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Six of One, Two Dozen of the Other: The Abatement of Mutilating Punishments under Han Emperor Wen

Es gieng niemals ohne Blut, Martern, Opfer ab, wenn der
Mensch es nöthig hielt, sich ein Gedächtniss zu machen.

Friedrich Nietzsche, *Zur Genealogie der Moral*

Famous emperors are drawn in bold strokes, and the first century of imperial rule in China is filled with renowned characters. The histories tell of Qin Shihuang 秦始皇 (Ying Zheng 嬴政, r. 221–211 BC), whose talents were exceeded only by his hubris and hunger for self-aggrandizement. The genius of Liu Bang 劉邦 for strategy and leadership is celebrated as the divine brilliance of the Han 漢 (206–221 BC) dynastic founder Gaozu 高祖 (r. 206–195 BC). Emperor Wu 武帝 (Liu Che 劉徹, r. 140–87 BC) boldly used military force to secure and expand the borders of the realm while presiding over a golden age of cultural achievement at home. And then there is emperor Wen 文帝 (Liu Heng 劉恒, r. 179–157 BC).

Known as modest and unassuming even before ascending to power, Wen is celebrated for thrift and humaneness. He solicited – and even better, followed – the advice of courtiers, accepting correction and criticism from them with a remarkable equanimity. He rewarded those who were right for acuity and those who were wrong for loyalty.¹

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¹ A good example of this is Wen's accession to the throne. After acting to remove the Lü 呂 clan from its usurped position of power, the faction of loyalists to the Liu clan led by Chen Ping 陳平 (d. 178 BC) and Zhou Bo 周勃 (d. 169 BC) summoned Liu Heng (then king of Dai 代) to the capital. Understandably cautious, Liu Heng conferred with the members of his entourage and received contrary advice: Zhang Wu 張武 (fl. ca. 175–150 BC) and others counseled against trusting the conspirators and thus not to go, while Song Chang 宋昌 (fl. ca. 175–150 BC) ad-

Emperor Wen is also praised for his solicitude toward the common folk. He is known to have limited expenditures for his personal upkeep, and the frugality of his rule enabled him eventually to cancel land rents.² Perhaps the best-remembered instance of his concern is the abolishment of mutilating corporal punishments 除肉刑 in the thirteenth year of his reign (167 BC), accompanied by the establishment of new sentences for incarceration.³ With one command, Wen did away – for a time, at least – with the amputations and tattooings that had formed such an integral part of earlier penal practice. Yet, despite its fame, the case is problematic, because the oft-praised change effectively worsened the punishment in many cases. What replaced mutilation was, in some cases, capital punishment; in other cases, it was a harsh beating that amounted to a *de facto* death sentence.

This disjunction between intention and effect was noted already in the Han dynasty, leading some to deem the changes a failure. I will consider such criticism, below, as formulated by Ban Gu 班固 (32–92 AD). Moreover, in order to give more context for interpretation, I will bring in other, indirectly related, evidence from the thinking of Jia Yi 賈誼 (200–168 BC), an important advisor to emperor Wen on many topics. Although ostensibly unrelated to the penal reforms of 167 BC, two of Jia Yi's policy suggestions open a line of interpretation that can re-

vised him to go. In the end, of course, Song was proved correct, and the king of Dai became emperor of the Han. Song Chang received promotion to the position of general of the guards (*wei jiangjun* 衛將軍). Zhang Wu, whose incorrect but loyal advice had been ignored, received a slightly lower but still high appointment as prefect of the gentlemen of the palace (*langzhong ling* 郎中令). See Sima Qian 司馬遷 (ca. 145–ca. 86 BC), *Shi ji* 史記 (Beijing: Zhonghua shuju, 1959; hereafter, *SJ*) 10, pp. 413–17; see also Hans Bielenstein, *The Bureaucracy of Han Times* (Cambridge: Cambridge U.P., 1980), pp. 23–24, 116.

² In the 13th year of his reign (167 BC), the same year he did away with mutilating punishments, Wen abolished land rents and taxes, though they were reinstated by emperor Jing in his first year. See Qian Mu 錢穆, *Qin Han shi* 秦漢史 (Hong Kong: Xinhua yinshua gufen gongsi, 1957), p. 60; for the act itself, see *SJ* 10, pp. 428; Ban Gu 班固 (32–92), *Han shu* 漢書 (Beijing: Zhonghua shuju, 1962; hereafter, *HS*), p. 125.

³ Most sources date this event to the 13th year (167 BC); e.g., the “Xiao Wen ben ji” 孝文本紀, *SJ* 10, pp. 427–28; “Han xing yilai jiang xiang mingchen nianbiao” 漢興以來將相名臣年表, *SJ*, p. 1127; “Wendi ji” 文帝紀 in *HS* 4, p. 125; the “Xingfa zhi” 刑法志, *HS* 22, pp. 1097–98; and Sima Guang 司馬光 (1019–1086), *Zizhi tongjian* 資治通鑑 (Beijing: Zhonghua shuju, 1956) 15, pp. 495–96. The *SJ* section “Bian Que, Cangong liezhuan” 扁鵲倉公列傳 dates the change to the 4th year of Wen's reign (176 BC); Xu Guang's 徐廣 (352–425) commentary says, “According to the ‘Nian biao,’ The Filial Wen abolished [mutilating] corporal punishments in the 12th year [of his reign]” 案年表孝文十二年除肉刑; see *SJ* 105, p. 2795. No other source I have located dates the change to the 4th year. The only extant “Nianbiao” referring to the abatement of corporal punishments is the “Han xing yilai jiang xiang mingchen nianbiao,” cited above, which in its transmitted form dates the change to the 13th year. Presumably, either Xu Guang had a bad copy or made a mistake, or the table was emended to match the information given in other sources. At any rate, 167 BC is the accepted dating for this event.

solve the apparent contradiction between the purpose of Wen's act and its effects. Ultimately, I propose that the changes to the legal system were successful, but mostly as a way to create an image of beneficence than actually to ameliorate penal harshness.

THE PROXIMATE CAUSE AND THE POLITICAL CAUSE

Punishment in early China had a distinctly corporal character. Execution and dismemberment were common, and many corporal punishments not meant to be fatal were purposely disfiguring, including amputation of the feet and nose, and tattooing. Under the legal systems of the Qin 秦 (221–206 BC) and early-Han, a wide variety of crimes were physically punished with what seems today a great harshness. Punitive amputees must have been numerous since even earlier times, though no ruler before emperor Wen seems to have expressed any concern about their plight.⁴ According to standard accounts, a letter from a condemned man's daughter stirred Wen's compassion.

The condemned man was the famous physician Chunyu Yi 淳于意, a native of Linzi 臨淄 in Qi 齊.⁵ Interested in medicine from his youth, he administered to many sick people in his home state, including members of the royal family.⁶ He was also prefect of the great granary (*taicang ling* 太倉令) in Qi and thus is often known as His Honor of the Great Granary (Taicang gong 太倉公).⁷ In the thirteenth year of emperor Wen's reign (167 BC), Chunyu Yi was convicted of a crime and sentenced to punishment. There is no record of what the crime was.⁸

⁴ The large quantity of punitive amputees and the lack of rulers' compassion for them is reflected in pre-Qin historical and quasi-historical sources. There is, for example, the famous story of Mr. He's jade disk 和氏璧 in *Han Feizi* 韓非子: in it the king of Chu expresses surprise that Mr. He should be upset about the fact that both his feet had been punitively amputated. The king's messenger asks Mr. He, "Those of the realm that have borne foot amputation are many. Why do you mourn it to weeping? 天下之刑者多矣, 子奚哭之悲也"; Wang Xianshen 王先慎 (1859–1922), *Han Feizi jijie* 韓非子集解 (Beijing: Zhonghua shuju, 1998) 4, p. 95. In another well-known incident, Yanzi 晏子 (Yan Ying 晏嬰, d. 500 BC) mocked duke Jing (Jing gong 景公, r. 547–490 BC) for Qi's predilection for punitive amputations, saying that the market-driven prices for shoes had gone down, while "stump-covers 踊" for amputees were up. Needless to say, the duke had not noticed the effects of his policies on his people. See *Zuo zhuan*, Zhao 昭 3; *Chunqiu Zuo zhuan zheng yi* 春秋左傳正義 (SSJZS; Taipei: Yiwen yinshuguan, 2004) 42, p. 723; the same *bon mot* is recorded twice in *Yanzi chungqiu* 晏子春秋; see Wu Zeyu 吳則虞, *Yanzi chungqiu jishi* 晏子春秋集釋 (Beijing: Zhonghua shuju, 1962) 4, p. 268; 6, p. 416.

⁵ Linzi (also written 臨淄) was located in the area of modern Shandong.

⁶ Chunyu Yi's biog., *SJ* 105, pp. 2794–817, includes numerous medical case histories submitted in response to imperial command, which record his patients, their diagnoses, and treatment regimens.

⁷ Chunyu Yi's official position is given variously. *SJ* 10, "Xiao Wen ben ji," p. 427) gives *taicang ling*; *SJ* 105, p. 2794, describes him as the "chief of the great granary in Qi" (Qi *taicang ling* 齊太倉長).

⁸ *SJ* 105, p. 2795, says only, "Someone sent up a letter discussing Yi 人上書言意." Since Sima

As Chunyu Yi was taken off in fetters to be sent to the capital Chang'an 長安 for punishment, his five daughters trailed after him crying. Chunyu Yi had no sons, and reproached his daughters: "Having children but not having boys, I have no one of use in an emergency 生子不生男, 緩急無可使者."⁹ Affected by these words, his youngest daughter Tiying 緹縈 followed her father to the capital. Once there, she sent a letter to the emperor, saying,

My father is an officer, and everyone in Qi praises his incorruptibility and fairness. Now he is convicted by law and sentenced to punishment. I mourn, for one dead cannot be restored to life and one punished cannot be reattached. Even if one of these should desire to correct his error and begin anew, there is no way. I am willing to be confiscated and become a government slave girl, in order to redeem my father from punishment and permit him to start anew. 妾父爲吏, 齊中皆稱其廉平。今坐法當刑。妾傷夫死者不可復生, 刑者不可復屬, 雖復欲改過自新, 其道無由也。妾願沒入爲官婢, 贖父刑罪, 使得自新。¹⁰

The letter has two main points. First, it makes a general argument against capital and mutilating punishments on the grounds of their irrevocable nature. For the executed, this irreversibility goes without saying. Mutilation, too, forever cut limb from body and the punished off from the community.¹¹ As Tiying points out, that left no way for

Qian also mentions that, "There were many among the households of the sick that resented him 病家多怨之者," it is possible that the combination of envy (over his successes) and bitterness (over his failures) earned by the doctor was responsible for his condemnation; *SJ* 105, p. 2795. In his evaluation at the end of the "Bian Que Cang gong zhuan," *SJ* 105, p. 2817, Sima Qian writes, "Any woman – without regard to beauty or ugliness – will be envied if she lives in the palace; a gentleman – without regard to worthiness or incapability – will be suspected if he enters court. Accordingly, Bian Que 扁鵲 was harmed because of his skills; His Honor of the Granary covered his tracks and hid his [methods] and so was convicted [and sentenced] to punishment. 女無美惡, 居宮見妒, 士無賢不肖, 入朝見疑。故扁鵲以其伎見殃, 倉公乃匿迹自隱而當刑。" This suggests that Chunyu Yi, known to have been reticent about his methods of diagnosis and determining treatment, was calumniated because of his abilities.

⁹ *SJ* 105, p. 2795. Given the unpleasant experience ahead of him, we can forgive Chunyu Yi his foul mood. But it must be noted that these are hardly fair words: a son would have been as powerless as a daughter to assist directly. As Ban Gu writes in a poem, "A hundred sons – how foolish! / They were not as good as one Tiying 百男何憤憤, 不如一緹縈"; preserved in the commentary at *SJ* 105, p. 2795–96.

¹⁰ The three main versions of this letter have slight variations. The text and translation follow *SJ* 10, "Xiao Wen ben ji," p. 427. Other versions are Chunyu Yi's biog., *SJ* 105, p. 2795; and "Xingfa zhi," *HS* 23, p. 1098. The letter and related material from "Xingfa zhi" are trans. A.F.P. Hulswé, *Remnants of Han Law* (Leiden: Brill, 1955), pp. 334–37.

¹¹ Shiga Shūzō 滋賀秀三, "Zhongguo shanggu xingfa kao, yi mengshi wei xiansuo" 中國上古刑罰考以盟誓爲綫索, in Liu Junwen 劉俊文, ed., *Riben xuezhè yanjiu Zhongguo shi lunzhu xuan yi* 日本學者研究中國史論著選譯 (Beijing: Zhonghua shuju, 1992), p. 8.

people once punished to resume a normal life and correct their former errors. This permanence and not the intrinsic cruelty of the punishment itself is the basis for Tiying's appeal to the emperor's compassion. She leaves unenunciated the effects of such practices on the wrongly punished and makes no protestation of her father's innocence.

Second, Tiying offers to assume the punishment due her father by becoming a slave. The word she uses for this assumption is "redemption" or "ransom" (*shu* 贖). Although *shu* is most often connected to paying a fine (in cash or kind) or accepting reduction in rank to offset a punishment, there were provisions in the Qin code for redemption by substitution as well.¹² Since the Han generally followed the Qin legal system, this suggests that although Tiying defends her father's reputation and appeals to the emperor for mercy, her offer is essentially in keeping with contemporary legal notions.

This letter is said to have moved the emperor to pity, with two effects: Tiying's father was released, and some major changes in legal practice were instituted. There is no further record of Tiying, so we do not know whether or not she was required to enter slavery, as she had offered.¹³ Tiying was later held up as a model of filiality and as such we might expect her to be further praised for her sacrifice if she had become a slave.¹⁴ The absence of such information suggests that she was released from her bargain. If actually taken into slavery, she was presumably released no later than 160 BC.¹⁵ We know that Chunyu Yi himself was released in 167 BC, and some think that the case histories and summary of his background demanded of Chunyu Yi and included in his *Shi ji* biography formed part of a dossier compiled during the resolution of his case.¹⁶

The changes to the legal system were general and represent an important turning point in Chinese legal history, albeit as part of a

¹² For redemption as usually understood, see Hulsewé, *Remnants of Han Law*, pp. 205-24. Regarding the Qin code on redemption by substitution, see Gao Heng 高恒, "Qin lü zhong 'li chen qie' wenti de tantao" 秦律中隸臣妾問題的探討, *WW* 7 (1972), p. 46.

¹³ Gao Yang's 高陽 (20th c.) novel *Tiying* 緹縈 is about this event and its aftermath, imagining that Tiying indeed entered imperial servitude. The novel is available on the internet at a number of websites, e.g., <http://www.bookhome.net/xiandangdai/gy/tiying/> (accessed March 16, 2005).

¹⁴ Such information is missing from all early versions of the story, including that found in Liu Xiang's hagiographical *Lie nü zhuan* 列女傳 (SBBY) 6, pp. 13b-14b.

¹⁵ According to *HS* 4, p. 130, emperor Wen freed all government slaves in 160 BC.

¹⁶ This is suggested by Zhang Shouren 張壽仁, "Bian Que Cang gong zhuan" suibi, Han chu Qi di yixue chuancheng zi Qin Yue ren" 扁鵲倉公傳隨筆漢初齊地醫學傳承自秦越人, in *Guoji jiandu xuehui huikan bianji weiyuanhui* 國際簡牘學會會刊編輯委員會, ed., *Guoji jiandu xuehui huikan, di san hao* 國際簡牘學會會刊, 第三號 (Taipei: Lantai chubanshe, 2001), p. 224.

larger trend toward legal reform in Han China.¹⁷ It must be noted that although her arguments mention the general hardships of those convicted and punished, Tiying makes no direct appeal for a larger shift in policy. As one would expect from the daughter of a man about to suffer harsh punishment, hers is essentially a plea for mercy in a specific case – thus the details of her father’s previous good conduct and her own brave offer. Emperor Wen had his own reasons for expanding the scope of the reforms, which I discuss, below. But at this point the political context, involving a larger policy discussion about legal practices, bears on the discussion.

The Influence of Jia Yi

As with any major change, there was surely more at work in Wen’s decision than a single incident. I have already mentioned the ongoing reform of penal processes in Han China. Another factor was the emperor’s long-standing interest in legal practice and punishments, which is connected closely to the political theories now referred to as Huang-Lao 黃老, a term that was in early-Han times often used to denote ideas conventionally associated with “legalist” thinkers like Han Fei 韓非 (d. 233 BC).¹⁸

At least one additional contributing factor can be identified: the influence of a practical political philosophy exemplified in the writings of early-Han political thinker Jia Yi. While still a youth, Jia Yi had been summoned to join the retinue of the governor of Henan, the Honorable Wu (Wu gong 吳公), on the basis of his skills in composition and the classics. When Wu was brought to the capital and appointed commandant of justice (*tingwei* 廷尉) by emperor Wen, then newly ascended to power, he recommended the young man to the emperor. Jia Yi in turn was called to court and appointed to the first of a number of official posts he would hold in his short career. Though machinations at court limited Jia Yi’s time of service there, every indication is that the emperor valued Jia and his advice.¹⁹ Jia Yi was the most impor-

¹⁷ Chen Zhonglong 陳中龍, “Qin Han xingtu yanjiu pingshu” 秦漢刑徒研究評述, in Chen Hongqi 陳鴻琦, ed., *Jiandu xuebao, di shiba qi* 簡牘學報, 第十八期 (Taipei: Jiandu xuehui, 2002), p. 283; Zhang Shouren, “Qin Han wutu zhi xingqi” 秦漢五徒之刑期, in Jiandu xuehui bianji bu 簡牘學會編輯部, ed., *Jiandu xuebao: di shi qi* 簡牘學報, 第十期 (Taipei: Jiandu xuehui, 1981), p. 111.

¹⁸ See *SJ* 10, p. 3117, and *HS* 88, p. 3592; see also the discussion in Xing Yitian 邢義田, “Qin Han de lu ling xue, jian lun Cao Wei de lu boshi de chuxian” 秦漢的律令學兼論曹魏的律博士的出現, in idem, *Qin Han shi lun gao* 秦漢史論稿 (Taipei: Dongda tushu gongsi, 1987), pp. 273–78.

¹⁹ See Jia Yi’s biogs., *SJ* 84, pp. 2491–503, and *HS* 48, pp. 2221–65. The former is translated in William H. Nienhauser, Jr., ed., *The Grand Scribe’s Records*, vol. 7: *The Memoirs of Pre-Han*

tant thinker of his time. Thus, his *Xin shu* 新書 is valuable not only as a record of his ideas, but also for the insight it gives us into political thought and culture during emperor Wen's reign.²⁰ I would suggest that ideas presented there help us to understand some of Wen's actions in regard to the penal code.

Already in the first year of his reign (179 BC) – and over the objections of the responsible officials – emperor Wen had changed the legal code, abolishing the laws that sentenced a convicted criminal's family to slavery as part of the penalty.²¹ In 178 BC, he did away with rules against criticizing the throne.²² Wang Xingguo 王興國 points out that Jia Yi had criticized these very laws in his writing called “Guo Qin lun” 過秦論, and reasonably suggests that Jia Yi instigated Wen's act.²³ These changes indicate Jia's influence in matters of penal law.

Sometime around the fourth year of Wen's reign (176 BC), Jia Yi wrote an essay addressed to the emperor advocating the abolishment of mutilating and humiliating punishments in cases of the emperor's close vassals. This essay is now preserved in the *Xin shu* chapter named “Jie ji” 階級.²⁴ Although not directly connected to the changes of 167 BC, it gives us a way to put them into a larger context.

The main argument of “Jie ji” is that doing away with these punishments will create a buffer zone of respect around the person of the emperor. He also argues that exemption of vassals from these penalties and degradations will be like a gift, by which the emperor will create *virtus* 德 – what David S. Nivison has aptly termed “gratitude credit” – in them toward himself.²⁵ The vassals will feel grateful to the ruler

China (Bloomington: Indiana U.P., 1994), pp. 302–7; the latter trans. Stuart V. Aque, “The *Han shu* Biography of Jia Yi and Other Writings,” M.A. thesis (University of Washington, 1989).

²⁰ Whenever *Xin shu* is discussed, the question of authenticity emerges. These questions have been recently considered in two studies, which take different though complementary approaches: Rune Svarverud, *Methods of the Way: Early Chinese Ethical Thought* (Leiden: Brill, 1998), and Luo Shaodan, “Getting beyond the Dichotomy of Authenticity and Spuriousness: A Textual Study on the *Xinshu*,” Ph.D. diss. (Berkeley: University of California, 2002).

²¹ See *SJ* 10, p. 418; *HS* 10, p. 110.

²² *SJ*, p. 1125; emperor Jing's edict after the death of Wen also mentions this; *SJ* 10, p. 436, and *HS* 5, p. 137.

²³ Wang Xingguo 王興國, *Jia Yi ping zhuan* 賈誼評傳 (Nanjing: Nanjing daxue chubanshe, 1992), pp. 17–18.

²⁴ “Jie ji” is found in Qi Yuzhang 祁玉章, *Jiazi Xin shu jiao shi* 賈子新書校釋 (Taipei: Zhongguo wenhua zazhi she, 1974) 2, pp. 241–82. I discuss this chapter and the twin exclusions from ritual and punishment in “Rituals That Don't Reach, Punishments That Don't Impugn: Jia Yi on the Exclusions from Punishment and Ritual,” *JASOS*, forthcoming. See a brief discussion of some of Jia Yi's ideas, including the role of suicide in a system of punishment based on rank, in Hans van Ess, *Politik und Gelehrsamkeit in der Zeit der Han (202 v. Chr.-220 n. Chr.): Die Alttext/Neutext-Kontroverse* (Wiesbaden: Harrassowitz, 1993), pp. 259–63.

²⁵ See David S. Nivison, “The Paradox of ‘Virtue,’” in idem, *The Ways of Confucianism*:

for being spared these punishments, which will increase their loyalty and help to secure the status and security of the lord. In this context, Jia Yi invokes the dictum that, “In antiquity ... punishment did not reach to the lordling 古者 ... 刑不至君子.”²⁶

But Jia Yi did not recommend that these courtiers be exempted from punishment entirely. Rather, he proposed an ideal system under which officials guilty of misconduct commit suicide rather than suffer humiliation and punishment. Thus the death penalty is not to be done away with. Indeed, Jia Yi’s proposals would have increased the numbers of those who died for their crimes, especially by suicide. But at least those holding high rank would be spared mutilation and the accompanying humiliation. In the process, emperor Wen would generate *virtus* for himself, even as the accused continued to die for their crimes.

Although Jia Yi’s focus is on the upper stratum of society, I suggest that the idea of particular and selective mercy as a method for achieving *virtus* is reflected in the changes Wen made to the penal system later, in 167 BC. Specifically, I suggest that when the emperor bemoaned his lack of *virtus* in responding to Chunyu Tiyang’s letter (see below), Jia Yi’s suggestions were at work. The emperor has simply moved focus from punishments for the highly ranked to those for the common people. Like Jia Yi’s proposals, emperor Wen’s command shifts the focus of punishment away from mutilation and the accompanying permanent humiliation; also like Jia Yi, the emperor does not propose doing away with punishment altogether. He commands a shift to a system under which punishment has two forms: imprisonment of specific, temporary duration, enacted without permanent disfiguration; and execution.

I believe that there is an additional, indirect, aspect of Jia Yi’s influence on emperor Wen’s decision to change the penal code in the manner he did. In what is now the chapter “Wu mei” 五美 (“Five Noble

Investigations in Chinese Philosophy, ed. Bryan Van Norden (Chicago: Open Court, 1996), pp. 17–30, 31–43; Nivison, “Comment on Chad Hansen, ‘*Dao* and Duty,’” in Philip J. Ivanhoe, ed., *Chinese Language, Thought, and Culture: Nivison and His Critics* (La Salle: Open Court, 1996), p. 316, etc.; and Nivison, “Royal ‘Virtue’ in Shang Oracle Inscriptions,” *EC* 4 (1978–79), pp. 52–55.

²⁶ Qi, *Jiazi Xin shu* 2, p. 267. The same line is found in Jia Yi’s biog., *HS* 48, p. 2257, but substituting “grantees” (*dafu* 大夫) for “lordlings” (*junzi* 君子). This is certainly related to the slightly-differently-worded line in the “*Qu li*” 曲禮 chapter of *Li ji* 禮記: “Punishment does not [extend] up to grantees” 禮不下庶人, 刑不上大夫; *Li ji zhu shu* 禮記注疏 (SSJZS edn.) 3, pp. 55–56. Cf. the text “*Zun de yi*” 尊德義 recovered at Guodian 郭店, strips 31–32, containing the line, “Punishments do not reach to the lordling; ritual does not reach to the petty person 刑不逮於君子, 禮不逮於小人”; Zhang Guangyu 張光裕, ed., *Guodian Chu jian yanjiu, di yi juan wenzi bian* 郭店楚簡研究, 第一卷文字編 (Taipei: Yiwen yinshuguan, 1999), pp. 578–79.

Qualities”) of *Xin shu*,²⁷ Jia Yi lays out specific proposals for a policy he elsewhere describes as, “establishing many feudal lords, but lessening their power 眾建諸侯而少其力.”²⁸ The crux of this policy lies in preventing any particular local lord from accumulating excessive power by breaking up large fiefs into smaller ones. The sons of local rulers who would have gone without inheriting significant territory under the system of primogeniture would now receive these smaller pieces. This addressed the most serious difficulty of internal governance in emperor Wen’s time.

Local kingdoms were a problem throughout the first half-century of Han rule. Relative freedom from central control enabled the rulers of these kingdoms to accumulate power and resources sufficient to directly challenge the central government. In the first decade of Han rule, all but one of the seven kings that Gaozu had crowned who were not members of the ruling Liu 劉 clan rebelled. Those kings belonging to the Liu clan were not much more loyal. The trend of increasingly rebellious insolence on the part of the local rulers more or less peaked in the 154 BC Rebellion of the Seven Kingdoms 七國之亂, though tension between local and central power was ongoing. One way to limit the power of these rulers was to limit their resources by reducing the size of their territories.²⁹ Jia Yi’s proposal would create lords that were landed but in control of smaller territories than the previous norm, and with correspondingly decreased access to resources.

Thus, in “Wu mei,” Jia Yi proposes that the states of Qi 齊, Zhao 趙, Chu 楚, Yan 燕, Wu 吳, Huainan 淮南, and others, be divided into smaller territories, which were to be granted to the descendants of the original fief-holders. If descendants should be lacking, the state should still be carved up to await the birth of inheritors. Emperor Wen would later follow this course of action, dividing Qi in 166 BC and Huainan 淮南 in 165. And although instability followed in 154, the essence of

²⁷ For “Wu mei,” see Qi, *Jiazi Xin shu* 2, pp. 195–206; an abridged version of this piece is in Jia Yi’s biog., *HS* 48, pp. 2237–38.

²⁸ From “Fan qiang” 藩疆, in Qi, *Jiazi Xin shu* 1, p. 120.

²⁹ Qian, *Qin Han shi*, pp. 57–59; Lao Gan 勞幹, *Qin Han shi* 秦漢史 (1952; rpt. Taipei: Wenhua daxue chubanshe, 1980), pp. 29–34; for the background and events of the Rebellion of the Seven Kingdoms, see Reinhard Emmerich, “Die Rebellion der Sieben Könige, 154 v. Chr.,” in Reinhard Emmerich and Hans Stumpfeldt, eds., *Und folge nun dem, was mein Herz begehrt: Festschrift für Ulrich Unger zum 70. Geburtstag* (Hamburg: Hamburger Sinologische Gesellschaft, 2002), pp. 397–497. Jia Yi wrote often about these and related issues, offering a variety of suggestions for action. In addition to “Wu mei” and “Fan qiang,” already mentioned, see e.g., “Zong shou” 宗首, in Qi, *Jiazi Xin shu* 1, pp. 75–83, “Yi rang” 益壤, *ibid.* 1, pp. 165–87, etc.

the plan was solid, and it was suggested again during the reign of emperor Wu.³⁰

The ingenuity of Jia Yi's proposal lies in the suggestion to enfeoff the heirs of the original lord with the newly created, smaller territories instead of taking the lands under the control of the central government. This should both avoid incurring the resentment of the lords' sons and avoid giving the appearance of selfish motivation:

Thus, the Son of Heaven would get no benefit – [not] a single inch of territory or one member of population. This would sincerely be done in order to establish regulation, and that is all. Thus would the realm universally know your majesty's incorruptibility. 故一寸之地，一人之眾，天子無所利焉，誠以定治而已，故天下咸知陛下之廉。³¹

And indeed, the emperor would not gain any direct material benefit. But clearly, other sorts of benefits *would* accrue for the emperor: namely, a limitation of the effective power of local rulers. Regardless of the feelings of those sons that primogeniture might otherwise have left landless, the result would be a gain for Wen. The purpose of the proposal was the strengthening of imperial power at the expense of the individual feudal lords.

Jia Yi did not assert this plan as merely politically expedient. He also assured Wen – an emperor who from the first had shown concern for his reputation, his *kleos* – that by this fundamentally self-interested act, he would gain fame for rectitude. Jia Yi repeats the formula, “The whole realm will know of your majesty's... 天下咸知陛下之...” to list the encomiums of “perspicacity 明,” “incorruptibility 廉,” “humaneness 仁,” and “dutifulness 義” that will come to Wen in his lifetime as a result of the plan – to be followed by praise of “sagacity 聖” after death.³² Giving away all pieces of the territories will not only head off criticism that the emperor is depriving the feudal lords of their due, but will also generate acclaim.

Thus, the plan suggests – consciously and deliberately – a way to garner praise for the emperor on what might be considered false pretenses. Its focus lies in giving the appearance of praiseworthy action

³⁰ Lao, *Qin Han shi*, pp. 32–35. As Lao Gan says, in the time shortly after Jia Yi's death, Chao Cuo 鼂錯 (d. 154 BC) suggested similar plans to Wen's successor, emperor Jing. He also points out that the same was suggested to emperor Wu by Zhufu Yan 主父偃 (d. 127 BC); cf. *SJ* 112, p. 2961; *HS* 64A, p. 2802.

³¹ Qi, *Jiazhi Xin shu* 2, p. 196.

³² *Ibid.*, pp. 195–204. These are the “five noble qualities” that give this *Xin shu* chapter its title.

while achieving politically volatile goals.³³ This could be seen as cynicism on the part of Jia Yi, but is perhaps better considered a pragmatic concern for internal stability coupled with acknowledgement of the fact that public opinion matters – even in an empire, and especially when unruly underlings possess the power to threaten the dynasty. That such an act was virtually certain to earn praise for Wen – praise that would translate into perceived *virtus* – added an additional layer of benefit. I suggest that these same concerns were impetus for Wen’s changes to the penal system as well.

WENDI’S CHANGES TO THE PENAL SYSTEM

After receiving Tiyang’s letter, emperor Wen issued a decree that reads in part,

Now, while the law has three mutilating corporal punishments, depravity does not cease. Where is the fault? Is it not simply that my *virtus* is thin and my influence unenlightened?³⁴ I am extremely ashamed of myself... Now, if one of the people makes an error, before my influence reaches him punishment is applied. Perhaps he wants to change his actions for the better but has no way to get there. I really pity him. If punishment comes to cutting limb from body, to carving in flesh and skin, to the end of one’s life, it never ceases. How can the punishments for these things be so painful, and I be so lacking in *virtus*? How could this match the intention of being “father and mother of the people?”³⁵ Do away

³³ It is interesting to note that in advocating a similar plan of action, Zhufu Yan is more straightforward about the discrepancy between appearance and result: “I would like your Majesty to command that the feudal lords be allowed to spread kindness by dividing their fiefs among their sons and younger brothers, making them marquises with [the divisions of] territory. Every one of those men will delight that he can get what he desires. Your highness will thereby spread *virtus*, while in reality dividing their states. And while you do not expropriate [their territories], they will be gradually weakened. 願陛下令諸侯得推恩分子弟，以地侯之彼人人喜得所願，上以德施，實分其國，不削而稍弱矣。” Zhufu also acknowledges the importance of avoiding the appearance of acting with the goal of reducing local power, citing the case of Chao Cuo’s suggestions and the consequent Rebellion of the Seven Kingdoms. See *SJ* 112, p. 2961; the version in *HS* 64A, p. 2802, is slightly different.

³⁴ I translate the word *jiao* 教 here as “influence.” *Jiao* of course often has the sense of “to teach, instruct.” However, in a high-level political context like the one here, that reading is not apropos. In such a situation, *jiao* certainly indicates the sort of intangible expression of power implied by “influence.” This is similar to Xu Shen’s 許慎 (d. ca. 120) point that *jiao* is, “what the superior promulgates and the subordinate imitates 上所施，下所效也”; *Shuo wen jie zi* 說文解字; see Duan Yucai 段玉裁 (1735–1815), *Shuo wen jie zi zhu* 注 (Hangzhou: Zhejiang guji chubanshe, 1998), p. 127.

³⁵ The image of the ruler as “father and mother of the people 民之父母” that Wen mentions is a commonplace in early texts. Most cite a line from the *Shijing* poem “Jiong zhao” 洞酌 (Mao 251) as locus classicus: “The joyous and pleasant lord is the father and mother of the

with mutilating punishments and substitute something for them. When it comes to punishing people, each [case will be decided] according to the seriousness [of the crime]. If they do not try to escape, after a certain number of years they will be released.³⁶ Make all these regulations. 今法有肉刑三，而姦不止，其咎安在。非乃朕德之薄而教不明與。吾甚自愧... 今人有過，教未施而刑加焉。或欲改行爲善而道亡繇至。朕甚憐之。夫刑至斷支體，刻肌膚，終身不息，何其刑之痛而不德也，豈稱爲民父母之意哉。其除肉刑，有以易之。及令罪人各以輕重，不亡逃，有年而免。具爲令。³⁷

Wen's directive leaves a number of important points unexpressed. The text does not tell us what the three corporal punishments to be done away with are. Meng Kang 孟康 (ca. 2d c. BC) gives the most common explanation: they are tattooing (*qing* 黥), amputation of the nose (*yi* 劓), and amputation of one or both feet (*yue* 剕).³⁸ Although the amputation of the left foot or both feet was stipulated as punishment for different offenses, the two are taken together in this explanation.³⁹ Caning is not treated here, but is discussed separately.

Thus understood, *rouxing* 肉刑 means specifically "mutilating corporal punishments": although the body (the *corpus*, the *rou* 肉) is struck during a beating, it is not a *rouxing* until you permanently, deliberately, and obviously mark the body of the subject. Thus, although the canings could undoubtedly cause scarring and lasting injury, they were not *rouxing*. Conversely, although tattooing does not involve removing part of the body, it is an intentional and permanent marking of the body and so is included. Castration is excluded from this list as well, for unclear reasons and despite the fact that emperor Wen is credited with doing away with it as well (though it was also later reinstated).⁴⁰

people" 豈弟君子，民之父母；see *Maoshi zheng yi* 毛詩正義 (SSJZS edn.) 17, p. 622; trans. Bernhard Karlgren, *The Book of Odes* (Stockholm: Museum of Far Eastern Antiquities, 1950), no. 251. It also occurs in the "Hong fan" 洪範 section of *Shang shu* 尚書, although the authenticity of this chapter is doubtful; *Shang shu zheng yi* 尚書正義 (SSJZS edn.) 12, p. 173. The idea occurs in a wide variety of texts, and emperor Wen referred to it more than once; see, e.g., *SJ* 10, p. 428; *HS* 4, p. 113, etc.

³⁶ Meng Kang explains this in his commentary at *HS* 23, p. 1099: "[Under the new system,] those that did not try to escape would be released as commoners after fulfilling the stipulated number of years [of their sentence] 其不亡逃者，滿其年數，得免爲庶人。"

³⁷ *HS* 23, p. 1098; cf. the slightly different version in *SJ* 10, pp. 427–28.

³⁸ This is echoed by Wei Zhao 韋昭 (204–273), quoted in *SJ*, "Suo yin" 索隱 commentary; see *SJ* 10, p. 428, n. 4; *HS* 23, p. 1098, n. 5.

³⁹ Although Hulsewé, *Remnants of Han Law*, pp. 125–26, says that amputation of the right foot stands for amputation of both feet, this interpretation is not supported by any early source. All evidence supports a distinction only between amputation of the left foot and the right; Tomiya Itaru, personal communication, February 2, 2005.

⁴⁰ "Suo yin" commentary, quotes the preface to Cui Hao's 崔浩 (d. 450) *Han li* 漢律,

While the emperor says that something else should be substituted for the mutilations, he doesn't say what, delegating the specifics of reformulation to his officials.

Here, emperor Wen also commands that people be released from imprisonment "after a certain number of years." Although this seems like it might be a throwaway line, it is not. A modern reader might assume – as many in antiquity apparently did – that imprisonment and/or penal servitude must necessarily have a time limit. But this seems to have not been the case under Qin law. The evidence suggests that those sentenced to incarceration were imprisoned at labor for an indefinite period of time until eventually released under an imperial amnesty, a point which has become clear only in recent decades.⁴¹ Thus, Wen's call for the institution of specific sentences was itself a significant revision of legal practice.

Specific Changes to the Penal Code

In response to the emperor's command, chancellor Zhang Cang 張蒼 (256–152 BC) and grandee secretary Feng Jing 馮敬 (d. 142 BC) (and others) drew up a memorial outlining the proposed new system. The memorial has three parts: introductory material defending corporal punishment, a list of the punishments to be substituted for mutilation, and the recommended periods for particular stages and types of incarceration. My focus here is on the general shape of the changes and the

"When emperor Wen abolished mutilating corporal punishments, castration was not changed" 文帝除肉刑而宮不易; *SJ* 10, p. 428, n. 4. However, in emperor Jing's 景帝 command to arrange proper honors for emperor Wen (discussed below), Jing says, "He abolished castration ... [because he] took cutting off others' lineages as difficult 除肉[=宮]刑...重絕人之世"; *SJ* 10, p. 436; *HS* 5, p. 137. (Note that the received *SJ* text has *rouxing* 肉刑, "[mutilating] corporal punishments"; the editors of the *Zhonghua shuju* edition follow the *HS* parallel to emend this to *gongxing* 宮刑, "castration." In light of the *HS* and given that *rouxing* was previously mentioned in the command, and as there is no evident relationship between corporal punishments and "cutting off lineages," this seems a proper emendation.) Chao Cuo also alludes to Wen's elimination of castration; *HS* 49, p. 2297.

⁴¹ The Han generally followed the Qin legal code. And although there is not a consensus, many scholars now believe that the Qin code did not stipulate set sentences for the labor aspect of punishments, a practice that continued until the changes under emperor Wen. This idea was first put forth by Gao, "Qin li zhong 'li chen qie,'" pp. 43–44. Tomiya Itaru made the valuable clarification that sentences did not, in practice, last for life, but rather that convicts were imprisoned until released under an amnesty. There is a great deal of scholarship on this and related points. See the summary in Chen, "Qin Han xingtu," pp. 271–86; see also Du Qin 杜欽, "Han Wen chu rouxing ji Qin Han xingtu de xingqi wenti" 漢文帝除肉刑及秦漢刑徒的刑期問題, *Shi yun* 史耘 2 (1996), pp. 1–25; Zhang Jianguo 張建國, "Xihan xingzhi gaige xintan" 西漢刑制改革新探, *Lishi yanjiu* 243 (1996), pp. 12–14; Shiga Shūzō, "Xihan Wen di de xingfa gaige he Cao Wei xinlü shiba pian pianmu kao" 西漢文帝的刑法改革和曹魏新律十八篇篇目考, in Liu, ed., *Riben xuezhè*, pp. 76–82. It must be acknowledged that this idea is not universally accepted; e.g., Zhang, "Qin Han wutu," pp. 103–12.

reasons for these, with particular attention to mutilations, so I will not go into the details of the new regulations for imprisonment.⁴²

Zhang Cang and Feng Jing begin their memorial with a two-part defense of mutilating punishments: “Mutilating corporal punishments are the means by which to prevent depravity, and their origins are old 肉刑所以禁姦，所由來者久矣。”⁴³ The extent to which harsh punishments actually function as deterrent is a complicated question, even in the modern world. But this is certainly a common understanding, now as apparently then. Thus this first assertion makes a utilitarian appeal based on the presumed function of these laws.

The second part is an appeal to authority: Zhang and Feng point out that these punishments were of long standing. And indeed they are correct. The study of punishment in early times is complicated and must often rely on transmitted textual sources with problematic histories and/or archaeologically recovered sources, which are prone to difficulties in interpretation and give at best incomplete information. Nevertheless, all indications are that punishment in China from earliest times often took the form of corporal punishment of the same types that are discussed here.⁴⁴ Already in the opening of their memorial, Zhang and Feng hint that what they will suggest is not what you might expect for penal reform under an emperor renowned for clemency.

Having established the advisability of corporal punishment, Zhang Cang, Feng Jing, and the others lay out a set of punishments to be substituted for mutilations. The first substitution is for tattooing:⁴⁵ “Those

⁴² These laws were complicated, and their exact function is a matter of ongoing research and debate. Zhang, “Xihan xingzhi,” pp. 12–24, esp. 13–14, 18–21, discusses these changes at length, as do Shiga, “Xihan Wen di de xingfa gaige,” pp. 78–82, and Du, “Han Wendi,” pp. 1–25. See also the summary of recent scholarship in Chen, “Qin Han xingtu.”

⁴³ The text of the memorial is preserved in “Xingfa zhi,” *HS* 23, p. 1099.

⁴⁴ Cf. Shiga, “Zhongguo shanggu xingfa kao,” pp. 1–30. Li Hengmei 李衡眉, “Xianqin xingfa de yan’ge” 先秦刑法的沿革, in idem, *Xianqin shi lunji (xu)* 先秦史論集(續) (Ji’nan: Qi Lu shushe, 2003), pp. 221–33, outlines the history of mutilating punishments as attested in transmitted sources, with some reference to recovered materials. His summary of early materials is illuminating, although Marxism influences the analysis in a way that diminishes the value of its conclusions.

⁴⁵ Before this first substitution comes confirmation of an existing punishment, that of *wan* 完, literally, “[to leave] complete.” This line from “Xingfa zhi” says, “Those convicted [of an offense formerly subject to the punishment of] being *wan*, will be *wan* and become wall-builders or rice-pounders 諸當完者，完為城旦舂”; *HS* 23, p. 1099. Meng Kang defines *wan* as, “Not to apply mutilating corporal punishment or shaving 不加肉刑髡”; *HS* 2, p. 88. Elsewhere, Yan Shigu 顏師古 (581–645) explains, “*Wan* means not to harm the body, and only to stay [in custody] and do [the labor sentence] 完謂不虧其體，但居作也”; *HS* 23, p. 1092. Since we know that punitive labor was part of the *wan* punishment anyway, this is basically a continuation of existing practice. In his commentary on *HS* 23, p. 1099, Minister Zan 臣瓚 (probably late-3d-c. AD; perhaps a certain Wang Zan 王瓚 who was associated with Jia Mi’s 賈謐 circle of “24 friends” in the 290s; see *Jin shu* 晉書 [Beijing: Zhonghua, 1974] 40, p. 1174; also Alan

convicted [of an offense formerly subject to a sentence of] tattooing will be shaved,⁴⁶ and collared,⁴⁷ and become builders of fortifications or rice pounders 當黥者，髡鉗爲城旦舂。⁴⁸ This change is perhaps the closest to what you might expect from reforms meant to soften punishment, that is, the substitution of imprisonment at labor and *temporary* marking instead of permanent disfigurement combined with an indefinite period of servitude.⁴⁹

The next set of substitutions exchanges heavy beatings for what were formerly amputations. Those who were convicted of an offense that would previously have been punished by nose amputation were to be caned three hundred strokes. Similarly, an offense that formerly drew amputation of the left foot was now to be punished with five hundred strokes.⁵⁰ The cudgel used for these punishments was a serious instrument,⁵¹ meaning that the new sentences were very se-

Berkowitz, "Courting Disengagement: 'Beckoning the Recluse' Poems of Western Jin," in Paul W. Kroll and David R. Knechtges, eds., *Studies in Early Medieval Chinese Literature and Cultural History: In Honor of Richard B. Mather and Donald Holzman* [Provo: T'ang Studies Society, 2003], pp. 88, 114-15 suggests that the first *wan* is to be understood as *kun* 髡, "to shave." This follows the interpretive example of Zheng Sinong 鄭司農 (Zheng Zhong 鄭眾, d. 83 AD), who suggests the same reading in his *Zhou li* 周禮 commentary; see *Zhou li zhu shu* 周禮注疏 (SSJZS edn.) 36, p. 545. Wang Pinzhen 王聘珍 (18th c.) explains Zheng's scholium, "Shaving is cutting the hair and leaving the body intact (*wan*) 髡爲剪毛髮，完其肢體"; Wang Pinzhen, *Zhou li xue* 周禮學 2, pp. 6b-7a, in Ruan Yuan 阮元 (1764-1840), *Huang Qing jing jie xu bian* 皇清經解續編 (Jiangyin: Nanjing shuyuan, 1888).

⁴⁶ *Shuo wen jie zi* defines, "*Kun* means to shave the hair" 髡，剃髮也; see Duan, *Shuo wen jie zi zhu*, p. 428. Though it has a general usage, *kun* is also used in a specific sense to refer to penal shaving, as in the "Zhang lu" 掌戮 section of *Zhou li*: "Those shaved are sent to guard the stores 髡者使守積"; see *Zhou li zhu shu* 36, p. 545.

⁴⁷ Yan Shigu states, "*Qian* means to bind the neck with iron 鉗，以鐵束頸也"; *HS* 1B, p. 67.

⁴⁸ *HS* 23, p. 1099. Wei Hong's 衛宏 (1st c. AD) *Han jiu yi* 漢舊儀 (sometimes called *Han guan jiu yi* 漢官舊儀) says in reference to the Qin system, "Whenever there was a punishment, men would be shaved and collared to become builders of fortifications (*chengdan*); *chengdan* means working on fortifications (*cheng* 城). Women became [rice] pounders; pounding means working rice 凡有罪，男髡鉗爲城旦，城旦者，治城也。女爲舂，舂者，治米也"; *Han jiu yi* B, pp. 6b-7a, in Sun Xingyan 孫星衍 (1753-1818), *Han guan liu zhong* 漢官六種 (SBBY). At *HS* 2, p. 87, Ying Shao 應邵 (fl. 189-94) explains the terminology of these punishments as follows: "Builders of fortifications (*chengdan*) arise at dawn (*dan*) and go to work on the fortifications (*cheng*). As for pounders (*chong*): women do not participate in outside labor service, and only pound to make [finished] rice 城旦者，旦起行治城。舂者，婦人不豫外徭，但舂作米。"

⁴⁹ Shiga, "Zhongguo shanggu xingfa kao," pp. 19-21, makes the point that from early times, mutilating punishments had been connected to an indefinite sentence of mandatory labor service; see also Chen, "Qin Han xingtu," p. 271.

⁵⁰ *HS* 23, p. 1099. The word I translate as "foot, feet" is *zhi* 趾, which is later more commonly written *zhi* 趾. Though often understood as "foot," it can refer specifically to the toes. Thus it has been suggested that "toes" is the preferred meaning in "Xingfa zhi," an interpretation certainly worthy of consideration. However, I have not yet been able to locate definite evidence to support it.

⁵¹ This is suggested by the fact that emperor Jing later stipulated that the main part of the cane was to be five feet (*chi*) long, with the main part an inch (*cun*) thick and the tip a half

vere.⁵² Indeed, the reported effects support the contention that these beatings were, practically speaking, death sentences. However, there must have been some perceived difference between these offenses and actual capital crimes, as the latter come next.

Several offenses were listed as subject to execution. Crimes formerly punished by amputation of the right foot became capital offenses. Likewise, those guilty of murder but who turned themselves in, those guilty of official corruption or embezzlement, and certain repeat offenders were all to be killed.⁵³ Changes like the substitution of execution for amputation of the right foot are perhaps the most confusing of all in the context of a supposed amelioration of harsh punishments: instead of a punishment that left the convict alive, if mutilated, there is now simple execution. This is an indisputable extension of the death penalty.

An Effective Increase in Deaths

As might be expected, the above changes led to an increase in the number of people who died as a result of punishment, whether or not they were sentenced to execution. Ban Gu writes:

After this, outside [the court, Wen] had the name of having lightened punishments, but within they were in reality killing people. Those convicted [of crimes formerly punished by] cutting off the right foot were now sentenced to die. Those [who formerly would] have the left foot cut off were caned five hundred strokes, those [who would have been] sentenced to nose amputation were caned three hundred strokes, and the great majority died. 是後，外有輕刑之名，內實殺人。斬右止者又當死。斬左止者笞五百，當劓者笞三百，率多死。⁵⁴

inch thick – a serious stick! Since this was an attempt to ameliorate the harshness of beatings, presumably the previous implements were at least this substantial. See *HS* 23, p. 1100, also discussed below.

⁵² To give a rough frame of reference, a search of Singapore's current legal statutes at <http://statutes.agc.gov.sg/> (January 20, 2005), particularly section 231 of the Criminal Procedure Code, indicates that the most strokes of the cane that any convicted person can receive as punishment under that code is twenty-four, with the great majority of offenses punishable by half that number or fewer.

⁵³ *HS* 23, p. 1099: "Those convicted [of an offense formerly punished] by having the right foot cut off; those who have killed someone but report themselves before [being arrested]; those officials found guilty of receiving bribes and bending the law; those who administer prefectural or official wealth and then steal it; and those already judged and sentenced who again [commit a crime] to be punished by beating shall all be [executed and] left in the marketplace. 當斬右止，及殺人先自告，及吏坐受賕枉法，守縣官財物而即盜之，已論命復有笞罪者，皆棄市。" See also Zhang, "Xihan xingzhi," p. 16.

⁵⁴ *HS* 23, p. 1099.

Ban Gu's assertion that name (*ming* 名) and reality (*shi* 實) were not in accord is clear criticism of the situation.⁵⁵ But despite the tone of condemnation, Ban also praised emperor Wen elsewhere.⁵⁶ Thus, it is safe to accept his critique as directed at what he saw to have been a misguided policy and not at the emperor personally. And even Wen's successor – who was decidedly not criticizing his father and predecessor – would portray the result of the changes in a fashion similar to Ban Gu's, acknowledging that the numbers of dead had increased (discussed below). I suggest that the disjunction between name and reality that Ban Gu reports is an important factor for understanding the reason for the changes, not just an accidental result of them.

According to Ban Gu's portrayal, the emperor's efforts to lighten the penalties failed:

In abolishing mutilating corporal punishments, [emperor Wen] originally desired thereby to preserve the people whole. But now, if you went one level away from being shaved and collared, you came round into the greatest punishment.⁵⁷ Netting⁵⁸ the people with death, they had lost the original kindness [of the changes]. 除肉刑者, 本欲以全民也, 今去髡鉗一等, 轉而入於大辟。以死罔民, 失本惠矣。⁵⁹

Ban Gu is criticizing the changes on the grounds that the new penalties were either too harsh or too light. On the one hand, "Those killed numbered in the tens of thousands per year; this was what was brought about by punishments being heavy 死者歲以萬數, 刑重之所致也。"⁶⁰ But on the other hand, petty crimes, not punishable by death, were supposedly not deterred by the new penalties:

⁵⁵ For background and implications of the name/actuality dichotomy, see John Makeham, *Name and Actuality in Early Chinese Thought* (Albany: State University of New York Press, 1994).

⁵⁶ Thus, in the sect. "Xingfa zhi," *HS* 23, p. 1097, Ban Gu describes the beginning years of emperor Wen's reign in very positive terms, particularly his frugality, magnanimity, and desire to rule through *virtus*. Ban even praises him for the changes made to the penal system in the early years of his rule, saying that they had reduced the numbers of those punished. Ban repeats some of this in the "encomium" (*zan* 贊) at the end of "Wendi ji," *HS* 4, p. 134, extolling emperor Wen as "humane 仁." All this underscores Ban Gu's opinion that the changes of 167 BC were a bad policy decision by an otherwise laudable ruler.

⁵⁷ The "greatest punishment 大辟" is execution. The "Wen wang shi zi" 文王世子 chapter of the *Li ji* says, "If it is to be the death penalty, then he says, 'So-and-so's punishment lies with the greatest punishment 其死罪則曰某之罪在大辟'; as Zheng Xuan 鄭玄 (127–200) explains, "Bi also means punishment 辟亦罪也"; *Li ji zhu shu* 20, p. 401.

⁵⁸ *Wang* 罔 is "net," often written *wang* 網. Yan Shigu says, "*Wang* means the spread nets [of the law] 罔, 謂羅網也"; *HS* 23, p. 1113. This is a conventional image of unfair legal practices that entrap or mislead the common folk.

⁵⁹ *HS* 23, p. 1112.

⁶⁰ *Ibid.*

Accordingly, those punished numbered in the hundreds of thousands, but the people were afterwards not afraid, and also increasingly lacked a sense of shame. This is what punishment being light gave rise to. 故刑者歲十萬數，民既不畏，又曾不恥，刑輕之所生也。⁶¹

Beginning soon after emperor Wen did away with penal mutilations, there was pressure from some quarters to reinstate them. Later advocates of a return to the ancient system included important scholars and thinkers like Yang Xiong 揚雄 (53 BC–18 AD) and Ban Gu. The two most common reasons given were those that Ban Gu mentions: there was no longer a middle ground of punishment between a slap on the wrist and death, and punishments had lost their effectiveness as deterrence against crime. Such criticisms must be taken with a grain of salt. Although Ban and others who criticize the change away from mutilation give the impression that there was no middle ground, this is not borne out by other information. Nor is the contention that the lightened penalties were insufficient to serve as real punishments plausible. The labor sentences inevitably associated with shaving and collaring, now connected to incarceration for specific time periods, gave a way to modulate penal severity. That these sentences always ran into years means that even the lightest was no slap on the wrist.⁶² Likewise, the beatings prescribed were even harsher punishments than they might seem at first, as they also included penal servitude.⁶³ And by all accounts, the changes to the law greatly increased the number of people who died under punishment.

Further Reform

When emperor Wen died in 157 BC, he was succeeded by his son Liu Qi 劉啓, known posthumously as emperor Jing 景帝 (r. 156–141 BC). In the first year of his reign, Jing commanded the imperial secretary (*yushi* 御史) to arrange observances in memory of emperor Wen. Not surprisingly, the directive includes ample praise of Wen, and gives, *inter alia*, the following list of his efforts to care for his subjects:

When the Filial Emperor Wen ruled the realm, he [let people move freely] through the passes and bridges and did not differentiate the distant places [from the near]. He abolished [laws against] slander

⁶¹ Ibid.

⁶² For the foregoing, see Xing Yitian, “Lun qianxixing zhi yong yu rouxing zhi bu fu” 論遷徙刑之用與肉刑之不復, in *Qin Han shi lun gao*, pp. 436–48.

⁶³ Zhang, “Xihan xingzhi,” pp. 15–16.

and did away with mutilating corporal punishments. He rewarded and gifted the elderly, provided for and relieved the orphaned and widowed. By these things, he nurtured the many living beings. 孝文皇帝臨天下，通關梁，不異遠方。除誹謗，去肉刑，賞賜長老，收恤孤獨，以育羣生。⁶⁴

Thus, Jing seems to support and extend Wen's reputation for humaneness, and he lists the elimination of mutilating punishments among his father's many good deeds. However, in the very year of his accession, emperor Jing also made a number of changes to the penal code, continuing the process begun by his father. The background of these modifications is a picture of continuing harshness at the time of accession, which contrasts with the picture painted in the above panegyric:

There is [now] no difference between caning and the heaviest punishment (that is, death). If someone [punished by caning] is fortunate and does not die, he cannot constitute a person [any more].⁶⁵ Establish the code as follows: a caning [formerly] of five hundred strokes will be three hundred, and a caning of three hundred strokes will be two hundred. 加笞與重罪無異，幸而不死，不可爲人。其定律：笞五百曰三百，笞三百曰二百。⁶⁶

This supports the contention that the new penalties led to an increase in deaths. The actual brutality of emperor Wen's system of punishments was also reflected by the fact that in 144 BC Jing again reduced their severity, further subtracting a hundred strokes from each.⁶⁷

It is important to note that emperor Jing made his alterations to the legal system at just about the same time he ascended to power. Thus, he required no long observation to recognize the effects of Wen's reforms. This suggests that these must have already been recognized at the highest levels of government. The implication in turn is that, in all likelihood, emperor Wen knew, for some or all of the ten years between the 167 BC changes and his death in 157 BC, the results of the new penal regime, but did not act.

AN INTERPRETATION

In summary, emperor Wen commanded alterations that increased the overall lethality of punishment, yet included a limited degree of mitigation of severity. Despite the leniency shown Chunyu Yi because

⁶⁴ *SJ* 10, p. 436.

⁶⁵ I.e., injured so that he can no longer function normally.

⁶⁶ *HS* 23, p. 1100.

⁶⁷ *Ibid.*

of his daughter's letter, there is thus reason to doubt that Wen's revisions of the penal system necessarily represented mercy to the general populace. The rapidity with which emperor Jing further reformed the system suggests that emperor Wen was likely aware that the "name" and "actuality" of his reforms did not accord. Ban Gu and others seem to have assumed that the disjunction signaled a failed policy. But perhaps it was deliberate.

If we step back for a moment and consider the secondary effects of the changes, the first that comes to mind is that there were no new mutilated convicts created. As Jia Yi had suggested for those of high rank, the punishment for many crimes was now, practically speaking, simply death. Given the apparently commonplace nature of mutilating punishments in the times before Wen's changes, it can only have been normal to see the mutilated going about the tasks especially prescribed to them.⁶⁸ And of course, the mutilation lasted as long as the person lived. So these people, although cut off from the community, were visible reminders of the law long after the punishment was carried out. Thus, to end the perceptible cruelty of mutilation was a visible and obvious step – much more so than stopping something that existed out of the public view would have been. After 167 BC, there were two groups of convicts: laborers, who worked for a set period and were then returned whole to society; and the dead, no longer visible after the initial period.⁶⁹ There were no new mutilations, no more of those most evidently *marked* convicts.

Michel Foucault has written about the function of public torture and execution in Europe as the visible proof of sovereign power on the body of the convicted.⁷⁰ The purpose of this "spectacle" is "terror: to make everyone aware, through the body of the criminal, of the unrestrained presence of the sovereign."⁷¹ Especially thought-provoking for the early Chinese case is Foucault's observations about the ease with which the spectacle designed to overawe the populace could reverse to evoke its anger against the punishing authorities.⁷² Foucault focuses on

⁶⁸ See, e.g., the summary of the assignments given in *Zhou li; Zhou li zhu shu*, p. 545, for those who had been mutilated.

⁶⁹ Obviously, corpse exposure was connected to the "mark" that I discuss next: by making the body visible, the ruler made his power visible. But after the corpse was taken away or decomposed, the mark disappeared. Compared to the remaining lifetime of someone who survived mutilation, this lasted a much shorter period of time.

⁷⁰ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1979), esp. pp. 32–69.

⁷¹ *Ibid.*, p. 49.

⁷² *Ibid.*, pp. 59–65.

the violent performance of execution. But maybe the same phenomenon functioned in the cases of those mutilated and left alive.

We should consider the early-Han situation in conjunction with the idea of mutilating punishment as a mark of power. Perhaps mutilation was recognized as enacted cruelty – as hinted in Tiyang's letter. Thus, each mutilation (and, by extension, each mutilated person) demonstrated not only imperial power, but also imperial cruelty. Perhaps emperor Wen put an end to mutilating punishments in order to soften or deflect people's perception of an "unrestrained presence of the sovereign." That imperial power was not actually constrained but in fact extended by these changes reflects their true purpose.

What we see is the deliberate generation of *virtus* that Jia Yi predicted for the ruler who avoids corporal punishment for his vassals, but generalized to the broader population. The people would have noted the discontinuation of old practices. Likewise, the establishment of set sentences had the effect of instituting an ongoing amnesty, with all the benefits thereof not only for the populace but for the ruler as well.⁷³ Thus, the penal code changes were something like a gift to the whole population. But at the same time – and as Jia Yi recommended – it is not that punishment was avoided.

When Ban Gu writes that emperor Wen, "had the reputation (*ming*) of having lightened punishments, but within they were in reality (*shi*) killing people," it is doubtless criticism. But perhaps the situation Ban Gu describes was the intended consequence of emperor Wen's modifications: the perception of amelioration combined with maintaining or even increasing the severity of punishment.

Jia Yi would deprive the emperor's most troublesome subjects, the powerful feudal lords, of potency while earning accolades for Wen, a situation in which name and reality were deliberately at odds. I would suggest that the same idea is at work in the changes to the penal system: that emperor Wen deliberately took actions calculated to win him praise for his humanity, while upholding and extending the severity of a system of punishment whose basic mode and utility is not questioned.

Xing Yitian 邢義田 has written that Wen's reputation for humane-ness was based in large part on the abolishment of corporal mutilating punishments, and that his successors did not want to damage their

⁷³ Amnesties and their effects are analyzed in Brian E. McKnight, *The Quality of Mercy: Amnesties and Traditional Chinese Justice* (Honolulu: U.P. of Hawaii, 1981).

reputations by undoing this act.⁷⁴ I propose that a motivation to acquire such a reputation in fact was behind Wen's penal reforms from the first. He created and used the dissonance between his "name" for humane-ness, gained through acts like abolishing mutilating punishments, and the "reality" of ongoing, harsh penalties to maintain the effectiveness of the penal system's deterrent function. And Tiying's letter – despite its fame – was little more than a pretext. Seen thus, Wen's reforms and their results were not a failure of lost kindness, but rather a splendid success in public relations.

LIST OF ABBREVIATIONS

<i>HS</i>	<i>Han shu</i> 漢書
<i>SJ</i>	<i>Shi ji</i> 史記

⁷⁴ Xing, "Lun qianxixing," pp. 436–48, discusses the abolishment of mutilating punishments and the proposals for their restoration. For his observation about Wen's humane repute, see p. 438.