

## Notes on Penal Ritual and Subjective Truth under the Qin

Historians of China long believed the legal practices of the Qin dynasty (221–207 BC) were cruel and harsh. Yet the historical record was impressionistic and general and lacked concrete information. In the 1970s, Qin documents dating to the third century BC were unearthed at Shuihudi 睡虎地 (Yunmeng county, Hubei), giving researchers substantial if fragmentary new information about Qin penal practices.<sup>1</sup> But predictably this information has created as many questions as it has answered.

One of the newly recovered documents is named “Fengzhen shi” 封診式, which describes Qin procedures for investigating crimes, including interrogation of witnesses and suspected criminals.<sup>2</sup> It begins with some general guidelines:

I WOULD like to thank Lothar von Falkenhausen and Christian Schwermann, who read and commented on a draft of this article; an anonymous reader, who made numerous helpful suggestions and corrections, and referred me to valuable secondary literature; and the editors at *Asia Major* for their invaluable advice and assistance. Any remaining mistakes are of course my own. Funding was provided by the Japan Society for the Promotion of Science.

<sup>1</sup> Shuihudi Qinmu zhujian zhengli xiaozu 睡虎地秦墓竹簡整理小組, ed., *Shuihudi Qinmu zhujian* 睡虎地秦墓竹簡 (Beijing: Wenwu chubanshe, 1990; hereafter, *Shuihudi*).

<sup>2</sup> The text of “Fengzhen shi” is in *Shuihudi*, pp. 147–64, which includes notes and a translation into modern Chinese. There are two highly technical, heavily annotated, and extremely detailed translations of “Fengzhen shi” into English: A. F. P. Hulswé, *Remnants of Ch'in Law: An Annotated Translation of the Ch'in Legal and Administrative Rules of the 3rd Century B.C. Discovered in Yün-meng Prefecture, Hu-pei Province, in 1975* (Leiden: E. J. Brill, 1985), pp. 183–207; Katrina C. D. McLeod and Robin D. S. Yates, “Forms of Ch'in Law: An Annotated Translation of the *Feng-chen shih*,” *HJAS* 41 (1981), pp. 111–63. The translations here are my own, though I have naturally referred to all of these. Since the others exist, my translations here are minimally annotated.

“Fengzhen shi” has generally been taken to represent official Qin policy; see e.g., Liu Hai-nien 劉海年, “Wenwuzhong de falü shiliao ji qi yanjiu” 文物中的法律史料及其研究, in Yang Yifan 楊一凡, ed., *Zhongguo fazhishi kaozheng* 中國法制史考證, part 1, vol. 4, of *Fashi kaozheng zhongyao lunwen xuanbian: falü shiliao kaoshi* 法史考證重要論文選編, 法律史料考釋, ed. Yang Yifan and Liu Ducai 劉篤才 (Beijing: Zhongguo shehui kexue chubanshe, 2003), p. 13. That being said, as Chen Gongrou 陳公柔 reasons in “Yunmeng Qin mu chutu ‘Fengzhen shi’ jiance yanjiu” 雲夢秦墓出土“封診式”簡冊研究, in *Zhongguo fazhishi kaozheng*, part 2, vol. 2, *Lidai fazhikao: Zhanguo Qin fazhi kao* 歷代法制考, 戰國秦法制考, ed. Ma Xiaohong 馬小紅 (Beijing: Zhongguo shehui kexue chubanshe, 2003), pp. 318–20, the text’s provenance

When handling a criminal case, it is best to be able to follow [the subject's] words by writing them down, and so get to the person's true situation without beating. Beating is inferior. If there is fear, it is failure. 治獄，能以書從迹其言毋治[=答]諒[=掠]而得人請[=情]爲上，治[=答]諒[=掠]爲下，有恐爲敗。<sup>3</sup>

Unfortunately, the text does not explain *why* beating was inferior. Clearly it was a possibility, so there seems to have been neither an absolute objection to it nor a belief that it would *necessarily* taint any evidence it produced. So if the goal was simply getting at the *qing* 情, the truth of the situation, then it seems that any method permitted by law should have been acceptable (and the law in early China generally did not shy away from the physical). Of course, torture produces unreliable information, as people in early China knew and acknowledged.<sup>4</sup> But the permissibility of beating in specific situations indicates that the Qin accepted it as part of interrogation, provided it was not undue.

And why the unexpected assertion that if there is fear it is a failure? Qin law promised a variety of harsh punishments for those who transgressed it in any number of ways, and even witnesses under questioning could be arrested. There was also the possibility of beating during interrogation, as just mentioned. So it is hard to imagine anyone *not* being scared when brought before the investigating officer.<sup>5</sup> The third-century BC political philosopher Han Fei 韓非 (d. 233 BC) commended fear as the route to upright action – a commonsensical way

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and incomplete state mean that it is impossible to prove its originally intended purpose. He says, e.g., it could conceivably represent material copied out of other cases for personal reference. However, Chen agrees it seems likely to represent material promulgated by authorities. In particular, Chen points to the word *shi* 式, which was the technical term for official legal forms in later, and probably earlier, times.

<sup>3</sup> “Fengzhen shi,” *Shuihudi*, p. 147.

<sup>4</sup> This is shown, e.g., in Ban Gu 班固 (32–92), *Han shu* 漢書 (Beijing: Zhonghua shuju, 1962) 53, p. 2430, which describes how the concubine Rong Ai 榮愛 was caned and induced to give what the *Han shu* explicitly labels as a false confession of an affair with a doctor. For an example from recovered materials, see Zhangjiashan ersiqihao Han mu zhujian zhengli xiaozu 張家山二四七號漢墓竹簡整理小組, ed., *Zhangjiashan Han mu zhujian: (Ersiqihao mu)* 張家山漢墓竹簡 (二四七號墓) (Beijing: Wenwu chubanshe, 2001), pp. 221–22; and Zhangjiashan ersiqihao Han mu zhujian zhengli xiaozu, ed., *Zhangjiashan Han mu zhujian: (Ersiqihao mu)*, rev. edn. (Beijing: Wenwu chubanshe, 2006), pp. 100–2; trans. Mark Csikszentmihalyi, *Readings in Han Chinese Thought* (Indianapolis: Hackett Publishing Company, 2006), pp. 29–35. The aversion to confessions extracted through violence appears to have had deep roots, and is reflected already in a Western Zhou bronze inscription; see Li Feng, *Landscape and Power in Early China: The Crisis and Fall of the Western Zhou, 1045–771 BC* (Cambridge: Cambridge U.P., 2006), pp. 100–1.

<sup>5</sup> See A. F. P. Hulswé, *Remnants of Han Law, Volume 1: Introductory Studies and an Annotated Translation of Chapters 22 and 23 of the History of the Former Han Dynasty* (Leiden: E. J. Brill, 1955), p. 73; as pointed out by McLeod and Yates, “Forms of Ch’in Law,” p. 131, n. 56.

of thinking about penal law.<sup>6</sup> One could try to resolve the question by interpreting the language of “Fengzhen shi,” but I think a straightforward understanding is best, even if the text seems counter-intuitive.<sup>7</sup> And “Fengzhen shi” is not the only recovered Qin text that exhorts officials to avoid scaring the common people.<sup>8</sup>

The Qin attitude toward punishment becomes more complicated when we consider the fragments of Qin legal texts from the same find in this context, for one of the thought-provoking aspects of Qin legal practice was a conspicuous interest in the mental state of a given actor in the context of a particular criminal or potentially criminal act. In some cases, the intent of the person determined the nature or scope of a crime; in certain situations the existence of a crime could depend on whether or not the person had particular knowledge (see discussion, below).

Beyond the preference for confession already noted, the Qin code was no more explicit about how subjective states were to be ascertained than it was about why fear should constitute failure. Given the possible punishments, one would expect lying and/or refusal to confess. Yet the Qin paid particular attention to establishing the truth, particularly through nonviolent means.

In the following, I argue that Qin penal practices are best understood as a ritual response to the exigencies of this situation. Robin D. S. Yates decades ago pointed out that the Qin documents reveal methods of government that went beyond the bounds of banal rationality often connected with bureaucracy.<sup>9</sup> And examination of recovered texts describing Qin investigation and interrogation procedures will show that they meet Roy A. Rappaport’s definition of ritual.<sup>10</sup> With these scholars’ insights in mind, I will argue that these investigative rituals maintained a Qin ideal of fairness and counteracted the negative possibilities created by the Qin legal interest in the subjective aspects of crimes. They did this through what can best be understood as ritual production of

<sup>6</sup> See “Jie Lao” 解老, in Chen Qiyou 陳奇猷, *Han Feizi xin jiao zhu* 韓非子新校注 (Shanghai: Shanghai guji chubanshe, 2000), pp. 386–87, including Chen’s note 2, where he suggests the text refers specifically to fear of the law and its penalties.

<sup>7</sup> McLeod and Yates, “Forms of Ch’in Law,” and Hulsewé, *Han Law*, suggest interpreting the text so as to resolve the difficulty, while the editors of *Shuihudi* give a straightforward translation, like mine.

<sup>8</sup> See “Wei li zhi dao” 爲吏之道, *Shuihudi*, pp. 171–72.

<sup>9</sup> Robin D.S. Yates, “Some Notes on Ch’in Law: A Review Article of *Remnants of Ch’in Law*, by A.F.P. Hulsewé,” *EC* 11–12 (1985–87), p. 245, who mentions specifically, “religious and ‘magical’ concepts.”

<sup>10</sup> Roy A. Rappaport, *Ritual and Religion in the Making of Humanity* (Cambridge: Cambridge U.P., 1999).

social truth. This analysis helps explain both how the Qin resolved the problem of establishing subjective states, and why they opposed extracting confession through beating and intimidation.

I begin by arguing that it is justifiable to consider penal practice as a kind of ritual, employing Rappaport's definition as my standard. Then I look at how the Qin portrayed (and apparently viewed) their legal practices as adhering to high standards of fairness. I next show how the Qin code emphasized consideration of subjective factors in criminal matters. And since these factors existed only in the minds of those involved and were not externally verifiable, I argue that there was instability and possible contradiction inherent in the evaluation of crime in the Qin. I further argue that the common people of the Qin empire had sufficient knowledge of legal practices to notice this – and that the officials involved certainly did. I finally show that Qin interrogation procedures were a kind of ritual. Drawing from both early Chinese sources and the work of modern scholars and researchers, I see ritual as having worked against the potential contradiction by improving the effectiveness of investigations and establishing the effective truth.

#### PENAL PRACTICE AS RITUAL?

It might be objected that ritual and punishment existed in opposition to each other, and that this opposition precludes thinking of penal practice as rite. Famous remarks attributed to Kongzi 孔子 (551–479 BC) explicitly juxtapose punishment and *li* 禮:

Lead them with government and order them with punishment, and the people will avoid these but lack a sense of shame. Lead them with virtue and order them with *li* and they will have a sense of shame and be correct. 子曰，道之以政，齊之以刑，民免而無恥。道之以德，齊之以禮，有恥且格。<sup>11</sup>

And after all, the Shuihudi strips do not even include the term *li*, the Chinese word generally translated as ritual (but see discussion, below). Nevertheless, I argue that considering penal practice as ritual is justified, on a couple of grounds.

The first of these relates to the common and accurate assertion that the meaning of the word *li* does not perfectly match the English word

<sup>11</sup> *Lunyu zhu shu* 論語注疏, j. 2, p. 16 [p. 1b]; this and all references to the Thirteen Classics cite *Shisanjing zhu shu* 十三經注疏, ed. Ruan Yuan 阮元 (1764–1849) (Taipei: Yiwen yinshuguan, 2001).

“ritual.” Ma Xiaohong 馬小紅 has written about the various forms and meanings *li* had in early times, and argues that even in modern Chinese only the word *li* itself can cover that ground – and she also points out that the modern term differs significantly from classical usage. In short, elucidation of the various aspects of *li* requires discussion, not equivalent vocabulary.<sup>12</sup>

In English, this multivalence leads to the objection that the word “ritual” does not exactly match the meaning of *li*, and that is certainly true. Sometimes long lists of words are adduced in order to give an idea of *li*'s scope, which can be an instructive exercise.<sup>13</sup> But just as “ritual” does not fully comprehend the meaning of *li*, so does *li* – or better, any particular instantiation of *li* – not necessarily limit use of the concept of ritual in considering early Chinese practice. Thus, sentiments like those attributed to Kongzi do not rule out the possibility of ritual in penal practice.

One approach is to begin with an accepted definition of ritual. Then, if a given practice matches that definition, we can justifiably analyze it as ritual. In this paper, I adopt Rappaport's definition of ritual: “The performance of more or less invariant sequences of formal acts and utterances not entirely encoded by the performers.”<sup>14</sup> Rappaport developed and applied this definition over more than twenty years; my discussion draws on his posthumously-published *Ritual and Religion in the Making of Humanity*, the culmination of that work.

Rappaport's definition may appear more nebulous than one might expect. However, it is not far removed from those of some other influential scholars. For example, Catherine Bell has listed six characteristics that for her define “ritualized” activities: “formalism, traditionalism, disciplined invariance, rule-governance, sacral symbolism, and performance.”<sup>15</sup> Both Bell and Rappaport include performance, formalism, and invariance. Rappaport's conception of patterns “not entirely encoded by the performers” connects both to traditionalism and rule-governance, in that these are origins outside the performer. The notion of tradition is perhaps slightly more limited, in that it implies

<sup>12</sup> Ma Xiaohong, *Li yu fa: fa de lishi lianjie* 禮與法, 法的歷史連接 (Beijing: Beijing daxue chubanshe, 2004), pp. 76–87.

<sup>13</sup> E.g., Masayuki Sato, *The Confucian Quest for Order: The Origin and Formation of the Political Thought of Xun Zi* (Leiden: Brill, 2003), p. 178.

<sup>14</sup> Rappaport, *Ritual and Religion*, p. 24; the following explication of his definition is based on pp. 24–47. My understanding of Rappaport draws much from Joel Robbins, “Ritual Communication and Linguistic Ideology,” *Current Anthropology* 42 (2001), pp. 591–614.

<sup>15</sup> Catherine Bell, *Ritual: Perspectives and Dimensions* (Oxford: Oxford U.P., 1997), p. 138; the following discussion based on pp. 138–69.

(in common usage) some sort of historical derivation for the acts. But Bell also notes that not everything putatively “traditional” merits the feeling of historical authenticity attributed to it, as these are sometimes quite new.<sup>16</sup> Thus, only the sacral would be missing from Rappaport’s schema, but as Bell says, “Ritual-like action effectively *creates* the sacred by explicitly differentiating such a realm.”<sup>17</sup> And Bell’s discussion makes it clear that the sacred as she conceives of it can encompass matters which have no ostensible connection to the supernatural. It instead is characterized by extreme reverence established through ritual. Given the great importance the Qin placed on their legal system, it seems it could apply here, too. But all in all, Bell – like Rappaport – gives a very open-ended definition. And this sort of definition is necessary in order to encompass the wide variety of human ritual.

As I will show, records of Qin legal procedure indicate that it meets Rappaport’s definition. Furthermore, although penal practice is commonly understood in opposition to *li*, there was considerable overlap between the two. This is probably most evident when texts in the ritual canon, for example, *Zhou li* 周禮, discuss legal practice. Li Xueqin 李學勤 has written about the relationship between *Zhou li* and the legal systems of Qin and Han that are reflected in recovered materials.<sup>18</sup>

Although a later composite of essentially unknown provenance, the *Zhou li* text purports to describe the bureaucracy of the Zhou state.<sup>19</sup> As such, it is to be expected that legal officials would figure in it. For example, it describes the responsibilities of the *sixing* 司刑, whose duties included applying penalties like tattooing, amputation of noses and feet, and execution.<sup>20</sup> It also describes the tasks of the *zhanglu* 掌戮, another official involved with carrying out punishments.<sup>21</sup> But *Zhou li* goes beyond describing officials and discusses at some length other aspects of penal practice. For example, the description of the official called *dasitu* 大司徒 lists the types of crimes he punished – a list that might seem merely moralistic and not to be taken literally until it is recalled that Qin law in fact punished unfiliality 不孝, the first crime on the list.<sup>22</sup>

<sup>16</sup> Bell, *Ritual*, pp. 147–48.

<sup>17</sup> *Ibid.*, p. 157.

<sup>18</sup> Li Xueqin, *Jianbo yiji yu xueshu shi* 簡帛佚籍與學術史 (1994; rpt. Nanchang: Jiangxi jiaoyu chubanshe, 2001), pp. 110–18.

<sup>19</sup> See the discussion in Xia Chuancai 夏傳才, *Shisanjing gai lun* 十三經概論 (Tianjin: Tianjin renmin chubanshe, 1998), p. 201.

<sup>20</sup> *Zhou li zhu shu* 周禮注疏, j. 36, p. 539 [pp. 1a–2a].

<sup>21</sup> *Ibid.*, p. 545 [pp. 13a–14b].

<sup>22</sup> *Ibid.*, j. 10, p. 161 [p. 26a]; for *buxiao* in Qin law, see, e.g., “Fengzhen shi,” *Shuohudi*, p. 156; here and below I cite Hulsewé’s translations for reference; cf. Hulsewé, *Ch’in Law*, pp. 196–97.

*Li ji* 禮記 also discusses matters relating to law. In describing an ancient penal official, its chapter titled “Wang zhi” 王制 segues into precepts of broad applicability; for example: “Whenever hearing cases of the five punishments, invariably follow the close relationship between father and son and confirm the duty of lord and vassal in weighing them 凡聽五刑之訟，必原父子之親，立君臣之義以權之。”<sup>23</sup>

This crossover goes in the other direction as well: legal codes contained rules that followed or overlapped with those found in the ritual canons. A clear example is the proscription against taking eggs and young animals. This is found in *Li ji*: “Before the insects have swarmed ... do not take fawns and do not take eggs 昆蟲未蟄 ... 不騶，不卵。”<sup>24</sup> *Zhou li* describes an official whose task included prohibiting just these acts,<sup>25</sup> and both the Qin and Han made this into law; the Qin version was: “If it is not a summer month, do not ... take fawns, eggs, or young birds” 不夏月，毋敢 ... 騶騶 [=卵] 鷃。<sup>26</sup> And although the *Shuihudi* strips do not use the word *li*, they do indicate that Qin law governed ritual offerings made to spirits, and gave the items used in those observances special legal protection.<sup>27</sup>

Thus, at the broadest level, we can see that ritual and law overlapped in early China. There were of course distinctions between the two, particularly in the degree of direct coercion involved. But nothing necessarily rules out that one should include aspects of the other. In fact, as shown, below, information available to us about Qin interrogation techniques indicates that they had a ritual character.

#### THE DECLARED FAIRNESS OF QIN LEGAL PRACTICE

The Qin placed great importance on the evident fairness of their legal system. Absolute equality before the law for everyone except the

<sup>23</sup> *Li ji zhu shu* 禮記注疏, j. 13, p. 259 [p. 8b]. The constituents of the “five punishments” (*wuxing* 五刑) varied over history. In Qin and Han times, they were tattooing, amputation of the nose, amputation of feet, execution followed by exposure of the head, and execution followed by pickling of the corpse; see *Han shu* 23, p. 1104. *Li* 立 means, “to establish, set up.” However, since – theoretically at least – the positions of lord and vassal should have already existed and so not in need of “establishment” per se, I understand it in these lines in an ongoing sense, thus “to confirm.”

<sup>24</sup> See “Wang zhi,” *Li ji zhu shu*, j. 12, p. 237 [p. 5b].

<sup>25</sup> *Zhou li zhu shu*, j. 16, p. 249 [p. 14b].

<sup>26</sup> *Shuihudi*, p. 20, trans. Hulswé, *Ch'in Law*, p. 22; for the Han version, see “Ernian lüling” 二年律令 no. 249, in *Zhangjiashan Han mu zhujian*, p. 167; *Zhangjiashan Han mu zhujian*, rev. edn., pp. 42–43; Zhu Honglin 朱紅林, *Zhangjiashan Han jian* “Ernian lüling” jishi 張家山漢簡“二年律令”集釋 (Beijing: Shehui kexue wenxian chubanshe, 2005), pp. 164–65; see also the discussion in Li, *Jianbo yiji*, pp. 111–13.

<sup>27</sup> See “Falü dawen” 法律答問, nos. 25–28, 161, in *Shuihudi*, pp. 99–100, 131; trans. Hulswé, *Ch'in Law*, 127–28; discussed by Peng Hao 彭浩, “Shuihudi Qin jian ‘Wangshi ci’ yu ‘Ji lü’

sole ruler was one of the tenets of what would come to be called Legalism 法家.<sup>28</sup> For the Qin, this is reflected both in its political theory and the legal code itself. Chief among the theoretical underpinnings of the Qin were the ideas of Shang Yang 商鞅 (d. 338 BC), commonly considered the architect of the Qin legal system.<sup>29</sup> In the *Shangjun shu* 商君書 attributed to him we find the assertion that, “If the law is fair then the officers will not do wrong 法平則吏無姦.”<sup>30</sup> Writing in the third century, Han Fei said,

Thus, at the present time, if [a ruler] could do away with self-interested manipulation and adopt fair law, the people would be stable and the country ordered. If he could do away with self-interested action and enact fair law, then his army would be strong and his opponents weak. 故當今之時，能去私曲就公法者，民安而國治。能去私行行公法者，則兵強而敵弱。<sup>31</sup>

This interest in fairness was not exclusive to theoretical writings. It is reflected in materials for official education as well. When the First Emperor took the texts of the various masters out of public circulation and limited them to the confines of the imperial library, chancellor Li Si 李斯 (d. 208 BC) recommended, “If someone wants to study the laws and edicts” – the only useful education under the Qin – “he shall have officers as teachers 若欲有學法令，以吏爲師，” and the emperor agreed.<sup>32</sup> It might be easy to take this as “let them eat cake”-style flippancy. But this idea can be seen in writings attributed to Han Feizi and Shang Yang, and Li Si and the First Emperor were quite earnest.<sup>33</sup> And along with

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kaobian” 睡虎地秦簡“王室祠”與“齋律”考辨，in *Wuhan daxue jianbo yanjiu zhongxin* 武漢大學簡帛研究中心，ed., *Jianbo* 簡帛 (Shanghai: Shanghai guji chubanshe, 2006), vol. 1 of ser., pp. 239–43. For examples of Qin bureaucratic records of buying and selling items used in offerings, see Zhang Chunlong 張春龍, “Liye Qin jian ci Xiannong, ci yin he ci di jiaojuan” 里耶秦簡祠先農，祠窖和祠隄校券，in *Wuhan daxue jianbo yanjiu zhongxin*, ed., *Jianbo* (Shanghai: Shanghai guji chubanshe, 2007), vol. 2 of ser., p. 393–96.

<sup>28</sup> A.C. Graham, *Disputers of the Tao* (La Salle: Open Court, 1989), pp. 276–77.

<sup>29</sup> For arguments supporting this traditional conception on the basis of recovered legal materials, see Ye Shan 葉山 (Robin D.S. Yates), “Qin de falü yu shehui, guanyu Zhangjiashan ‘Ernian lüling’ deng xin chutu wenxian de sikao” 秦的法律與社會，關於張家山“二年律令”等新出土文獻的思考，trans. Lin Fan 林凡，in Guo Qiyong 郭齊勇，ed., *Rujia wenhua yanjiu* 儒家文化研究 (Beijing: Sanlian shudian, 2007), vol. 1 of ser., pp. 309–10 and passim.

<sup>30</sup> From the “Jin ling” 靳令 chapter, in Jiang Lihong 蔣禮鴻，ed., *Shangjun shu zhui zhi* 商君疏證 (Beijing: Zhonghua shuju, 1986), j. 3, p. 77.

<sup>31</sup> From the “You du” 有度 chapter of *Han Feizi*, in *Han Feizi xin jiao zhu*, j. 2, p. 91.

<sup>32</sup> Sima Qian 司馬遷 (ca. 145–ca. 86 BC), *Shi ji* 史記 (Beijing: Zhonghua shuju, 1959) 6, p. 255; Wu Fuzhu 吳福助, “‘Wei li zhi dao’ huanxue shizi jiaocai lunkao” “爲吏之道”宦學識字教材論考，in idem, *Shuihudi Qin jian lunkao* 睡虎地秦簡論考 (Taipei: Wenjin chubanshe, 1994), p. 153.

<sup>33</sup> Sun Kai 孫楷 (1871–1907), *Qin hui yao* 秦會要, revised and expanded by Yang Shanqun

legal codes and the like, archaeologists at Shuihudi recovered “Wei li zhi dao” 爲吏之道, a text that served – in part at least – for the education of officials.<sup>34</sup> Part of what the text inculcated was a proper morality for officials, a morality that included the most basic sort of legal fairness: “Do not punish those without crime 毋罪毋罪.”<sup>35</sup>

The Shuihudi strips also contain a text referred to as “Yu shu” 語書, a document that Teng 騰, governor of Nanjun 南郡, sent to subordinate local bureaucrats in 227 BC; it contained information and exhortation about legal and related matters. At certain points it gives normative descriptions of good and bad officials, and one of the characteristics Teng says divides the two is the “fair mind 公心” of the good official and his ability to, “Make correct judgments himself 能自端,” in contrast to the bad official, who “Has no fair and correct mind 毋公端之心.”<sup>36</sup>

A compilation of questions and answers about the law titled “Falü dawen” 法律答問 was also recovered at Shuihudi. It contains the following:

[Question:] In judging criminal cases, what is *buzhi* 不直 (crookedness), and what is *zongqiu* 縱囚 (letting a prisoner off)? [Answer:] If the punishment should be heavy but you deliberately lighten it, or it should be light but you deliberately make it heavy, this is called *buzhi*. If you should convict but you deliberately do not convict, as well as if you treat a case leniently or deliberately cause [the crime] to not reach [the legal standard] and so make a judgment to free [the criminal], this is called *zongqiu*. 論獄, [何謂]不直。可 [=何]謂縱囚。罪當重而端輕之, 當輕而端重之, 是謂不直。當論而端弗論, 及其獄, 端令不致, 論出之, 是謂縱囚。<sup>37</sup>

Both *buzhi* and *zongqiu* were offenses against applying the law in a fair and consistent manner. Their inclusion in the code reflects the broad Qin interest in legal integrity.<sup>38</sup>

楊善群 (Shanghai: Shanghai guji chubanshe, 2004), p. 515; see also *Han Feizi xin jiao zhu*, j. 19, p. 1112. On Shang Yang, see Xing Yitian 邢義田, “Qin Han de lüling xue” 秦漢的律令學, in *Qin Han shi lun gao* 秦漢史論稿 (Taipei: Dongda tushu gongsi, 1987), pp. 262–63; and “Ding fen,” *Shangjun shu zhui zhi*, j. 5, p. 146.

<sup>34</sup> The text is found in *Shuihudi*, pp. 167–76; see Wu, “Wei li zhi dao,” pp. 139–74; Xing, “Qin Han de lüling xue,” pp. 262–63.

<sup>35</sup> *Shuihudi*, p. 170.

<sup>36</sup> For the complete text of “Yu shu,” see *Shuihudi*, pp. 13–16, this quote from p. 15; see also the introduction and annotated text in Wu, *Shuihudi Qin jian lun kao*, pp. 39–59, and discussion pp. 63–138, particularly pp. 53–54.

<sup>37</sup> “Falü dawen” no. 93, *Shuihudi*, p. 115; trans. Hulseyé, *Ch'in Law*, p. 144.

<sup>38</sup> See also “Falü dawen” nos. 33–34, 35–36, 94, *Shuihudi*, pp. 101–2, 115; trans. Hulseyé, *Ch'in Law*, pp. 129–30, 144.

## THE SUBJECTIVE ELEMENT OF CRIME UNDER QIN LAW

Such professions of integrity seem straightforward enough at first glance. But another striking characteristic of the Qin legal code was its interest in subjective aspects of crime.<sup>39</sup> The mental state of the actor in a given act could be a decisive factor in determining if the act was criminal; or if the act was certainly criminal, the seriousness of the crime. The difficulty of establishing mental states complicates the issue of assessing culpability.

Li Jing 栗勁 has suggested that the existence of a crime under Qin law *required* a criminal intent on the part of the agent – though this goes a bit further than can be conclusively proved.<sup>40</sup> Huang Yuansheng 黃源盛 has argued that consideration of subjective factors primarily affected the severity of a crime and thus the appropriate punishment.<sup>41</sup> Although generally true, there were cases in which the existence of a crime depended on subjective state, as I will show, below.

The interest in subjective considerations is not only logical to a modern sensibility, but also has deep roots in early thinking about punishment in China. Li Jing points to canonical texts that make similar stipulations. He cites an example in *Zhou li*: “The first [cause for] leniency is ignorance, the next is accident, the third is forgetting 壹有曰不識，再有曰過失，三有曰遺忘.<sup>42</sup> These are mitigating factors that are mental states and so require the judging authority to make a determination of what was in a given subject’s mind.

Subjective states featured in many aspects of Qin legal practice. At the highest level, this interest connects to the broader trend toward punishing deliberate crimes more harshly than the inadvertent, itself a

<sup>39</sup> See Li Jing 栗勁, *Qin lü tonglun* 秦律通論 (Ji’nan: Shandong renmin chubanshe, 1985), pp. 163–68; Tomiya Itaru 富谷至, “Muhon: Shin Kan keibatsu shisō no hakken” 謀反, 秦漢刑罰思想の發展, *TSK* 42 (1983), pp. 1–23; Tomiya Itaru, *Kodai Chūgoku no keibatsu: sarekoube ga kataru mono* 古代中国の刑罰, 觸體が語るもの (Tokyo: Chūō Kōronsha, 1995), pp. 117–26.

<sup>40</sup> Li, *Qin lü tonglun*, p. 163.

<sup>41</sup> Huang Yuansheng 黃源盛, “Lianghan Chunqiu zheyu ‘yuan xin ding zui’ de xingfa lilun” 兩漢春秋折獄原心定罪的刑法理論, *Zhengda faxue pinglun* 政大法學評論 85 (2005), pp. 120–21.

<sup>42</sup> *Zhou li zhu shu*, j. 36 p. 2b [p. 539]; Li, *Qin lü tonglun*, p. 164. *Guo* 過 and *shi* 失 were used individually as distinct legal terms. However, in this context I believe they are best understood as a single word, thus my translation of *guoshi* 過失 as “accident.” This is indicated by textual parallel with the phrases *bushi* 不識, “ignorance,” in the previous phrase, and *yiwang* 遺忘, “forgetting,” in the next. The commentaries of Zheng Sinong 鄭司農 (i.e., Zheng Zhong 鄭眾, d. 83) and Zheng Xuan treat *guoshi* as a single matter; see also *Hanyu dacidian* 漢語大詞典, s.v., “*guoshi*,” which gives this definition for the binome and refers to this line of *Zhou li*. On the other hand, Hulsewé, *Han Law*, p. 262, treats them separately in this context and translates “faults and errors.”

Scholars who would take other routes in tracing the Qin interest in subjectivity to Zhou times include Cui Yongdong 崔永東, “Chutu falü shiliao zhong de xingfa sixiang” 出土法律史

manifestation of the focus on subjective factors.<sup>43</sup> In certain situations, simple knowledge – the most subjective of subjective states – could turn an otherwise innocent act into criminal collusion. This is the case in the following example:

[Question:] *A* stole less than one *qian*. He went to *B*'s house, and *B* did not realize [the situation]. I ask, how should *B* be judged? [Answer:] He is not judged [guilty]. But if he knew yet did not capture [*A*], it warrants a fine of one shield. 甲盜不盈一錢，行乙室，乙弗覺，問乙論可[=何]毆[=也]。毋論。其見智[=知]之而弗捕，當賞一盾。<sup>44</sup>

The distinction between guilt and innocence in this case depends only on knowledge: welcoming a known thief is a crime; but if the thief is not known as such, it is no crime to host him. There is no apparent relationship between the two actors here that would have brought the issue into a situation of mutual responsibility – and in the absence of knowledge of *A*'s crime, *B* was simply innocent. Another section of “*Falü dawen*” specifies it was not criminal to store unwittingly what a thief purchased with the proceeds of theft, but knowingly to accept any part of a thief's loot made the recipient as guilty as the thief. And family members who knowingly enjoyed what the thief bought with money gained by thievery were as guilty as the thief, while those who did so unknowingly were guilty of a lesser crime.<sup>45</sup>

Laws concerning how legal officials should fulfill their duties provide clear example of Qin interest in intent, another subjective state. Consider the definitions of *buzhi* and *zongqiu* cited above from “*Falü dawen*”: both infractions of official code depended on the fact that the official involved *deliberately* miscarried the law. This stresses that the same acts committed unintentionally are of a nature fundamentally different from those committed with intent, and intent changed a case of negligence (albeit culpable) into criminal malfeasance. “*Yu shu*” mentions a similar distinction that determines if an error is an instance of (punishable) incompetence or crime.<sup>46</sup>

料中的刑法思想, *Beijing daxue xuebao (zhexue shehuikexue ban)* 北京大學學報 (哲學社會科學版) 1 (1999), p. 142 and passim, and Xiao Bofu 蕭伯符, “*Chunqiu jueyu chutan: jian yu liangben tongbian jiaocazhong mouxie guandian shangque*” 春秋決獄初探, 兼與兩本統編教材中某些觀點商榷, *Hubei caijing xueyuan xuebao* 湖北財經學院學報 4 (1984), p. 99.

<sup>43</sup> Cui Yongdong, *Jianbo wenxian yu gudai fawenhua* 簡帛文獻與古代法文化 (Wuhan: Hubei jiaoyu chubanshe, 2002), pp. 225–26; see remarks on Han legal practice in Hulsewé's discussion of intent and negligence; Hulsewé, *Han Law*, pp. 251–71.

<sup>44</sup> “*Falü dawen*,” no. 10, *Shuihudi*, p. 96; trans. Hulsewé, *Ch'in Law*, p. 123.

<sup>45</sup> “*Falü dawen*” nos. 9, 11, 15–16, 17, and 18, *Shuihudi*, pp. 96–97; trans. Hulsewé, *Ch'in Law*, pp. 123–25; see also Cui, *Jianbo wenxian*, pp. 225–27.

<sup>46</sup> “*Yu shu*,” *Shuihudi*, p. 13: “If they don't know it, then they are not up to their duties and

There is a similar principle at work in laws concerning accusations made by ordinary people. If investigation did not bear out an accusation, it became a “disproved accusation 告不審,” a culpable error – but if it is determined that the inaccuracy was deliberate, it became a more serious case of “slander” (*wu* 誣).<sup>47</sup> Along similar lines, to purposely inflate the value when reporting a crime warranted twice the fine that was due if the discrepancy was an accident.<sup>48</sup>

Intent could also factor into determining the severity of an instance of common thievery. “Falü dawen” contains a question asking if the value of a rope around a stolen goat’s neck should be included in calculating the value of the theft. The answer indicates that the intent of the thief (*A*), which was to steal the goat, defined the scope of his crime: “What *A* intended to steal was the goat, and the rope was tied to the goat. *A* [meant only to] lead away the goat, so the decision [on the scope of his crime] does not go beyond the goat 甲意所盜羊毆 [=也], 而索繫羊, 甲即牽羊去, 議不為過羊.”<sup>49</sup>

The Qin code made a conceptually similar distinction in the seriousness about the crime of “prying locks 抉籥[=鑰]” (breaking and entering) based on motive:

[Question:] Is it “prying locks” only after [the lock] is opened, or is it also prying before it is opened? .... If one tries to pry [a lock] and wants to steal, but cannot open it and so leaves, or if he is caught before it is open, [the crime] warrants a fine equivalent to tattooing.<sup>50</sup> But if the prying was not done out of the desire to steal, it is only “prying” after [the lock] is opened; if not opened, it warrants [only] a fine of two suits of armor. 抉籥[=鑰]者已抉啓之

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are not knowledgeable; if they know but will not convict, this then is corruption 若弗智 [=知], 是即不勝任, 不智毆 [=也]; 智[=知]而弗敢論, 是即不廉毆[=也].”

<sup>47</sup> “Falü dawen,” no. 43, *Shuihudi*, p. 103; trans. Hulsewé, *Ch'in Law*, p. 132. On the subjective element as the deciding factor between these two, see Ji Lin 季琳, “Lun Zhangjiashan Hanjian zhong de ‘gaobushen’ zui” 論張家山漢簡中的“告不審”罪, *Xinxiang shifan gaodeng zhuanke xuexiao xuebao* 新鄉師範高等專科學校學報 21 (2007), pp. 59–60.

<sup>48</sup> “Falü dawen,” nos. 38–39, *Shuihudi*, p. 102; trans. Hulsewé, *Ch'in Law*, p. 131. It may be noted that this apparently applied only to exaggerations that materially affected the degree of the crime, so even a small amount could be punishable if it pushed the total value over the minimum of the next higher level. On the other hand, a larger exaggeration could be excused, provided it did not change the degree; see “Falü dawen” no. 40, *Shuihudi*, p. 102, including the editors’ notes; trans. Hulsewé, *Ch'in Law*, p. 131.

<sup>49</sup> “Falü dawen” no. 29, *Shuihudi*, p. 100; trans. Hulsewé, *Ch'in Law*, pp. 128–29.

<sup>50</sup> For a discussion of a “fine equivalent to tattooing” and related punishments, including some discussion of this case, see Tomiya Itaru, *Shin Kan keibatsu seido no kenkyū* 秦漢刑罰制度の研究 (Kyoto: Dōhōsha, 1998), pp. 69–89.

乃爲挾，且未啓亦爲挾... 挾之且欲有盜，弗能啓即去，若未啓而得，當贖黥。挾之非欲盜毆[=也]，已啓乃爲挾，未啓當贖二甲。<sup>51</sup>

It is hard to imagine that someone prying another's lock could have a congenial purpose in mind, even if not planning to steal. Yet there was a distinction made according to intent in this respect. The salient fact for the discussion here is that this applied in cases where the crime was interrupted before completion, so there was no objective proof of purpose (as there would be, e.g., if the culprit was caught with stolen goods in hand). Such a law would require the authorities to make a determination about the culprit's intent without material proof. All in all, it cannot be doubted that the Qin gave great importance to subjective factors in criminal matters.

#### THE PUBLIC AND THE LAW

It should not be imagined that the people who were not part of the Qin bureaucracy had no knowledge of the Qin legal interest in integrity on the one hand and subjective states on the other. For there are clear indications that the commonality was supposed to be aware of the law. The Qin rulers were in many ways very open about their law, much more so than the state had been in earlier times. Both transmitted and recovered texts indicate that the Qin recognized the importance of broad knowledge about legal matters.

In earliest times, long before the Qin dynasty, the dominant attitude among rulers in the area that would become China was opposition to public and/or written law. Obviously, it is not that there was no regulation, but rather that social order depended on *li* and the decisions of individuals in positions of authority. Later, written law existed, but it was under the close control of those in charge and was not known by the people. The idea was that a written public law would lead to legal wrangling. But beginning in the late-sixth century in the states of Zheng 鄭 and then Jin 晉, there was just such law, and the practice gradually spread to other states, one of the first of which was Qin.<sup>52</sup>

<sup>51</sup> "Falü dawen" nos. 30-31, *Shuihudi*, p. 100; trans. Hulswé, *Ch'in Law*, p. 129.

<sup>52</sup> Xing, "Qin Han de lüling xue," pp. 253-60; Ma Xiaohong, *Zhongguo gudai falü sixiang shi* 中國古代法律思想史 (Beijing: Falü chubanshe, 2003), pp. 31-32. A classic summary of the argument against written law is in *Zuo zhuan* 左傳 (Zhao 6), *Chunqiu Zuo zhuan zhengyi* 春秋左傳正義 j. 43, pp. 749-51 [pp. 16a-20a]. Fears about wrangling seem to have been well founded. It is said that shortly after the law code became public in Zheng, Deng Xi 鄧析 (545-501 BC) took to giving legal advice to whoever paid him – even advising both sides of a single dispute! See Chen Qiyu 陳奇猷, ed., *Lüshi chunqiu xin jiao shi* 呂氏春秋新校釋 (Shanghai: Shanghai guji chubanshe, 2002), j. 18, pp. 1187-88.

*Shangjun shu* advocates making the law clear and known to all the people. For although it favors keeping the population stupid, it is explicit that this does not mean ignorance of the law. This is a logical outgrowth of *Shangjun shu's* focus on a combination of punishment and reward as the means for governance: a reward must be known in order to motivate, and law must be known in order to deter. Thus, a situation is recommended in which “None of the officers or people of the realm does not know the law 天下之吏民無不知法者。”<sup>53</sup>

Shang Yang's *Shi ji* 史記 biography relates that when he had first written up the law in the state of Qin but not yet made it public, he feared the ordinary people would not trust it. So he set up a wooden pillar in the capital marketplace and with a notice offering a reward to anyone who could move it. This did not produce the result he wanted, presumably because no one believed money could be so easily earned. Shang then multiplied the reward, which convinced someone to move the pillar, and the reward was paid immediately. Shang Yang thus proved that written law should be trusted. This reflects the both importance Shang put on communicating with the public, and how important it was that the public believe the law – something that clearly would only be a factor if the law was meant to be known and respected.<sup>54</sup>

*Han Feizi* also asserts the importance of the people's knowing and fearing penal processes:

As for punishments, nothing is as good as making them heavy and inevitable, and causing the people to fear them; for law, nothing is as good as making it unified and certain, and causing the people to know it. 罰莫如重而必, 使民畏之。法莫如一而固, 使民知之。<sup>55</sup>

Recovered materials confirm that such an attitude existed under the Qin. In “Yu shu,” Teng stresses that it was necessary for all people and officers to understand the law so as to avoid breaking it: “I commanded the officers to clearly promulgate [the law], to cause all the officers and people to clearly know it, so they would not commit a crime 令吏明布, 令吏民皆明智[=知]之, 毋亾[=咎]於罪。”<sup>56</sup>

Thus, we can see that the Qin legal system was intended for public knowledge. In fact this was not limited to Qin documents. Even the Ru 儒 canons advocate public punishment as a way to communicate with the population: not just about the law, but about the new status of those who had been punished.<sup>57</sup>

<sup>53</sup> *Shangjun shu zhui zhi*, j. 5, pp. 144-45.

<sup>54</sup> *Shi ji* 68, p. 2231.

<sup>55</sup> “Wu du” 五蠹, *Han Feizi xin jiao zhu*, j. 19, p. 1100.

<sup>56</sup> *Shuihudi*, p. 13.

<sup>57</sup> E.g., *Li ji zhu shu*, j. 11, p. 224 [p. 26a], “Wang zhi” says, “Punish people in the market, joining with the populace in discarding [the one punished] 刑人於市, 與眾棄之。” The idea that

It may be objected that the common people were simply not aware of legal processes. Unfortunately, I have not been able to locate information about the degree of secrecy in the Qin legal process. But we know that the Han dynasty generally continued the legal system set up by the Qin.<sup>58</sup> And Jia Yi 賈誼 (200–168 BC), writing in the first decades of Han rule, spoke of the humiliation of officials who were publicly accused with and punished for specific crimes, and the secondary effects of this on the empire.<sup>59</sup> Jia Yi's discussion makes it clear that these things were broadly known at all levels of society. Even if the crimes of the famous are especially gossip-worthy – as was acknowledged in Han times – there is no reason to imagine there would have been any more secrecy for accused and/or convicted commoners.<sup>60</sup>

Furthermore, many kinds of punishment carried out in whole or in part before the public. We also know that criminals, notorious or not, could have their crimes written out and displayed before the public.<sup>61</sup> And archaeologists have uncovered the graves of Qin convict laborers marked with their names, hometowns, and punishments.<sup>62</sup> All this strongly suggests that there was knowledge about punishment in Qin

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law is a medium for communication has been explored by R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford U.P., 2001), and although Duff limits his discussion to liberal polities, the core notion has broader applicability.

<sup>58</sup> This is widely acknowledged; see, e.g., Gao Min 高敏. “Han chu falüxi quanbu jicheng Qin lü shuo: du Zhangjishan Han jian ‘Zou yan shu’ zha ji” 漢初法律系全部繼承秦律說，讀張家山漢簡“奏讞書”札記，in *Qin Han Wei Jin Nanbeichao shi lunkao* 秦漢魏晉南北朝史論考 (Beijing: Zhongguo shehui kexue chubanshe, 2004), pp. 76–84.

<sup>59</sup> See, e.g. chap. “Jieji” 階級 of *Xin shu* 新書, in Qi Yuzhang 祁玉章, ed., *Jiazi Xin shu jiao shi* 賈子新書校釋 (Taipei: Zhongguo wenhua zazhi she, 1974), j. 2, pp. 241–82, esp. lines found on page p. 253:

But if you handcuff [a high official], bind him, give him over to the minister of works, and rank him under the service officials, then the penal officials, prison directors, foremen, and petty officers curse and beat him. This is probably not something to allow the populace to see. 若夫束縛之，係綆之，輸之司空，編之徒官，司寇·率正·徒長·小吏罵詈而榜笞之，殆非所以令眾庶見也。

Since Jia Yi is arguing for a change to the situation in his times, this indicates that the common people had knowledge about cases of punishment; other parts of “Jie ji” indicate that this was not limited to the punishment itself, but also to other aspects of criminal matters, including crimes, etc. See also the discussion in Charles Sanft, “Rituals that Don’t Reach, Punishments that Don’t Impugn: Jia Yi on the Exclusions from Punishment and Ritual,” *JAOS* 125 (2005), pp. 31–44.

<sup>60</sup> In addition to Jia Yi, see also e.g. *Han shu* 60, p. 2678, which mentions the fondness of the common people for discussing the affairs of the well-known.

<sup>61</sup> E.g., *Han shu* 60, p. 3673; 77, p. 3249; consider also 77, pp. 3266–67, where such an announcement of punishment is made on false pretences for the purpose of creating incorrect common knowledge – and succeeded.

<sup>62</sup> Qinshihuang Qin yongkeng kaogu fajue dui 始皇陵秦俑坑考古發掘隊, “Qinshihuangling xice Zhaobeibucun Qin xingtu mu” 秦始皇陵西側趙背戶村秦刑徒墓, *WW* 3 (1982), pp. 9–10, lists the 18 pottery fragments recovered with names on them, of which exactly half state name,

society. It follows that penal processes should also have been known in Qin society.

#### THE PROBLEM OF DETERMINING MENTAL STATES

The examples cited above show that the Qin had a broad interest in subjective aspects of criminal or potentially criminal acts. This raises an important question: How were those mental states to be determined? Subjective states by definition exist only in the minds of the person(s) involved. If public perception of the law was important for the Qin, as I have argued, then explicitly considering the subjective states of actors in criminal matters might have injected indeterminacy into the penal process.

Forensic science was a key part of the Qin investigative process: officers controlled and inspected crime scenes; experts examined victims; officials recorded statements and details and submitted reports to higher authorities.<sup>63</sup> But no amount of Qin forensics could determine a mental state. With the technology available to the Qin, it was not possible to say with certitude that a person had heard and so *knew* that a particular object had been stolen, or that some quantity of money was the profit of a theft. Without a means to make a recording of speech, witnesses were the only means for speculating about the mental states of the accused, and witnesses can be unreliable – as the Qin knew well.<sup>64</sup> And no number of witnesses can really *prove* an intention. In the absence of a confession, there was really no way to know about a subject's internal state. Yet these states formed an important part of Qin law.

Nor should it be imagined that the people of Qin times were unaware of this difficulty. A passage in *Han Feizi* quoted an already ancient adage to the effect that, “The mind is hard to know 其心難知.”<sup>65</sup>

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place, and punishment – these being what the report authors describe as a fairly standard format for the grave markers of convict laborers. Sun Yingmin 孫英民, “Qinshihuangling xice Zhaobeihucun Qin xingtu mu' zhiyi” “秦始皇陵西側趙背戶村秦刑徒墓”質疑, *WW* 10 (1982), pp. 87–89, argues that these were not criminals; but see the discussion in Tomiya Itaru, *Shin-Kan keibatsu seido no kenkyū* 秦漢刑罰制度の研究 (Kyoto: Dōhōsha, 1998), pp. 306–9.

<sup>63</sup> Many of the Shuihudi documents touch on these matters; for a discussion, see Wu Fuzhu, “Ying-Qin falü de tezhi tanxi” 嬴秦法律的特質探析, in idem, *Shuihudi Qin jian lunkao*, pp. 7–17.

<sup>64</sup> Thus the numerous provisions for dealing with deliberately falsified reports against others, as discussed above; see, e.g., “Falü dawen” nos. 38–39, 41, 42, 43, *Shuihudi*, pp. 102–3; trans. Hulseyé, *Ch'in Law*, pp. 131–32. Although there is perhaps a greater sophistication in approaching the question in present times, the essential problem of witness unreliability remains the same; for a modern perspective on the difficulties in establishing or confirming even the identity of a perpetrator on the basis of eyewitnesses, see Gary L. Wells and Elizabeth A. Olson, “Eyewitness Testimony,” *Annual Review of Psychology* 54 (2003), pp. 277–95.

<sup>65</sup> From the “Yong ren” 用人 chapter of *Han Feizi*; see *Han Feizi xin jiao zhu*, j. 8, p. 543.

The *Lüshi chunqiu* 呂氏春秋, compiled in the late-third century BC in the preunification state of Qin, also acknowledges that speech does not always express the mind:

Generally, speech is the way to convey [what is in] the mind. But when speech and the mind are at odds, and the superior has no way to check, then those below will say much that is not what they do, and will do much that is not what they say. 凡言者, 以諭心也。言心相離, 而上無以參之, 則下多所言非所行也, 所行非所言也。<sup>66</sup>

Although the specific referent in this context is the ruler's officials, surely the point applies generally: word and thought can differ, and speech alone cannot be depended on; without an external means of reference, lying is sure to occur.

Qin penal officials knew that speech was (and is) prone to deceit. Their instructions for interrogation take it for granted that people will be deceptive.<sup>67</sup> They knew that accused people would lie – and given the punishments that awaited, this is easy to understand. The same goes for witnesses. The Qin code's distinction between incorrect allegations that were accidental and those that were deliberate not only reinforces the importance of subjective factors in determining a crime, but also acknowledges that a witness could deliberately give erroneous testimony – especially in a system that rewarded informing on others.<sup>68</sup> Indeed, the ability to convey false information – to lie – is one of the innate characteristics of speech (and its analogues).<sup>69</sup> Some have even argued that speech is the only communication system among living things that so readily permits sustained deception.<sup>70</sup>

So, on the one hand, the Qin emphasized the fairness and incorruptibility of their legal system. Yet at the same time they emphasized subjective factors in determining crimes and sentences – factors that

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The *Han Feizi* text attributes this simply to “ancient people 古人.” However, there is a remark attributed to Lu Zhonglian 魯仲連 (ca. 4th c. BC) that asserts, “People's minds are harder to know than the heavens. The heavens have spring, summer, autumn, and winter, with which to create the seasons. But people all have deep feelings and thick appearances, with which they deceive each other 人心難知於天。天有春夏 秋冬以作時。人皆深情厚貌以相欺”; see Ma Zong 馬總 (d. 823), *Yi lin* 意林 (SKQS edn.) 1, p. 18b.

<sup>66</sup> *Lüshi chunqiu xin jiao shi*, j. 18, p. 1195.

<sup>67</sup> Thus, the “Fengzhen shi” specifies the forms officials were to use, “Even though you know they're lying...” 雖智[=知]其誣; *Shuihudi*, p. 148; also see below.

<sup>68</sup> See Li, *Qin lu tonglun*, pp. 313–15; Ji, “Lun Zhangjiashan,” p. 59.

<sup>69</sup> See also Robbins, “Ritual Communication.”

<sup>70</sup> Amotz and Avishag Zahavi, *The Handicap Principle: A Missing Piece of Darwin's Puzzle*, trans. Naama Zahavi-Ely and Melvin Patrick Ely (Oxford: Oxford U.P., 1997), pp. 221–23; see also Rappaport, *Ritual and Religion*, pp. 13–15 and passim on the limitations of animal deception, particularly in comparison to speech.

could only be determined through the distinctly unreliable medium of the word, an unreliability they were aware of at the time.

How can we square Qin assertions of fairness and accuracy with their interest in subjective factors? Must we assume it was impossible for Qin officials and people to have recognized the potential contradiction? That is an unsatisfactory response. It seems equally unlikely that such a subtle problem could be resolved by reliance on changing statements and officials' gut feelings alone.

I propose that Qin penal rituals helped resolve the problem of determining mental states. This is not to say that the rituals were formulated consciously with this goal (though that should not be ruled out), but rather this one instantiation of ritual had particular effects. These rituals helped to compel adherence to the law, and could actually influence those who took part to tell the truth when under interrogation. But more importantly: the rituals actually served to establish what was understood as the truth itself, essentially making the problem disappear. In a sense, Qin penal rituals produced the very truths they purported to reveal.

#### THE RITUAL OF INTERROGATION

Whenever questioning about a criminal case, always first listen to everything they say and write it down, each one laying out his statement. Even if you know they are lying, do not immediately question it. If, when the statement is completely written out, some matters are unexplained, only then question them with these questions. Question them completely, listening to and writing down the explanatory statement completely. Again look at those things not explained and question them about these. If the interrogation is done and they repeatedly deceive or change what they say and do not confess, or for those the statutes warrant beating, only then should you beat them. If you beat them, you must record it, saying in the report that because so-and-so changed his story repeatedly, or could not explain his statement, we beat and questioned him. 凡訊獄，必先盡聽其言而書之，各展其辭，雖智[=知]其詖，勿庸輒詰。其辭已盡書而毋[=無]解，乃以詰者詰之。詰之有[=又]盡聽書其解辭，有[=又]視其它毋[=無]解者以復詰之。詰之極而數詖，更言不服，其律當治[=答]諒[=掠]者，乃治[=答]諒[=掠]。治[=答]諒[=掠]之必書曰爰書，以某數更言，毋[=無]解辭，治[=答]訊某。<sup>71</sup>

<sup>71</sup> "Fengzhen shi," *Shuihudi*, p. 148.

This sequence is from “Fengzhen shi,” which contains models of the procedures to be used by officers when investigating crimes.<sup>72</sup> What it describes meets Rappaport’s definition of ritual cited above: “The performance of more or less invariant sequences of formal acts and utterances not entirely encoded by the performers.”

It records an “invariant sequence” to be repeated in every interrogation. The sequence itself consists of “formal acts” – acts that adhere to set forms. The title itself indicates this with the designation of *shi* 式, “form(s), model(s).” These include perfunctory forms to be followed, “even if you know they are lying.” They also include sequences of “utterance”: not only serial sequences, but a formula to be used when beating is called for. These forms are specified by political authority, not by the interrogating officer, much less by the person being questioned; yet there is room for choice and decision on both sides. Thus the forms meet exactly Rappaport’s specification that ritual is “not entirely encoded by the performers.” The interrogation is ritual as Rappaport defines it.

The description of this ritual brings out the core problems of considering subjective states. It specifies that the ritual is to be carried out, “Even if you know they are lying,” but does not hint at how an official was to determine someone was lying about a subjective state: about knowing at a given point in time that someone was a thief, or about the motivation for attempting breaking and entering. How could an official distinguish a true claim insisted upon from “repeated deception” in this ritual context, when proof existed only in the mind of the interrogated subject? How could the official in charge of the penal ritual decide what things were left “unexplained,” or what intent should be confessed? In fact the question so formulated contains its own answer, as it was the ritual of interrogation in which the questioning occurred that resolved these problems.

#### RITUAL AND TRUTH

Xunzi 荀子 (Xun Kuang 荀况, d. 238 BC) was probably the most important thinker on *li* in early China, and his ideas about it both epitomize what came before and underlay much of what followed.<sup>73</sup> He has also traditionally been credited with influencing the develop-

<sup>72</sup> See the introductory material in McLeod and Yates, “Forms of Ch’in Law,” and Hulsewé, *Ch’in Law*.

<sup>73</sup> Yuri Pines, “Disputers of the *Li*: Breakthroughs in the Concept of Ritual in Preimperial China,” *AM* 3d ser. 13 (2000), pp. 1–41.

ment of Chinese law.<sup>74</sup> The text *Xunzi* 荀子 attributed to him proposed that *li* could be a route to truth and an antidote to deception, saying, “When the gentleman delves into *li*, he cannot be deceived by the false or artificial 君子審禮，則不可欺以詐偽。”<sup>75</sup> The *Li ji* expresses the same in slightly different words: “The lordling delves into *li*, and cannot be deceived by trickery 君子審禮，不可誣以姦詐。”<sup>76</sup> *Xunzi* quotes a line found also in the “Yue ji” 樂記 chapter of *Li ji*, “To establish sincerity and get rid of artifice is the principle of *li* 著誠去偽，禮之經也。”<sup>77</sup> Other texts contain similar notions: according to *Zhou li*, one of the duties of the *dasitu* penal official, mentioned above, was to “Use the five *li* to block the artifices of the people and teach them rectitude 以五禮防萬民之偽而教之中。”<sup>78</sup>

The *Zhou li* description of the *xiaosikou* 小司寇 contains information about how to conduct an interrogation, and it is here that we can find some information about how decisions were made. As noted above, *Zhou li* almost certainly post-dates the Zhou, but there is no reason to doubt that the Qin interrogators of the third century BC had similar ideas:

[The *xiaosikou*] uses the five observations in hearing cases and seeking the true situation of the people [involved]:<sup>79</sup> the first is hearing their statement, second is observing their expression, third is observing their breathing, fourth is observing their listening, and fifth is observing their eyes. 以五聲聽獄訟，求民情，一曰辭聽，二曰色聽，三曰氣聽，四曰耳聽，五曰目聽。<sup>80</sup>

<sup>74</sup> See, e.g., Wu Shuchen 武樹臣, “Erqiannian lai zhi fa, Xun fa ye. Xunzi yu Zhongguo fengjian falü wenhua” 二千年來之法，荀法也。荀子與中國封建法律文化, in *Wu Shuchen faxue wenji* 武樹臣法學文集 (Beijing: Zhongguo zhengfa daxue chubanshe, 2003), pp. 240–47.

<sup>75</sup> From “Li lun” 禮論; in Wang Xianqian 王先謙 (1842–1918), *Xunzi jijie* 荀子集解 (Beijing: Zhonghua shuju, 1988), j. 13, p. 356.

<sup>76</sup> *Li ji zhu shu*, j. 50, p. 846 [p. 4a]. *Wu* 誣, often “slander,” is here “to deceive”; see *Chun-qiu Zuo zhuan zhengyi*, j. 32, p. 561 [p. 16a], where Du Yu 杜豫 (222–84) gives this gloss.

<sup>77</sup> *Xunzi jijie*, j. 14, p. 382; *Li ji zhu shu*, j. 38, p. 684 [p. 16a].

<sup>78</sup> *Zhou li*, j. 10, p. 161 [p. 26b].

<sup>79</sup> Although the text refers to the “five sounds” (*wusheng* 五聲) here, most of what is involved is not (apparently) auditory. Thus, although it here speaks of “sounds” and below speaks of “listening” (*ting* 聽), I render *wusheng* as the “five observations” and the subsequent instances of *ting* as “to observe,” except in the case of the “statement” (*ci* 辭), which should indeed be “heard.” This is in keeping with Zheng Xuan’s 鄭玄 (127–200) commentary, which does not, however, give a particular gloss for *sheng* or *ting*. The same group (explicitly cited from *Zhou li*) comes in Ban Gu, *Han shu* 23 (sect. “Xingfa zhi” 刑法志), pp. 1105–7, under the name, “five listenings” (*wuting* 五聽), probably also better as, “five observations”; commentator Yan Shigu’s 顏師古 (581–645) reading matches Zheng Xuan’s; see also Hulsewé, *Han Law*, p. 342 and his note.

<sup>80</sup> This passage and Zheng Xuan’s commentary in *Zhou li zhu shu*, j. 35, p. 524 [pp. 3a–b].

Zheng Xuan's 鄭玄 (127–200) commentary on this passage clarifies some of its content, while much of it seems plain enough. It makes sense that carefully listening to statements should be an important part of handling a case, and it is in keeping with everyday experience that the expression and eyes of the person under questioning could indicate deception. Zheng further explains that if someone is being deceptive, their breathing will be rapid. He also says that their hearing will be disordered, and they will be confused and unable to follow what others say.<sup>81</sup>

These early guidelines for recognizing deception give us some indication of how decisions about veracity could have been made in Qin times. That these guidelines are found in the *Zhou li* underscores the close relationship between ritual and penal practice. But this is much more the start than the end of the issue: there is still the possibility of skillful lying, as well as simple refusal to confess or admit a subjective state. Nor can these considerations resolve cases of conflicting but apparently believable statements, or when the truth as one person knows it simply does not make sense because that person lacks information necessary to produce a coherent and believable explanation. Which is to say nothing of someone whose agitated emotional state leads to an appearance of deception, or someone who does not recollect clearly and so changes his statement. All of these shortcomings are magnified in consideration of subjective factors, in which there was no proof outside the mind of the person. And that would threaten Qin legal integrity.

There is also no indication in the guidelines about why fear should cause a failure. If, however, the truth is the only goal, then the absence of fear seems not only like an unrealistic goal, but would be an unnecessary one.

Rappaport's ideas clarify how ritual works against deception, and can help resolve these questions. He called language's amenability to deception one of its core problems, and proposed that ritual as he defined it generally was a way to ameliorate this.<sup>82</sup> Ritual's effects in this respect can be broadly divided into two aspects: effects on the participants in the ritual, and effects among observers and others who know of the ritual. Rappaport says, "The transmitters of ritual's messages are always among their most important receivers."<sup>83</sup> And a ritual can

<sup>81</sup> Zahavi and Zahavi, *Handicap Principle*, p. 236, n. 10, discuss a similar phenomenon.

<sup>82</sup> Rappaport, *Ritual and Religion*, pp. 11–16 and passim. The following discussion draws generally from this work and its use by Robbins, "Ritual Communication," particularly the focus on Rappaport's interest in ritual as an antidote to lying.

<sup>83</sup> Rappaport, *Ritual and Religion*, p. 51.

be expected to affect its participants' behavior and beliefs concretely, causing them to come into accord with what is professed in the rituals.<sup>84</sup> Ritual can also bring about direct physiological changes that make interior states more obvious externally (something also at work in the "five observations" of the *Zhou li*).<sup>85</sup>

In the Qin context, the two effects impacted both the interrogated person and the interrogator. For the one under questioning, ritual's effect would tend to induce him to tell the truth, since that is what the ritual professed – reinforced, of course, by the interrogator, who recorded and reiterated and compared statements. The ritual would also assist the interrogator by causing physiological changes that made it easier to evaluate the truthfulness of the one under questioning. The interrogator himself would come to believe that he was on the one hand being fair and impartial by adhering to the ritual, and would become more fair because of this belief.

Finally, and most importantly, from Rappaport's perspective, taking part was what Charles Peirce called an "index" signifying submission to the moral order of that ritual for *both* sides.<sup>86</sup> It is here that the broader public becomes important. For in a ritual context, the point is no longer what the subject believes, but rather the ritual index: acceptance of the moral order through participation in the ritual obviates disbelief, "renders it publicly impotent."<sup>87</sup> The ritual index commits the subject to the outcome of the process. In the Qin case, the penal ritual formed an indexical sign that outweighed the possibility of states other than that one determined by the ritual.

Joel Robbins extends Rappaport's analysis by pointing out that this sort of index can have great influence, since, "Ritual indices have the perlocutionary effect of convincing those who observe them (including their participants) that they are in possession of reliable knowledge about their social world."<sup>88</sup> By taking part in the rituals of interrogation – even under compulsion – those under investigation turned the subjective states established through those rituals into the public truth

<sup>84</sup> See also Richard Sosis, "Why Aren't We All Hutterites? Costly Signaling Theory and Religious Behavior," *Human Nature* 14 (2003), pp. 97–98.

<sup>85</sup> Richard Sosis and Candace Alcorta, "Signaling, Solidarity, and the Sacred: The Evolution of Religious Behavior," *Evolutionary Anthropology* 12 (2003), pp. 268–69, dealing with Rappaport's ideas; note that although Sosis and Alcorta speak specifically of religious rituals, Robbins' analysis, however, makes it clear that Rappaport's conceptions apply to ritual generally.

<sup>86</sup> Charles Peirce, "Logic as Semiotic: The Theory of Signs," in *The Philosophical Writings of Peirce*, ed. Justus Buchler (New York: Dover, 1955), pp. 98–119, particularly p. 102.

<sup>87</sup> Quotation from Rappaport, *Ritual and Religion*, p. 122; see also discussion pp. 119–22.

<sup>88</sup> Robbins, "Ritual Communication," p. 595.

of the situation. The internal state was thus converted into public legal fact, and anything left hidden in the heart was rendered irrelevant. The ritual interrogation that professed to ascertain the subject's internal state turned the state determined through that ritual into a social truth and simultaneously generated an image of adherence to a fair legal code.

Thus, I propose that Qin penal rituals served two purposes. On the one hand, they induced participants to be more truthful than they otherwise might have been, and also helped make their truthfulness more apparent to the judging official. But more important was how these rituals helped to control public views of the Qin legal process by publicly establishing the truth about internal states. Whether or not the person under interrogation believed a statement or not, the ritual of interrogation made disbelief irrelevant, and persuaded everyone who knew about it that its result *was* the truth: the possibility of a subjective state other than the one determined by the adjudicating official was neutralized, and the relevant particulars became *effectively* true. The statement from "Yue ji" and *Xunzi* that "to establish sincerity and get rid of artifice is the principle of *li*" describes this exactly. The Qin proclaimed their fairness and adherence to the law, and their penal rituals proved and publicized it.

The connection to ritual helps explain why "Fengzhen shi" speaks so strongly against beating – and against fear in the interrogation process generally. The Qin used penal rituals to communicate and maintain the idea that their governance by law was fair, thus creating "common knowledge" about its character.<sup>89</sup> But this sort of consensus is weakened if perceived as forced.<sup>90</sup> Beatings and evident fear would have worked against the perception of fairness that the Qin so emphasized. The Qin stance against beating resulted not from moral qualms, but from a practical interest in image management.

### LIST OF ABBREVIATIONS

*Shuihudi*                      *Shuihudi Qinmu zhujian* 睡虎地秦墓竹簡

<sup>89</sup> On common knowledge, see Michael Suk-Young Chwe, *Rational Ritual: Culture, Coordination, and Common Knowledge* (Princeton: Princeton U.P., 2001).

<sup>90</sup> Lucian Gideon Conway, III, and Mark Schaller, "When Authorities' Commands Backfire: Attributions About Consensus and Effects on Deviant Decision Making," *Journal of Personality and Social Psychology* 89 (2005), pp. 311–26.