Prince Liang. He began to hate Yuan Ang and sent assassins to kill the minister. Yuan Ang turned and saw the assassins and said, "I am indeed General Yuan Ang, surely you have not mistaken me for someone else?" The assassins replied, "It is exactly you who we want!" and then killed him. They left behind their swords, which were stabbed into Yuan Ang's body. After inspecting these swords, it was revealed they were just sharpened. The craftsman in Chang'an who had sharpened the blades was questioned; he said: "An official from Liang once came by and had this sword sharpened." From this the Court found a trail of evidence of the plotting of this assassination and sent people to capture the assassins. The ministers Prince Liang himself wanted murdered numbered over ten people. The court judicial officials thoroughly

¹⁵¹ See CHUNQIU GONGYANZHUAN, *supra* note 147, at 3.

investigated, especially in terms of who gave the orders for Yuan Ang's assassination. Later on clues [of the assassination] clearly implicated and revealed Prince Liang's involvement. As a result, the Empress Dowager did not eat; she cried day and night. Emperor Jing was extremely worried and asked his ministers for advice. The ministers believed that it would be best to send the officials most intimately familiar with the Classics; they could relieve the Empress Dowager's despair. As a result they dispatched Tian Shu and Lü Jizhu to settle this case. These two individuals were both well-trained and well-versed in the Classics and understood and recognized great propriety and order. They went . . . and burned away all the evidence of Prince Liang's involvement, and returned to the Emperor only with empty hands. Emperor Jing asked them, "How is the handling of this case coming along?" They replied, "Prince Liang was not in the know. Those who participated in the assassination were only his minions Yang Sheng and Gongsun Gui. We will carefully—according to the law and ordinances—kill and punish them both, and Prince Liang will remain at peace and in good health." Emperor Jing was very happy and said, "Quickly go and tell the Empress Dowager." After the Empress Dowager heard this, she immediately sat up and started to eat again, and her heart was at peace. Thus it is said: "Those men who are not versed in the Classics and those men who do not understand the great propriety of antiquity and the present simply cannot become . . . trusted and reliable ministers."¹⁵²

This case first shows how the method of *Chunqiu Jueyu* was intertwined with moral education—just as Dong originally intended—to create a systematic and consistent approach to jurisprudence. Here, Yuan Ang and the ministers relied on the Duke Huan of Song story as recorded in the *Spring and Autumn Annals* to extrapolate numerous legal rules, such as the prohibition on passing on thrones to brothers and also to root out "minor temptations" and "selfish heart[s]" before they could cause great

¹⁵² SIMA QIAN (司馬遷) (circa 145-86 B.C.), *SHIJI* (史記) [RECORDS OF THE GRAND HISTORIAN] 58.2091-2092 (Taipei: Dingwen Publishing Co. 1981). The *Shiji* is the first major official history, authored by Han dynasty historian Sima Qian. It covers Chinese history from the time of the Yellow Emperor to the period of Emperor Wu of the Han. It is an incredibly important primary source and classified as the first of the dynastic histories. Its influence on Chinese historiography cannot be understated, as every subsequent dynastic history by and large followed Sima Qian's organizational format.

disturbances in society. In this case, the use of *Chunqiu Jueyu* not only is praised and leads to good decision-making by the ministers in the eyes of the Emperor and other officials, it also teaches and successfully convinces the Empress Dowager not to establish the Prince of Liang as the Crown Prince. Further, the method of legal reasoning and argumentation used by Yuan Ang and his ministers shows concern for precedent—in their view, the Duke Huan story and the lesson it teaches (passing thrones onto your sons or wife’s eldest grandsons, not brothers) should be binding on any future case similar to the one they were currently dealing with.

The previous two cases evoked specific events or lines from the *Spring and Autumn Annals*—the final example below instead relies on a general, fundamental principle as seen in the *Spring and Autumn Annals* text:

During the reign of Emperor Cheng of the Han (51-7 B.C.), a Liang minister memorialized to the Emperor, accusing Liu Li (the Prince of Liang¹⁵³) of saying bad things about the Emperor’s family. The Court sent investigators to look into the accusation. These investigators, however, discovered that Liu Li was having illicit relations with the Emperor’s aunt. The investigators then prepared and sent up a memorial (a document with recommendations or opinions presented to the emperor), decrying Liu Li’s behavior as beastly and urged for his beheading. Minister Gu Yong himself memorialized to the Emperor: “I have heard that ‘*li* (ritual and civic propriety) is the screen and barrier of the emperor to the outside world, because the emperor does not wish to see or be unduly influenced by [common] things happening outside his doors.’ Thus, the emperor in his role as a ruler should neither peep into or involve himself in the private affairs of others nor eavesdrop in on others’ conversations in their own homes. The *Spring and Autumn Annals* expounds that relatives and family members should not disclose [their private life] details. The *Book of Poetry* says, “Closely related are brethren; let none be absent, let all be near.”¹⁵⁴ In this present case, the Prince of Liang is still young and has a temperamental and rash attitude; in the

¹⁵³ The Prince of Liang was a noble title in use during the Han dynasty, first created by the Liu Bang, the first emperor of the Han dynasty. Liang enjoyed a good geographical location (located in modern-day Henan province), and thus those on whom this title was bestowed in turn enjoyed high status.

¹⁵⁴ I rely on James Legge’s translation of this line from the *Book of Poetry*; see THE CHINESE CLASSICS, *supra* note 78.

end, no evidence was found to support the minister's initial slanderous accusation, but instead, extremely private matters from the royal family (the aunt) were discovered . . . yet these matters were not within the scope of the original accusation . . . if we were to pursue the matter of the Emperor's aunt and Liu Li's relations, this would in effect stain and destroy the imperial house, revealing this matter to the entire world. This is not the means by which to protect the imperial family, increase the prosperity of the state, or elicit to all [true] virtuous mores. I respectively submit the following judgment: 1) we know the following facts: the Prince of Liang is still young, and his aunt is old, the two's ages are so far apart, 2) with the great prosperity of Liang, the prince could use money to buy any beautiful girl he wanted, and 3) although Liu Li's behavior was shameless, his aunt also has a heart of shame; [it is highly doubtful that she would agree to] have relations with him. Those handling this case (the investigators) were originally sent to investigate the alleged slander; why then did they instead pursue the matter of the affair? . . . I believe the time allotted to the investigators was far too little and they were scrambling to meet an urgent deadline; if by the deadline their investigations did not bear fruit, these officials feared facing possible reprimand. As a result, they had no choice but to transfer their attention to something else. If this matter was in its infant stages, the Emperor could have ordered that the matter be concealed and ceased any further investigation. If the case reports had already been written and sent up to the Court, the Emperor could have ordered . . . the prosecution of the original investigators for mishandling the investigation, and then have this innocence of Prince Liang (to the original charge) confirmed to the judicial authorities. This way, not only can we promote the principle of protecting our fellow vassals, we can . . . wash the stains from the imperial house and family, and be in accordance with the proper way to govern our vassals."¹⁵⁵ The Emperor, as a result, stopped the continuation of the case.¹⁵⁵

Here, Gu Yong built his *panwen* not on a specific event or quote from the *Spring and Autumn Annals*, but a general principle he was able to elicit from the text, namely that people should protect details of their private family

¹⁵⁵ BAN GU, *supra* note 97, at 70.2212.

lives. In addition, he argued that the evidence regarding Liu Li's private relations were immaterial because they were not related to the original accusation.

Thus, as we have seen, there is consistency and continuity among Dong's hypothetical *panwen* and real-life cases from the period. The *Chunqiu Jueyu* practice did not seek to weaken law at the expense of Confucian morality, but rather to combine them both in a systematic, methodical way to strengthen law by imbuing it with more flexibility, as well as giving certain cases and legal rules precedential value. To quickly summarize, the *Chunqiu Jueyu Panwen* reveal growing sophistication in terms of *panwen*'s historical development, especially the use of "case law" and analogical reasoning. Sometimes, as seen through the examples previously discussed, the *Spring and Autumn Annals* was quoted directly; other times, decisions were based on general and inherent principles in the text (at least how Dong and his contemporaries interpreted it). Additionally, legal rules were sometimes affirmatively developed from historical events and examples in the *Spring and Autumn Annals*. This is all a testament to the complexity of Chinese legal thought and jurisprudence, and the care and importance premodern Chinese society placed on law.

Further, from a modern legal perspective the *Chunqiu Jueyu* method of applying general principles (as in the Liu Li case) of a widely accepted canonical and revered text to cases—sometimes overturning or setting aside certain codified laws—should not really be that alien to us. We can perhaps analogize the *Spring and Autumn Annals* text to a sort of premodern constitution. Similar to modern-day constitutions, which claim to contain the most important tenets, principles, and foundations of a country's laws, the *Spring and Autumn Annals* also took on a constitutional status in Dong's time. The principles enshrined in the *Spring and Autumn Annals*—principles of morality, behavior, tradition, and history, for example—were seen as more important than codified statutes. Likewise, for example, many laws in countries such as the United States and the Republic of China (Taiwan) were often overturned and found unconstitutional because they violated a specific provision—either through an actual textual conflict—or because they went against a principle or the "spirit" of these countries' respective constitutions.

D. The Han-Tang Transition: The Age of Division (Wei, Jin, Northern & Southern Dynasties, and the Sui) (220-618 A.D.)

While the Han period enjoyed roughly four centuries of stable rule, contributing much to the foundation of Chinese civilization (so much so that

ethnic Chinese today refer to themselves as Han Chinese), the later Han suffered severe internal problems, especially conflicts among eunuchs, court officials, and the royal family, which poisoned the government. Externally, warlords, barbarians, and peasant rebellions weakened the dynasty. These problems all eventually lead to the collapse of the Han in 220 A.D.

After the fall of the Han, from roughly 220 to 280 A.D., China was broken up into three kingdoms, the Wei (魏), Shu (蜀), and Wu (吳), in a time known as the “Three Kingdoms period.” The Three Kingdoms period ended with the reunification of China under the Jin (晉) in 280, but China effectively split again into numerous kingdoms between north and south in the early-mid fourth century. Much of Northern China was later ruled by the Northern Wei (北魏) from 386 to 534 A.D., later followed by the Eastern Wei (東魏) from 534 to 550 A.D. This period of disunion lasted until 589, when Yang Guang (楊廣) reunified all of China under the Sui dynasty, until the establishment of the Tang dynasty in 618.

Given the chaos that characterized much of China’s political history during the Han to Tang transition, it is impossible to cleanly summarize relevant developments in Chinese legal history during this period. However, we do know that Confucianism survived and during the Three Kingdoms period Confucian scholars continued to be involved in drafting legal codes. In the state of Wei, Confucian scholars put together the Wei Code (which is no longer extant).¹⁵⁶ Confucian influence on law was also pronounced in the Jin dynasty, where Confucian scholars prepared and subsequently promulgated the Jin Code (now lost), which was used in the Jin up to 420 A.D.¹⁵⁷

The *Chunqiu Jueyu* method, and Confucian application and interpretation of law as seen in *panwen*, also continued.¹⁵⁸ More and more scholars took an interest in the study of jurisprudence and engaged in the writing of legal commentaries.¹⁵⁹ Later on in the Sui dynasty, Yang Guang promulgated the Kaihuang Code, which although now lost, is believed to have formed the basis for the Tang Code of 653.¹⁶⁰

Unfortunately, not many *panwen* from the Han-Tang transition survived—but those that have demonstrate a growing sophistication and highlight the importance of law and legal reasoning in society at the time. They draw on specific laws and principles and apply the facts to the law.

¹⁵⁶ HEAD & WANG, *supra* note 1, at 109.

¹⁵⁷ *Id.* at 110-11.

¹⁵⁸ *Id.* at 110.

¹⁵⁹ ZHONGGUO FAZHI SHI YUANLI YU ANLI JIAOCHENG, *supra* note 32, at 133-34.

¹⁶⁰ *Id.* at 114-15.

Some also consciously refer to themselves as *pan* (similar to Dong's *panwen*), and more interestingly, we have an actual case where multiple judgments were recorded (similar to the modern-day practice of dissenting opinions). Similar to Han and pre-Han *panwen*, the *panwen* from this period also deal with a variety of issues—such as marriage, mourning rituals, and ancestral sacrifice.

We begin with a *panwen* from the Jin dynasty dealing with rules involving mourning after one's death,¹⁶¹ which includes four different competing judgments. Unfortunately, we do not know ultimately which judgment was upheld. But, what is even more interesting is all four officials utilized similar forms and styles in rendering their judgments, suggesting growing standardization of the *panwen* form (with the ultimate standardization occurring in the Tang when *panwen* had to be written in strict parallel prose form). Furthermore, three of the four judgments were constructed as hypothetical *panwen* (again, like Dong's *panwen*, precursors to Tang *nipan*, or model judgments) that sought to be analogized and applied to the facts of the case being decided upon; the fourth relied on precedent (again, showing the importance of *stare decisis* reasoning in premodern Chinese law). The facts of the case are first set out briefly:

Former Anfeng prefect Cheng Liang already had a wife. Later on, he married again and so had a total of two wives. His first wife died, and then his second wife's son Chen Xun had some questions about the proper way in which to mourn for the first wife [or if mourning was even required in the first place].¹⁶²

The first judgment was prepared by Zhang Hua (張華) (232-300 A.D.), a Jin poet, author, and official:

A took B as his wife, and he later married C as well, concealing to both B and C that he was actually already married. He lived two separate lives with each wife and had no sense of shame. After B died, how then should C's son mourn according to propriety [and the law]? [Now in this situation] . . . there was no proper distinguishing between the sons of the first and

¹⁶¹ For an overview of the practice of mourning in later Chinese history, see NORMAN ALAN KUTCHER, *MOURNING IN LATE IMPERIAL CHINA: FILIAL PIETY AND THE STATE* (1999).

¹⁶² FANG XUANLING (房玄齡) (579-648 A.D.) ET AL., *JINSHU* (晉書) [THE BOOK OF JIN] 640 (Taipei Dingwen Book Co. (鼎文書局) 1980). The Book of Jin is one of the dynastic histories, covering the period of the Jin dynasty from 265 to 420. The lead editor, writer, and compiler was Fang Xuanling, a famous chancellor under Emperor Taizong (唐太宗) (599-649 A.D.) in the Tang dynasty.

second wives. Although both marriages were not conducted according to ritual propriety, these errors were perpetrated by A's actions. How can the second wife's son mourn only one mother and be separated from his birth parents if he does? For example, if one was to mourn the second mother, he does not automatically become her son. Thus, it is not clear how to proceed on this matter.¹⁶³

Zhang Hua's judgment perhaps needs a quick explanation. He first set up a hypothetical situation that mirrored Chen Xun's situation—this move is significant as it shows that Zhang intended his judgment to hopefully have precedential value and perhaps universal applicability in the future. In premodern Chinese culture, it was very important to distinguish between the first wife (who generally had the most power) and her children, and the second (and in some cases, third, fourth, etc.) wife and her children, who were generally more inferior in the household hierarchy. As Zhang pointed out, there was no such “distinguishing” by A in his marriage life. The rest of the judgment shows Zhang's ambivalence—on the one hand, he believed there should be “distinguishing,” but then saw no harm in having C's son mourn for B. His point is that even if C's son did mourn for B, this would not be some traitorous action against his own birth parents. The fact that Zhang Hua did not reach a judgment is also extremely significant—it highlights that judges in premodern China also struggled in their decision-making. Rather than pronounce sentences just for the sake of pronouncing sentences, they could say they could not reach a decision. In other words, justice in premodern China was not always arbitrary, as is frequently assumed.

A second official then chimed in on the matter:

Another official, Zheng Zhong, said: “A lacked the decency of ritual propriety in the household. The son could do nothing to correct the problem of his father having two wives. Thus, B and C's sons should all mourn for three years. The principle to remember is the following: when there are any doubts or ambiguities as to the laws on ritual propriety, it is always better to err on the side of caution.”¹⁶⁴

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Zheng Zhong, agreeing with Zhang that the case was quite difficult, nevertheless believed it was better to play it safe and to read the laws on ritual propriety as more sweeping, a sensible approach.

A third official evoked a general principle from the *Spring and Autumn Annals* (similar to Gu Yong's evocation of the principle of inter-family protection of details relating to family private lives) and also a historical story from the pre-Qin period:

Another official, Xun Yi, said the following: “From the *Spring and Autumn Annals* forth there has been a consistent rule: if one does not distinguish between the first son of a proper (the first) wife and the sons of secondary wives, this is the root of disorder and strife. Now, we cannot go against the ancient principles of ritual and condone or tolerate having two proper wives. We cannot wantonly fail to properly distinguish between the dignified and the base and simply sit on the sidelines with regards to A's errors. We should make our decision here based on the laws of ritual propriety. The first wife—B—should be the main, proper wife, and C should be the secondary wife. C's son should mourn for B in her status as the legally proper mother, and B's son should serve C with respect but in her status as the secondary wife. From the past, Qu Jian (who died in 537 B.C.)¹⁶⁵ spurred controversy with his using

¹⁶⁵ The story of Qu Jian (屈建) can be found in the GUO YU [DISCOURSES OF THE VARIOUS STATES]. See GUO YU, *supra* note 75, at 532. The following is a full translation of the story:

Qu Jian's father, Qu Dao 屈到 (an official of the ancient state of Chu) liked to eat water chestnuts. When he later became dangerously and severely ill, he called on the local responsible for ancestral sacrifices to prepare his last will and testament, which said: “After I die, when offerings are prepared to me, they must include water chestnuts!” After Qu Dao died and when the time came to prepare the ritual offerings, the official laid out water chestnuts according to Qu Dao's wishes, but Qu Jian ordered him to remove the water chestnuts. The official said, “Your father dictated his last will and testament; he wanted me to do this!” Qu Jian said, “Don't be like this. I am not convinced. During my father's life, he had the responsibility of carrying forth the great rule of the Chu state and making sure that Chu laws and regulations were executed [properly] and in accordance with the people's expectations and needs, while entrenching this all in government. These laws and regulations rivaled those of the great ancient kings in the Xia, Shang, and Zhou dynasties, and they had a positive impact on the entire world – not only the state of Chu and her rulers and ministers, but also the other vassal states. There was not one person who did not praise these laws and regulations. The *Jidian* (祭典) [Code on Sacrifices] had this rule: ‘When presenting offerings, rulers should use cows, lambs, and pigs; grand ministers should use hogs and sheep only; the *shi* (士) class (the lower aristocracy) should use dogs and pigs; and commoners should use fish meat. As for fruit, dried meat, and meat sauce offerings, the ruler and all those

water chestnuts for ritual, ancestral sacrifices to honor his father, with some saying he had acted in accordance with ritual property and some saying he did not. Now, C's son is not necessarily insulting his own birth mother [by honoring B]; this is rather his respecting and recognizing the ancient principles.¹⁶⁶

Here, Xun Yi rendered a clear judgment based on a legal rule he extracted from the *Spring and Autumn Annals* and also from common sense—one must distinguish between the “dignified” and “the base,” and specifically, between the proper, first wife and secondary wives. In Xun Yi's view, it was critically important to follow the “ancient principles.” He also cited the historical example of Qu Jian, where Qu followed the ritual propriety rules of the *Jidian*, or the *Code of Sacrifices* (no longer extant), despite a conflict between its rules and the wishes of his own father with respect to water chestnuts. Xun Yi, in other words, took a very linear, clear approach, analogizing the current case with the precedent of Qu Jian's case. Qu Jian was a son who was nevertheless able to sacrifice any possible sympathy he may have felt for his father's dying wishes, in order to ultimately follow the law, which had distinguished between multiple classes and what offerings could be used (according to the *Jidian*, his father's status as an official did not provide for the use of water chestnuts). Thus, in Xun Yi's view, Chen Xun should also follow the ancient principles and properly honor B.

The fourth judgment opinion does not utilize the hypothetical *panwen* format, but attempts to rely on past precedent, although like Zhang Hua's *panwen*, does not reach a final conclusion given the difficulty of the case:

Xin Xu (who died in 289 A.D.) said the following: “since the past, fellow resident Zheng Ziqun married Chen Sikong's cousin, and later because of the great Lu Bu (吕布) Rebellion [and the separation it caused], he did not know whether his wife was dead or alive. He thus married a girl from the Cai family, also from the same hometown. After the Xuzhou territory was pacified, the Chen family returned, and the two wives lived together with Zheng. Cai's son (named Yuan Xin) mourned his father's first wife in her status as legal, principal wife, and also

below him can use them, but the only difference is in what quantities and proportions they are offered.’ My father could not possibly have, for the sake of his own private, selfish appetite or proclivities, to go against the Chu laws on offerings.” In the end, water chestnuts were not used.

¹⁶⁶ FANG XUANLING ET AL., *supra* note 162, at 640.

properly attended . . . [on the Chen family]. One of his family elders blamed Yuan Xin for being improper, believing that he was disrespecting and looking down upon his own birth mother. But the most prestigious and respectable people in the town thought that Yuan Xin's actions were correct. I am unsure if this situation is alike [to the present case involving Chen Xun].¹⁶⁷

Thus, from this one case involving Chen Xun's question about proper mourning etiquette, we can see varied judicial approaches. They all, however, highlight the growing complexity of *panwen* since the Han dynasty, a trend that we have examined in this article.

From the Wei period in the reign of Emperor Xiaojing (魏孝靜帝) (524-552 A.D.), we have a *panwen* (again, consciously referred to as *pan*). This *panwen* does not address a pending legal case, but rather a debate over legislative policy and reform surrounding laws on parent-child mutual cover-up of crimes, specifically the law regarding a child reporting his own mother.¹⁶⁸

Some context must be provided before delving into the actual *panwen*. A man named Dou Yuan (竇瑗) was serving as a high official to Gao Huan, also known as Prince Xianwu of Qi, the leading general of the Northern Wei. Dou Yuan had submitted a memorial, urging the reform of a law that stated that if a child's mother kills her husband, the child is not permitted to report his mother (if he did, he would be executed). Dou wrote to Prince Xianwu, arguing that such a legal measure did not make sense. Dou reasoned that if the father killed the mother (i.e., the husband killing the wife), it would be right for the child to refrain from reporting his father.¹⁶⁹ It was wrong, however, in Dou's view, to not allow the child to report his mother for killing his father, as this debased the father's status and would be barbaric (it should be noted here that Dou Yuan was not completely one-sided in the father's favor—he also urged the central government to add a law that would allow a child to report his father if his father had committed a very serious,

¹⁶⁷ *Id.*

¹⁶⁸ Recall the general Confucian principle on father-son mutual concealment of crimes, reflected in the Analects: “the father conceals the wrongdoings of the son, and the son likewise conceals the wrongdoings of his father. Moral correctness can be found in this situation.” THE ANALECTS, *supra* note 124, at 14.

¹⁶⁹ *See id.*

traitorous, and seditious offense).¹⁷⁰ In any case, Dou's proposal to change the law regarding a child reporting on his mother spawned a lot of debate.

One official wrote the following *panwen* in response:

We get our bodies, hair, and skin from our parents. They have expended so much to give birth to us . . . it is so hard for children throughout the course of their entire lives to properly and rightfully repay their parents . . . Today, we have suddenly started to discuss the nobility and baseness, the goodness and evil of our parents. In our hearts, it would be hard for us to admit that our parents are committing bad behavior. [On this issue sparked by Dou's proposal of allowing children to report on their mothers if they kill their husbands], the historical and classical texts do not provide clear answers. [I believe that, however] if a mother killed her husband the child then reported his mother, leading directly to her execution, this would be the same as a child killing her mother. In this world, there are no countries [that can endure] without mothers. I do not know where such children [that report on and cause the deaths of their mothers] would go! As the *Spring and Autumn Annals* record, Duke Zhuang (魯莊公) (reign dates 693-662 B.C.) was not able to immediately ascend to the throne because his mother, Wen Jiang, left the state.¹⁷¹ Fu Qian (服虔)¹⁷² had said (regarding the Wen Jiang event): "Wen Jiang had plotted with the Prince of Qi and they together murdered Lord Huan and did not return to the state of Lu . . . [even though his own mother conspired to murder Lord Huan, his father] Duke Zhuang kept this all to himself in great pain. After the period of mourning for his father . . . Lord Zhuang started to miss his mother. Thus, the *Spring and Autumn Annals* says, "in the third month, the wife of Lord Huan retired to Qi."¹⁷³ Now, because we have this story and historical proof of a child who simultaneously hid his mother's crime and yet still missed her [affectionately], we can

¹⁷⁰ WEI SHOU (魏收) (506-572 A.D.), WEISHU (魏書) [BOOK OF THE WEI] 1908-10 (Taipei Dingwen Book Co. (鼎文書局) 1980). The Weishu is one of the dynastic histories; it covers the Northern and Eastern Wei from about 386 to 550 A.D.

¹⁷¹ Lord Zhuang eventually came to power after his father, Lord Huan, had been murdered as a result of an affair between Wen Jiang (Lord Zhuang's mother) and her own brother, the Prince of Qi.

¹⁷² Fu Qian was a prominent Han Confucian scholar and commentator on texts and a colleague of fellow influential commentator Zheng Xuan (鄭玄) (127-200 A.D.).

¹⁷³ See CHUNQIU ZUOZHUAN, *supra* note 60, at 17.

see that a child does not bear grudges against his mother and harbor a desire to vengefully report her. The ancient sages created the present law [prohibiting children from reporting on their mothers] in order to prevent despicable and tumultuous acts of violence . . . and to let people understand evil and to avoid breaking the law. If we were to start over again and discuss [and revise] the law, the people who would retroactively be found to have broken the law would number far too many . . . I do not think we should . . . [adopt Dou Yuan's proposal].¹⁷⁴

Here, this official used different forms of legal reasoning to reject Dou Yuan's proposal. First, he relied on the universal, almost natural law proposition that one must respect and love his parents (as they have sacrificed so much for us and we can never repay them adequately). A historical example from the *Spring and Autumn Annals* was used to emphasize the deep relationship between mother and son, and to prove that there is no emotional harm to children who hide their mother's crimes. Finally, a policy argument was advanced with regards to the issue of retroactivity. The main point regarding this *panwen* is we can see sophisticated forms of legal reasoning in an organized form and structure.

Unfortunately, we have very few *panwen* from the Sui, and the few that survive are too short for proper analysis; because the Sui was such an ephemeral dynasty, most scholars utilize post-Han and pre-Sui as representative *panwen* for the Han-Tang transition. We do know, however, that the Sui continued to emphasize *panwen* in judicial decision-making.¹⁷⁵ Thus, the Sui period does not disrupt the narrative of pre-Tang *panwen*. Therefore, as we can see from the *panwen* examples above, the Han-Tang transition *panwen* continued many of the developments in Han *panwen* form and substance.

III. CONCLUSION

From the first ancient *panwen* in the Western Zhou to the sixth century A.D. *panwen* from the Wei period, we see a continuing line of development of the *panwen* genre. As *panwen* developed, they became

¹⁷⁴ WEI SHOU, *supra* note 170, at 1910. Dou responded in another *panwen* which essentially takes the opposite view to each of the objections advanced by this official. Dou argued that a child who does not report on his mother is in effect also participating in the killing of his father. Furthermore, as a retort to the official's point that all countries have mothers in order to succeed, he argued that there were no successful countries in the world that did not have fathers. *Id.* at 1911.

¹⁷⁵ WU CHENGXUE (吳承學), *ZHONGGUO GUDAI WENTI XINGTAI YANJIU* (中國古代文體形態研究) [A STUDY ON LITERARY FORMS IN THE CHINESE LITERARY TRADITION] 113-14 (1997).

more sophisticated and complex in both form and substance. Pre-Han dynasty *panwen* were frequently first oral *panwen* which were later recorded. In the Han, however, authors such as Dong Zhongshu began to immediately write down their judgments and consciously label them as *pan*.

In terms of legal reasoning, *panwen* throughout the pre-Tang development years drew on a variety of sources of law—history, general principles in ancient authoritative texts such as the *Spring and Autumn Annals*, and even natural law norms. Rules of law were announced and facts were applied to law both with growing sophistication and specificity, from simple juxtaposition in earlier *panwen*, to a desire to precisely match (even to the point of a very clear, character-to-character language analysis by the judges, such as in Shuxiang's judgment of Yang Shefu and Sima Shuo's *panwen* on Qing Zheng) the alleged criminal actions and the legal standards. A growing respect of precedent can also be seen as reflected first in Dong Zhongshu's *panwen*, and later throughout the Han-Tang transition period of Chinese history. *Panwen*'s linguistic form also steadily developed from freer forms of prose, to language that utilized parallel construction and parallel sentences. Hypothetical *panwen* also emerged in the Han as a way for officials to create precedents and also to think through difficult cases. Finally, *panwen* throughout the entire pre-Tang period were steadily utilized to deal with more and more issues and disputes in society—from crime (theft, murder, and the like), to family issues (marriage), ritual propriety, ancestral sacrifices and offerings, military affairs, animal criminals (such as Tong Hui's tiger case) and even to (as we saw in the Han-Tang transition) more abstract debates over legislative policy. This is a testament to the growing pervasiveness of *panwen* in Chinese society, and the importance premodern Chinese government placed on law and legal reasoning to solve a variety of social and administrative problems (again, countering the stereotypical narrative of premodern China as a society quite unconcerned with law). Of course, not all *panwen* we have examined in this article are models for good, reliable, and sound legal reasoning (such as Confucius's judgment on Shaozheng Mao). We cannot possibly expect them all to be. But all of them, I believe, fundamentally show an honest attempt on the part of the officials involved to engage with the law and legal reasoning even during as early a time as pre-Tang China. *Panwen* was influenced by, and in turn influenced, the path of Chinese legal historical development. The growing sophistication of *panwen* in form, substance, and also its steady increase in influence would eventually culminate in the Tang dynasty, where *panwen* would be institutionalized in the civil service examinations (and thus impact the lives of many men preparing for government service),

written up in formal parallel prose form, and utilized for taking care of even a broader range of social problems.

Last, through studying Chinese legal history, we can better situate current developments in Chinese law—such as the Supreme People’s Court’s Guiding Cases—in historical context and at the very least, understand that they are not necessarily new or revolutionary ideas to penetrate Chinese jurisprudence. Rather, such ideas surrounding case law development have been a fundamental part of Chinese historical jurisprudence.