Beyond the Formal Law:
Making Cases in Roman Controversiae and Tang Literary Judgments

A dissertation presented

by

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Abstract

In the Roman Empire and the Chinese Tang dynasty, two societies with sophisticated laws, students were trained to argue cases through rhetorical exercises that paid little attention to formal legal sources (statutes, regulations, case precedents, etc.). This dissertation examines how these exercises shaped, and were themselves shaped by, Roman and Tang legal culture. *Controversiae* were legal speeches performed before fictitious judges as a Roman schoolroom exercise, and literary judgments (*pan判*) were decisions on legal and administrative questions of the sort tested by the Tang selection examinations. Both types of exercises used arguments drawn from history, literature, and moral principles, and featured ornate language addressed to trial judges or officials who must approve a decision already made.

This dissertation focuses on the relationship that these exercises had to the formal law of their respective societies as a way to explore the interactions between law, rhetoric, and morality. Chapter One looks at Roman and Tang legal training and practice, and argues that these exercises taught students how to introduce traditional moral values into legal norms. Chapter Two examines cases from the elder Seneca’s (ca. 55 BC–AD 37) *controversiae* in light of Augustan moral legislation, showing how these cases challenged the claims of the Augustan legislative program. Chapter Three looks at cases from the pseudo-Quintilianic *Declamationes maior*es (ca. 2nd to 4th c.) and their use of pathos to sway judges in conflicts that the formal law allegedly could not adequately resolve. Chapter Four analyzes the relationship between classical learning and law,
and the persuasive power of literary display, in Zhang Zhu’s 張鷟 (658–730) judgments. Chapter Five looks at the judgments of Bai Juyi 白居易 (772–846) and their use of moral and ritual propriety as a standard for deciding private and familial conflicts. The Conclusion questions the view that controversiae and judgments were literary showpieces that had a peripheral interest in law, and argues that both genres understood the limitations of the formal law and the persuasive power of a language of equity shaped by a recycled set of stories, arguments, and scenarios with minor variations.
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Finally, I thank my wife, Valerie, for many things, but most of all for being a companion in Christ our Lord. To her I dedicate this work.
<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>753 BC</td>
<td>Founding of Rome</td>
</tr>
<tr>
<td>509 BC</td>
<td>First year of the Republic</td>
</tr>
<tr>
<td>366 BC</td>
<td>The consulship re-established</td>
</tr>
<tr>
<td>450 BC</td>
<td>Twelve Tables completed</td>
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<tr>
<td>ca. 145–120 BC</td>
<td>Lex Aebutia authorizes the formulary system</td>
</tr>
<tr>
<td>ca. 55 BC</td>
<td>The elder Seneca born</td>
</tr>
<tr>
<td>52 BC</td>
<td>Third (and last) consulship of Pompey</td>
</tr>
<tr>
<td>63 BC</td>
<td>Consulship of Cicero (with C. Antonius Hibrida)</td>
</tr>
<tr>
<td>44 BC</td>
<td>Caesar appointed dictator in perpetuum (15 March, Caesar assassinated)</td>
</tr>
<tr>
<td>43 BC</td>
<td>Triumvirate of Octavian, Mark Antony, and Lepidus; Cicero killed</td>
</tr>
<tr>
<td>31 BC</td>
<td>Battle of Actium—Octavian triumphs</td>
</tr>
<tr>
<td>27 BC–AD 284</td>
<td>“Principate”</td>
</tr>
<tr>
<td>18/17 BC</td>
<td>Augustan moral legislation passed</td>
</tr>
<tr>
<td>AD 14</td>
<td>Res gestae divi Augusti engraved upon a pair of bronze pillars in front of Augustus' mausoleum</td>
</tr>
<tr>
<td>Late AD 30s</td>
<td>The elder Seneca composes his Oratorum et rhetorum sententiae divisiones colores</td>
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</table>
AD 90s: Quintilian writes the *Institutio oratoria*

ca. 2nd century: *Declamationes minores* composed

Early AD 100s: Tacitus writes the *Dialogus de oratoribus*

ca. AD 125: Emperor Hadrian commissions Julian to produce the definitive text of the Praetor’s Edict

ca. mid-2nd century: Gaius’ *Institutes* composed

Late 2nd/early 3rd century: The jurists Papinian, Ulpian, and Paul at the height of their activity (“classical” period of Roman law)

Mid-3rd century: Formulary system begins to disappear

AD 294: Diocletian orders provincial governors not to give cases to inferior judges (officially abolishing the two-phased formulary system)

Late 4th century: *Declamationes maiores* attain present form

AD 426: Law of Citations recognizes the authority of five jurists

AD 438: *Codex Theodosianus* promulgated

AD 533: Justinian’s *Institutes and Digest* promulgated

AD 69–96: Flavian dynasty

AD 96–192: Nerva-Antonine dynasty

AD 193–235: Severan dynasty

AD 284–476: “Dominate” in the Western Roman Empire

AD 284–305: Reign of Diocletian

AD 425–455: Reign of Valentinian III over the Western Roman Empire

AD 408–450: Reign of Theodosius II over the Eastern Roman Empire

AD 527–565: Reign of Justinian I
<table>
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<th>Chinese Term</th>
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<tr>
<td>著作 (Class of Documents)</td>
<td>\textit{Classic of Documents}</td>
</tr>
<tr>
<td>詩經 (Classic of Odes)</td>
<td>\textit{Classic of Odes}</td>
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<td>\textit{Classic of Odes}</td>
</tr>
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<td>詩經</td>
<td>\textit{Classic of Odes}</td>
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<tr>
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<td>\textit{Spring and Autumn}</td>
</tr>
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<td>春秋左傳</td>
<td>\textit{The Zuo Tradition to the Spring and Autumn Annals}</td>
</tr>
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<td>\textit{Records of the Historian}</td>
</tr>
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<td>\textit{History of the Former Han}</td>
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<tr>
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<td>\textit{Five Classics}</td>
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<td>\textit{Five Classics}</td>
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<tr>
<td>經典</td>
<td>\textit{Classics}</td>
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<td>\textit{Classics}</td>
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<td>\textit{Spring and Autumn}</td>
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<td>\textit{Spring and Autumn}</td>
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<td>\textit{Five Classics}</td>
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**China**

**Literary and Legal History**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>ca. 1042–1036 BC</td>
<td>Oldest parts of the \textit{Shangshu} composed</td>
</tr>
<tr>
<td>ca. 1000–600 BC</td>
<td>\textit{Shijing} composed</td>
</tr>
<tr>
<td>479 BC</td>
<td>Confucius dies</td>
</tr>
<tr>
<td>ca. 450 BC</td>
<td>\textit{Lun yu} composed</td>
</tr>
<tr>
<td>ca. 300 BC</td>
<td>\textit{Chunqiu Zuozhuan} composed</td>
</tr>
<tr>
<td>ca. 250–200 BC</td>
<td>Commentaries in the \textit{Zhou Yi} attain present form</td>
</tr>
<tr>
<td>ca. 200 BC</td>
<td>The phrase “Five Classics” (\textit{wujing}) first appears</td>
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<tr>
<td>ca. 140–30 BC</td>
<td>Copies of the \textit{Zhou li} and \textit{Yili} presented to the Han Imperial Library</td>
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<tr>
<td>87 BC</td>
<td>\textit{Shiji} completed</td>
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**Political History**

<table>
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</thead>
<tbody>
<tr>
<td>1122–771 BC</td>
<td>Western Zhou 西周</td>
</tr>
<tr>
<td>770–256 BC</td>
<td>Eastern Zhou 東周</td>
</tr>
<tr>
<td>722–481 BC</td>
<td>Spring and Autumn 春秋</td>
</tr>
<tr>
<td>221–207 BC</td>
<td>Qin 秦 dynasty</td>
</tr>
<tr>
<td>206 BC–AD 25</td>
<td>Western (former) Han 西漢 dynasty (including the Wang Mang 王莽 interregnum)</td>
</tr>
<tr>
<td>AD 96</td>
<td>\textit{Han shu} 漢書 (History of the Former Han) presented to the throne</td>
</tr>
<tr>
<td>ca. AD 100</td>
<td>\textit{Liji} 禮記 (Records of Rites) attains present form</td>
</tr>
<tr>
<td>AD 297</td>
<td>\textit{Sanguo zhi} 三國志 (Records of the Three Kingdoms) completed</td>
</tr>
<tr>
<td>AD 265–420</td>
<td>Jin 晉 dynasty</td>
</tr>
<tr>
<td>AD 220–280</td>
<td>Three Kingdoms 三國 period</td>
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AD 445: *Hou Han shu* 後漢書 (History of the Later Han) completed

AD 420–589: Southern and Northern Dynasties 南北朝

AD 520s: *Wenxuan* 文選 (Selections of Fine Writings) compiled

AD 581–618: Sui 隋 dynasty

AD 618–907: Tang 唐 dynasty

AD 648: *Jin shu* 晉書 (History of the Jin) completed

AD 626–649: Reign of Taizong 太宗

AD 653: The *Wujing zhengyi* 五經正義 (Correct Significance of the Five Classics) and the *Tangli shuyi* 唐律疏議 (Tang Code with Subcommentary) promulgated

AD 650–683: Reign of Gaozong 高宗

ca. AD 705–710: Zhang Zhuo writes the *Longjin fengsui pan* 龍筋鳳髓判 (Dragon Sinews, Phoenix Marrow Judgments)

AD 690–705: Zhou 周 dynasty (reign of Empress Wu)

AD 712–756: Reign of Xuanzong 玄宗

AD 755–763: An Lushan 安祿山 Rebellion

ca. AD 800–802: Bai Juyi writes the *Baidao pan* 百道判 (Hundred Judgments)

AD 690–705: Zhou 周 dynasty (reign of Empress Wu)

AD 712–756: Reign of Xuanzong 玄宗

AD 945: *Jiu Tang shu* 舊唐書 (Old History of the Tang) completed

AD 907–979: Five Dynasties and Ten Kingdoms 五代十國

AD 986: *Wenyuan yinghua* 文苑英華 (Finest Blossoms in the Garden of Literature) compiled

AD 960–1127: Northern Song 北宋 dynasty

AD 1042: *Chongwen zongmu* 崇文總目 (General Catalogue of the Chongwen Academy) presented to the throne

AD 1060: *Xin Tang shu* 新唐書 (New History of the Tang) completed

AD 907–979: Five Dynasties and Ten Kingdoms 五代十國

ca. AD 1200: Hong Mai writes the *Rongzhai suibi* 容齋隨筆 (Casual Notes from the Studio of Forbearance)

AD 1127–1279: Southern Song 南宋 dynasty
Introduction

Before embarking on a study of two genres from two different cultures and time periods, I would like to set this work in a larger context so as to explain the impetus behind the comparison. Recent years have brought about a number of reflections on the future of the law-and-literature field. It is generally agreed that the field can be traced back to the 1970s with James Boyd White’s law school coursebook *The Legal Imagination*, which treated law not as a system of rules, but as a rhetorical art form, a system of thought and expression.¹ The ensuing decades witnessed the emergence of two related, but distinct, subfields: “law in literature” and “law as literature.” The former examines law-related fiction for insights into the foundations of law and its relation to justice. The latter examines legal texts (statutes, contracts, judicial opinions, etc.) by applying the hermeneutical tools of literary criticism and theory. Because law-and-literature originated in the United States in response to frustrations with American legal education and practice, the field has historically focused on the Western literary tradition and based its inquiries on Anglo-American jurisprudence.² This has been changing in recent years (for example, a recent article in the journal of *Law & Literature* treats Egil Skalla-Grimsson’s Old Norse elegy *Sonatorrek*³), though calls to expand the field to cover non-Anglo-American traditions are still heard.⁴

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² Christine Corcos’ *International Guide to Law and Literature Studies* (Buffalo, NY: W. S. Hein, 2000) shows that most works in law-and-literature up till the turn of the century have been on English and American literature (followed by French and German literature).


Law-and-literature has also faced challenges to rethink its two key terms. Jane Baron pointed out in the late 1990s that we cannot uncritically define “literature” as everything “law” is not, or vice versa, and questioned the view of law as “cold, mechanical, dehumanized” or as “uniquely authoritative.”5 Julie Stone Peters’ 2005 article in the PMLA further objected to the field’s binarism, which (she claimed) would see law as literature’s political redeemer (in effecting real changes) and literature as law’s ethical redeemer (in promoting compassion toward the disenfranchised and disempowered).6 The future of law-and-literature would involve, Peters anticipated, a “transformation into something bigger and necessarily more amorphous,” likely resulting in “a new set of anxieties.”7 Indeed, law-and-literature has dropped its second term in some scholarly circles and become “law, culture and the humanities.”8 Guyora Binder and Robert Weisberg have also proposed that the term “law” should be understood broadly as a cultural artifact, both reflecting and forming cultural meanings.9

With law-and-literature broadening its focus both geographically and through a re-conception of its two key terms around the amorphous axis of “culture,” the possibilities for the field seem endless. But the danger that the field might thereby lose its distinctiveness is also all the more real. Hence, the ever more pressing need for concreteness and specificity, the lack of which has been a common criticism of the field. Austin Sarat, Cathrine O. Frank, and Matthew

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7 Ibid., 451.

8 See the website of the Association for the Study of Law, Culture and the Humanities: http://lawculturehumanities.com.

Anderson’s *Teaching Law and Literature* emphasized an approach to the relationship between law and literature that relies “on a sense of the specific, contingent ways in which literary texts emerge from and engage with particular traditions—for example, legal and religious traditions of textual interpretation—at discrete historical moments.” Rooted in the specific, law-and-literature may succeed in expanding without losing sight of its original conviction, that what we call “law” and what we call “literature” have important things to say to each other.

Holding to that conviction, this dissertation explores a perennial topic in law-and-literature—the relationship between law and morality—by looking beyond the field’s usual confines and examining two distinct literary genres in two pre-modern societies. The choice to look at *controversiae* from the Roman Empire and literary judgments (pan 判) from the Chinese Tang dynasty (618–907) requires some explanation. First, the Roman Empire of the first several centuries AD and the Tang were especially prolific periods from the standpoint of formal law, both having a large quantity of extant legal material. The former witnessed the development of classical Roman law, preserved mainly in the *Corpus iuris civilis*; the latter saw the growth of a complex body of codified law organized into four parts—the Code, Statutes, Regulations, and Ordinances—with the Code and Statutes being the earliest comprehensive Chinese laws to survive. But despite having these formal sources of law, the exercises used for the training of advocates (in Rome) and of bureaucratic officials (in the Tang) emphasized methods of persuasion that had little interest in the formal law. By means of hypothetical cases with sometimes farfetched scenarios, *controversiae* taught students how to make speeches to sway

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iudices by appealing to their moral convictions and emotions. Judgments, the most important part of the Tang civil service selection examinations (xuan 選), taught aspiring candidates how to defend a legal or administrative decision through the use of classical allusions and ornate prose. It is not surprising that each society viewed "law" as consisting of both the formal law and extralegal considerations—this is arguably true for every society. What is more notable is that both Rome and the Tang emphasized moral and equitable considerations to such a degree that the formal law was marginalized in the exercises that claimed to train those who would be key players in the Roman and Tang courts.

Focusing on these societies and genres has a major advantage and disadvantage. The advantage is that both genres are, more or less, co-terminous with their respective periods. This is not to say that controversiae were no longer valued after the first several centuries AD or that literary judgments were no longer composed after the Tang. But both genres saw the peak of their popularity during these periods and declined markedly afterward. Though we do not know when training in controversiae ceased in the rhetorical schools, the latest extant Latin examples of them are the pseudo-Quintilianic Declamationes maiores, some of which were probably composed in the second century and others in the third or fourth centuries.\footnote{The timeline for controversiae stretches to the sixth century if we consider those written in Greek in the Eastern Roman Empire. See D. A. Russell, Greek Declamation (Cambridge: Cambridge University Press, 1983), 5–6.} Perhaps the ability to argue cases as imagined in controversiae became less important in the late Roman Empire, when increasing bureaucratization made advocacy more a matter of applying relevant legislation than of rhetorical display. Judgments in the literary style were highly regarded in the Tang because they were part of the selection examinations, but in subsequent dynasties they were never again used as a criterion for selecting officials. After the Tang, judgments were usually written in unadorned prose, though some literati still composed ornate judgments well into the late imperial period. In short, it is
possible to think of *controversiae* and literary judgments as the products of specific institutions and cultures, and as shapers of these institutions and cultures, during two discrete periods.

The disadvantage is that the actual pleadings of advocates and the actual decisions of officials in these periods do not, in general, survive. Therefore our understanding of how these exercises related to actual legal practice must involve some guesswork—though it is likely that they were not representative of the kind of pleadings or decisions that were routinely seen in the Roman and Tang courts. Both genres were preserved as belles lettres and one could hardly expect advocates and judges to plead and write in such an elaborate way all the time. But there is also no reason to think that there was a total disconnect between the skills taught in the schools (or studied in private) and the skills required in the courtroom. Hence, this dissertation argues that these exercises, though they were not real cases (insofar as they were not taken from legal or administrative archives), show us what people in Rome and the Tang thought exemplary arguments should look like.

These arguments, so often venturing beyond the formal law, can be understood as belonging to the realm of equity. By “equity,” I mean that aspect of law that introduces moral values into legal norms. Every legal system has a way to make discretionary ex post decisions based on notions of fairness, though legal cultures differ in the extent to which the equitable mode of decision-making is distinguished from decision-making based on the formal law. Generally speaking, in civil-law systems, equitable doctrines (good faith, unconscionability, abuse of right, etc.) are received into the law by means of codified rules, so that there is formally only

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13 For the few exceptions, see Appendixes I and II.

14 They might have of course been inspired by real cases.

one mode of decision-making. In common-law systems, equitable relief was historically granted in a separate court, which has given persistence to the idea, even after the fusion of law and equity, that equity is to be used for cases of extreme hardship or where damages are an inadequate remedy. Equity also comes in through subtler means in common-law systems: moral considerations can sway a jury to rule against the dictates of the formal law and equity maxims are sometimes employed by courts to modify the law in certain circumstances (without technically granting “equitable” relief), for example, to combat opportunistic behavior that takes advantage of legal loopholes.16 But every legal system needs to be able to limit equitable considerations in some way so as not to unduly increase uncertainty in legal outcomes in the name of fairness. What can supply the standards for equity? Or where can we go to look for them? The answer necessarily depends on the legal culture in question. This dissertation sees controversiae and literary judgments as sources of “law” in the sense that they were places where equity (what is fair, proper, moral, or in accordance with tradition) could be worked out and circumscribed through application to specific cases.

Chapter One, by looking at the particular contexts of Roman and Tang legal training and practice, shows how controversiae and literary judgments could play an important role in the education of future advocates and magistrates. The subsequent chapters delve deeper into the relationship that these exercises had to the formal law by looking at two collections of controversiae and two collections of judgments. In Chapter Two, I read a selection of cases in the elder Seneca’s (ca. 55 BC–AD 37) collection of controversiae in light of Augustan moral legislation, showing how they generate problems that undermine the Augustan program of moral revival through state regulation of familial relations. In Chapter Three, I focus on cases in the pseudo-

Quintilianic *Declamationes maiores* (ca. 2nd to 4th c.) that use pathos to make arguments in situations that expose the formal law’s limitations. In Chapter Four, I show how Zhang Zhuo’s 張鷟 (658–730) judgments use classical learning to make cases, both when the formal law is applicable and when it is not. In Chapter Five, I examine how Bai Juyi’s 白居易 (772–846) judgments on private and familial conflicts rely on principles of moral and ritual propriety as the source of their most forceful arguments. In the Conclusion, I question the view that law in both societies matured or modernized with the result that *controversiae* and literary judgments supposedly became increasingly irrelevant as legal genres, and reflect more broadly on how these two exercises succeeded in using a recycled set of stories, arguments, and scenarios with minor variations to introduce the moral norms of the literary elite into law.
Chapter One

Controversiae and Literary Judgments in Their Contexts

And this is the nature of the equitable, a correction of law where it fails on account of its generality.

καὶ ἐστὶν αὕτη ἡ φύσις ἡ τοῦ ἐπεικοῦς, ἐπανόρθωμα νόμου ἢ ἐλλεῖπει διὰ τὸ καθόλου.¹

Equity is at once separate and inseparable from law. Because legal rules must be generally formulated, no laws can anticipate every event that may occur. The certainty of legal rules even makes it possible that there will be those who could take advantage of those rules to achieve unfair results. New legislation is too slow a remedy and moreover would not rectify past injustices. It is in these cases that the formal law looks to equity to achieve what is fair, proper, and moral. But where does equity look to for a set of criteria for fairness? How does a society circumscribe equitable considerations so that they do not become indefinable and vague standards? In the Roman Empire and the Tang, controversiae and literary judgments were exercises were fundamental ideas about justice, fairness, and propriety were discussed in the context of specific scenarios. It is possible to focus on the literary achievement of these texts and consider the legal framework as merely incidental. It is also possible to emphasize the connection that these texts had to actual Roman and Tang legal practice and treat the literary embellishments as merely window dressing. But the people of Rome and the Tang did not view these genres as either literature with a dose of law or law with a dose of literature. Controversiae and literary judgments were exercises that made sense to contemporaries as vehicles for teaching exemplary arguments for specific cases. Since subsequent chapters will examine particular

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¹ Aristotle, Nicomachean Ethics, 5.10.6.
declamatory and judgment collections, this chapter will serve to introduce these texts in the context of Roman and Tang legal training and practice, and show how they might have served as sources of equitable considerations from which arguments for real cases could be drawn.

CONTROVERSIAE AND THE RHETORICAL SCHOOLS

The controversia was one of two subgenres under the heading of “declamation” (declamatio), which trained students in the art of oratory. The term declamatio technically referred to a way of making speeches. The other subgenre, the suasoria, asked students to compose a speech addressed to a historical or mythical figure who is deciding whether to take a course of action. The controversia dealt with legal controversies before fictitious iudices. Whereas the grammatici might have taught the composition of suasoriae, the controversiae, considered more difficult, were in the exclusive domain of the teachers of rhetoric.\(^2\) Roman controversiae survive in four collections: the elder Seneca’s collection from the late 30s AD, Calpurnius Flaccus’ collection from the early second century,\(^3\) and the Declamationes maiores and minores, attributed to Quintilian (ca. 35–100), from the second to fourth centuries. Of the four, only the Declamationes maiores contain full examples of controversiae.

The role of controversiae was ostensibly to prepare students approximately of high school age for careers as advocates.\(^4\) Students learned to deliver a convincing narrative of what happened

\(^2\) Quintilian, Institutio oratoria 2.1.8 (hereafter Inst. orat.).

\(^3\) See Calpurnius Flaccus, The Declamations of Calpurnius Flaccus: Text, Translation, and Commentary, ed. and trans. Lewis A. Sussman (Leiden: Brill, 1994). The collection contains 53 fragmentary cases; the author is otherwise unknown.

\(^4\) In Inst. orat. 2.1.7, Quintilian tells us that the age for entering the school of the rhetor is not to be imposed across the board, but depends on the achievement of the individual student. According to S. F. Bonner, from evidence in Probus’ biography of Persius, a boy would have reached the school of the grammaticus (which focused on the study of poetry) by age 12 and probably advanced to the school of the
in a case and to use rhetorical tropes to persuade, discredit the opposition, and elicit sympathy. These speeches also contained verbal resonances to literary sources that displayed the students’ learning.\(^5\) We get a glimpse of what happened in the schools in the *Declamationes minores*, where excerpts of *controversiae* are sometimes preceded by *sermones*, instructions by the teacher on how to approach the case at hand: what facts to emphasize, what kind of tone to use, how to manipulate the facts so as to make them sound most favorable to one’s case, and so on.\(^6\) Students could posit all kinds of facts and motives as long as these did not contradict the stated facts; sometimes vagueness in how the case was stated was considered a defect that students could exploit.\(^7\)

The elder Seneca claims in his collection that the practice of declamation was born after him,\(^8\) but he could not have meant that hypothetical speeches in a legal context were new.\(^9\) Most likely, he considered both the specific scenarios treated and the practice of public demonstrations rhetor by age 15. See Bonner, *Education in Ancient Rome: From the Elder Cato to the Younger Pliny* (Berkeley: University of California Press, 1977), 136–37.

\(^5\) Numerous studies have identified these resonances. See, e.g., S. F. Bonner, *Roman Declamation in the Late Republic and Early Empire* (Liverpool: University Press of Liverpool, 1949), 133–48; Albert Becker, *Pseudo-Quintilianae: Symbolae ad Quintilianii quae feruntur declamationes XIX maiores* (Ludwigshafen a. Rh.: Buchdruckerei von Julius Waldkirch & Co., 1904); and the University of Cassino’s series of translations and commentaries on the *Declamationes maiores*.

\(^6\) For a discussion of the didactic purpose of the *Declamationes minores* and the hypothesis that they were lecture notes, see *Declamationes pseudo-Quintilianae (Minores)*, ed. Michael Winterbottom (Berlin: De Gruyter, 1984), xi–xiii.

\(^7\) *Inst. orat.* 2.10.14–15.


\(^9\) They already existed in fifth-century BC Greece. See, e.g., Gorgias’ (ca. 485–380 BC) “Encomium for Helen” and “Apology for Palamedes” as well as Antiphon’s (480–411 BC) *Tetralogies*. Antiphon’s “Against the Stepmother for Poisoning” might have been an early example of the use of the evil stepmother as a stock character. Evidence for might be properly called “declamation” in the narrow sense of a school exercise comes from the third century BC in papyri. See Russell, *Greek Declamation*, 3–4.
among the declaimers to be essential to his definition of the genre.\textsuperscript{10} As Seneca probably understood them, \textit{controversiae} were concerned with a relatively closed set of potential scenarios involving a number of recurring character types: the rich man and the poor man, the disinheriting father and the disinherited son, the cruel husband and the mistreated wife, the tyrant and the tyrannicide, the pirate and the captive, the ravisher and the \textit{rapta} (a raped or seduced young woman), the wicked stepmother and the stepson, as well as heroes, soldiers, merchants, love-sick young men, prostitutes, priests, and parasites.\textsuperscript{11} Many of these scenarios (“themes”) were not meant to be plausible and were designed to give possible arguments to both sides of the case. In one case, a father who lost both of his hands in war caught his wife with an adulterer and orders his son to kill his mother along with the adulterer, but the son refuses.\textsuperscript{12} In another case, a man raped two women in one night, but one of the women demands his death while the other wants to marry him.\textsuperscript{13} Though usually confined to the schoolroom and practiced by students, declamations were commonly performed in Seneca’s days by adults outside of the schools; for example, Albucius is said to have spoken five or six times a year in public, “to say not what should be said but what can be” \textit{(dicere non quidquid debet dici sed quidquid potest)}.\textsuperscript{14} Declamatory

\textsuperscript{10} Michael Winterbottom argues that public performances were the real novelty of declamations in the days of Seneca. See Winterbottom, \textit{Roman Declamation: Extracts Edited with Commentary} (Bristol: Bristol Classical Press, 1980), 78. Though Cicero practiced declamation from his boyhood, and in his old age declaimed with the consuls Hirtius and Pansa, he is never recorded declaiming in a large public demonstration. See \textit{Contr. 1.pr.11}, and Suetonius, \textit{Grammarians and Rhetoricians} 25.

\textsuperscript{11} Philostratus (ca. 170–250) testifies that stock characters such as the rich and poor man, and princes and tyrants, were already known in the school of Aeschines (389–314 BC). See Philostratus, \textit{Lives of the Sophists} 481. However, we do not know whether these characters were used in hypothetical legal cases. Most surviving Greek declamations are later than the Roman collections, such as the declamations of Libanius (314–393). See D. A. Russell, trans., \textit{Libanius: Imaginary Speeches} (London: Duckworth, 1996).

\textsuperscript{12} \textit{Contr. 1.4}.

\textsuperscript{13} \textit{Contr. 1.5}.

\textsuperscript{14} \textit{Contr. 7.pr.1}.
exhibitions were no doubt a game of one-upmanship among the teachers of rhetoric, who performed in public for popular entertainment as well as to attract students. They tried to outdo one another in their treatment of set themes, occurred praise as well as derision, and popularized epigrams that were circulated under their names. The audience could be the general public or a more exclusive group: Seneca, for example, reports a declamatory performance of Porcius Latro before Caesar Augustus, Marcus Agrippa, and Gaius Maecenas. In these demonstrations, the declaimers’ reputations were on the line, and most likely, so was the success of their schools.

Suetonius tells us that earlier controversiae “were either drawn from history, as indeed some are even now, or from real-life occurrence, if any had by chance happened recently” (aut ex historiis trahebantur, sicut sane nonnullae usque adhuc, aut ex veritate ac re, si qua forte recens accidisset), and gives us two examples of such cases. One case involved the accidental discovery of a basket of gold by fishermen in Ostia and two competing claims of ownership: the fishermen who fished it out or those who paid for the haul. The other involved a slave who was dressed in the toga of a freeborn man so that his master could avoid paying customs on him in Brundisium, but who later claimed in Rome that his master freed him voluntarily. Unlike in these cases, place names are not usually found in extant themes, and while historical themes do appear, they are not

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15 Contr. 1.7.13.
16 Contr. 1.8.12, 2.1.36, 2.2.9.
17 Contr. 10.5.27–28.
18 Contr. 2.1.28, 2.4.9, 10.5.26.
19 Contr. 2.4.12–13.
20 Suetonius, Grammarians and Rhetoricians 25. But see Bonner, Roman Declamation, 18–19, arguing that “ex historiis” could mean “from collections of stories” rather than “from history.”
21 This theme, without the specific locality, is found in Declamationes minores 340.
taken from recent history. None of the ancient authors give us an explanation for why cases based on recent events were abandoned in favor of set school themes that were, on the whole, more farfetched. One possible reason is that the fanciful themes were more pedagogically effective. They could pose more intricate problems to challenge the students’ analytical and creative skills than could most real cases, and probably had more interesting details. We can imagine that the dry business of the law courts probably did not provide the kind of material that could keep students interested. Another reason could be that political dangers made the declaimers cautious, and having a corpus of stock characters and scenarios (and avoiding mention of recent events) would have been an easy way to disavow any alleged commentary on the contemporary age. Declaratory themes with a thin political veil already existed in the time of Cicero (though in Cicero’s examples, they were more akin to the themes of suasoriae than controversiae): shortly after Caesar crossed the Rubicon, Cicero wrote to Atticus that he had decided to occupy himself with some “themes” (θέσεις) that were “political” (πολιτικαί) and “of these times” (temporum horum) so as to distract him from his griefs; the themes all involved the subject of despotism and political maneuverings, such as:

Ought a man to remain in his country under a despotism? Ought he to strive for the overthrow of a despotism by every means, even if the existence of the state is going to be endangered thereby? Ought he to beware of the overthrower lest he be set up as a despot?

Εἰ μενετέον ἐν τῇ πατρίδι τυραννουμένης αὐτῆς, εἰ παντὶ τρόπῳ τυραννίδος κατάλυσιν πραγματευτέον, κἂν μέλλῃ διὰ τοῦτο περί τῶν ὀλων ἢ πόλις κινδυνεύσειν. εἰ εὐλαβητέον τὸν καταλύοντα μὴ αὐτὸς αἰρηταί.  

22 See, e.g., Contr. 4.2 on L. Caecilius Metellus’ rescue of the Palladium from the temple of Vesta in 241 BC, and Contr. 6.5 on the trial of Iphicrates for treason in 355 BC. The most recent historical event alluded to in the controversiae recorded by Seneca is the murder of Cicero by Popillius in Contr. 7.2.

23 Cf. Philostratus, Lives of the Sophists 481, which claims that Aeschines began the practice of declaiming on stock characters after he had been exiled from political life at Athens.

There is no question whom Cicero had in mind. The view of declamation as political commentary also existed in the Principate: in his *Roman History*, Dio Cassius (ca. 155–235) writes of cases where death and exile were imposed on those declaiming on themes involving tyrants. These were certainly extreme cases. But it is possible that the declaimers found it more prudent as a whole to focus on variations of set themes rather than take up the facts of a contemporary case in a speech that might be seen as political. For even under the rule of Augustus, a time of relative verbal license (so claims Seneca), an infelicitous phrase in a declamation on even a set theme could earn the opprobrium of leading political figures.

Usually accompanying the themes are “laws,” such as: “let children support their parents or be imprisoned” (*liberi parentes alant aut vinciantur*) or “let a woman who has been raped choose the death of the ravisher or marriage to him without a dowry” (*rapta raptoris aut mortem aut indotatas nuptias optet*). What to make of these laws has often been debated. One part of S. F. Bonner’s seminal study on declamations (in particular those of Seneca) draws parallels between the laws in *controversiae* and actual Greek and Roman laws in order to show that declamatory laws reflected genuine Greco-Roman legal tradition. It is one thing, however, to demonstrate that there were affinities between declamatory laws and real laws, and another to say that the declamatory laws were the actual laws in effect. The laws of *controversiae* are not in any extant legal sources. There are at least three possible explanations for the differences between

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25 Dio Cassius, *Roman History* 59.20.6, 67.12.5.

26 See *Contr.* 2.4.12–13. The case involved an adoption and was declaimed by Porcius Latro in the presence of Augustus and Marcus Agrippa, whose sons (Augustus’ grandsons) Augustus was planning to adopt. Latro spoke against adoption, saying that it grafted someone onto the nobility. Seneca writes that this caused offense to Augustus and Agrippa.

27 See, e.g., *Contr.* 1.1.

28 See, e.g., *Contr.* 1.5.

declamatory laws and extant laws. First, even though declamatory laws are not recorded in legal sources, they might have in fact existed, even if not in the exact form portrayed in the _controversiae_. Second, these laws might have been a reflection of popular understanding (or misunderstanding) of the formal law. Third, the rhetorical schools might have invented these laws as simplifications (or caricatures) of the formal law. If the declamatory laws were invented, why? Michael Winterbottom has argued that fictional laws allowed students to focus on argument and delivery without worrying about whether they got the law right.\(^\text{30}\) Moreover, the rhetorical schools were not schools of law. Quintilian practiced long enough in the forum to know the details of the law, but this did not cause him to support modifications of declamatory laws to reflect real actions that one might see in court.\(^\text{31}\)

Ultimately, the question is: what were _controversiae_ meant to teach? Elizabeth Haight, an early proponent of the view that _controversiae_ were not primarily legal exercises, argued that “the young Romans found [in _controversiae_] the prose fiction and romance of the day and in discussing fictitious cases where unreality let their imagination have full play unhampered by the _mos maiorum_, they developed new psychology, new ethics, new sympathies.”\(^\text{32}\) Many recent studies on _controversiae_ have followed this line of thought. Arguments have been advanced, for example, to show how _controversiae_ offered the Roman elite a “mythico-fictional” framework to

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\(^\text{31}\) In *Inst. orat*. 7.4.11, Quintilian notes that the themes on _abdicatio_ involved the same principle as cases of sons deprived of an inheritance by their fathers that were heard in the centumviral court, that themes on _mala tractatio_ approximate cases of divorce where it must be decided which party was to blame, and that themes on _dementia_ corresponded to cases seeking appointment of a guardian upon the incapacity of a property holder.

negotiate the problems and paradoxes in the application of traditional rules, how they provided a means by which the elite identified themselves to each other and to those outside their circles, how they taught the elite how to play the variety of roles that might at different times be demanded of them (father, son, husband, soldier, advocate, etc.), and how they offered some reassurance of the continuity of traditional values in the Empire by inculcating approved values in the minds of adolescents and showing how the most startling of social transgressions might be tackled with the most conventional of arguments. As important as this scholarship has been to our understanding of controversiae, it has not shown that Roman educators actually had these goals in mind. No ancient writers, in response to the numerous criticisms that declamations received, claimed that controversiae were a means of cultural myth-making, identity-formation, or acculturation.

Indeed, there was no shortage of criticisms of declamation in antiquity. The works of Petronius, Juvenal, and Tacitus ridiculed the farfetched themes, but the criticisms appear in ways that suggest they were themselves a common trope. Petronius also has Agamemnon blame the parents for seeking out these exercises for their children rather than more serious education.


34 Margaret Imber, “Tyrants and Mothers: Roman Education and Ideology” (PhD diss., Stanford University, 1997), 7–9.


37 Petronius, Satyricon 1–2; Juvenal, Satire 7.150–215. Tacitus, Dialogus de oratoribus 35.

38 Petronius, Satyricon 4.
Quintilian, on the other hand, blames the teachers, who had caused this “most useful” (*utilissima*) exercise for oratorical training to degenerate.\(^{39}\) The elder Seneca has Votienus Montanus, a harsh critic of *controversiae*, decry the fact that declamations did not prepare students adequately for careers in advocacy. We are told that declaimers enjoyed frequent applause in the schoolroom, while advocates faced constant opposition, interruptions, and contradictions in the forum. In declamatory exercises, each student prepared his own speech with no regard for counterarguments: “They make out their opponents to be as silly as they like; they give them replies as they will and when they will” (*Accedit . . . illud, quod adversarios quamvis fatuos fingunt: respondent illis et quae volunt et cum volunt*).\(^{40}\) Montanus continues:

> In the court they take the role they are given, in the school they choose it. There they have to coax the judge, here they give him orders. There they have to concentrate, and struggle to make their voices reach the judge’s ears amid the competing hubbub of the throng; here every face hangs on the face of the speaker. Men going out of a dark shady place are blinded by the dazzle of broad daylight; similarly as pupils pass from the schools to the forum, they are put off by the novelty and un-familiarity of everything, and they can only be hardened off into orators after they have had many insults to chasten them, and real work to toughen juvenile minds relaxed by the spoiling they get in the schools.

\(^{41}\) Apparently, there was no attempt by the rhetorical schools to approximate the conditions of the forum, and students were allegedly not prepared to deal with real cases until they left the safe confines of the schools and practiced in the courts themselves.

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\(^{39}\) *Inst. orat.* 2.10.1–3.  
\(^{40}\) *Contr.* 9.\textit{pr.}2. Translation by Michael Winterbottom.  
\(^{41}\) *Contr.* 9.\textit{pr.}2–5. Translation by Winterbottom.
In response to these criticisms, Quintilian, a defender of *controversiae*, focused on the value that these exercises had for legal training, though the *Institutio oratoria* does not go into details. Countering those who would say that declamation and legal practice had nothing to do with each other, Quintilian writes: “If [declamation] does not prepare for the forum, it is similar to either the performance of an actress or the clamor of a madwoman” (*nam si foro non praeparat, aut scaenicae ostentationi aut furiosae vociferationi simillimum est*).\(^42\) He did not approve of the unrealistic themes, but was willing to keep them so that students would enjoy the subject, as long as the themes were not too silly.\(^43\) Quintilian’s stance reminds us that we should not lose sight of the fact that the *controversia* had an inexorable link to the law.\(^44\) Yes, some cases were farfetched, and allowing a student to give a whole speech without interruption did not help his transition into actual practice. But no educational exercise can perfectly imitate the real thing, and even if it can, that might not be desirable. The popularity of declamatory training, despite its faults, suggests that the Romans believed that success in the courts required not only an understanding of legal rules, but rhetorical mastery and knowledge of moral arguments. This was not a new idea in the Principate. Cicero had named *aequitas* (along with *leges*, the senatorial resolutions, decided cases, juristic opinions, the edicts of magistrates, and custom) as a source of law.\(^45\) In the Republic, there existed the practice of using *aequitas* to argue against the letter of the law, in real cases and in the schools.\(^46\) *Aequitas*, however, is difficult to define as a general concept. According

\(^{42}\) Inst. orat. 2.10.8.

\(^{43}\) Inst. orat. 2.10.5–6.

\(^{44}\) See the recently edited volume of Eugenio Amato, Francesco Citti, and Bart Huelsenbeck, *Law and Ethics in Greek and Roman Declamation* (Berlin: De Gruyter, 2015).

\(^{45}\) Cicero, *Topica* 28.

to W. W. Buckland, it could mean “fairness” in classical Roman law, but later on it could mean *benignitas* or *indulgentia*, that is, “modifications of the law in favour of the weaker party in a way which . . . often ushers in a rule the implications of which must have made the application of the law very uncertain.”

How then to give some shape to *aequitas*? The speeches composed for *controversiae* were convenient places to formulate and articulate equitable considerations in response to specific scenarios. They made use of a recycled set of historical *exempla*, cultural references, and moral arguments, and helped reinforce a common set of values (*pietas, clementia, fidelitas*, etc.). It is true, as Mary Beard has shown, that these exercises taught students what it meant “to be and think Roman.”

But more specifically, and practically, they were likely the training ground for moral arguments that one might very well have heard in court.

TANG LITERARY JUDGMENTS AND THE CIVIL SERVICE SELECTION EXAMINATIONS

Tang judgments, which have been the subject of some interest in recent years, can be divided into two main categories: decisions written by actual officials to resolve judicial and administrative cases, and decisions written in the persona of an official in connection with the selection examinations. Most of the judgments that survive belong to the second category and

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48 Beard, “Looking (Harder) for Roman Myth,” 56 (emphasis in the original).


50 I.e., either actual exam responses, practice pieces, or model answers.
have been preserved as belles lettres (hence I call them literary judgments). The only two
garment collections that survive from the Tang are those of Zhang Zhuo and Bai Juyi, which will
be the focus of Chapters Four and Five. However, over one thousand literary judgments (most of
them from the Tang) are preserved in 50 juan\textsuperscript{51} in the tenth-century Song dynasty literary
compendium \textit{Wenyuan yinghua} 文苑英華 (Finest Blossoms in the Garden of Literature).\textsuperscript{52} At least
some of the literary judgments responded to cases taken from actual judicial and administrative
archives, as the \textit{Tongdian} 通典 (Comprehensive Compendium of the History of Institutions)
claims.\textsuperscript{53} Some cases in Zhang Zhuo’s collection might have been inspired by real cases, such as:

“Palace Physician Zhang Zhong is skilled at prescribing medication. When he presented medicine
[to the throne], he added three doses, which differed from the classical prescription. He has been
sentenced to strangulation. He contests, saying that the specific condition of the illness called for
adding this dosage. I respectfully plead for judgment” 太醫令張仲善處方，進藥加三味，與古方不
同。斷絞。不伏，云：病狀合加此味。仰止處分.\textsuperscript{54} Other cases, such as some in Bai Juyi’s
collection, read more like hypotheticals derived from stories in the classical tradition, such as: “A’s

\textsuperscript{51} “Fascicles” or “scrolls”; one juan contained text that fills about four (7 x 10 in.) pages in the
Zhonghua shuju facsimile edition of the \textit{Wenyuan yinghua}.

\textsuperscript{52} Of the 38 literary genres included in the \textit{Wenyuan yinghua}, the amount of space devoted to the
literary judgment ranks only after poetry (\textit{shi} 詩), rhapsody (\textit{fu} 賦), epitaph (\textit{bei} 碑), memorials to the
throne (\textit{biao} 表), and edicts from the Hanlin Academy (\textit{Hanlin zhizhao} 翰林制詔). This dissertation
unfortunately cannot give these judgments the attention they deserve.

\textsuperscript{53} Du You 杜佑 (735–812), \textit{Tongdian} 通典, ed. Wang Wenjing 王文錦 et al. (Beijing: Zhonghua shuju,
1988), 15.361–62 (hereafter \textit{TD}). The \textit{Tongdian} was an administrative digest compiled in 801 that traces the
branches of government from antiquity to the year 756.

\textsuperscript{54} LJFSP 70.210. The first number is the case number, the second, the page in Jiang Zongxu 蒋宗許
et al.’s edition \textit{Longjin fengsui pan jianzhu} 龍筋鳳髓判箋注. Huo Cunfu 霍存福 notes that there was a palace
physician named Zhang Wenzhong 張文仲 who was a contemporary of Zhang Zhuo, and so this case of
Zhang Zhong could plausibly be based on a real case. Huo, \textit{“Longjin fengsui pan} panmu poyi—Zhang Zhuo
panci wenmu yuanzi zhenshi anli zouzhang shishi kao” 龍筋鳳髓判判目破譯——張鷟判詞問目源自真實案
wife yelled at the dog in front of her mother-in-law. A was angry and divorced her. She pleads that this is not one of the seven grounds for divorce. A responds that she was disrespectful. In their responses, judgments cite the Classics, the histories, and other canonical works, and were composed in parallel clauses of four and six syllables (with some variations permitted) and with the proper tonal balances. The allusions are often obscure, while the limitations imposed by the parallel style frequently result in elliptical lines and references. Many times, entire stories and arguments are compressed into a four- or six-syllable line that must be deciphered. As can be expected, judgments collected as belles lettres are distinctly more polished and learned in comparison with surviving manuscripts of judgments on what might have been real cases. But we need not consider literary judgments to be a genre entirely different from judgments written in the actual administration of the Tang bureaucracy, since it is possible to detect literary tendencies even in real judgments. Moreover, the Song dynasty apparently did not sharply distinguish real Tang judgments from Tang examination judgments: Zheng Qiao’s 鄭樵 (1104–1162) Tongzhi 通志 (Comprehensive Treatises), compiled in 1161, lists in its literary bibliography 20 works under “case judgments” (anpan 案判),

55 BJYJ 66.3594. The first number is the juan number, the second, the page in Zhu Jincheng’s 朱金城 edition of Bai Juyi’s collected works, Bai Juyi ji jianjiao 白居易集箋校. This case is taken straight from the story of Bao Yong’s 鮑永 wife in the Hou Han shu 後漢書 (History of the Later Han). See Hou Han shu (Beijing: Zhonghua shuju, 1965), 29.1017.


58 These have been recovered in northwest China, in particular in the cities of Dunhuang and Turfan. See Dunhuang Tuhufan Tengdai fazhi wenshu kaoshi 敦煌吐魯番唐代法制文書考釋, ed. Liu Junwen 劉俊文 (Beijing: Zhonghua shuju, 1989), 436–94. How representative these cases are, however, seeing that they all come from military administrations, is uncertain.

which include works devoted to both examination judgments and real judgments. We are likely looking at a spectrum, with examination judgments tending toward the ornate and real judgments toward the prosaic.

The literary judgment is one of the best sources of our knowledge about the selection examinations. Most of the judgments that survive (i.e., those from the *Wenyuan yinghua*) were likely examination responses. We know that literary judgments circulated among aspiring candidates; some might have been preserved in collections held in provincial libraries. One Tang anecdote ridicules a candidate who memorized two hundred judgments only to be foiled when none of the actual examination questions matched exactly what he memorized. We are told by the *Tongdian* that originally, questions for judgment were taken from real cases, but that this practice faded over time (just as it supposedly did for *controversiae*). The explanation given

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60 Zheng Qiao 鄭樵 (1104–1162), *Tongzhi* 通志 (Taipei: Shangwu yinshuguan, 1987), 70.827c.


62 For a discussion of the provenance of the judgments in the *Wenyuan yinghua*, see Tan, *Tangdai pantiwen yanjiu*, 88–89, 97–101. Tan lists the 45 judgments in the *Wenyuan yinghua* that are also mentioned in the *Dengkeji kao* 登科記考 (A Study of Examination Records from the Tang) as well as the 154 judgments that show up at least twice in the *Wenyuan yinghua*, which might suggest that they were examination questions. For the other judgments in the *Wenyuan yinghua* nothing certain can be said. Tan notes that there are hundreds of judgments whose authors have no other surviving works and over 300 judgments without a named author, making it unlikely that any of these were taken from personal literary collections; hence, she concludes that they were taken from official examination archives. Chen Xiaoyuan 陳小遠 notes that the Song dynasty collected Tang examination prose, and it is possible that the *Wenyuan yinghua* compilers culled these examination collections for judgments. See Chen Xiaoyuan, “*Wenyuan yinghua* panwen yanjiu” 《文苑英華》判文研究 (MA thesis, Peking University, 2011), 14. The judgments of Bai Juyi and Yuan Zhen 元稹 (779–831) that are included in *Wenyuan yinghua* were most likely practice responses, with the exception of the “Judgment on Smoothing the Rough Edges to Unite with the Potsherds” (Huifang wahe pan 毀方瓦合判), a response composed for actual examinations.

63 See “Letter to Yuan Ninth” 與元九書, in *BJYJ* 45.2793, for an account of the circulation of Bai Juyi’s judgments.

64 Zhang Zhuo 張鷟 (658–730), *Chaoye qianzai* 朝野僉載 (Beijing: Zhonghua shuju, 1979), 4.93.
by the *Tongdian* is that real cases no longer presented sufficient difficulty to distinguish the candidates, and therefore examination officials had to look to increasingly obscure books in order to draw their questions from them.\(^{65}\) This tells us that one of the challenges in answering judgment questions in the selection examinations was to identify the passage in the question itself. For example, a question might pose a scenario that was similar to an account in one of the Classics or histories, or might refer to an obscure phrase, and a successful response would, in the course of rendering judgment, identify its source.

In the Tang, in order to receive an official post in the ranks of six to nine,\(^{66}\) candidates were tested in the composition of judgments during a selection process. Candidates would have already passed the *keju* 科舉, literally, “presentation by categories.”\(^{67}\) These candidates might have received an education in the state colleges in the capital, but the number of students enrolled in these schools was small compared to the number of provincial students, whose schooling we know far less about.\(^{68}\) Others who took part in the selection examinations were those with hereditary privileges,\(^{69}\) officials of the sixth rank or lower who were seeking new posts after the

\(^{65}\) *TD* 15.361–62.

\(^{66}\) Officials in the Tang were ranked one to nine, one being the highest. Each rank (pin 品) was divided into two classes: principal (zheng 正) and subordinate (cong 從). For ranks four to nine, the principal and subordinate class within each rank were further divided into upper (shang 上) and lower (xia 下).

\(^{67}\) There were many categories of examinations, including the *jinshi* 進士 (“Presented Scholar”), the *mingjing* 明經 (“Understanding the Classics”), and other examinations on law, mathematics, and calligraphy. After 634, when the *xiucai* 秀才 (“Flourishing Talent”) examination was abolished, the *jinshi* and *mingjing* became the two most prestigious examinations. See *TD* 15.353–54. Those who passed the *keju* received a nominal status, meaning they held no functional office, but this status would determine the kind of office they could potentially receive during selection.

\(^{68}\) The *Tongdian* records that there were 2,610 students in the major colleges in the capital, but over 60,000 provincial students. *TD* 15.362.

\(^{69}\) These men did not have to pass the *keju*. According to one estimate, the *keju* were responsible for only around ten percent of the total bureaucracy. Denis Twitchett, *Introduction to The Cambridge History*
completion of a previous term in office (four years is a typical term), or petty officials looking to enter the regular bureaucracy for the first time. 70 Most had to wait a period of years before taking part in the selection because qualified appointees vastly outnumbered the available posts. 71 Judgments were also tested by the Shupan bacui 書判拔粹 and Pingpan 平判 examinations, which were open to all candidates, even those still in their waiting periods. 72 At the annual selection examination, candidates were evaluated in four areas: “physical bearing” (shen 身), “speech” (yan 言), “calligraphy” (shu 書), and “judgments” (pan 判); for judgments, the standard was “outstanding composition and substance” (wenli youchang 文理優長). 73 In general, while the keju granted nominal status through a variety of tested subjects, the selection examinations actually appointed candidates to offices in the bureaucracy. The considerable importance of judgments probably gave rise to an industry that produced collections of exemplary answers. Zhang Zhuo’s Dragon Sinews, Phoenix Marrow Judgments, however, is the only surviving example of such a collection composed especially as templates for aspiring candidates.

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70 See P. A. Herbert, Examine the Honest, Appraise the Able: Contemporary Assessments of Civil Service Selection in Early Tang China (Canberra: Faculty of Asian Studies, Australian National University, 1988), 8. From the official careers of well-known literati, it is clear that officials could also be transferred and promoted without going through the selection examinations.

71 According to a statistic in the Tongdian, there were 18,085 posts for 120,000 qualified appointees. TD 15.362. For more on waiting periods, see Wang Xuncheng 王勛成, Tangdai quanxuan yu wenxue 唐代銓選與文學 (Beijing: Zhonghua shuju, 2001), 51–63. Chen, “Tangdai shipan yanjiu,” 66–69, argues that the waiting period could vary based on the quality of two judgments composed for the guanshi 關試, or “credential examination,” which occurred when the credentials of candidates were submitted to the Ministry of Personnel by the Ministry of Rites (after 737, the Ministry of Rites oversaw the keju while the Ministry of Personnel oversaw selections). Wang Xuncheng, however, considers the guanshi to be mere formality. See Wang, Tangdai quanxuan yu wenxue, 6.


73 TD 15.360.
Large literary projects in the early Tang were undertaken to make possible a defined curriculum of texts for both the keju and the selection examinations. Taizong 太宗 (r. 626–649), the second emperor of the Tang, appointed a committee to compose official commentaries on five of the Classics. Taizong also ordered that official histories be compiled for the dynasties that preceded the Tang. An Institute of Historiography (Shiguan 史館) was established in 629 to compile these histories and to keep records for the current dynasty. By the mid-seventh century, the histories of the Liang, Chen, Northern Qi, Northern Zhou, Sui, and Jin dynasties were completed, and Li Yanshou’s 李延壽 private histories of the Northern and Southern Dynasties were presented to the throne in 656. It is no coincidence that the Classics and histories were the main sources drawn upon by judgments.

Legal decisions made in accordance with principles found in the Classics were not new to the Tang and can be traced back to at least the Han dynasty, around the time of Dong Zhongshu 董仲舒 (179–104 BC) and his Chunqiu jueyu 春秋決獄 (Disposition of Cases according to the Spring and Autumn Annals), a collection of 232 legal cases. It is clear, however, from the few examples

74 Howard J. Wechsler, “Tai-tsung (reign 626–49) the consolidator,” in The Cambridge History of China, 3:214–15; Denis Twitchett and Howard J. Wechsler, “Kao-tsung (reign 649–83) and the empress Wu: the inheritor and the usurper,” in The Cambridge History of China, 3:262. The five were the Zhou Yi 周易 (Changes of Zhou), the Shangshu 尚書 (Classic of Documents), the Mao Shi 毛詩 (Classic of Odes in the Mao Tradition), the Liji 禮記 (Records of Rites), and Chunqiu Zuozhuan 春秋左傳 (Zuo Tradition to the Spring and Autumn Annals). The committee worked off a draft that had been started in the Sui. The commentaries were eventually known collectively as the Wujing zhengyi 五經正義 (Correct Significance of the Five Classics).


77 The number is mentioned in Ma Duanlin 馬端臨 (1254–1323), Wenxian tongkao 文獻通考 (Taipei: Taiwan shangwu yinshuguan, 1987), 164.1423a. Only half-a-dozen of these decisions are extant, available in modern annotations in Gudai panci sanbaipian 古代判詞三百篇, ed. Chen Chongye 陳重業 (Shanghai: Shanghai guji chubanshe, 2008), 1–5. For a discussion of these six decisions along with a dozen other
that survive from this collection that we are still a long way from judgments in the ornate and formal style of the Tang. The decisions of the Chunqiu jueyu cite the Classics, but are written in loose prose. The “judgment” as a literary genre did not exist until much later, since neither Liu Xie’s Wenxin diaolong (Literary Mind and the Carving of Dragons), an exhaustive discussion of literary genres, nor Xiao Tong’s Wenxuan (Selections of Fine Writings), the most important literary anthology before the Tang, has a category devoted to the judgment. The judgment probably became a recognized genre around the mid-sixth century, though the first time the judgment is given its own category in a literary compendium (that we know about) is in the Wenyuan yinghua of the tenth century. Judgments written after the Tang begin to diverge from the strict four-six style. The most famous collection of legal cases from the Song, Minggong shupan qingming ji (Judgments by the Eminent: the Pure and Enlightened Collection), contains judgments written in loose and relatively unadorned prose.

Tang literary judgments use unadorned prose only in the statement of the case. The responses are invariably devoted to literary display and allusions to the classical tradition. There is sometimes language in the judgments that clearly refers to distinct provisions in Tang law. But these references pale in comparison to the numerous references to the canonical texts. For some cases, there is no mention of the formal law at all, sometimes because they involved matters

examples of Han cases decided with reference to the Classics, see Huang Yuansheng, Han Tang fazhi yu rujia chuantong (Taipei: Yuanzhao, 2009), 31–98.


outside of the coverage of the formal law. Even when a provision of Tang law directly governs a case, no judgment is content with simply citing the formal law. Part of the reason no doubt has to do with the fact that examination judgments were meant to impress examiners and a simple citation of the formal law leaves no room for rhetorical display. But it is also an indication, as we shall see, that the Tang literati probably did not view the formal law as the most persuasive authority.

Because literary judgments do not fit neatly into the category of either “law” or “literature,” the need to approach them from a cross-disciplinary perspective, neither purely as legal or administrative documents nor as literary compositions, has been noted. They do not read like documents that could have been composed in the day-to-day operations of a magistrate’s court (at least not for every case). And yet, everyone who would enter the bureaucracy had to prove that they could compose such a text. Manuscript evidence from northwest China shows that Tang officials wrote in a simple, concise prose in most cases (especially administrative cases), but also shows that sometimes a case might have called for a more literary treatment. What is clear is that, like the controversia, the literary judgment trained students to look beyond the formal law to other measures of the fair and equitable.

CONTROVERSIAE AND THE ROMAN COURTS

Forensic oratory did not die in the Principate, even though most writers during the first century AD believed that the golden days of oratory had passed with the demise of the Republic. The evidence for increased court activity and for the continuing role of legal advocacy in the

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Principate is robust. For example, Augustus built a new forum, extended its hours, increased the number of jurors and lowered the age requirement, and added to the number of praetors. Quintilian, writing in the late first century, speaks in detail about how to persuade judges and the importance of pathos. It is probably true that in the Principate, the cases that would have brought the most renown to advocates in the Republic—the political cases—no longer offered the same potential for career advancement. Nevertheless, ordinary cases still required advocates and students needed to be trained in how to make persuasive cases. For that training, students invariably went to the schools of rhetoric, even though many of the themes of controversiae dealt with scenarios that were unlikely ever to occur in real life. Exactly when specialized schools of law were established is a matter of controversy (much depends on what we make of the schools of the Sabinians and the Proculians, in existence by the mid-first century AD), though it is possible that it was not until the mid-second century (if the Institutes of Gaius is an indication) that legal instruction became widely available. But the larger question, regardless of when Roman law schools became a viable contender for students with the schools of rhetoric, is why the Romans were apparently content with sending students from the rhetorical schools to the forum with no official training in the formal law.

81 The senate and the comitia, however, clearly declined in power.

82 See E. Patrick Parks, The Roman Rhetorical Schools as a Preparation for the Courts under the Early Empire (Baltimore: The Johns Hopkins Press, 1945), 54–56.

83 Inst. orat. 4.1–5, 6.2.

84 See Tacitus, Dialogus 37.6: Cicero became Cicero not because of his defense of Publius Quintius or Licinius Archias, but because of his Catilinarians.

85 For a discussion of the Sabinians and the Proculians, who regarded as their founders Capito (suffect consul AD 5) and Labeo (d. ca. AD 10), respectively, see Peter Stein, “The Two Schools of Jurists in the Early Roman Principate,” Cambridge Law Journal 31, no. 1 (1972): 8–31. Stein notes that “as established institutions, whether or not they provided courses of instruction, the schools were founded by Proculus and Cassius [of the mid-first century]” (10). For a description of the history of Roman law schools, see Fritz Schulz, History of Roman Legal Science (Oxford: Clarendon Press, 1953), 119–123.
A brief description of the Roman legal system is in order. Our knowledge of the courts in the late Republic comes from the legal speeches of Cicero and the description of the formulary system in Gaius’ *Institutes*. We also know something about the courts in the late Roman Empire from the *Codex Theodosianus* and the *Corpus iuris civilis*. In the intervening centuries, the evidence is paltry. One matter of scholarly consensus is that, during these centuries, the Roman courts gradually moved away from the formulary system (which disappeared completely by the time of Diocletian) and toward the procedure of the *cognitio extra ordinem*, which had been the procedure in the Roman provinces. Under the formulary system, the judges were laypeople, either a single *iudex* in most civil cases or a group of *iudices* in criminal cases; their decision could not be appealed. Under the *cognitio*, judges were administrators of the Roman Empire, whose decisions were ultimately appealable to the emperor.

Criminal jurisdiction in the first century probably remained with the *quaestiones perpetuae*, which had been established in the Republic to try specific cases, such as murder and poisoning, forgery, and extortion. Each court was usually presided over by a praetor who did not pass judgment and consisted of *iudices* who, like the *iudex* in civil cases, were selected from an

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87 The constitution of Diocletian in 294 that ordered provincial governors not to give cases to inferior judges is sometimes regarded as the official end to the two-phased formulary system in the Roman Empire. However, it is likely that the formulary system had already been in desuetude for decades before that constitution. See Thomas Rüfner, “The Imperial *Cognitio* Process,” in *Oxford Handbook of Roman Law and Society*, ed. Paul J. du Plessis, Clifford Ando, and Kaius Tuori (Oxford: Oxford University Press, 2016), 262.


89 Parks, *Roman Rhetorical Schools*, 27. Parks argues that the *quaestiones* retained power in ordinary (non-political) cases in the Principate. But see Galsterer, “The Administration of Justice,” in *The Cambridge Ancient History*, 10:408–09, for the view that the *quaestiones* were functionally obsolete in the first century.
What we know about the procedure of the quaeestiones comes from what can be deduced from surviving legal speeches, which is to say, those of Cicero. If these speeches were given as they are recorded in the manuscripts, trial procedure apparently allowed the prosecution and defense to speak without interruption for long stretches of time. A trial consisted of one or more actiones, each of which was divided into three parts: the speech for the prosecution; the speech for the defense; and oral testimony and examination of witnesses—a process about which we know almost nothing beyond a passage in Quintilian and in several passages in Justinian’s Digest. Because evidence and witnesses would usually not have been heard before the speeches, this is probably why Cicero’s speeches tend not to contain arguments based on the evidence, but rather deal more with matters of character, motive, and probability.

The Principate added a major wrinkle to Roman legal procedure by adding the jurisdiction of the emperor and his delegates. The exercise of jurisdiction varied from emperor to emperor, but in general, the emperor could hear cases as a court of first instance or on appeal from any magistrate or criminal court. He could also refer a case to the senate. Though the emperor had the power to hear any case and judge it with the assistance of his consilium, this was apparently

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90 Originally, iudices were made up of senators, but later consisted of one-third senators, one-third equites, and one-third tribuni aerarii.

91 See Jonathan Powell, “Court Procedure and Rhetorical Strategy in Cicero,” in Form and Function in Roman Oratory, ed. D. H. Berry and Andrew Erskine (Cambridge: Cambridge University Press, 2010), 25, arguing that the quaeestio procedure can be reconstructed consistently from Cicero’s speeches.

92 Inst. orat. 5.7.

93 See D.22.5.

94 We know that this order of the proceedings could be changed by statute, as in the case of Milo, when the statute reversed the usual procedure to put the presentation of evidence first.

95 For an overview of the emperor’s and the senate’s jurisdictions, see Parks, Roman Rhetorical Schools, 32–42.
rarely done, unless the case was highly political. Advocates handled cases in the emperor’s court as well as the senatorial court, and there are some contemporary accounts for how they pleaded. Different emperors ran their courts differently: Nero did not allow continuous speeches, while Marcus Aurelius allowed unlimited time to those who pleaded before him. This evidence suggests that declamatory demonstrations before the emperor, such as the one reported by Seneca, might not have been entirely for entertainment, since they could have been useful practice for appearances before the emperor in real cases.

An advocate’s skills would have been as crucial in civil cases as in criminal cases, though we know much less about the civil proceedings. Under the formulary procedure, a civil trial was conducted in two parts: in iure and apud iudicem. In the former part, the formula would be settled by the praetor, who would also assign, if possible with the parties’ agreement, a private iudex to hear and decide the case. The praetor was a means by which equity could be

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96 Ibid., 29.

97 See Pliny, Epistle 6.31 and Suetonius, Claudius 15. Seneca the Younger’s Apocolocyntosis 12 has an unflattering portrait of Claudius as judge: “Weep over the man than whom no one was able more quickly to decide cases, with only one side having been heard, often not either. . . .” (Deflete virum, quo non alius/potuit citius discere causas,/una tantum parte audit,/saepe et neutra. . . .).

98 Suetonius, Nero 15.1.

99 Dio, Roman History 72.6.1.

100 In Roman law, public (or “criminal”) law was concerned with violations of established leges on matters important to state interest, while the private (or “civil”) law dealt with other wrongs committed between individuals.

101 For example, see Gaius, Institutes 4.47: “Let a judge be appointed. If it appears that Aulus Agerius deposited a silver table with Numerius Negidius and that the same was not returned to Aulus Agerius by the bad faith of Numerius Negidius, let the judge condemn Numerius Negidius to pay the value of the matter to Aulus Agerius. If it does not so appear, exonerate” (Iudex esto. Si paret Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res sit, tantam pecuniam, iudex, Numerium Negidium Aulo Agerio condemnato. Si non paret, absolvito). Translation by W. M. Gordon and O. F. Robinson.

102 Inst. orat. 12.5.3.
introduced into the system because of his discretion to grant remedies; he could grant a formula even when there was no precedent or specific legal authority for a remedy. In the latter part, the parties, with or without their advocates, were heard before the iudex with his consilium (or in some cases before recuperatores or before the centumviral court). As always, there was no appeal. The iudex, though subject to the praetor’s formula, had full discretion to determine the facts of a case, and it is likely that a persuasive advocate could play a large role in swaying the judge’s view of the case. E. Patrick Parks speculates that when the number of potential iudices expanded in the Principate to deal with the increase in lawsuits, the quality of the average iudex might have declined, such that an advocate skilled in persuasion might have made an even bigger impact than before. We have little idea of how advocates actually pleaded before iudices, but based on evidence in papyri from Roman Egypt—with all the caveats that such evidence entails—it seems that the set speech was a feature of civil proceedings well into the early centuries AD. However, from passing references in Tacitus’ Dialogus de oratoribus, a conversation set in the 70s AD, we know that a iudex could and did interrupt advocates’ speeches. When the younger Pliny writes that he gave pleaders before him unlimited time, he writes as if his practical was exceptional.

From the Institutio oratoria, most likely written in the context of the formulary system, we know that advocates in the late first century still had an incentive to make emotional appeals to

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104 Parks, Roman Rhetorical Schools, 45. 47.


106 Tacitus, Dialogus 19.3–5, 39.3.

107 Pliny, Epistle 6.2.7–9.
the *iudices*. Quintilian observes that arguments ought to be made to charm the judges’ ears\(^\text{108}\) and elicit their emotions:

> The man who can carry the judge with him, and put him in whatever frame of mind he wishes, whose words move men to tears or anger, has always been a rare creature. Yet this is what dominates the courts, this is the eloquence that reigns supreme. Arguments, for the most part, spring out of the Cause, and the better side always has more of them . . . . But where force has to be brought to bear on the judges’ feelings and their minds distracted from the truth, there the orator’s true work begins. This is not something on which the litigant instructs him, or which is contained in the notes for the Cause. Of course, Proofs may lead the judges to *think* our Cause the better one, but it is our emotional appeals that make them also *want* it to be so; and what they want, they also believe.

\[\text{qui . . . iudicem rapere et in quem vellet habitum animi posset perducere, quo dicente flendum irascendum esset, rarus fuit. Atqui hoc est quod dominetur in iudiciis : haec eloquentia regnat. Namque argumenta plerumque nascuntur ex causa, et pro meliore parte plura sunt semper . . . : ubi vero animis iudicum vis adferenda est et ab ipsa veri contemplatione abducta mens, ibi proprium oratoris opus est. Hoc non docet litigator, hoc causarum libellis non continetur. Probationes enim efficiant sane ut causam nostram meliorem esse iudices putent, affectus praestant ut etiam velint ; sed id quod volunt credunt quoque.}\] \(^\text{109}\)

Quintilian takes the proofs and the legal arguments for granted, treating them as not presenting the same level of difficulty as actually making the *iudices* want to rule in one’s favor. It is not so much that the *iudices* would often be convinced to rule knowingly against the formal law, but rather that a skilled advocate could persuade them to see the law in his client’s favor even when he seemed to have the weaker case. Quintilian is following Cicero, who in the *De oratore* has Antonius note that the skill of the advocate lies in making arguments when the formal law is uncertain: “as for the law which is unsettled in the most learned circles, it is easy enough for [the orator] to find some authority in favour of whichever side he is supporting, and, having obtained a supply of thonged shafts from him, he himself will hurl these with all the might of an orator’s arm”

\[\text{(in eo . . . iure, quod ambiguetur inter peritissimos, non est difficile oratori, eius partis, quamcumque)}\]

\(^{108}\) *Inst. orat.* 4.1.57, 4.2.119–21.

We do not know exactly when the formulary procedure began to decline in Rome, but given that Ulpian wrote a commentary on the Praetor's Edict in 83 books in the early third century, it seems that the formula could not already have been obsolete. But it is also clear that by the time of Diocletian, the formulary procedure had disappeared. Hence, it must have been around the middle of the third century that the two-phased system gave way to the *cognitio*. This would have been at least a century after the collections of *controversiae* (with the exception of some cases in the *Declamations maiores*) were composed. This period might have been the beginning of the end of the popularity of *controversiae*, especially as training for making arguments to sway lay judges. In the *cognitio* procedure, with his *consilium*, the judge—no longer a layperson but an officer of the law—could determine both the law and the facts of a case. There was more flexibility in the *cognitio* to allow the judge to actively examine the issues one by one, which might have discouraged the set speech. And there was now the possibility of appeal. Once an appeal was filed, the decision of the judge and the grounds for it had to be given to the parties and forwarded to the appeals court. The appeals process fundamentally changed the role of the judge, whose decision was no longer final and who now had to justify his decision to a higher tribunal. (We know that judges wrote to the emperor for his advice on how a case should be decided to save themselves the embarrassment of having their decisions overturned.) With the *cognitio*, it is possible that long speeches and rhetorical displays lost their importance since the

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decisions they secured could now be appealed. There was also probably less incentive to press
aequitas arguments that challenged the letter of the law, especially when an appeal could strike
down a departure from the law. This is not to say that controversiae had no longer anything to
offer, since they still taught the rhetorical skills useful when arguing before a judge. Judges even
under the cognitio had plenty of discretion despite increased accountability, especially since they
were the primary factfinders, so that the skills prized by Quintilian that could make a judge want
to believe one’s side of the case would still have been valuable. Judges might have gotten advice
from the emperor about the law, but they still decided how to apply the law to specific facts.

Training in controversiae did not in any case cease with the end of the formulary
procedure. But the genre might also have stuck around because of its prestige. Already in Seneca’s
days, the controversia had become a genre with its own rules and expectations. Seneca observes
that good advocates were not necessarily good declaimers,\(^{113}\) an observation that makes little
sense if the sole purpose of controversiae was to train advocates. Professional declaimers took
pride in their eloquence, so much so that some declaimers considered themselves too eloquent to
plead real cases.\(^{114}\) Men who were both declaimers and advocates had to adjust their style
according to their audience.\(^{115}\) But compared with declamation, advocacy had a better reputation:
it was thought that teaching declamation was an option for those unable to succeed as real
advocates.\(^{116}\)

\(^{113}\) Contr. 3.pr.1.

\(^{114}\) Inst. orat. 12.6.6.

\(^{115}\) In Contr. 4.pr.3, Seneca reports that the declaimer Asinius Pollio was more flowery in
declamation than as an advocate in the forum.

\(^{116}\) Contr. 7.pr.6.
_Controversiae_ did nevertheless decrease in influence sometime after the third century. The _Declamationes maiores_, even if some of them were composed in the fourth century, attached themselves to the name of Quintilian, a man who lived three centuries ago; it is hard not to think that they were of antiquarian, rather than of practical, interest. Perhaps reality finally caught up with the declamatory genre, and it no longer made sense to devote so much energy to learning how to make set speeches on imaginary themes when opportunities to give long speeches became less common under the _cognitio_. But the “set speech” has always been an ideal, since frequent interruptions in court were also common under the formulary system. Those trained in _controversiae_ did not necessarily expect to be able to give uninterrupted speeches. The slow decline of declamations (and it was slow because they were still practiced in the Eastern Roman Empire in the sixth century) can be attributed to another cause, which we cannot discuss without mentioning a class of men whose contribution to Roman law we have thus far passed over: the jurists.

Leaving aside the archaic period, we know that beginning in the second century BC, the private law was studied by members of the college of the pontiffs (though increasingly less so) as well as by the non-pontifical nobility, from at least the equestrian rank, who pursued a non-pecuniary interest in the law.117 They gave legal advice to everyone who came to them (magistrates, _iudices_, advocates, and private clients) through _responsa_, and served the crucial role of helping compose the praetorian, aedilician, and provincial edicts (which contained model _formulae_) and serving as members of _consilia_ to private _iudices_ and magistrates.118 For the most part, starting in the middle of the second century BC, these jurists left it to the advocates to argue

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117 In _D.1.2.2.39_, Pomponius calls the founders of the _ius civile_ P. Mucius Scaevola, M. Iunis Brutus, and M. Manilius, all from the second century BC. See Schulz, _History of Roman Legal Science_, 40–48, for a discussion of the different classes of ancient jurists.

118 Schulz, _History of Roman Legal Science_, 49–53.
cases in court." Apprentices learned from a master by attending his consultations and observing his work as a member of a consilium or in helping settle a formula before a magistrate, in short, through a purely practical education. B. W. Frier reads the distinction between advocates and jurists firmly, while J. W. Tellegen has called for this distinction to be relaxed. We need not settle the debate here, but only note that the ancient texts do talk about two groups of men, even if some overlap between them was possible. The jurists had always filled a niche by giving legal advice to the laypeople who ran the legal system, but when the courts became more professionalized in the second and third centuries, the jurist' role became more pronounced. They were no longer coming from the old aristocratic families and many were paid officials. In developing a discipline that organized and rationalized legal materials, articulated formal rules, and defined legal categories, they might have helped speed up the handling of cases by settling issues prior to pleading and establishing rules (for example, the codification of the Praetor's Edict under Hadrian) that increased the consistency of results especially among the newly-enfranchised Italians.

The formal legal training of the jurists did not fundamentally conflict with the rhetorical training of the advocates such that the rise of the former should lead to the decline of the latter. A

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119 Ibid., 53–55.

120 Ibid., 56–58.


122 See Tellegen, “Oratores, Iurisprudentes, and the ‘Causa Curiana,’” 294, which proposes that the causa Curiana can only be fully understood when we do not press too much the distinction between advocates and jurists.


factor, however, that probably did cause the decline of rhetorical training and the rise of formal legal training was the fact that it was the jurists who were increasingly incorporated into the imperial bureaucracy. They were the instruments by which the emperor exercised his legal prerogatives. Pomponius ascribes to Augustus the policy of giving a few jurists the right to give *responsa ex auctoritate principis*, an early indication of how the *princeps* got involved in the law (though still giving the jurists much freedom). Toward the end of the first century, jurists were summoned to the emperor’s *consilium*. Hadrian in the early second century had his *consilium* staffed by the leading jurists such that it functioned as a state organ with salaried members. Permanent legal advisers to magistrates became the *de facto* legal decision-makers. Hadrian held that unanimity among the jurists on an issue could count as law, but where they differed, a judge could choose between their opinions. By the fourth century, the “bureaucratic jurists” (in Fritz Schulz’s term) were the framers of imperial rescripts and the late antique law codes. Advocates who only had rhetorical training did not enjoy the same patronage, and were actually required officially to know some law. In the Eastern Empire, advocates were expected to study in a law school, and legal expertise officially became a prerequisite for advocates appearing in court in 460. By this time, it is no surprise that declamations were becoming obsolete.

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125 D.1.2.2.49.
127 Ibid., 117–18.
128 Gaius, *Institutes* 1.7.
130 Ibid., 268–69.
131 Ibid., 270.
Tang Law, Legal Procedure, and the Role of Judgments

Tang codified law was divided into four categories—the Code (lü 律), Statutes (ling 令), Regulations (ge 格), and Ordinances (shi 式)—but the relationship between them is not precisely known. While the Code survives in full and the Statutes have been substantially reconstructed, the Regulations and Ordinances survive only in fragments. The Code survives as the Tanglü shuyi 唐律疏議 (Tang Code with Subcommentary133), an eighth-century revision (by all evidence a modest one) of an annotated Code originally promulgated in 653, the same year as the Wujing zhengyi 五經正義 (Correct Significance of the Five Classics). Its distinctive feature is the assignment of exact punishments for violations. The other three categories of law provided more detailed rules for the administration of the state. The Statutes were organized by

132 See discussion in Denis Twitchett, “The Fragment of the T'ang Ordinances of the Department of Waterways Discovered at Tun-huang,” Asia Minor New Series 6 (1957): 23–79, esp. 26–28. The reconstruction, completed by Niida Noboru 仁井田陞 in the 1930s, was based on a medieval Japanese legal compilation that took the Tang Statutes as its model.

133 The main text of the Code is supplemented by “commentaries” (zhu 注) that give additional clarification as to the meaning of the law. The “explanatory discussions” (shuyi 疏議), or subcommentaries, expound on the main text and on the commentaries, allude to canonical texts, refer to other articles of the Code, and raise hypothetical questions and give answers to them.


135 An offense was regarded as a disruption both of human society and of nature; punishments offered the counterbalance, and accordingly, must be precise. If they were too light or too heavy, they could bring about disasters such as floods and droughts. The Code set out punishments in five categories, corresponding to the five natural elements (metal, wood, water, fire, and earth). The lightest punishment was beating with the light stick, subdivided into five degrees: 10, 20, 30, 40, and 50 strokes. The second category was beating with the heavy stick, again subdivided into five degrees: 60, 70, 80, 90, and 100 strokes. The third category was penal servitude in five degrees: one year, one-and-a-half years, two years, two-and-a-half years, and three years. The fourth and fifth categories were life exile in three degrees (distances of 2000, 2500, and 3000 li, one li being about one-third of a mile) and capital punishment in two degrees (strangulation and decapitation). See Tanglü shuyi 唐律疏議, ed. Yue Chunzhi 岳純之 (Shanghai: Shanghai guji chubanshe, 2013), Articles 1–5 (pp. 4–6) (hereafter Tang Cod., with article number, followed by the page in parentheses).
administrative topics: for example, there were Statutes on Schools, on Fiefs and Nobility, on Music, and on the Arrest of Fugitives. Violations of the Statutes were punished according to Article 449 of the Code. The Regulations appear to be administrative instructions meant for particular departments and offices. These were closely tied to the Edicts (chi 敕), since Regulations were amended periodically to reflect revisions imposed by the Edicts. As a result, the Regulations served the important function of keeping the codified law up-to-date. Violations of the Regulations were not addressed in the Code, suggesting that they contained their own sanctions.136 The Ordinances, perhaps put into effect through the Edicts, were supplementary rules to the Code and Statutes. They were of a more local color137 and, like the Regulations, were directed toward specific departments and offices. Violations of the Ordinances received a one-degree reduction of the punishment imposed for violations of the Statutes. Hence, in Tang law, the most stable138 and fundamental laws—the Code and Statutes—had the least effect, while the Regulations and Ordinances, and the sporadic Edicts issued separately or embodied in them, did the bulk of the work.

History has preserved for us the Code and Statutes rather than the laws that were actually in effect; this fact must temper any conclusions we draw from them about Tang legal procedure. Various provisions of the Code give us a picture of how cases (especially what we would consider criminal cases) might have been processed. For example, Article 453 allows bystanders to arrest

136 Shiga Shūzō, “A Basic History of T’ang Legislative Forms,” 104–05, notes that because the Regulations contained Edicts that might conflict with the Code and Statutes, they had to provide their own sanctions. For him, the Regulations were the functional penal and administrative laws of the Tang, not the Code and Statutes.

137 This does not mean that they were local laws. They were still centrally codified laws that addressed specific local problems.

138 Shiga Shūzō, “A Basic History of T’ang Legislative Forms,” 100, notes that amendments to the Code and Statutes could only be made by promulgating an entirely new version.
those who have committed the crime of beating, wounding, robbery, or rape, and bring them to the proper authorities, though in the usual case, “military runners” (jiang 將) or “civil runners” (li 吏) were sent to make arrests. Complaints may be lodged against someone starting in the lowest competent court, which usually meant the county court, but the complaint must not be anonymous and must clearly indicate the year and month and a statement of the facts. Although the Tang did not have advocates, there might have been professional drafters of complaints, since Article 356 prohibits altering the circumstances when making a written statement on behalf of another. Once a complaint has been accepted, a distinction was made as to whether the matter was one of “utmost severity” (qiehai 切害), such as homicide, robbery, jail-breaking, and rape. If so, a magistrate probably heard the case right away, but if not, the Statutes provide that an official should question the accuser in three separate hearings, record his statements, and make a preliminary decision before submitting the case to an “official authority” (guansi 官司). In context, this official authority probably meant the magistrate, with the abovementioned official being a deputy. The magistrate had the power to order an arrest if

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139 Tang Cod. 453 (449).

140 Tang Cod. 359 (384); see also Tang ling shiyi 唐令拾遺, ed. Niida Noboru 仁井田陞, trans. Lijing 栗劲, et al. (Changchun: Changchun chubanshe, 1989), 21.40 (532) (hereafter Tang Stat., with the article and subsection, followed by the page in parentheses). “Court” is a convenient translation for the magistrate’s place of business, but the magistrate did not only oversee judicial matters. Among his administrative duties were registration of households, collection of taxes, and allocation of lands.

141 Tang Cod. 351 (376).

142 Tang Cod. 355 (380).

143 Tang Cod. 356 (381). If the accuser did not know how to write, a clerical officer could also make a written statement on his behalf. See also Tang Stat. 30.23 (710): “As for those who do not know how to write, a clerk should write for him” 不解書者，典為書之.

144 Tang Stat. 30.23 (710).

145 Ibid.
necessary and examine the accused (and even the accuser). Witnesses were also examined, since Article 387 provides for punishment of witnesses who give false testimony. A trial might end with a confession by either the accused or the accuser (for bringing a false accusation), but even if there was no confession, a magistrate could pass a sentence if there was “no reasonable doubt” 理不可疑.\footnote{146 Tang Cod. 476 (469).} If, however, doubt remained, judicial torture was permitted, but only after an agreement was reached, probably in consultation with other officials and deputy officials.\footnote{147 Ibid.} In cases where torture did not produce a confession by either the accused or the accuser, Article 502 allows for redemption by payment of copper or additional deliberations not to exceed three times.\footnote{148 Tang Cod. 502 (489).}

This outline of Tang court procedure as gleaned from the Code necessarily leaves some gaps. It tells us almost nothing about how accusers pleaded in court or how the accused defended themselves. Were both parties allowed to read out their written statements? Were they allowed to confront each other or the witnesses? As for the magistrate who had to make the decision, did he have legal advisors with whom to consult? These details of trial procedure remain unclear.

What is clear, however, is that after a decision was made, a magistrate had to write a judgment that cited a provision of the Code, Statutes, Regulations, or Ordinances, for review by a higher tribunal.\footnote{149 Tang Cod. 484 (476).} The appeals process is not well understood. We know that all cases where the punishment was more than a beating would be automatically reviewed. But we do not know what part the accused played in the appeals process, except that the Statutes describe a procedure that

\begin{footnotes}
\item[146] Tang Cod. 476 (469).
\item[147] Ibid.
\item[148] Tang Cod. 502 (489).
\item[149] Tang Cod. 484 (476).
\end{footnotes}
would allow an accused to refuse to accept a decision.\textsuperscript{150} Article 490 also provides that a sentence of penal servitude or more had to be officially accepted by the accused; otherwise, he was permitted to have his case reexamined. This reexamination was probably by the same court, since review by a higher court in these cases was automatic. The higher courts, such as the prefectural court, the Court of Judicial Review (Dali si 大理寺), and the Ministry of Punishment (Xingbu 刑部), might have only examined the written records rather than questioning the parties or witnesses in person, since travel from a remote county to the prefectural or metropolitan capital would have been difficult in most cases. In doubtful cases, officials likely wrote to the higher tribunals for their opinion, just as Roman magistrates wrote to the emperor. The prefectural court automatically reviewed cases involving penal servitude, the Ministry of Punishment reviewed all cases involving life exile, and the Court of Judicial Review had the power to pronounce the death penalty; the emperor alone could confirm a death sentence.\textsuperscript{151} In addition, the Censorate (Yushi t'ai 御史臺), the state organ tasked with prosecuting official misconduct, could also bring and review a case of its own accord.

It is hard to see the role that literary judgments played in this appellate process. They do not report facts or testimonies in detail, do not explain any rationale for accepting a testimony over another, do not explicitly cite Tang law (though they sometimes do so implicitly), and do not give detailed interpretations of the law. They demonstrate familiarity with the law, but no interest in it. What did they offer the appellate courts?

To answer this question, we have to consider the fact that traditionally in China, law was not treated as an honorable subject. This is because it dealt with the punishment of transgressions, punishment that would not ideally be necessary if the people submitted to the

\textsuperscript{150} Tang Stat. 21.40 (532).

\textsuperscript{151} Tang Stat. 30.6 (692–93).
moral influence of an enlightened ruler. Some officials specialized in law, but they were the minority. A college of law under the Directorate of Education (Guozi jian 國子監) trained students to pass a special examination called the mingfa 明法 (“Understanding the Law”), which tested their knowledge of the Code and Statutes. But there were only 50 law students out of 2210 in the Directorate of Education in 739. The mingfa was not, in any case, a prestigious way to enter the bureaucracy, normally resulting in a restricted career in judicial offices at the capital. In competition with these law graduates were students who passed the more prestigious examinations and who would staff the junior posts in the Court of Judicial Review, the Ministry of Punishment, and the Censorate on their way to higher offices.

The lack of prestige that attended the law graduates probably also had to do with the fact that technical expertise was considered beneath the literati. From the little evidence we have of the operation of the county magistrate’s court, technical matters were clearly the business of the petty officials or clerks. In the county court, apart from the magistrate himself and several deputy officials, most of the clerks were local men without an official rank who probably had more knowledge of local laws and customs than the magistrate himself. These were men who, after eight to ten years of service, could hope to enter the ranks of the regular bureaucracy. They were indispensable to the administration of counties that on average contained about 25,000 to 30,000 persons. Ranking officials were appointed from the capital, were not native to the area, and

152 See TD 15.357.


154 Ibid.

155 Ibid., 82.

156 Ibid., 70.
were liable to be transferred after around four years of service—all measures intended to
discourage the formation of local concentrations of power. The magistrate took formal
responsibility for every decision that was made within his court, but his subordinates and clerks
probably took care of most of the paperwork, even formulating judicial and administrative
decisions pending his approval.

Denis Twitchett’s examination of a Tang administrative case processed at a county court
gives us a good picture of the division of labor at the county level.157 In this case, a letter from the
intendant of the Commissioners for re-registering households had been dispatched to the
Dunhuang County outlining a central policy to re-register and return to their homes the
households who had left for other prefectures. The letter was received by the magistrate, who
passed the matter on to his subordinates to process. An official examined and signed the file
related to the matter, and a clerk also signed it. The official then ordered that letters be sent to
the Commissioner and to the neighboring prefectures in response to the original letter. The
magistrate then gave his approval while providing further oral instructions. This relatively routine
matter—though it did involve a central bureau and neighboring prefectures—is instructive. A
magistrate probably rarely heard a case or drafted a decision personally, or routinely wrote the
kind of literary judgments typical of the examinations. More likely, his subordinates and clerks
processed most cases and sent them up to the magistrate for rubber-stamping. Since the Statutes
made a distinction between ordinary matters and severe and urgent matters,158 the magistrate
probably only heard the latter cases, which were also more likely to require appellate review. For
all cases that required review, a formal document of some sort, laying out the magistrate’s
decision, certifying the record, and citing the law, must have been drafted, though the magistrate

157 Ibid., 71–75.

158 Tang Stat. 30.23 (710).
probably did not prepare it himself. I believe that it is in addition to this document that a judgment, with some literary polish, might have been written by the magistrate in special cases.

There is evidence that for some cases, a literary judgment might have accompanied a more technical legal document. We do not have an extant Tang case that comes with both a literary judgment and a technical legal discussion, but we have something very close in Bai Juyi’s “Petition to the Throne to Discuss the Case of Yao Wenxiu Who Beat and Killed His Wife” 論姚文秀打殺妻狀.¹⁵⁹ The case, heard by both the Court of Judicial Review and the Ministry of Punishment, involved a man who beat his wife to death and who was sentenced to strangulation for having “killed in an affray and struggle” 鬥毆殺人.¹⁶⁰ Because the punishment was death, the throne had to confirm the sentence. Bai’s petition challenges that decision, arguing that Yao should have been convicted for “intentional killing” (gusha 故殺), which would have warranted decapitation.¹⁶¹ The petition is an example of the kind of legal reasoning that Tang officials were capable of. The petition quotes the ruling of the two high courts: “According to the Code: ‘A killing not due to an affray and struggle, with no occasion, is called intentional killing.’ In the present case, Yao Wenxiu killed with occasion; hence it was not intentional killing” 准律: 非因鬬爭, 無事而殺者, 名為故殺。今姚文秀有事而殺者, 則非故殺. The provision in quotes is taken from the Subcommentary to Article 306 of the Code. The petition then quotes what appears to be a dissenting opinion, which argued that Yao killed his wife “intentionally” because Yao had no wounds on his person and hence there had been no affray. Bai goes on to argue that, by the two high courts’ reasoning, “occasion” in the Subcommentary would mean any motivation other than


¹⁶⁰ Tang Cod. 306 (332–33).

¹⁶¹ Ibid.
to kill, so that if Yao had the intention to beat his wife but she died unexpectedly, this would not be intentional killing. For Bai, however, intentional killing ought not to be confined only to those killings where the sole intention was to kill; agreeing with the dissenting opinion, Bai believes that as long as there was no affray or struggle, the Subcommentary considers the killing that results as “intentional.” In other words, “occasion” in the Subcommentary would be interpreted narrowly as referring to an affray or struggle.

This petition gives us a sense of what a formal legal decision in a murder case looked like in the Tang. Apparently, the Tang courts issued both majority and dissenting opinions, which all cited the law. Evidently, the Subcommentary to the Code had the force of law. Because Bai quotes excerpts from prior opinions, we do not know how long those opinions were, but they were certainly not short. Bai’s argument about the correct interpretation of the Subcommentary is quite lengthy, written in unadorned prose that analyzes the meaning of “occasion” in the Subcommentary and the practical implications of reading that term too broadly. Bai also refers to, and challenges, the high courts’ use of legal precedents in their decisions, finding the cases that they used to be inapposite. Apparently, the courts argued not only by means of statutory interpretation but also through case precedents.

The throne, after receiving Bai’s petition, rendered a ruling a favor of Bai. It is hard to imagine that the throne did not have officials consider Bai’s petition and the decisions of the two high courts, including the dissenting opinion, and give their own thoughts on the matter. Documents might have even been drawn up to argue for the correct interpretation of the text of the Code. The case might also have been reexamined for its facts in relation to the law. But when it came to pronouncing judgment, the throne did not apparently see the need to articulate any
Bai obviously preserved this ruling because he took pride in the fact that his petition overturned the decision of the two high courts. It is interesting that Bai did not apparently care about whether his interpretation of the law was accepted. Additional documents were probably issued from the throne for this case, but Bai preserved what he thought was the only document that mattered. This ruling was a moral judgment: it did not matter that it did not resolve the interpretive question. This was the throne’s pronouncement—let all take heed. The fifth and sixth lines especially, with the contrast between the Code (lü 律) and “correct principles” (li 理), are in strict parallel. Maybe only the throne could openly declare that the conflicting interpretations of the Code were of no concern because an example had to be made of the man in this case. But in

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163 BJYJ 60.3410–11.

165 The Ten Abominations (shi’e 十惡), covered under Article 6, are: 1) plotting rebellion (moufan 謀反); 2) plotting great subversion (moudani 謀大逆), i.e., the destruction of the emperor’s ancestral temples, tombs, or palaces; 3) plotting treason (moupan 謀叛); 4) abominable subversion (e’ni 惡逆), which includes beating or plotting to kill one’s parents; 5) acting against the Way (budao 不道), which includes poisoning and dismemberment; 6) great irreverence (dabujiing 大不敬), which includes stealing or forging imperial seals, among other offenses against the person of the emperor; 7) lack of filial piety (buxiao 不孝), which includes accusing one’s parents or paternal grandparents in court, or cursing them; 8) acting against tranquility (bumu 不睦), i.e., serious offenses against close relatives; 9) unrighteousness (buyi 不義), which includes beating or killing an official; and 10) incest (neiluan 內亂). See Tang Cod. 6 (6–16). In this case, Yao Wenxiu would have been guilty of “acting against tranquility.”
literary judgments, we also see legal ambiguities and conflicting interpretations brushed aside in favor of moral arguments.\textsuperscript{164}

Like the \textit{controversia}, the literary judgment became a genre that had its own rules and aesthetics apart from its role as an exercise. But that does not mean that it was not meant to train magistrates to write actual decisions, in much the same way as how the declamatory exercise was still meant, even in the late Empire, to train students to argue before judges. The ability to produce a moving speech or a literary judgment was a skill that complemented knowledge of the formal law. In fact, it was a higher skill. The ordinary advocate could cite laws before a judge, but only the outstanding advocate could also bring moral arguments and pathos to bear on a judge's decision. The local clerks of the Tang bureaucracy could process the paperwork and write the formal legal documents, but only a magistrate (or assistant magistrate) was capable of composing a literary judgment.

The ornate judgment largely disappeared as a practice when examinations after the Tang no longer tested the composition of judgments. Why this was so is difficult to say. Most likely it has to do with the combination of a couple of factors: the growing distaste for parallel prose in the Song\textsuperscript{165} and an expansion of the examination system that made it more accessible to the greater population.\textsuperscript{166} The ability to compose a dense literary piece filled with classical allusions no longer appealed to the Song bureaucracy, no longer consisting of mostly people with aristocratic backgrounds. But this is not to say that moral arguments disappeared. In Song judgments, we still

\textsuperscript{164} Professor Stephen Owen has suggested to me that tomb inscriptions (\textit{muzhiming} 墓誌銘) are another example where a long text is "summarized" by a much shorter text, much like how a legal decision might have been "summarized" by a judgment.

\textsuperscript{165} See, generally, Peter Bol, \textit{"This Culture of Ours": Intellectual Transitions in T'ang and Sung China} (Stanford: Stanford University Press, 1992).

\textsuperscript{166} For details about the Song examination system, see Thomas H. C. Lee, \textit{Government Education and Examinations in Sung China} (New York: St. Martin's, 1985).
see many instances of judges deciding cases based on moral arguments drawn from the classical tradition. But the language was not nearly so ornate or self-consciously erudite.

**Summary**

*Controversiae* and literary judgments were exercises where rhetorical skill and equitable considerations had the pride of place. In the former, school scenarios helped students learn to speak persuasively and articulate moral arguments, skills that would be useful in the law courts. Literary judgments trained future officials in how to make moral pronouncements distinct from the technical paperwork that they (or more likely their subordinates) had to produce. The genres were necessarily shaped by the legal procedures in the two empires: in Rome, rhetorical and moral arguments were orally delivered to sway lay trial judges and (later) law officers; in the Tang, rhetorical and moral judgments were written to gain the approval of colleagues and higher-ranking officials. *Controversiae* tended to be less dependent on textual allusions, relying more on epigrams and turns of phrase that appealed to the ear, while judgments were saturated with references to the classical tradition, more easily digested and more impressive when read.

But at the same time, both genres also shaped how the formal law was viewed in both societies. In the following chapters, I will show how specific examples of *controversiae* and judgments interacted with and responded to the formal law.
Chapter Two

Subversive Themes in the Controversiae of the Elder Seneca

By means of new laws proposed under my sponsorship, I restored many examples of the ancestors now growing obsolete in our age, and I myself handed down examples of many things to be imitated by posterity.

*Legibus novis me auctore latis multa exempla maiorum exolescentia iam ex nostro saeculo reduxi et ipse multarum rerum exempla imitanda posteris tradidi.*¹

Very little is known about the life of the elder Seneca (ca. 55 BC–AD 37) beyond what he tells us in the *Oratorum et rhetorum sententiae divisiones colores*, the earliest surviving work devoted to declamations and the only work of his that survives.² Because Seneca claims that he might have heard Cicero declaim in 44 BC if not for the civil wars, we can with some confidence place his year of birth sometime in the 50s BC.³ That he died after the year 37 can be gathered from some circumstantial evidence of his having outlived Tiberius.⁴ From Tacitus’ account of the younger Seneca, we know that the family was equestrian and from the provinces (namely Spain).⁵ The family’s provincial status has led to the observation by W. M. Bloomer that the *Oratorum et

¹ *Res gestae divi Augusti* 8.5 (hereafter RGDA).


³ *Contr. 1.pr.11.*


rhetorum, a compilation of declamatory themes and epigrams, might have served as a means for a provincial outsider to claim membership in elite Roman circles by elevating a schoolroom practice to the status of traditional oratory.6

The bulk of the Oratorum et rhetorum is devoted to controversiae, divided into ten books, each containing six to nine themes that were common in Seneca’s days.7 The ten books do not survive in full, but two separate manuscript traditions from the ninth and tenth centuries give us a good idea of what they originally contained.8 We have the full contents of Books 1, 2, 7, 9, and 10, the prefaces only for Books 3 and 4, and excerpts only for the rest. These themes are usually preceded by a law or laws that govern the case at hand. After the theme, Seneca gives us the sententiae, that is, epigrams used by declaimers known to Seneca in their performances in response to these themes. These sententiae are grouped under the names of declaimers and according to which side they are arguing for. Rarely are both sides of a case given equal space, suggesting that for most cases, one side usually received more attention than the other, whether because it was easier to argue or because it offered more opportunities for rhetorical display. The epigrams are all excerpted from full speeches.9 Following the sententiae is the divisio, which describes how different declaimers arranged their case. This section may be very long, sometimes almost double the combined length of the preceding sections. It is not a systematic outline of the arguments for a case, but instead explains how some declaimers approached the theme, which questions they asked and in what order, which issues they raised and which they avoided, and so


7 Seven themes devoted to suasoriae follow the controversiae.


9 Contr. 2.7.1–9 contains the longest continuous declamatory speech, but is incomplete.
on. The most standard division is to distinguish law from equity, what is lawful from what is morally justified. Included in this section are also the colores, which are possible ways to interpret (or even manipulate) the facts, or explain away unfavorable facts, without directly contradicting the facts given.

Seneca could very well have believed in the educational value of such a collection: the ten books would have been a useful reference guide to *sententiae*, conveniently arranged by themes. He specifically addresses the work to his sons, expressing hope that they might learn from these models. The work was also composed partly out of nostalgia for times past and his friendship with the declaimer Latro, as Seneca himself writes, “it is pleasant for me to return to my old studies and to look back on better years” (*est . . . iucundum mihi redire in antiqua studia melioresque ad annos respicere*), and elsewhere, “for I shall often be compelled to take hold of again the memory of Porcius Latro, my dearest friend” (*Latronis enim Porcii, carissimi mihi sodalist, memoriam saepius cogar retractare*). Seneca thought of the arrangement of his work as a presentation of gladiatorial combats: each preface introduces the declaimers who would be prominently (though not exclusively) featured in the book to follow. The comparison to gladiatorial combats suggests that Seneca viewed the practice of declamation as entertainment, though not without some real consequence. Hence, Erik Gunderson compares the declamatory arena to a zoo in the middle of a city: “Declamation’s crimes are themselves a wilderness

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10 See, e.g., *Contr. 1.1.13.*

11 *Contr. 1.pr.6.*

12 *Contr. 1.pr.1.*

13 *Contr. 1.pr.13.*

14 See *Contr. 4.pr.1.*
fabricated for public consumption . . . : everything is contained within an elaborate artifice, and it is not for that harmless or insignificant.”

In this chapter, rather than focusing on the educational or entertainment value of this collection, I propose that we look at some of its themes as a response to a formal legal text, the moral legislation of Augustus. By the moral legislation, I mean the *lex Iulia de maritandis ordinibus* of 18 BC, the *lex Iulia de adulteriis coercendis* (passed shortly after the legislation of 18 BC), and the *lex Papia Poppaea* of AD 9, which updated the 18 BC legislation. These laws, which encouraged marriage and childbearing and imposed penalties on sexual immorality, were unprecedented in their reach into the Roman private sphere. The fragmentary declamations recorded by Seneca are roughly contemporaneous with this legislation; though they do not address it directly, they were performed under its shadow. Declamations have been studied as a means by which Roman students learned what it meant to be Roman and how to apply traditional values to transgressive situations (see Chapter One), a mostly positive and constructive account. But Gunderson has approached the genre from its darker side, highlighting how it “habituate[s] people to submission to the law . . . that frequently produces impossible and contradictory situations” and how it “asks that one come to the aid of a failing law, that one assume the name of its authority in order to shore up a possible gap in the field covered by the law’s sovereignty.”

The laws in the declamations recorded by Seneca are found in no extant legal sources; if they produced impossible and contradictory situations, they were perhaps using the name of law to subvert the law.

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16 Ibid., 228.
This chapter focuses specifically on how the themes recorded by Seneca subverted Augustan legislation and challenged the figure of the princeps as pater patriae, “father of the fatherland.” First, I argue that the undermining of paternal authority in these themes can be read as indirectly questioning the legitimacy of the legal and moral order that the princeps sought to impose. Second, I argue from the many themes in the collection that deal with marriage and sexual immorality that Seneca’s work can be read as resisting and problematizing the Augustan legislative program to restore Roman morals.

AUGUSTAN RHETORIC AND LEGISLATION

Legislation played a prominent part in Augustus’ narrative of moral revival. Horace, who began with pessimism about the effectiveness of legislating morals, eventually changed his tune and praised the princeps for “guard[ing] the Italian state with arms, furnish[ing] it with morals, and reform[ing] it with laws” (res Italas armis tuteris, moribus ornes, legibus emendes). Augustus himself highlighted his legal reforms in the Res gestae divi Augusti (RGDA), calling them a means by which ancient traditions could be restored and moral examples handed down. The lex Iulia de maritandis ordinibus, the “Julian law relating to the marriages of the (senatorial and equestrian) orders” (containing at least 35 chapters), was passed in 18 BC and faced immediate resistance, such that some of its provisions were revised under the lex Papia Poppaea of AD 9.

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18 Horace, Epistles 2.1.2–3.
19 RGDA 8.5.
20 See D.23.2.19.
21 Suetonius, Augustus 34.
Papian law sought to strengthen the Roman household by encouraging marriage and childbearing through rewards; non-compliance, on the other hand, was met with penalties. The original text is no longer extant, but quotations and paraphrases in the works of the classical jurists are plentiful. The *lex Iulia de adulteriis coercendis*, the “Julian law on repressing adulteries,” was probably passed shortly after the Julian marriage law in at least nine chapters. It introduced penalties for adultery (*adulterium*) and fornication (*stuprum*), the former strictly an offense committed by married women, and while the latter included sexual offenses against married and unmarried women, widows, divorced women, and even young men. Augustan moral legislation hence addressed both legitimate and illegitimate sexual relations, encouraging the former and proscribing the latter. 

One way to understand this legislation is through the lens of Augustus as the father of the Roman state, seeking to restore the morals of his political household. The title of *pater patriae* was formally conferred on Augustus in 2 BC, a fact that is presented as the apex of his rule in the *RGDA*. But the title had been in use informally far earlier in Horace, who wrote of Augustus: “Here, you adore to be spoken of as father and *princeps*” (*hic ames dici pater atque princeps*). As “father of the fatherland,” the *princeps* symbolically held the rights and duties of a father in relation to the state.

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23 *RGDA* 35.1.

24 Horace, *Odes* 1.2.50.
Beginning in archaic times, the Roman father had absolute power (*patria potestas*) over his children, including, theoretically, the right to put them to death (*vitae necisque potestas*). 25 Though “the right of life and death” was almost never exercised, 26 it was customary for the father, usually in cases of sexual misconduct, to convene a domestic council to dispense punishment. 27 The father also had the obligation to protect his children’s interests. The younger Seneca, writing of the *pater patriae*, maintains: “To the *pater patriae* we have given the name in order that he may know that he has been entrusted with a father’s power, which is most forbearing in its care for the interests of his children and subordinates his own to theirs” (*patrem quidem patriae appellavimus, ut sciret datum sibi potestatem patriam, quae est temperantissima libelis consulens suaque post illos reponens*). 28 The *princeps* embraced the title as one designating himself as the benevolent guardian of the state, as well as a stern disciplinarian when it comes to matters of private morality.

The status of *pater* allowed Augustus to downplay his power in his official capacity and to emphasize a parental authority that was unofficial but more pervasive. In the *RGDA*, Augustus claims: “I surpassed all in *auctoritas*, but I had no more power than the rest who were colleagues of mine in each magistracy” (*auctoritate omnibus praestiti, potestatis autem nihilo amplius habui quam ceteri, qui mihi quoque in magistratu conlegae fuerunt*). 29 A recurring refrain of the *RGDA* is

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26 W. V. Harris lists all known cases of fathers who executed their sons, finding that the practice was virtually nonexistent. See Harris, “The Roman Father’s Power of Life and Death,” in *Studies in Roman Law in Memory of A. Arthur Schiller*, ed. R. S. Bagnall and W. V. Harris (Leiden: Brill, 1986), 81–95.

27 See Bé Breij, *Quintilian: The Son Suspected of Incest with his Mother* (*Major Declamations*, 18–19) (Cassino: Edizioni Università di Cassino, 2015), 23. Suetonius writes that in the time of Tiberius, even though the *quaestio* for adultery existed, the Senate could authorize an adultery trial by *iudicium domesticum*. Suetonius, *Tiberius* 35.


29 *RGDA* 34.3.
the phrase “I did not accept” (*non recepi*),30 “I rejected” (*recusavi*),31 or “I refused” (*non accepi*).32 The princeps would have it known that the Roman people rushed to confer upon him honors that he did not seek, and to grant him powers that he did not, in any official capacity, have. But Augustus did not shy away from proclaiming that his moral influence transformed the decadence that was thought typical of the late Republic. So the RGDA proclaims, toward its conclusion, that in 27 BC (when Octavian became Augustus), a gold shield was given to the princeps in the senate, inscribed with the words *virtus, clementia, iustitia, and pietas*.33 These were the virtues of the ideal Roman, and Augustus was their personification. Laws were a part of the moral re-edification of Rome, as Augustus proclaims: “By means of new laws proposed under my sponsorship, I restored many examples of the ancestors now growing obsolete in our age, and I myself handed down examples of many things to be imitated by posterity” (*Legibus novis me auctore latis multa exempla maiorum exolescentia iam ex nostro saeculo reduxi et ipse multarum rerum exempla imitanda posteris tradidi*).34 Such was the narrative of the self-proclaimed restorer of the morality of the Roman people.

The marriage and adultery laws can therefore be seen as the laws by which the political father would protect the honor of his household, the *res publica*. The state, in the words of Tacitus, became “father of all” (*parens omnium*),35 especially when adultery and sexual immorality were made public offenses, like murder and treason, to be tried in a *quaestio*. Because the

30 RGDA 5.1, 5.3.
31 RGDA 10.2.
32 RGDA 21.3.
33 RGDA 34.2.
34 RGDA 8.5.
ultimate victim of such offenses was the state, anyone could prosecute a woman on a charge of adultery after 60 days, and a husband who condoned his wife’s adultery could be prosecuted himself. We see a conflation of the private and public spheres when, upon seeing his own daughter and granddaughter convicted of adultery, the princeps, according to Tacitus (who might indeed have intended the conflation), considered the offense of adultery to be comparable to cases “of sacrilege and injured maiestas” (laesarum religionum ac violatae maiestatis).

In legislating on the family, Augustus stepped into an arena where the state traditionally had little to say. The matters of the household were the tasks of fathers and husbands, but the laws on marriage and adultery clearly suggest that neither fathers nor husbands were fulfilling their duty. The moral legislation fundamentally changed how people thought about entering into and dissolving marriage. Marriage in Rome was traditionally formed and dissolved without any formality: a common intention to marry (or a unilateral intention to divorce) was all that was required for those who were sui iuris (for those in potestate, the consent of the pater familias would also be required). The legal consequences of marriage were few, other than as pertained to the status of the children (as being in potestate or not). By the last century BC, among the upper classes, divorce was apparently common and without a doubt easy. Cicero divorced his wife of 30 years, and a year later divorced his second wife; Augustus himself divorced twice. The younger Seneca went so far as to say that some women could reckon the years by the names of their husbands rather than of the consuls. To what extent Rome’s upper classes were committing

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36 D.48.5.2.8, 48.5.14. Within the 60 days, the father and husband had exclusive right to prosecute.

37 D.48.5.2.2, 48.5.2.6, 48.5.30pr.


39 See Treggiari, Roman Marriage, 516–17, for a list of attested divorces during the Republic.

40 Seneca, De beneficiis 3.16.
adultery and divorcing more than ever before, and to what extent this was the posturing of the moralists, we have no sure way of knowing. But the laws on marriage and adultery certainly fed upon this narrative of moral decline and saw immorality as destructive to the state.

The basic provisions of the laws on marriage and adultery were as follows.\footnote{For details on the \textit{leges Iuliae}, see Pál Csillag, \textit{Augustan Laws on Family Relations}, trans. József Decsényi and Imre Gombos (Budapest: Akadémiai Kiadó, 1976), and Treggiari, \textit{Roman Marriage}, 60–80, 277–98.} The marriage law made marriage mandatory for men and women of certain ages.\footnote{See Ulpian, \textit{Regulae} 16.1, for the provision in the Papian law.} It required divorced women and widows to remarry within a certain time period: six months and a year, respectively, in the Julian law, and 18 months and two years in the Papian law.\footnote{Ulpian, \textit{Regulae} 14.} To encourage marriage, the unmarried and childless were prohibited from taking inheritances and legacies.\footnote{Gaius, \textit{Institutes} 2.111.} Men and women with children (especially three or more) had certain advantages, for example, in taking office and in being relieved from acting as guardian.\footnote{For details, see Treggiari, \textit{Roman Marriage}, 66–75.} In the law on adultery, two provisions allowed summary justice: one allowed a father to kill his married daughter if she was caught committing adultery, provided that he also killed the adulterer;\footnote{\textit{Collatio} 4.2.3.} the other allowed a husband to kill the adulterer of his wife provided that he was of a certain status (a convicted criminal, an actor, a slave, etc.), but prohibited him from killing his wife.\footnote{\textit{D.48.5.25pr}; \textit{Collatio} 4.3.1.} The penalties for adultery extended to banishment: adulterers lost half their property and were banished to an island,\footnote{Paul, \textit{Sententiae} 2.26.14.} while
adulteresses were deprived of half their dowries and one third of their property and were also banished to an island.49 Those who committed *stuprum* with a virgin or widow without force lost half of his goods.50 If force was used, another law, the Julian law on violence, imposed the death penalty.51

In the context of these laws and Augustan rhetoric, I propose that we read some of the themes of the *Oratorum et rhetorum* afresh in their treatment of paternal authority, marriage, and sexual offenses.

**PATRIA POTESTAS CHALLENGED**

Themes in the *Oratorum et rhetorum* on the discord between fathers and sons would have resonated not only on the level of the private household but also on the level of the state, with the *princeps* as *pater* of the Roman people. Parricide, of course, is the most serious offense a son could commit against his father, but there are only a handful of cases in Seneca’s work involving such a charge.52 These are cases where both parties focus on the facts and motive, one side to show that the crime was committed, and the other to show that it was not, since there is never a valid justification for parricide. Where we can get a better sense of how the authority of the father is challenged in these *controversiae* is in cases involving *abdicatio*, charges of insanity, and pleas for support from one’s child.

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49 *D*.4.4.37.1.


51 *D*.48.6.3.4, 48.6.5.2.

52 *Contr*. 3.2, 5.4, 7.1., 7.3, 7.5.
In *abdicatio* cases (often misleadingly translated as cases of “disinheritance”), a child is ordered to leave the house by his or her father, but may be allowed to return at any time.  

*Abdicatio* (which I will translate as “repudiation”) is in effect a straightforward exercise of *patria potestas*. Margaret Imber argues that the *abdicatio* was a way for declaimers to imagine the exercise of the *vitae necisque potestas* by allowing a father to sentence a child to a kind of social death. Quintilian does not treat the *abdicatio* as a real legal action and compares it to the action for *exheredatio* in the centumviral court, with the difference being that in the *exheredatio*, the father is deceased. Regardless of whether the *abdicatio* was recognized in any formal legal sense, no one can doubt that a Roman father could cast his child out of his house. Hence, the *abdicatio* serves as a convenient way to set up a contest between father and son over the proper exercise of paternal power. For example, *Controversia* 1.4, to be addressed in more details below, involves a father who caught his wife committing adultery and who ordered his son to kill the two lovers. Upon his son’s refusal to carry out the execution, the father repudiates the son. The case therefore pits the father against the son in a debate on what *pietas* demanded in such a situation.

Though in most cases of *abdicatio* the father exercises his power to the detriment of his son, I would like to focus on one case that involves the exercise of the paternal power for the alleged benefit of the son. The theme for *Controversia* 2.1 reads as follows: “A rich man repudiated his three sons. He asks to adopt the only son of a poor man. The poor man wants to give his son;

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53 Cases that mention *abdicatio*, even tangentially, are *Contr.* 1.1, 1.4, 1.6, 1.8, 2.1, 2.2, 2.4, 3.2, 3.3, 3.4, 4.3, 4.5, 5.2, 5.4, 6.1, 6.2, 7.1, 8.3, 8.5, and 10.2.

54 See *Contr.* 7.3, which describes a son three times *abdicatus* and three times *absolutus* (“absolved” or “taken back”). For a study of *abdicatio* in *controversiae*, see Elaine Fantham, “Disowning and Dysfunction in the Declamatory Family,” *Materiali e discussioni per l’analisi dei testi classici* 53 (2004): 65–82.


56 *Inst. orat.* 7.4.11.
when his son refuses to go, he repudiates him” (Dives tres filios abdicavit. Petit a paupere unicum filium in adoptionem. Pauper dare vult; nolentem ire abdicat). Under Roman law, in order for a child in potestate to be adopted by someone else, he must first be released from the old potestas, through a formulaic three-fold mancipation, and then made subject to the new.57 In this case, the poor man wants to give his son up for adoption by the rich man so that the son could escape poverty. His son apparently refused to undergo mancipation, and the father repudiated him as a result, hoping no doubt to change his mind. The poor man’s son makes two main objections to his father’s arrangement: he loves his father and does not want to abandon him;58 and he wants the rich man’s sons to eventually be reconciled with their father, which would be more difficult with him as the adoptee.59 He also defends his own good character and objects to being repudiated since he has not been accused of wasteful spending, shameful living, or drinking.60 But from the perspective of the father, the proof of his son’s bad character is his disobedience. The son’s challenge of the father’s power in this case arises from a disagreement with the father about what is good for the son. Whereas the father trusts in wealth to give his son a better life, the son argues that wealth does not guarantee a better life and that fortunes are unpredictable. He also raises the practical concern that since the rich man had already repudiated his own sons, what guarantee is there that he would not also repudiate him?

In the divisio, Seneca explains that one approach to the case was to claim that the son’s position is justifiable even if one assumes that it is against the law because he is actually acting as

57 For details, see Nicholas, Introduction to Roman Law, 77–78.
58 Contr. 2.1.17–18.
59 Contr. 2.1.6, 9, 20.
60 Contr. 2.1.6.
a son to his father by not wanting to cease to be his father’s son. What this relatively straightforward case brings up, therefore, is the question: what happens when a father wants to “un-father” himself when his son’s only offense is to want to remain his son? The father claims to have the power to define the extent of his patria potestas, including the prerogative to give it up. The son, however, challenges this claim. Because he disagrees with the father’s decision to give him up for adoption, he wants to define what the patria potestas encompasses: he wants to be his father’s son, but only if his judgment may be allowed to trump that of his father. This case reveals in stark terms the threat to patria potestas in abdicatio cases. In all abdicatio cases, there is a disagreement between father and son over the propriety of a son’s action. This case shows that it is not just the propriety of the action that is at stake, but whether the son could challenge a father’s judgment and insist on a continuation of the relationship between his father and himself on his own terms.

The actio dementiae, an accusation of insanity against a father, is another way to challenge the father’s capacity for judgment. The action is generally thought to be fictitious, but a real parallel existed, one which involved applying to the praetor for a guardian (curator) under certain conditions where the father was mentally incapacitated. We know that Seneca understood the differences between the action for a guardian and the actio dementiae, for he writes: “I am of course aware that a praetor never grants a guardian on the grounds that a father is unfair or lacks affection—only because he is physically mad” (Ego [semper] scio nulli a praetore curatorem dari quia inicus pater sit aut impius, sed quia furiosus). The “only because he is physically mad” 

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61 Contr. 2.1.19.

62 The cases are Contr. 2.3, 2.4, 2.6, 6.7, 7.6, and 10.3.

63 Ulpian, Regulae 12.2; D.27.10.1. See also Bonner, Roman Declamation, 93.

64 Contr. 2.3.13. Translation by Michael Winterbottom.
furiosus) is not entirely correct, since the jurist Paul (fl. early 3rd c.) contemplates the case where the squandering of family property could also lead to an appeal to the praetor. None of Seneca’s cases involve physical madness, and only one, Controversia 2.6, involves the squandering of property. Quintilian suggests that a son might demand a curator when the family interests were threatened, which raises the question of what might have counted as a threat to family interests. Regardless of how a praetor might have decided whether to grant an application for a guardian, in these controversiae, a charge of insanity is a way for a child to question the supposedly incontestable decisions of a father.

In Controversia 2.6, a son challenges a father for squandering the family’s property, a charge that, as we have said, a praetor might have entertained: “A certain man began to be a debauchee after his son was already one. The son accuses the father of insanity” (Quidam luxuriante filio luxuriari coepit. Filius accusat patrem dementiae). The declaimers present some creative, if farfetched, arguments. In one example, the father argues that he feigned extravagance in imitation of his son in order that his son might be shocked to reform his ways. The son argues that he fell into wasteful living because his father had been a bad role model for him. While it is easy to believe that a son would take after his father’s bad example, it is harder to believe that a father would imitate his son’s debauchery in order to reform him. The arguments for the son doubt the father’s reason, for example: “No one imitates vices because he hates them” (Nemo . . . vitia quia odit imitatur). This case shows not only that a son might be able to accuse his father of wasteful

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65 Paul, Sententiae 3.4A.7. This is the cura prodigi, as opposed to the cura furiosi.

66 Inst. orat. 7.4.10.

67 Contr. 2.6.6.

68 Contr. 2.6.7.

69 Contr. 2.6.4.
spending, but that he might act as a judge of his father’s character, questioning his motivations and justifications.

In *Controversia* 2.4, a son accuses his father of insanity because the father agreed to adopt a grandson that his other son had by a prostitute. The son, denying that his suit is motivated by his unwillingness to share his inheritance, focuses his argument on how the father ought to live up to his own moral standard, castigate vice and extravagance, and not accept a grandson from a prostitute. Accusing his father of compromising his moral convictions, the son instructs the father, reversing the traditional roles.

This case is also notable for an incident that Seneca recalls concerning Porcius Latro, who declaimed on this theme before Augustus, Maecenas, and Marcus Agrippa. While arguing on the side of the son, Latro made the comment that the adoption would graft one not noble from birth onto the nobility. This comment might have been interpreted as a criticism of Agrippa’s low birth or of Augustus’ desire to adopt Agrippa’s sons (and Augustus’ grandsons). Thereupon, Seneca remarks: “The blessed Augustus, I feel, deserves admiration if such licence was permitted in his reign; but I cannot feel any sympathy for those who think it worth losing their head rather than lose a jest” (*Mihi videtur admiratione dignus divus Augustus, sub quo tantum licuit, sed horum non possum misereri qui tanti putant caput potius quam dictum perdere*). This supposed praise for Augustus’ tolerance is framed by a veiled acknowledgment of the danger of unchecked speech. The fact that this theme against an allegedly insane father was declaimed before the *pater patriae* makes the danger all the more palpable.

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70 *Contr.* 2.4.5.
71 *Contr.* 2.4.9.
72 *Contr.* 2.4.13.
73 Ibid. Translation by Winterbottom.
In the two cases where a father sues for support from his children, we have a reversal of roles, where the son has power while the father is reduced to a beggar. The law is: “let children support their parents or be imprisoned” (*liberi parentes alant aut vinciantur*). In *Controversia* 1.7, the more straightforward case, the son refuses to support his father because the father had committed an outrage: he had refused to ransom his son and even encouraged the pirates to cut off his son’s hands because his son had previously disobeyed him. Latro claims in this case that the law was written with bad fathers in mind, since good fathers need not fear that their children would not support them. That goes too far, but the law no doubt contemplates scenarios where the son at least has a claim that the father has not been a good father. In this case, not only is the father in need, he is also put on the defensive since he must show that his previous action was justified.

*Controversia* 1.1, a more complex case on the law of support, involves a father who is more to be pitied than the tyrannical father in the previously mentioned case. The theme involves two brothers who are enemies; when one brother fell into need, the son of the other brother disobeyed his father to give support to his uncle. He was repudiated by his father and adopted by his uncle. When his uncle became rich, the son started to support his own father (now in need) against the wishes of his uncle, and was repudiated by his uncle. We know that under Roman law, once a person is adopted by another, his ties to his natural family end and it is as if he had been born to the adopter. But when his biological father needs support, what should he do?

The declaimers do not dwell on whether the law required the son to support his biological father; rather, they argue that he had a moral obligation to support his biological father without

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74 The cases are *Contr.* 1.1 and 1.7. Bonner notes that the Digest talks about mutual obligation between parents and children from the time of the Antonines. See *D.* 25.3.5, 34.1.3; Bonner, *Roman Declamation*, 95–96.

75 *Contr.* 1.7.11.
regard to what the law said. Though the uncle has the legal right to repudiate his adopted son, the
son tries to get him to have pity on his brother by reminding him of the pity he had shown him
when he supported him: “For what do you upbraid me, father [i.e., his adoptive father]? For pity? I
know someone in this city adopted on account of that crime” (Quid obiciis, pater?
<misericordiam?> Scio quendam in hac civitate propter istud crimen adoptatum). Pity drove him
then to support his uncle; pity drove him now to support his biological father. If all this is still
insufficient to convince his uncle, the son also appeals to the fear of divine retribution: “Now some
are praying for the same fortune for us. Believe me, the tongue of the people is divine” (Iam
quidam nobis eandem fortunam precantur. Crede mihi, sacra populi lingua est).

The other side, for the uncle, has a more difficult case to make. True, the uncle has every
right to repudiate his adopted son, but the facts make him out to be cruel and unyielding. One
attempt to make him look better is to emphasize the poetic justice of the situation: since the
father had ordered his son not to support his uncle, the uncle is now justified to order him not to
support his biological father: “It is evident to us that the gods exist: he who did not support is in
want; he who did not receive his brother into his house stays in the commons” (Liquet nobis deos
esse: qui non aluit eget, qui in domum suam fratrem non recepit in publico manet). For some
declaimers, this side requires that the uncle go all the way to show “inexorable and ardent hatred
from the gravest of injuries, in the manner of Thyestes” (gravissimarum iniuriarum inexorabilia

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76 Contr. 1.1.7.

77 Contr. 1.1.10.

78 Contr. 1.1.11.

79 Thyestes’ brother Atreus cooked Thyestes’ sons and served the flesh to his brother.
et ardentia . . . odia Thyesteo more). Though he has the law on his side, the declaimers would emphasize that he was mad with fury, almost not in his right mind.

In short, this case involves two fathers, both arguably cruel. The son is the one who had pity on both his uncle and his father. The declaimer for the uncle’s side must emphasize the father’s cruelty, which then justifies the uncle’s present cruelty; the declaimer for son’s side has to justify the son’s pity now toward his biological father by referring to his earlier compassion toward his uncle.

Through these cases on abdicatio, insanity, and support, we see that legal authority is not the same as moral authority. It is an unsettling possibility, but a real one, that the authority of the father might not be commensurate with his morality. The challenge to paternal authority in these controversiae is, of course, not necessarily a challenge to the authority of the princeps. But the prevalent picture of the opposed, mad, and cruel father must be read at least partly as a counter-rhetoric to imperial rhetoric that would impose the figure of the benevolent father as the symbol and model of political leadership.

CHALLENGING THE LAWS OF THE PATER PATRIAE

In themes involving marriage and adultery in the Oratorum et rhetorum, we read many scenarios that show how transgressions cannot so easily be dealt with by the legislative program of the pater patriae. Some of these themes might be read to expose the limitations of specific provisions in the moral legislation. For example, in Controversia 7.6, a father manumitted his slave and gave him his daughter in marriage; as a result, he was accused of insanity. The Papian law on marriage specifically allowed free-born men, excluding those in the senatorial class, to marry

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80 | Contr. 1.1.21.
freedwomen,\textsuperscript{81} but did not provide for whether a free-born woman not in the senatorial class could marry a freedman.\textsuperscript{82} The declaimers might have designed this case with this gap in the law in mind. In \textit{Controversia} 8.6, a rich man asked a poor man for his daughter in marriage and was rebuffed three times; when the poor man and his daughter were shipwrecked, the rich man asked again and was not refused; after marrying the daughter, the rich man was accused of rape. The Julian law on adultery had no clear answer as to whether such a scenario constituted coercion. In \textit{Controversia} 8.3, a father was suspected of committing incest with his daughter-in-law; his son killed himself without revealing the reason, and the father ordered another son to marry the widow; when the son refused, the father repudiated him. The alleged incest between a woman and her father-in-law would have been treated as adultery under the Julian law.\textsuperscript{83} However, the theme does not directly charge the father and daughter-in-law with incest, but rather, through a turn of events, frames the case as one of repudiation. Though the formal law punished such an act, the theme suggests that a formal charge is difficult to bring into the open.\textsuperscript{84}

In two cases involving adultery, a husband kills or orders someone to kill the adulterous wife in the act. The declamatory law is: “let him who apprehends an adulterer with the adulteress, provided that he kills both, be free from harm” (\textit{adulterum cum adultera qui deprehenderit, dum utrumque corpus interficiat, sine fraude sit}).\textsuperscript{85} Though phrased generally, it is the husband with

\begin{footnotes}
\item[81] D.23.2.23: From Celsus’ \textit{Digest}, Book 30, “The lex Papia provides that all freeborn men, apart from senators and their children, can marry freedwomen” (\textit{Lege papia cavetur omnibus ingenuis praeter senatores eorumque liberos libertinam uxorem habere licere}). Translation in Alan Watson.
\item[82] That a freeborn woman in the senatorial class cannot marry a freedman is repeated throughout Justinian’s \textit{Digest}, e.g., D.23.2.16, 23.2.42.1.
\item[83] Paul, \textit{Sententiae} 2.19.5.
\item[84] Cf. Gunderson’s discussion of the ineffability of incest in his discussion of \textit{Declamationes maiores} 18 and 19 in \textit{Declamation, Paternity, and Roman Identity}, 191–226.
\item[85] See \textit{Contr.} 1.4.pr.
\end{footnotes}
whom the declamatory exercises are concerned. The right of a husband to kill an adulterous couple seems to have been countenanced in archaic times. We recall Lysias’ “On the Murder of Eratosthenes” from the fifth century BC, involving a husband who took justice into his own hands, but even then, it is doubtful that such drastic action was commonly taken. Under the Julian law on adultery, the husband had no right to kill his wife even if he were to catch her in the act of adultery, though he could kill the adulterer in some cases. But the declamatory law, as Quintilian also testifies,\textsuperscript{86} extended the right to kill to the husband, probably because of the perceived injustice of executing a man who kills his adulterous wife in the heat of the moment. In the late second century AD, the emperors Marcus Aurelius and Commodus would issue a rescript to show leniency to husbands who kill their adulterous wives, suggesting that despite the Julian law, public sentiment favored the husbands in these cases.\textsuperscript{87}

One of the two cases, \textit{Controversia} 9.1, involves a husband who catches his wife committing adultery and kills her despite pleas from her father for mercy. Under the moral legislation, mentioned earlier, only the father of a woman caught in adultery had the right to kill both the adulterer and adulteress, but in this case, the husband usurps paternal authority and kills his wife. The other case, \textit{Controversia} 1.4, extends the right to kill even to the son of an adulterous mother. The scenario is as follows:

A war hero lost his hands in war. He apprehended an adulterer with his wife, with whom he had an adolescent son. He commanded the son to kill them; he did not kill them; the adulterer fled. He repudiates his son.

\textit{Vir fortis in bello manus perdidit. Deprendit adulterum cum uxore, ex qua filium adolescementem habebat. Imperavit filio ut occideret; non occidit; adulter effugit. Abdicat filium.}

\textsuperscript{86} \textit{Inst. orat.} 7.1.7.

\textsuperscript{87} \textit{D.} 48.5.39.8.
We are given the law: “let it be permitted for a son also to punish adultery on the part of his
mother” (liceat adulterium in matre et filio vindicare). The declamatory laws added to the list of
possible avengers, I suggest, with a purpose in mind. Though under the Julian law on adultery a
father could slay his daughter, his right was actually severely restricted by his having to kill the
adulterer as well. Moreover, the possibility that a father would actually exercise this privilege of
killing was remote, given that he had to discover the adultery in a house where he lived, the logic
being that it was an outrage for a daughter to bring a lover into her father’s house.88 The husband,
more likely than his father-in-law to discover the adultery and take summary vengeance, was
permitted to kill only the adulterer and only if the adulterer belonged to a certain class of
people—a fact which a husband would not know, unless he recognized the man, before deciding
to take vengeance. Hence, in reality, the privilege of killing was extremely restrictive. But was
Augustan legislation putting a stop to a large number of revenge killings in reality? The
declamatory laws, far more permissive in allowing revenge killings, tend to show that even under
a permissive regime, not many people would be capable of exacting vengeance. As the son in the
case above is made to say with regard to the law: “The husband may [kill], a father may, a son
may. Why does it name so many unless it thinks there are some who could not bring themselves
to do it?” (liceat et marito, liceat et patri, liceat et filio. Quare tam multos nominat, nisi quod putat
aliquos esse qui non possint?).89 The declamatory laws therefore suggest that the formal law had
little effect on the incidence of vengeance.

Another case on adultery, Controversia 4.7, asks: what if an adulterer commits adultery
with the wife of a tyrant, and being discovered, kills the tyrant? Of course, this is a farfetched and

88 See D.48.5.24.3. A father’s exercising this privilege is recounted only in D.48.5.33pr, but there, the
daughter was seriously wounded, not killed.

89 Contr. 1.4.8.
artificial scenario, but it does raise an interesting issue. If a father or husband had the right to kill
the adulterer caught in the act of adultery, what if the adulterer should defend himself and kill
the father or husband instead? We are made to recognize that the privilege to kill given by the
law could also endanger the very people to whom the privilege was given.

In adultery cases, the Julian law placed a married woman who might be suspected of
adultery, as well as her husband, in particularly difficult positions. Since under the law a woman
could be prosecuted for adultery as long as she was still married, a woman who was suspected of
adultery would not want to divorce her husband and remarry in case she opened herself up to
further suspicion and even prosecution. Her husband would have to think seriously about
divorcing her in case a third party should bring an accusation that he was condoning her adultery.
Controversia 2.7 contemplates the situation of a suspected adulteress: a foreign merchant tried to
seduce a married woman but was rebuffed; he died, leaving her all his wealth and declaring in his
will that he found her chaste; she took the bequest, and her husband now accuses her of adultery.
Under the moral legislation, the husband would have an incentive to bring the accusation, lest he
be prosecuted for having knowledge of his wife’s adultery. A law that would encourage
faithfulness between spouses actually could raise suspicion and tension within a marriage.

Beyond adultery, another offense that spouses can commit against each other in the
Oratorum et rhetorum is ingratitude. Controversia 2.5 gives us this case:

A wife, tortured by a tyrant to find out if she knew anything about her husband’s plot to
die him, persisted in saying she did not. Later her husband killed the tyrant. He divorced

90 D.48.5.12.10.

91 Bonner points out that an actio ingrati existed in Rome for a freedman who failed to show
gratitude to his former master. See Bonner, Roman Declamation, 87–88 and D.40.9.30. He further notes
that the action is described in the Codex Theodosianus 8.14.1 as allowing father to assert his potestas against
an ungrateful emancipated son. For a divorced wife, Bonner believes that no such action would have been
available.
her on the grounds of her barrenness when she bore no children within five years of marriage. She sues him for ingratitude.\textsuperscript{92}

\textit{Torta a tyranno uxor numquid de viri tyrannicidio sciret, perseveravit negare; postea maritus eius tyrannum occidit. Iliam sterilitatis nomine dimisit intra quinquennium non parientem. Ingrati actio est.}

The scenario as stated is ambiguous as to when the marriage began. If it began well before the torture, then the wife’s barrenness was not caused by the torture. Some declaimers assume this, and defend the wife’s barrenness by saying that she had refused to bear children during a tyranny. Other declaimers describe how the torture had made her incapable of bearing children. If the torture had indeed made her barren, was the divorce just? The moral legislation, because of its encouragement of childbearing, would give the husband every incentive to divorce his wife. But this scenario shows the potential injustice of this result, given the wife’s loyalty to her husband.

Other themes in the \textit{Oratorum et rhetorum} expose the ways in which the moral legislation might be rendered ineffective due to collusion. In \textit{Controversia} 2.3, we have the following scenario: “a ravisher prevailed over the father of the \textit{rapta}, but could not prevail over his own. He accuses him of insanity” (\textit{raptor raptae patrem exoravit, suum non exorat. Accusat dementiae}). The following law is supplied: “let a ravisher perish, unless he should within 30 days prevail upon both his own father and the father of the woman raped” (\textit{raptor, nisi et suum et raptae patrem intra dies triginta exoraverit, pereat}).\textsuperscript{93} The facts on their face are difficult to make sense of: the father of the \textit{rapta} has been convinced to give his daughter in marriage, but the father of the ravisher in effect condemns his son to death by withholding his approval. The Julian law on marriage actually had a provision that dealt with a \textit{pater familias} who did not allow his children to marry.\textsuperscript{94} The facts of

\begin{footnotes}
\item[92] Translation by Winterbottom.
\item[93] See \textit{Contr.} 2.3.pr.
\item[94] \textit{D.} 23.2.19.
\end{footnotes}
this case, of course, could hardly suggest that either father should be compelled to approve this marriage, but given that the father of the rapta already gave his blessing, why does the father of the ravisher withhold consent? The latter father’s most forceful argument is that he believes his son to have conspired with the woman and her father to make this marriage possible. This kind of marriage under the guise of seduction or rape poses a challenge to the moral legislation: could its incentives for people to marry in fact lead to marriages that contravene the will of a father?

This possibility is raised in a more troubling case in Controversia 6.7, where a father gives his wife (his son’s stepmother) to his son in marriage upon learning that his son’s illness was due to his obsession with his stepmother. In this already troubling scenario, the declaimers suggest a more insidious color: “It was all worked out between the step-son and the step-mother—the pretended illness and the shameful deception of the father” (Omnia inter privignum et novercam conposita: simulatum morbum et derisum animo turpissimo patrem).

Finally, there are themes in Seneca’s work that subvert the Augustan legislative program in subtler ways. For example, in Controversia 2.2, a husband and wife took an oath that they would not suffer themselves to live if the other should die; while traveling, the husband sent a note to his wife saying that he had died, in response to which the wife tried to commit suicide; the suicide attempt being unsuccessful, the woman’s father orders her to leave her husband, but she refuses. Such faithfulness that the wife shows her husband can be read as a parodic commentary on the Augustan imperative to discourage divorce. With respect to such a disastrous relationship, what good is it to keep this marriage intact? Several other themes can also be read as parodies of faithfulness taken to the extreme. In Controversia 6.4, a wife accompanies her husband into exile and decides to join him in committing suicide, only to die herself while her husband, failing his

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95 Contr. 2.3.17–18.

96 Contr. 6.7. Translation by Winterbottom.
own suicide attempt, very conveniently inherits her fortune. In Controversia 8.1, a wife tries to hang herself after losing her husband and two children, and failing to kill herself, volunteers to confess that she had committed sacrilege so that she may be put to death. In Controversia 5.1, a man tries to hang himself after losing his wife and children, and being saved, accuses the man who saved him for an offense under the unwritten law. These exaggerated cases of marital devotion appears to mock the Augustan legislation that would secure the sanctity of marriage.

The Julian laws on marriage and adultery were closely related, since one encouraged legitimate sexual relations while the other punished illegitimate relations. Ideally, marriage should discourage illegitimate relations. But in the world of controversiae, it is illegitimate relations that act as a potential catalyst to marriage, reversing the Augustan ideal.97 The most common declamatory law on rape is: “let a woman who has been raped choose the death of the ravisher or marriage to him without a dowry” (rapta raptoris aut mortem aut indotatas nuptias optet).98 This law conflates the crime of stuprum covered under the Julian law on adultery and the crime of forcible rape covered under the Julian law on violence. According to Justinian’s Institutes, the Julian law on adultery punished criminal sexual intercourse (without violence) with confiscation of half the offender’s wealth, or corporal punishment and banishment.99 The same passage in the Institutes also mentions capital punishment, probably for forcible rape (and, explicitly, for homosexual intercourse). In reality, it is unlikely that the same sexual crime could result in either marriage to the ravisher or death of the ravisher. A crime in which marriage is a possibility would seem not to be serious enough to call for capital punishment. A crime in which capital

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97 Rape appears in some form in Contr. 1.5, 2.3, 3.5, 4.3, 7.8, and 8.6.

98 See, e.g., Contr. 1.5.pr.

99 Justinian, Institutes 4.18.4.
punishment is a possibility would seem too serious for marriage to be a possibility as well. But in the world of controversiae, the same sexual crime can lead to two diametrically opposite results.

One of the more farfetched cases on rape in Seneca’s work reads: “One night a certain man raped two women; one chooses his death, the other marriage” (Una nocte quidam duas rapuit; altera mortem optat, altera nuptias). What this theme sets up is a contest between the lenient side of the law, which would encourage marriage (though a penalty is also exacted), and the punitive side of the law, which would harshly punish sexual immorality even to the point of death—the two facets of the moral legislation. An argument against the ravisher focuses on the fact that since one woman has the right to choose marriage and the other has the right to condemn to death, the latter’s right must trump the former. For instance, if the woman had already married the man, who afterward rapes another, she could not have saved him, or if the ravisher had committed another crime the same night such as sacrilege, the woman who wants to marry him also would not be able to prevent him from being punished. The declaimer Arellius Fuscus lists all the possible combinations of choices by the two women and concludes that only when both women choose death for the ravisher can both receive some satisfaction, since both cannot choose marriage. The punitive law is therefore to be preferred to the lenient law.

But on behalf of the ravisher, the declaimers plead for leniency. Since there is one vote for life and one vote for death, “let the more lenient [sentence] prevail” (mitior vincat). Mercy is also supported by history: we are told that the Sabine women accepted marriage after their rape, while

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100 Contr. 1.5.pr.
101 Contr. 1.5.4.
102 Contr. 1.5.5.
103 Contr. 1.5.7.
104 Contr. 1.5.3.
Verginia and Lucretia did not, “but the Sabine women are more numerous” (plures tamen Sabinae sunt). The lenient law is therefore to be preferred to the punitive. Through this farfetched case, the two facets of the moral legislation—its encouragement of marriage and its punishment of immorality—are intentionally brought into conflict.

CONCLUSION

The controversiae recorded by Seneca might be considered trivial rhetorical exercises based on the fact that they were made up of implausible scenarios and did not invoke real laws. This chapter, however, has argued that they served as a skeptical response to Augustus’ legislative program by generating conflicts between fathers and sons as a way to challenge the authority of the pater patriae, and by exposing the limitations of the formal law, specifically in marriage cases and cases of sexual immorality. In these exercises we see a picture of the Roman world under Augustus that is very different from the picture that the princeps would have us see.

We cannot, of course, ignore the possibility that Augustan rhetoric and the moral legislation were themselves reactions to the declamatory themes, an attempt by the princeps to elevate his moral authority and confirm the power of the formal law to revive morals in the face of declamatory challenges. Regardless of the order of causation, Augustan and declamatory rhetoric co-existed. If the former stood for the power of the princeps and his laws to revive morals, the latter stood for a challenge of their adequacy.

\[\text{105 Ibid.}\]
Chapter Three

Pathos in the *Declamationes maiores* of Pseudo-Quintilian

... how many are the things which the laws cannot obtain for us!

*et quanta... non possunt pro nobis impetrare leges!*

The *Declamationes maiores* (*DM*) ascribed to Quintilian is the only declamatory collection from Roman antiquity that contains full versions of *controversiae*. Our first witness is a tenth-century Italian manuscript, while several dozen Renaissance and post-Renaissance manuscripts are derived from a fifth-century copy corrected by two otherwise unknown men. A reliable *terminus ante quem* is the late fourth century, based on the testimony of Jerome, who mentions the theme of *DM* 13 in his letter to Praesidius on the paschal candle and quotes a short phrase from the same *controversia* in his preface to a philological study on Genesis. In both cases, Jerome mentions Quintilian as the author. One reason to question Quintilian’s authorship is the fact that the *Institutio oratoria*, written late in Quintilian’s life, does not mention his having composed a collection of *controversiae*. But that does not rule out the possibility that the collection did nevertheless exist or that Quintilian prepared such a collection after he published the *Institutio oratoria*. Even if Quintilian did not prepare the collection himself, someone else (perhaps a student) could have done so after his death. Another reason to doubt the attribution is

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1 Pseudo-Quintilian, *Declamationes maiores* 5.9.14–15 (hereafter *DM*).

2 Domitius Dracontius and Hierius, whose names are preserved in two subscriptions. See Reynolds, *Texts and Transmission*, 335. For a more detailed account of the manuscript tradition, see *Declamationes XIX maiores Quintiliano falso ascriptae*, ed. Lennart Håkanson (Stuttgart: Teubner, 1982), iv–xix.

that several themes in the collection are precisely the kinds that Quintilian criticized for being too unrealistic, such as those involving magicians, plagues, oracles, and cruel stepmothers. But Quintilian might not have composed every piece in the collection, especially since stylistic analyses suggest that the pieces were unlikely to have been composed by the same hand. If that is the case, the more farfetched themes could have come from other sources which over time mixed in with the genuine works of Quintilian.

In recent decades, the *Declamationes maiores* have received a lot of scholarly attention. They have been read as windows into Roman social history, especially with regard to the relationship between Roman fathers and their children. The University of Cassino’s series of translations and commentaries on the *Declamationes maiores* (nearly complete to cover all 19 *controversiae*) has elucidated much of what was obscure about these texts from a philological point of view. The laws in the collection (which, like those in the elder Seneca, are most likely fictitious) have also been looked at in detail.

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4 *Inst. orat.* 2.10.5.


6 For comparison, we might look to the *Heroides* of Ovid, which also has been noted to contain a mix of authentic and inauthentic pieces attributed to Ovid.


This chapter approaches the *Declamationes maiores* by asking the question: when the jurists’ law began to impact the Roman world to an unprecedented degree, especially with the establishment of schools of law and the summoning of jurists into the imperial bureaucracy, how did the schools of rhetoric respond so as to emphasize the continued importance of rhetorical training? The rhetoricians were not, for the most part, interested in the questions that were debated among the jurists. We would look in vain in the *Declamationes maiores* for sophisticated arguments that make use of the jurists’ law. But the fact that the *Declamationes maiores* were contemporaneous with a formative period in Roman law gives arise to the question: how might they have reflected the attitude of the rhetoricians toward the jurists’ law? This chapter shows how several of the *Declamationes maiores* highlight the limitations of the formal law through an emphasis on the importance of pathos, in the sense of both emotions and suffering, and how it governs human relationships.

**A Father’s Dilemma**

One of the most straightforward themes in the *Declamationes maiores* is *DM 5*, which serves as a good starting point to see how a *controversia* can expose the limitations of the formal law. In this case, two sons were captured by pirates, but the father had enough money to ransom only one. He ransomed the son who had become sick, even though that son had been a spendthrift. This son died shortly after he returned home. The other son later escaped and now refuses to support his father. The father sues based on the declamatory law that children must support their parents or be imprisoned.
The law of support is not uncommon in the declamatory tradition. It appears three times in the elder Seneca\(^9\) and is also mentioned several times in the *Institutio oratoria*.\(^{10}\) The jurist Ulpian (fl. early 3rd c.) describes the mutual obligation of support between parents and children, noting that if anyone refuses support, a judge must determine the fair amount to be provided and has the authority to enforce the judgment by taking the person’s property and selling it.\(^{11}\) No other evidence helps us decide whether this legal obligation existed prior to the time of Ulpian. The requirement of imprisonment is in no extant Roman legal sources. The declamatory version of the law, even if fictitious, is not out of the realm of plausibility. The law requires that children support their parents, a plausible enough legal obligation based on extant sources, and imposes a penalty to enforce its compliance. The fact that imprisonment was not, as far as we know, a sanctioned punishment is of no concern for our purposes, since no *controversiae* on this theme make an argument against the form of the punishment.

In short, the scenario as laid out by the theme is this: a child has a grievance against his father; depending on whether the grievance is legitimate, should he be exempt from supporting his father? The theme creates an ethical dilemma: if a father could choose to save only one of his two sons, by what criteria should he make that choice? In this theme, the father chose the son who was sick, which is clearly defensible. This was the son more likely to die soon, and the fact that he was a spendthrift meant little to the father when life and death were at stake. On the other hand, we can also understand the anger of the son who was left to die, even if our sympathies lie with the father. The declamatory exercise takes this broken relationship between father and son, due to a circumstance that neither could control, and places it in the context of a

\(^9\) *Contr.* 1.1, 1.7, and 7.4.
\(^{10}\) *Inst. orat.* 5.10.97, 7.1.55, and 7.6.5.
\(^{11}\) *D*.25.3.5.10.
legal dispute: the father who sues for support and the son who denies it. This, in other words, is a legal controversy that masks a deeper fissure in a relationship.

The exercise asks the declaimer to speak in the persona of the father making a personal appeal to his son. The father’s speech is not primarily focused on his legal claim to support, though that is mentioned, but on how to convince the son to come to terms with what has happened and to begin repairing their relationship.

The father starts his case with arguments meant to put his son to shame. He claims that the son’s decision not to support him proves that the father had indeed chosen the right son to ransom. He then explains that he did not weigh the respective merits of his sons before choosing whom to ransom, but rather chose the one closer to death, as a father naturally would. Moreover, he claims that the fact that the son could escape on his own strength again proves that he had made the right choice, thereby highlighting the strength that the surviving son had in comparison to the weakness of his brother who was too weak to live even after being ransomed.

After these arguments, the father tries to assuage the son’s resentment toward him by claiming that he actually loved him more whom he left behind. Though it was natural for him to choose the sick son because he was closer to death, the father claims that he had actually contemplated letting this sick son die so that he could rescue the son whom he favored.

Addressing the judges, the father says:

Who would not suppose that after I heard the terms I at once stripped away my ailing son’s chains? Although my admission may displease you, I had to think it over. Amid these inexpressible surges of grief how long, yes, how long a debate did my pathetic emotions of love hold? And here’s something I will never adequately explain away to my son’s ghost,
and never to my own guilty conscience: that son of mine who was sinking fast was not immediately in my judgment my best loved son.

_quis non putet audita condicione vincula me statim detraxisse languenti? oderitis licet confessionem meam, deliberavi. tenuit inter illos inexplicabiles doloris aestus, quam longum tenuit pietas misera consilium, et, quod numquam satis manibus filii, numquam satis excusabo conscientiae meae, non statim mihi ille deficiens unicus fuit._

Because he did not immediately choose the sick son as a father should, he was for a while ready to sentence one of his sons to inevitable death. This confession, far from showing the father in a bad light, effectively counters the surviving son’s resentment, since the father was actually going to choose him, and also makes the actual choice seem inevitable, for how could a father actually sentence a son to death?

Neil Bernstein reads this _controversia_ from the perspective of two competing stances: one, that filial obligation depends on nothing but the fact that the father gave life to the son; and two, that filial obligation depends on whether the father was a _good_ father. I see in these two stances the competition between law and equity. The father sometimes argues that he deserves support simply because he is the father, which is an argument based on the forml law: Ulpian writes about proving parentage as a prerequisite to support. Under this view, the law works where natural order is broken, that is, when the mutual affection of parents and children is gone, as the father proclaims: “let a son support a good father, and let the law support a bad one” (_bonum patrem filius alat, lex malum_); “the natural order of things” (_rerum naturae_) is distinguished from the law. When affection is gone, the law is the only motivation: “If you are willing, you owe me your

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16 _DM_ 5.4.26–30. Line numbers are from Håkanson’s critical edition. All translations of the _DM_ are by Lewis A. Sussman.


18 _D.25.3.5.6_, 8.

19 _DM_ 5.8.2–3.
love; if not, you are under a legal obligation and you must comply” (si vis, affectum debe, sin minus, necessitate servitum, patientiam). 20 On the other hand, the father is rather disdainful of the law: “What curse shall I call down on the man who first forced us to command respectful conduct from our children? The law enjoins children to support their parents. What a cruel joke! Never was starvation a more bitter pill” (quid imprecer homini, qui primus fecit, ut pietate iubemus! Liberi parentes alant. crudele factum, o numquam tristior fames!). 21 The son has refused support because he thinks that the father had been a bad father because he chose to save the spendthrift son. The father denies that that makes him a bad father: any father would choose the sick son. Though he relies on the law as the last resort, what he really wants is to prove that he is a good father for the sake of reconciliation with his son—the thing which he truly seeks. It is in this context that he declares that the law denies us many things. The law may procure certain concessions from unwilling givers, but in those cases, has the law succeeded? The son may be forced to support his father due to a legal requirement, but that is a superficial result. What the father really wants is for his son to do so willingly. At the end, the father confesses: “I am not seeking support, but a son” (non alimenta quaero, sed filium). 22

What DM 5 shows us through a simple scenario is the ability of a controversia to direct our attention to what lies beyond the formal law even though the case was brought on the basis of a formal legal provision. It shows that the resolution to legal controversies is sometimes not about ascertaining the precise requirements of the law, but about mending broken relationships that gave rise to the case in the first place.

20 DM 5.8.20–21.

21 DM 5.7.11–14.

22 DM 5.22.11.
DM 8 bears some resemblance to DM 5 insofar as it deals with a father who had to choose one of his sons over another, but primarily focuses on the relationship between the father and the mother. Two twins were dying of a mysterious illness. After all other doctors had given up, one doctor promised that if he was allowed to dissect one of the twins, he could cure the other. The father granted him permission without consulting the mother. The doctor killed one of the twins by examining his organs and went on to save the other. The mother accuses her husband of maltreatment, and the case is pleaded by the mother’s advocate.

The law, *mala tractatio*, is described by Quintilian as a declamatory law that approximated the *actio rei uxoriae*.²³ This action for the restoration of a divorced wife’s property—that is, her dowry, which belonged to her husband until the divorce—was originally available to a woman divorced without fault. Restoration of the dowry can be partial, depending on considerations of equity.²⁴ In declamations, however, the *mala tractatio* is generally used by wives complaining of ill treatment of the children by the husband.²⁵

The *mala tractatio* is most likely a hypothetical action designed to be broad enough to encompass many kinds of conflicts between a husband and wife. But the very scope of the *mala tractatio* gives the mother’s advocate in this case a preliminary hurdle. He has to explain why he believes the law was enacted in contemplation of this mother’s suit:

The laws and ordinances ought to be ashamed of themselves for limiting the grief of this poor, afflicted sex within these narrow restrictions. In a case such as this, when a husband has killed her son, complaints regarding conjugal quarrels and bedroom matters under the

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²³ *Inst. orat.* 7.4.11.


²⁵ This is the case in all three themes involving the *mala tractatio* in the *Declamationes maiores*.
jurisdiction of this law have impaired its effectiveness. But I believe that this law was enacted for mothers in real distress.

*Pudeat vos, o iura legesque, quod miserrimi sexus dolorem his clusistis angustiis. ita maritus, quod occisus est filius, malae tractationis uxor accusat? perdiderunt legis huius auctoritatem, quae ad illam uxorias querelas, matrimoniorum solent deferre delicias; ego illam datam miseris tantum matribus puto.*

That this legal concern is articulated suggests that the rhetoricians knew that such arguments were made in the forum with respect to real actions. In this particular case, the advocate's argument focuses on the intention of the law and shows an awareness of how a single legal rule might be evoked in many kinds of conflicts. The fact that one rule is usually used for certain kinds of complaints could potentially prevent it from being used for other complaints for which it was meant. Implicit in this argument is an instrumental view of the formal law: it is a means by which some conflicts can be framed and resolved, but it may also ignore, through the legal system's biases, other conflicts that it could cover.

At its core, *DM 8* is a conflict between a father and mother who disagree about what to do with their children, in particular, when the father allegedly usurps the prerogative of the mother. The advocate argues that the mother holds certain rights over her children that may defeat even the claims of a *pater familias*. With Roman society recognizing (at least in theory) that a *pater familias* has the power of life and death over his children, this paternal power would appear to be an absolute defense for the father, who here allowed one child to die with the intention of the saving the other. The father might not have been wise to trust the physician who promised the cure, and the physician might have had ulterior motives—both points are raised by the advocate—but there is no hint that the father wanted anything but to save the life of one child.

Against the position of the father, the advocate describes the mother's rights, which are evident from her relationship with the child:

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26 *DM 8.6.1–6.*
If we can properly calculate to which of their two parents children owe more, quite rightly will the tender feelings which began ten months before the husband’s awareness command total sovereignty, and, although your first joy-filled glimpse of them transforms you into fathers, mothers are mother before through their inner awareness of the life within them.

\[ si \ldots fas \ est \ aestimare, utri plus parenti debeatur ex liberis, non improbe \ totam potestatem \ sibi vindicabit affectus, qui decem mensibus ante vestram incipit diligere notitiam, et, cum vos patres gaudium primum faciat oculorum, ante sunt conscientia matres. \]

In short, it is the priority of the mother’s relationship with her child that grants her \textit{totam potestatem} over even the father’s \textit{potestas}. Bernstein notes that in Roman law, the father had many rights over his unborn child, and therefore “the advocate’s attempt to build a case for the mother from her earlier awareness of her pregnancy belongs to the world of the schoolroom rather than to the courtroom.”\textsuperscript{28} This may very well be true, but we need not necessarily conclude that just because the argument was not legally persuasive that it did not hint at a real pushback against the power of the father. The \textit{patria potestas} was the basis for a father’s legal power over his children, but its scope is limited to the areas where the formal law reaches. The advocate proceeds to make this explicit:

\[ quam \ multa \ ideo \ tantum \ de \ filiis, \ quia \ licet! \ldots \ vos \ mores, \ vos \ vitae \ genus, \ vos \ matrimonia \ ceterosque \ actus \ vestra \ persuasione \ firmetis; \ numquid \ arrogans \ consortium, \ numquid \ impotens \ societas \ est \ liberos \ communes \ esse \ languentes? \]

During a child’s illness, a mother’s prerogative to care for her child trumps the father’s rights because, in such a situation, a father’s rights are ineffectual. We are told that the father in this

\textsuperscript{27} DM 8.7.1–6.

\textsuperscript{28} Bernstein, \textit{Ethics, Identity, and Community}, 71.

\textsuperscript{29} DM 8.7.11, 22–25.
case could not bring himself to choose which son to give up for dissection and which son to save. Hence, he abdicated his power to the physician, who made the choice. The advocate argues that, in this situation, the mother was a better diagnostician than any physician because of both her biological and emotional connection to her children: “[in their sons] more of a mother’s blood runs and more of a mother’s soul passes” (plus ex harum sanguine, ex harum transit anima). The advocate argues that a mother’s care and affections can trump the status of the father.

DM 6 raises in a different way the same rival claims of a father and mother on their children. In this theme, the father was captured by pirates, and his wife lost her eyesight from constant weeping. The son, disobeying his mother’s wishes, went to ransom his father by offering himself as a substitute. He died in captivity and his body has washed up on shore. The father now wishes to bury his son, but the mother wishes to leave him unburied based on the law that forbids children from deserting their parents. The father argues his case.

While the mother’s attorney in DM 8 focuses on the mother’s rights based on her affections for her children, the father here claims that the mother has relinquished her rights because she is not acting like an affectionate mother. Bernstein puts it thus: “The father redefines his wife as the dreaded declamatory stepmother and reframes her (factually undisputed) biological connection to her son as physically insufficient.” But the declamation goes beyond casting the mother as a stepmother. The mother, by claiming a son’s absolute obedience and punishing his disobedience in such an extreme way, is acting like a tyrannical father. The real reason for the suit, it soon appears, is the mother’s indignation that her son appeared to have loved his father more than her.

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31 See Contr. 7.4 for a similar theme.

32 Bernstein, Ethics, Identity, and Community, 89.
The father begins his case by lamenting his fate. Despite all of his suffering at the hands of pirates, he regrets more being freed, since it cost him his son’s life. But now that he would have him buried, his wife “has misguidedly taken legal possession of the corpse” (*init errantem corpori manum*).\(^3\) *Manus iniectio* is a reference to the method of physical restraint permitted by the Twelve Tables, first as a means of bringing a man to court, and later to collect debt from a judgment debtor.\(^4\) According to the Twelve Tables, a plaintiff would lay hold of the defendant while pronouncing formal words, and the defendant was not permitted to make any resistance. The father apparently uses this language to describe the mother’s laying hold of her son’s corpse to show that the mother has resorted to the law to accuse her son, an act which, as we shall see, he believes is beneath her.

The theme sets up a scenario where the son could not have obeyed both his father and mother. But the father cleverly argues how his son actually succeeded in rendering his obligation to both parents. That is, the son sacrificed himself so that his father might be saved and also so that his mother might have her husband back. But rejecting this view of the situation and insisting upon her legal right, the mother obstinately refuses the burial.

Burial is a time-sensitive matter, and this fact is not lost on the litigants. The father knows that the process by which the rights of the youth are defended is inadequate because the time it takes renders the burial moot:

> While we both who lost our son quarrel over a corpse belonging to the two of us, while the case of the deceased is being tried, while in accordance with the law his burial is forbidden, while the legally prescribed time is granted to the speakers, while all this occurs, his body rots.

\(^3\) *DM* 6.1.23–24.

\(^4\) *XII Tables* 1.1, 3.2. See Frederick Goodwin, *The XII Tables* (London: Stevens and Sons, 1886), 47, 61. See also Gaius, *Institutes* 4.21.
dum circa cadaver nostrum orbi rixamur, dum agitur causa defuncti, dum sepulcro lege praescribitur, dum dantur legitima dicentibus tempora, putrescit interim corpus.\textsuperscript{35}

Even if the father wins the case, if it takes too long, his son’s body will be desecrated. Hence, there is an urgency to convince not only the judges to rule in his favor but also the mother to concede her case as soon as possible.

To defend his son’s decision to leave his mother, the father brings up his absolute power over his son, claiming that the “name [of father] is stronger than any law. We fathers punish sons who are tribunes and flog candidates for public office. We have the power of life or death over our children” (nomen omni lege maius est; tribunos deducimus, candidatos ferimus; ius nobis vitae necisque concessum est).\textsuperscript{36} He claims that he could have commanded his son to come rescue him, in which case the son could not have disobeyed. But he does not push this argument. He does not emphasize his legal right because it is the mother’s legalism that he wants to attack. The mother, says the father, quoted a law to prevent her son from leaving. He suggests that a mother might have prevented her son from leaving through all sorts of means, not the least of which is the emotional bond between mother and son, but to do so by appealing to the law is almost inhumane. In fact, the mother’s use of the law is described in a scene that highlights the inhumaneness of the law: when the body of her son washed up on shore, the mother recited the law and chastised the corpse. The father, in contrast, pleads with the mother by appealing, not to the law, but to their marriage and mutual affection, to the memory of their son, and to his devotion to her. His final appeal is to the mother’s mercy: “Even if there are any laws which stand in the way, if yet a narrow passage is at least granted through which human compassion may enter, true mercy is satisfied with such an opportunity” (etiam si qua sunt iura, quae obstent, si

\textsuperscript{35} DM 6.3.7–9.

Failing to win the mother over by such appeals, the father at last resorts to defeating her by challenging her understanding of the law. The law states: “let him who deserts his parents in distress be cast out unburied” (\textit{qui in calamitate parentes deseruerit, insepultus abiciatur}). The mother argues that this is exactly what happened: her son deserted her while she was blind and alone. The father, however, argues that because his son had a just and compelling reason to leave, his action cannot count as desertion. He thinks that whoever is unable to appreciate looking at the intention of a law—for no legislator, he believes, would have understood desertion to include what his son did—does not understand law. He argues that we have to look at legislative intent because the words are insufficient. In this situation, the father argues, the son could do no right under the literal terms of the law. Either he deserts his mother or deserts his father, both in distress. It cannot be that the law would demand in this case that, no matter what the son does, he should be cast out unburied. The mother, however, counters with the fact that the law says a man shall not \textit{desert} his parents in distress, but it does not say he has to go assist a parent in distress. Hence, the son was not in an impossible situation: he was only obligated to the mother. The father answers that there is no distinction between deserting and not assisting, since not assisting is simply a passive form of deserting. The father interprets the law to mean: “a child of our flesh and blood should help a parent in adverse circumstances with his effort and presence and should thereby repay a parent for the gift of life wherever he may be” (\textit{natus ex nobismet ipsis in rebus adversis praesidium parenti labore atque praestantia solveret lucis usuram ubicumque}).

\footnote{DM 6.10.21.}

\footnote{DM 6.pr.1–2.}

\footnote{DM 6.14.9–11.}
With this being his understanding of the law, the father comes up with a way to resolve the competing claims upon the son. First, he posits that the legal claim of the father, who has the power of life and death over his son, should be stronger than the mother’s. If this argument is not persuasive, then at least his letters came to his son earlier than the mother’s demand for him to stay. The father’s appeal therefore had chronological priority.

The father advances two more arguments. If they were to compare miseries, the father claims that his was greater. Moreover, the help that the son could give his father was more than he could give his mother. In these two arguments, reasonable people could disagree. How does one measure the misery of the father in captivity against the misery of the mother’s loneliness? Or prove that the son’s help to release his father is greater than the comfort he would have given to remain with his mother?

At the end, the father concludes with praise for his son. Could the law have meant to deprive such an exemplary man of a burial? But on the other hand, is such a man truly exemplary who would abandon his own blind mother to go on a journey of uncertain success? The law cannot settle these questions.

THE AFFECTIONS OF FRIENDSHIP

DM 9 is the only abdicatio case in the collection, and like many such cases, the scenario is rather involved though the law is simple. There are two friends whose fathers, one rich and one poor, are enemies. The rich man’s son was captured by pirates and later sold to the trainer of a gladiatorial troop. The poor man’s son traveled to find his friend, gave himself up to take his friend’s place in the gladiatorial contest, and was killed. The rich man’s son, having promised to
support his friend’s poor father, begins to do so, but his own father wants to repudiate him on that account.

As in all abdicatio cases, the question is whether the father’s repudiation is just. Our sympathies naturally lie with the rich man’s son, who made a promise to a friend who ransomed his life by giving up his own. The rich man’s son ought to keep his promise, but does that mean at the expense of his father? If we see the friends’ agreement as a contract, there is no reason an unwilling third party should contribute to its fulfillment. The controversia contemplates only two alternatives that would not cost the father anything: the youth could farm or work as a day laborer. The rich man’s son dismisses the former because he has no experience in farm work and claims that the latter does not provide sufficient wages to support two people.40 The youth therefore must have his father’s help in order to keep his promise to his friend. His father, however, would give no help and would even repudiate his son because of his enmity with the poor man.

How does the son, then, convince his father to grant help? He cannot dispute the father’s authority—in fact, he insists on several occasions upon his unquestioning obedience to his father’s wishes.41 He does not try to argue that his father is being unjust. His arguments are filled with ways to convince his father that, regardless of the father’s legal right, he should not refuse to show mercy. Throughout his speech, the son intimated what his father ought to do and think. For example, the father had apparently been upset that his son did not approach him first to ask for help for the poor man, but helped him of his own accord. If that is the reason for the father’s refusal to support the poor man, then the youth gladly admits his wrongdoing. He should have


41 See, e.g., DM 9.4.2–4, 7–8.
asked first—he does not dispute it. But if he did, the father surely would not have withheld support. So why begrudge support now because of this small oversight?

The youth also wants to show how, despite what his father says, the rivalry between the two fathers was actually ending. One indication is the fact that neither father forbade his son to become close friends with the other. Another indication is that when his friend left to ransom him, the poor man did not hold him back. He was willing to have his son risk his life to save his enemy’s son. Neither argument is very convincing since the whole point of the father’s refusal to grant support is that he should not be compelled to support his enemy. He does not dispute his son’s right to choose to be friends with or support anyone. Presumably the poor man also had no reason to stop his son from rescuing his friend because their friendship has nothing to do with the rich and poor man’s enmity. Here, the rich man is not preventing his son from supporting the poor man from his own means; the son simply has no means to support the poor man himself. Perhaps he should not have made the promise in the first place. But since he did, what is he to do now?

The youth must appeal to his father’s compassion. He describes the gladiatorial arena as a place of despair where he was prepared to die. He portrays his friend’s sacrifice as more admirable than anything in history or fiction:

Hold your tongues, past ages, in which even from the beginning of the human race very few pairs of friends whose faithfulness has been transmitted to our times have been more admired. Whatever historians have recorded, poets have invented, and storytellers have enlarged upon, let them all remain silent in comparison to this act.

*tacete, priora saecula, in quibus tamen a primordio generis humani paucissima amicitiae paria admirabiliora fecerat longa temporibus nostris fides intercepta. quicquid historiae tradiderunt, carmina finxerunt, fabulae adiererunt sub hac comparatione taceant.*

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42 *DM* 9.8.3–8.
He describes in detail the conversation they had in which his friend insisted on taking his place. The language used to depict that scene is very similar to the language used in DM 6, where the son offers to take the place of his father in captivity.

Compare the language in the two declamations by which one party insists that he himself take the other party’s place:

DM 6.6.12: “I will be either your substitute here or your companion” (aut vicarius ero, aut comes).

DM 9.8.23–24: “He kept saying that this was the single point of importance, whether I preferred to have him as a substitute or a companion in death” (unum adfirmabat interesse, utrum vicarium mallem habere mortis an comitem).

After one party finally convinces the other, we read:

DM 6.6.18–19: “He was more cheerful in his chains than his father now freed of them” (hilarior alligatus est filius, quam solutus est pater).

DM 9.8.27: “Nobody ever begged in such a way to be released from this place [as he begged to be chained]!” (nemo umquam sic rogavit missionem).

The final words of the son and friend to the now released captive are stylistically alike in their list of imperatives:

DM 6.6.21–23: “I entrust my mother to your care in keeping with what she has so justly deserved of you. Preserve, protect, and cherish her; don’t ever abandon her. This is the way we shall square our accounts—at home you will be my substitute” (Matrem . . . tibi per haec merita commendō: tu illam tuere, defende, ama, ne relinque. sic paria faciemus: illic tu eris vicarius meus).

DM 9.9.5–7: “Please don’t let my father become a beggar. Please support him, help him, and offer him your love. If I earned it, please act as a substitute son for my father” (non sinas mendicare parentem meum. sustineas, adiuves, praestes affectum. si mereor, tu sis illi vicarius meus).

I note these similarities to show that across different themes, the declaimers pursued the same corpus of rhetorical tropes, which leads to the conflation of different relationships. The same language used between son and father is used here between friends. The friend’s sacrifice for the rich man’s son is as noble as a son’s sacrifice for his father. The identification of a sacrificial
friendship with the father-son relationship is especially effective since it is a troubled father-son relationship here that is at issue. If the friend would sacrifice himself as a son for a father, why should the father here not show mercy to his son?

The youth proceeds to ask whether he should defend his decision to support the poor man based on the grounds that it is honorable (tamquam honestum) or on the grounds that it is necessary (tamquam necessarium). If it is purely out of necessity (as though fulfilling a contract), his obligation to the poor man may have to be excused because he simply does not have the means. But if it is because it is honorable, it should be praised and supported. He appeals to honor through the example of Terence, who when freed from captivity by Scipio Africanus, chose to do the honorable, beyond what was necessary, by wearing a freedman’s cap. Ultimately, what he does is honorable because he is repaying his friend as a son should repay his father, since his friend by his sacrifice became a second father to him:

I am not ignorant as I was at the time of my birth of what I owe to my father—life, liberty, and everything else—but now I have consciously and knowingly received these gifts, not just been endowed with them, and what is more, I have also been freed from horrible danger? Should I not confess that I was granted life by my faithful friend and that I am bound by yet firmer ties of obligation?

Qui lucem, libertatem, denique quicquid patri debo, non ignarus, ut primo natalis horae tempore, sed videns sentiensque acceperim, nec solum donatus his bonis sed summis periculis liberatus sum? nonne me ex amici fide natum et tenacioribus beneficiorum vinculis fatear esse constrictum?

Another of the youth’s arguments rests on what we might call natural affinity between men. Perhaps he should not have supported the poor man. Perhaps it gave his father a just cause

45 Bernstein notes that the use of paternal idiom to a rescuer is common. See Bernstein, Ethics, Identity, and Community, 97.
46 DM 9.20.26–21.3.
to repudiate him. Nevertheless, “can it be said I voluntarily made up my mind or that my affections were governed by my own choice? Or was I born with my crime stored up in me, was I at the whim of Nature which shapes everybody’s character?” (num animum mihi ipse finxi, aut mea potestate regitur affectus? an arbitrio formantis mores omnium naturae compositus cum crimine meo natus sum?). No, he says, his nature is that he cannot help feeling compassion for the less fortunate. For he knows that fortune has a way to turn rich men poor, as he himself has experienced. Whether his compassion is innate or comes from experience (he says both), he could not help it. It is a remarkable necessity defense.

There are two other reasons that the father should show compassion. First, it will bring him praise:

As Minucius’ rescue from the enemy brought immortal glory to Fabius Maximus, as the citizens admired Tiberius Gracchus after he prevented Scipio from being dragged off to prison, so also a similar magnanimity will give you your place in history.

Second, his friend deserves to have his last wish honored since his deed is “hardly believable in this age of ours” (saeculo nostro vix credibile).

DM 16, incomplete in the manuscript, is another theme that poses a conflict between the obligations of friendship and of kinship. Here, two friends were captured by a tyrant, and one was given permission to go back to see his mother, who (as in many themes) had lost her eyesight weeping. The agreement, however, was that he would return at a prearranged time or his friend would be executed. The mother detains the son based on the law against abandoning one’s

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47 DM 9.16.5–8.
48 DM 9.17.18–24.
49 DM 9.20.10.
parents in distress. (Recall that in DM 6, the son left his mother despite this law, and the mother wants to leave him unburied as punishment.) The son presents the case of why his loyalty to his friend must here trump his duty to his mother. The son must make the case of friendship over kinship.

The son does so by arguing that blood relationship is really a subset of friendship, and that friendship beyond blood ties is in fact more valuable and admirable. Familial status is subordinated to emotional connection. We have seen this argument before in DM 5, where the father claims to deserve support not only because he is the father but also because he is a good father who loves his sons, and in DM 8, where the mother claims her prerogative to save her children is based on her affections for them, not just on the biological fact that she is their mother.

The son claims that his mother's recourse to law is a sign that she knows she is in the wrong: “a woman who did everything up to now out of love sudden takes recourse in the law” (mulier, quae adhuc de affectu cuncta fecerat, ad legem subito convertitur), and “a mother’s case is very bad indeed when the law is her most powerful argument” (pessima . . . causa matris est, in qua plurimum lex potest). We have seen this argument before in DM 6, where the father criticizes the mother for her use of the same law.

At the end, the son dismisses the law’s application to this situation. Indeed, can this law apply to a son who actually returned to his mother in the first place? He argues that “there are no laws so strict that men should tolerate them under severe conditions of adversity” (nec ulla iura tam tristia sunt, ut ea in adversis patiantur homines). He then brings up an argument very

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51 DM 16.4.20–21.
52 DM 16.5.14–15.
similar to the one used by the father in DM 6: how should we interpret this law if his father had summoned him from his mother’s side? Or what if he had been called to military service, or to a diplomatic mission, or even to confinement as a criminal? Is his obligation to his friend any less binding than in those cases?

The son declares that friendship is a more powerful bond than even love for a mother. Indeed humanity requires this kind of friendship to survive. This is friendship, says the son, that “feared no law” (*nullam legem timuit*). This encomium for friendship and loyalty undermines not only the mother’s claim, but the authority of the law under which the mother makes her claim.

**The Literal Terms of the Law**

*DM* 11 is a relatively short piece, but its attitude toward law and what lies outside law is characteristically declamatory. A rich man was on the battlefield when his enemy, a poor man, falsely accused him of treason. In response to this accusation, a mob stoned the rich man’s three sons to death. When the rich man returned, he demanded the execution of the poor man’s three sons. The poor man offers his own life in accordance with these laws: a traitor should be punished by death; and a false accuser should suffer the same penalty as what the accused would have suffered.

Bernstein calls the rich man’s demand “a fairytale view of talion that ignores the responsibility of the actors”; he points out that because the poor man also happens to have three sons, the rich man is under the illusion that he can have perfect vengeance. But the rich man is under no such illusion. He knows that even if the poor man’s sons are sentenced to death, they

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53 *DM* 16.7.17.

will be killed by an executioner, more quickly and mercifully than by mob violence. Their father will also get to say farewell, when he himself could not. The fact that there are three sons on each side is not, in my view, that crucial. And it is certainly not the case that the rich man is ignorant of the concept of responsibility. Why then does he make this claim? Does he expect to succeed? 

There is no doubt that the rich man’s case is weak based on the wording of the law. According to the legal terms, a false accuser ought to suffer the penalty of death, which was the penalty that the poor man would have imposed on the rich man. The rich man, however, argues that “the law, which requires a false accuser to suffer the same punishment, demands as its penalty that which the false accuser had done, not what he intended to do” (\textit{legem, quae calumniatorem idem pati iubet, eius poenam exigere, quod fecisset, non quod facere voluisset}). There is confusion in this argument. What the poor man did was make a false accusation. For this false accusation, which would result in the death of the accused, he himself deserved death. Yet, the rich man would have the law mean that, because the poor man killed his sons, or at least led to their deaths, an equal \textit{result} should be the outcome—the death of the poor man’s sons. In no way can the law be fairly interpreted to mean this: the “\textit{idem}” in “\textit{calumniator idem pateretur}” clearly refers to equality of penalty, not equality of result. 

I do not think that the rich man is ignorant of the fact that his interpretation is unpersuasive as a matter of law. Rather, he knows that he is not asking for the law to be literally enforced, but something quite beyond the law. He focuses on the exceptional suffering that he has undergone and claims that the law is simply insufficient to deal with his case: “my disastrous experiences allow me to object to this stipulation of the law, as it has not made provision for sufficient retaliation in my special case” (\textit{permittunt mihi . . . iudices, calamitates meae queri de hac})

\footnotesize{\textit{55 DM} 11.7.3-4.}
Though the punishment that he proposes seems cruel and exceeds the ordinary, yet “the censure of the law is smoothed over, yes it is, when someone suffers what he has also inflicted” (explicata est, . . . explicata legis invidia, cum quis, quod patitur, et fecit). The rich man admits, therefore, that he is contravening the law. He is demanding, not that the law be applied, but that he should obtain “revenge” (ultio) and “retribution” (vindicta). But how is that justified when the law does not call for it and when innocent lives would be sacrificed?

Bernstein rightly points out that the theme says, “there were laws,” and by this emphasizes the unavailability of law during the stoning of the rich man’s sons by the mob. The poor man’s accusation had not been made before a court of law. There had been a rumor, and whether or not the poor man believed it, he made the accusation at a public meeting and incited the people to commit the violence. According to Bernstein, the rich man’s strategy to justify his demand for the execution of the poor man’s sons is “to situate the stoning of his sons inside the law, although the action self-evidently occurred outside the law.” That is, if the stoning can be characterized as the result of laws, it can be remedied by the law, but if it was mob violence, it has no legal remedy. But this makes sense only if we take the rich man’s legal claim seriously. I do not think the rich man is that naïve. Rather, he knowingly calls for an extralegal remedy under legal guise, precisely because the stoning of his children had been an extralegal action.

The fact that this extralegal action was carried out by the people presents a fundamental problem for the rich man. He cannot blame the people too much since he cannot afford to

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56 DM 11.4.14–16.
57 DM 11.5.1–2.
58 Bernstein, Ethics, Identity, and Community, 34.
59 Ibid., 35.
alienate the very people on whose judgment he now depends. He argues, therefore, that people in 
a crowd do not think for themselves and are easily manipulated. Ironically, in the same way that 
these people were induced to stone the rich man’s sons, the rich man is trying to induce them to 
carry out another extralegal execution. This, of course, suggests that the law is sometimes a 
façade, as judges are incited in much the same way as a mob is. For the rich man, this is not 
injustice, but real justice.

The rich man quotes and interprets the formal law, but we need not take him too 
seriously. He is not being fully open about his intentions. The rich man argues at the end of his 
speech (and hints at it at the beginning, too) that the poor man is putting up a charade in offering 
to die. According to the rich man, the poor man does not want to die; rather, his request for death 
is an attempt to rouse the crowd’s sympathy to forgive both him and his sons. It is easy to see the 
rich man also putting up a charade in this case. In asking for a legal remedy, he is really asking for 
the law to be transgressed. In the end, his is a cry against the limitations of law because of the 
reality of lawlessness.

*DM 12* presents another case where a legal forum is used to argue against the literal 
requirements of the law. The question that arises is: can a man who abides by the terms of the law 
nevertheless be guilty of wrongdoing in some sense? In this theme, an agent was sent to buy grain 
for a city suffering from famine. Blown off course on his way back, he stopped by a neighboring 
city and found the opportunity to bargain for twice the amount of grain than what he had. 
Despite the delay, he returned on the prearranged date, but during this time, the famine had 
gotten worse and the people of his city had to resort to eating the corpses of their fellow citizens. 
The man is charged with harming the state.

The prosecutor no doubt has a difficult case. The agent had returned to the city as agreed, 
even though he could have returned earlier. He negotiated for the purchase of grain as he was
authorized to do, and did not appear to have made any private profit through his dealings. What was his crime? The prosecution’s speech is devoted to describing the horror of famine and the inhumanity of cannibalism to which many, including the prosecutor, had to resort. The community disintegrated: family members waited on each other to die so they could eat them. The agent came back with much grain, but there were no longer that many people left. The story is tragic and the suffering is immense, but is the agent culpable?

The prosecutor speaks of the infamy that all of them now share for practicing cannibalism. He maintains that there is only one way to defend their action—they became cannibals because of the agent: “If he is innocent, the guilt belongs to us” (si hic innocens est, nostra culpa est). He tells the story of how the agent was appointed for the task, on the one condition that he return quickly. The agent was told: “You won’t do us any good at all if you come after the appointed day” (nihil agis adferendo frumentum, si post illum diem veneris). The agent did not hurry to return when he could have, but waited for the appointed day to come. Meanwhile, the citizens resorted to killing the cattle, ordering slaves to escape, plucking out the roots of dying vegetation, stripping bitter bark, and finally, practicing cannibalism.

Bernstein notes that the prosecutor “inflates the agent’s supposed crime in order to urge the jury, cannibals like himself, to transform their self-pity into (unjustified) revenge.” He believes that the prosecutor has no case, and that the whole speech is a protest that sets the agent’s negotiations in the impersonal marketplace “against the intensely personal exchanges

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60 DM 12.3.21–22.


62 Bernstein, Ethics, Identity, and Community, 106.
among the families who eat their own dead.” According to Bernstein, the prosecutor intends to invoke outrage through that contrast, but no more than that. But I think more may be going on.

B. W. Frier has noted that when Rome’s empire expanded, a consequence was that commerce thrived. In the marketplace, relationships and exchanges were not based on familial or personal ties, but rather on commercial ties. Frier argues that this led to the ascendancy of the jurists’ law because it limited factual inquiry and rendered more predictable outcomes, conditions more suitable for the impersonal marketplace. The agent in this case, who takes time to negotiate the price of grain, entirely unaware of the human suffering back home, is a parodic figure of the impersonal marketplace and the jurists’ law. He holds to the letter of the law, the requirement that he return by the appointed day, while trying to make the best deal in the meantime. He might have even returned expecting praise. But if he had any personal relationships, if he had family still residing in the city (there is no mention of his family if he had one), he might have rushed back regardless of what the appointed day was. Hence, the prosecutor’s argument can be read as a criticism of the supposed impersonalness of the jurists’ law, even though this characterization of the jurists’ law, as a general matter, is unfair.

The prosecutor charges the agent with “harming the state.” He will not forego the proper legal avenues to bring the agent to justice: “Nor indeed will this defendant receive punishment except according to the due and proper legal procedure. . . . See to it that we who have survived by violating the law exercise our anger in a legal manner” (nec scilicet nisi peracto legitimo ordine reus non punietur. . . . videte, ut iure irascamur, qui contra ius viximus). This insistence on using

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63 Ibid., 108.
64 See Frier, Rise of the Roman Jurists, 280–81.
65 DM 12.11.18–20.
proper legal procedure stands in contrast to what the prosecutor is asking for as a substantive matter: something beyond the literal terms of the law.

The agent, on the other hand, wants to be prosecuted under a different charge, not that of harming the state, but that of mismanaging the mission. But the prosecutor dismisses this request, arguing that “the suffering of our people does not neatly fall under convenient headings” (*non cadit in formulam publicus dolor*). Notice how suffering becomes a way to problematize the neat categories of the formal law. The agent’s request is clever: rather than a charge that highlights the suffering of the people, he wants a charge that would downplay the suffering and focus instead only on his alleged dereliction of duty. But the suffering of the people is precisely what the prosecutor wants to emphasize. He describes what starvation caused them to resort to:

Starvation dispatches nobly born hands to degrading labor, it thrusts us as beggars at the feet of strangers, it has often destroyed the loyalties of our associates, it has administered poison to people in public places, it has driven family members to kill each other.

*haec ad humile opus nobiles manus mittit, haec alienis pedibus mendicantes prosternit, haec saepe sociorum fidem fregit, haec venena populis publice dedit, haec in parricidium pios egit.*

He describes the constant waiting for the agent’s return, the false hopes when the semblance of a ship appeared. And all the while, the agent had favorable winds, but chose to stop at a neighboring city. The prosecutor therefore holds the agent responsible for all the suffering and all that the people did.

The agent volunteers a number of reasons for why he was delayed, but the final defense is that he came on the appointed day, which had been set mutually. But the prosecutor argues that the appointed day was set in anticipation of unfavorable winds and other unforeseen circumstances that might delay the trip. The date was set for the worst case scenario, lest the

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66 *DM* 12.10--11.

67 *DM* 12.15.16--19.
agent should return late due to a legitimate reason and be punished for it. The prosecutor maintains:

Yes, we agreed on this day with you, but how is that relevant? You bought the grain more quickly than we anticipated, your journey by sea exceeded our fondest expectations. . . . Therefore, as far as you are concerned, the time was wasted, the appointed day really passed.

*nos illum tibi diem dedimus, sed quid attinet? citius emisti, quam speravimus, supra votum nostrum navigasti; . . . ergo, quantum in te, tempus consumptum est, dies excessit.*

The allegation that the “day really passed” (*dies excessit*) is the most remarkable claim in the whole declamation. It effectively says that a man responsible for so much suffering, not just physical but moral, ought not to be able to hide behind legal literalism. To describe the everlasting torment that the city now suffers, the prosecutor alludes to Ixion’s punishment of being bound to a burning solar wheel, Tantalus mocked by food out of his reach, and Tityus, whose liver is constantly devoured by birds. At the end, the defenses “I brought back twice as much grain” and “I came back on the appointed day” ring hollow. To relieve the city’s guilt is justice that the formal law would deny. But as the agent says of himself and probably on behalf of others in the city, “if I see this man punished, I can justify my survival” (*si huius poenam videro, possum reddere rationem, quod vixi*).

**NEIGHBORLY BEHAVIOR: A CASE OF TRESPASSING BEES**

*DM* 13 involves a conflict between a poor man and his rich neighbor that gives us a chance to see how a possible (at least plausible) law school hypothetical was treated in the rhetorical

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69 See *Georgics* 3.38–39, 4.484 (Ixion); *Aeneid* 6.601–7 (Tantalus); *Aeneid* 6.595–600 (Tityus).

schools. A poor man raised bees, which flew into his rich neighbor's land to take nectar from the flowers there. The rich neighbor warned the poor man that this was theft of his property. Not receiving a satisfactory response, he laced the nectar with poison, thereby killing all of the poor man's bees. The poor man seeks damages.

Bees presented an interesting problem for the jurists. The question was whether bees are wild or domesticated animals, a classification that had implications for property rights.

Domesticated animals are the property of their owners, regardless of whether they are under their owners' control. If geese, hens, or sheep wander away, they do not for that reason cease to be under ownership. If after wandering away they cause damage to others' property, the owner is probably liable depending on the circumstances. Wild animals, however, come under ownership only when they are under physical control, that is, in possession. Ownership is lost when control is lost.

Justinian's *Institutes* classifies bees as wild in its treatment of possession:

> Bees are also wild by nature. If they swarm in your tree they are not yours till you manage to contain them. They are in the same position as birds nesting in the same tree. If another person hives them, he becomes their owner. Also, anyone can take their honey, if they have made any. If you see someone coming on your land, you can obviously stop him before anything is done. A swarm which leaves your hive remains yours while it is within your sight and can be followed without difficulty. Otherwise someone else can take it.

> Apium quoque natura fera est. itaque quae in arbore tua consederint, antequam a te alveo includantur, non magis tuae esse intelleguntur, quam volucres quae in tua arbore nidum fecerint: ideoque si alius eas incluserit, is earum dominus erit. favos quoque si quos hae fecerint, quilibet eximere potest. plane integra re, si provideris ingredientem in fundum tuum, potes eum iure prohibere, ne ingrediatur. examen quod ex alveo tuo evolaverit eo

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71 D.41.1.5.6, 41.2.3.13.


73 The requirement of possession is insisted upon by the classical jurists. There were some, such as Trebatius of the late Republican period, who would grant ownership the moment the wild animal is wounded and pursuit is ongoing.

74 D.41.1.3.2, 41.1.5pr.
Our evidence from the *Digest* shows this to be a fairly accurate statement of the law in the second century. The concern of this passage is how to take possession of bees, since obviously one could not capture them the way one could a larger wild animal. The requirement is hiving. Without hiving, the bees living on a land do not belong to the owner of the land, and the honey they produce also belongs to no one.

*Collatio* 12.7.10 gives the most thorough treatment of the question of trespassing bees. The passage features a debate between the jurists Proculus and Celsus on the question: did an action lie under the *lex Aquilia* if bees that belonged to one party flew onto the land of another, who then killed them by burning them up? Proculus argues that once the bees fly away, loss of control means loss of ownership. Celsus, however, disputes that view based on two considerations. The first is that bees are “accustomed to return” (*revenire soleant*). This is the view of Gaius, who writes that peafowl, doves, bees, and stags are animals who are wild in nature but habitually leave and return; ownership is retained even when possession is lacking in such cases as long as the animal has “an intent to return” (*animus revertendi*). Even if the “intent” is a legal fiction, it describes the behavior of bees well. Celsus’ second argument is that bees are a source of profit for the beekeeper. This is the more pragmatic consideration. Bees must be allowed to fly free and return to their hive if they are to be of profit to the hiver. They cannot be constantly

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76 See *D*.41.1.1.1, 41.1.3pr–3.2, 41.1.5pr–5.4.

77 The text reads: “when my bees had flown away to your (bees)” (*cum apes meae ad tuas aduolassent*), which seems to talk about a combining of swarms. But see B. W. Frier’s emendation in “Bees and Lawyers,” *Classical Journal* 78, no. 2 (1982/3): 105–14 (108). Frier suggests “when my bees had flown away to your property” (*cum apes meae ad tuas <aedes> advolassent*), which would make the debate about what happens when a swarm goes on the land of another.

78 *D*.41.1.5.5.
enclosed. Though Celsus does not elaborate, it seems clear that the desirability and profitability of beekeeping are part of the consideration for why beekeepers should retain a property right when their bees fly freely to gather nectar.

There is no question in this theme of the ownership of the bees. The poor man has bees in a hive. The bees, and the honey they make, belong to him. When they fly away onto another’s land, have they returned to their natural liberty? Hardly. We are told that the poor man’s bees indeed habitually returned to their hive.

Nevertheless, there is something to the rich man’s case. He has no more reason to provide nectar for the poor man’s bees than to allow the sheep or cattle of others to graze on his land. But the small size of the bees poses a problem for the poor man. One can take reasonable measures to keep one’s sheep from wandering, but how does one prevent one’s bees from flying onto another’s land? If there is no reasonable way to do so, does a beekeeper then give tacit permission to his neighbor to keep the bees out through whatever means necessary?

The *lex Aquilia* does not permit one to drive away an animal that wanders onto one’s land in a way that causes injury.⁷⁹ Yet with bees, there seems to be no reasonable way to keep them out without killing them. Ulpian writes about what should happen when trespassing bees are killed: "If someone drives away, or even kills, another’s bees by making smoke, he seems rather to have provided the cause of their death than directly to have killed them, and so he will be liable to an

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⁷⁹ Pomponius agrees with Quintus Mucius that an action under the *lex Aquilia* lies when a landowner drives away a pregnant mare with such violence that she miscarries: “even though a person finds someone else’s cattle on his land, he should show the same care in driving them off as if those he had found were his own; for if he has suffered any harm on their account, he has his own legal remedies. And, therefore, he who finds someone else’s cattle in his field may not lawfully impound them, nor must he drive them out other than as we have just said above, that is, as though they were his own; but he must either remove them without hurting them or tell their owner, so that he can come and collect them” (*quamvis alienum pecus in agro suo quis deprehendit, sic illud expellere debet, quomodo si suum deprehendisset, quoniam si quid ex ea re damnum cepit, habet proprias actiones. itaque qui pecus alienum in agro suo deprehenderit, non iure id includit, nec agere illud aliter debet quam ut supra diximus quasi suum: sed vel abigere debet sine damno vel admonere dominum, ut suum recipiat*). D.9.2.39.1. Translation in Watson.
action in factum” (si quis fumo facto apes alienas fugaverit vel etiam necaverit, magis causam mortis praestitisse videtur quam occidisse, et ideo in factum actione tenebitur). For Ulpian, the case of the trespassing bees does not fall under the lex Aquilia, but rather under the equitable jurisdiction of the praetor, because there is no direct killing of the bees. Ulpian is clearly sympathetic to the landowner who wants to drive bees away from his property, but nevertheless thinks that equity demands that the landowner should pay some damages. He continues: wrongful damage in general cannot be sought under the lex Aquilia when an act is committed under compulsion by an overpowering force; for example, according to Celsus, when a party pulls down his neighbor’s house so that a fire would not reach his own, an action under the lex Aquilia cannot be brought because the man acted to protect his property. Does Ulpian think that bees may become an overpowering force that would cause a landowner to act under compulsion?

Perhaps in some cases, but hardly in this case. How could these bees have been an overpowering force that drove the rich man to kill them? The nectar was not precious to the rich man; in fact, to poison the bees, he also poisoned all his flowers and nectar. Killing the only livelihood of one’s poor neighbor apparently out of spite does not sound like a viable necessity defense.

Hence, in his speech, the poor man repeatedly emphasizes the spiteful nature of the rich man’s action. He begins his speech by criticizing the rich neighbor for resorting to such tactics when his loss was so small but the poor man’s loss was, relatively speaking, so great: “the loss of which I speak is intolerable for a poor man, especially when rich men are provoked by such petty things” (illud . . . damnnum tolerabile est pauperi, cum tam parvis etiam divites moveantur). He

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80 D.9.2.49pr. Translation in Watson.

81 D.9.2.49.1.

82 DM 13.1.8–9.
describes his land as “a little plot” (agellus) surounded on all sides by the property of the rich neighbor, who had acquired all the property that surrounded the poor man and displaced all the previous landowners. The rich man had literally cornered him into this position, where it was impossible for him, because of his old age, to do anything but raise bees. There is also the hint that this case is not just about bees or nectar, but the rich man’s plan to eventually swallow up the last plot of land that was not his.

In addition to being a source of income, the bees were a source of pleasure for the poor man. The poor man speaks of preparing the beehive: “I derived pleasure from weaving pliant wicker hives for the swarms born in the spring, and smearing the gaping cracks with sticky manure to prevent the summer heat or the strong chill of winter from penetrating the teeming hive” (iuvabat aut lenta viminalis texere vel, ne aestivus ardor aut hiberna vis gravidam penetraret alvum, hiantis rimas tenaci linire fimo). He describes the steps that he took to care for them, offering honey to them, containing an escaping swarm, throwing dust on fighting swarms, chasing birds of prey away and barring small animals from them. He had a special pleasure in observing their work; the bees were his “means of escaping poverty and the comfort of [his] old age” (suffugium tenuitatis meae, solacium senectutis amisi). In short, he speaks of the bees with affection. But the rich man would take away even this livelihood and source of pleasure. Out of spite, he “sprinkled a deadly drug on all the flowers, and at the same time how much more did he spoil than anything the bees may have carried off!” (sparsit omnibus floribus mortem, et quanto plura interim corrupit quam quae apes abstulissent!).

83 DM 13.2.1.
84 DM 13.3.21–23.
85 DM 13.5.3.
86 DM 13.5.15–17.
Common sense and neighborly conduct could have prevailed. One solution would have been to let the bees take the nectar, but let part of the honey that they produce be given to the neighbor. That is precisely what the poor man said he did. But his neighbor was obstinate. He ordered the bees to be transferred elsewhere. The poor man does not claim he had a right to let the bees fly freely. He rather appeals to the impossibility of moving to another place: “I wanted to leave; yes, I did. But I couldn’t find any plot on which the rich man would not be my neighbor” (volui . . . decedere, volui, sed nullum potui invenire agellum, in quo non mihi vicinus dives esset).\(^8^7\)

The rich man has two arguments based on the formal law: first, he questions whether the poor man had ownership of the bees (and therefore could claim a financial loss); second, he questions whether he had committed an unlawful conduct. On the first point, the rich man asserts that the poor man had no control over a wild animal. On the second point, the rich man asserts that he did no wrong since he destroyed on his own property bees which were harming his interest.

On the first point, the poor man answers that he gathered the bees together, put them in a hive, and bred them. Even when they flew away, they remained under his control. His description of his bees would satisfy Celsus’ requirement for the intent to return: “But don’t they fly back home voluntarily, do they not time the end of their labor by the setting sun, does not the entire swarm esconce itself within its customary hive and don’t they pass the night in disciplined sleep?” (at non ipsae domum sua sponte revolant finemque laboris sui sole metiuntur, et omnis intra solitas domos turba conditur, noctemque modesto silentio trahunt?).\(^8^8\) Granted there is ownership and hence financial loss, the poor man goes on to argue why the rich man had no privilege to kill his bees. He starts by appealing to public interest, but then his argument goes awry. The poor man

\(^{8^7}\) DM 13.4.15–16.

\(^{8^8}\) DM 13.9.7–10.
could have stressed the utility of beekeeping and how it is against public policy to allow neighboring landowners to kill their neighbors’ bees. Instead, he makes the much weaker argument that it is against public policy to allow crimes to go unpunished when they are committed on one’s own property, namely the rich man’s crime of poisoning. But the rich man could, of course, convincingly point out that he is not committing a crime when he takes steps to protect his own property.

The declamation ends with a description of the community of bees, which functions as a contrast to the contentious relationship between the two men. Bees exhibit Roman virtues on a microcosmic level. The poor man exclaims: “Shall I say this animal in some way is a small archetype of man?” (dicam animal quodammodo parvum hominis exemplar?). The young give way to their parents; they work not for private profit but for the public good; they are above the pettiness of human conflict. In a long section that concludes the piece, echoes of Virgil’s Georgics abound.

*DM* 13 is the clearest example of a *controversia* that shows familiarity with both the jurists’ law and the art of rhetoric. It is comfortable making juristic arguments (even if imperfect), but it pushes toward a rhetorical, and even poetic, end. The justice due the poor man is not simply recovered damages, but a chance to publicly denounce the rich man’s unneighborly behavior.

**CONCLUSION**

The jurists’ law constructed an artificial view of the world, but it had the advantage of being ordered and rational. The world of *controversiae*, on the contrary, was one of chaos and

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89 *DM* 13.16.1–2.

90 For literary resonances in *DM* 13, see Becker, *Pseudo-Quintiliana*, 42–51.
disorder, reflecting an irrational, even perverse, view of the world. Pathos dominates the declamatory landscape, a fact that is especially obvious in the cases examined above. These declamations crossed swords with the formal law when they showed how ineffective the law was in reaching morally and emotionally acceptable outcomes. They did not necessarily give an accurate picture of the formal law; they presented caricatures—which was good enough for the rhetoricians. Especially in cases involving broken relationships and gross injustices, the rhetoricians underscored the still necessary role of rhetorical display in legal arguments.
Chapter Four

Erudition as Persuasion in the *Dragon Sinews, Phoenix Marrow Judgments* of Zhang Zhuo

其文臚比官曹，條分類繫，組織頗工。...是編取備程試之用，則本為隸事而作，不為定律而作。

The text [of the *Dragon Sinews, Phoenix Marrow Judgments*] arranges and sets side by side the offices of the bureaucracy, making divisions and connections between matters with an extremely skillful organization. ... It compiles and selects sources, preparing them for use in the examinations. Hence it was originally composed to categorize matters, not to establish law.¹

The *Longjin fengsui pan* (Dragon Sinews, Phoenix Marrow Judgments) of Zhang Zhuo 張鷟 (658–730) is the earlier of only two judgment collections that survive from the Tang. The other is the judgment collection of Bai Juyi 白居易 (772–846), found in juan 66 and 67 of the *Baishi Changqing ji* 白氏長慶集 (Mr. Bai’s Literary Collection Compiled in the Changqing Reign Period, 821–824). Among surviving literary judgments, Zhang’s judgments stand out as some of most ornate and erudite. Recent studies on the *Longjin fengsui pan* have emphasized its connection to formal sources of Tang law, especially the Tang Code.² These studies are necessarily selective in their treatment of Zhang’s work because many of its cases are not decided based on

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¹ *Siku quanshu zongmu tiyao* 四庫全書總目提要 (Shanghai: Shangwu yinshuguan, 1933), 135-2785.

² See, e.g., Pan Feng 潘峰, “*Longjin fengsui pan* lüwen tanxi” 《龍筋鳳髓判》律文探析 (MA thesis, Jilin daxue, 2006); Huang Yuansheng 黃源盛, *Han Tang fazhi yu rujia chuantong* 漢唐法制與儒家傳統 (Taipei: Yuanzhao, 2009), 339–84; and Xia Tingting 夏婷婷, *Tangdai nizhi panjue zhong de falü faxian: dui* *Tangdai panci de lingyizhong jiedu* 唐代擬制判決中的法律發現: 對唐代判詞的另一種解讀 (Beijing: Zhongguo shehui kexue chubanshe, 2012). There are also two modern annotated editions of the text published by the China University of Political Science and Law, and by the Law Press: *Longjin fengsui pan jiaozhu* 龍筋鳳髓判校注, ed. Tian Tao 田濤 and Guo Chengwei 郭成偉 (Beijing: Zhongguo zhengfa daxue, 1995); and *Longjin fengsui pan jianzhu* 龍筋鳳髓判箋注, ed. Jiang Zongxu 蒋宗禧 et al. (Beijing: Falü chubanshe, 2013).
the formal law. More importantly, even in cases where Tang law is clearly applicable, legal language and reasoning have a noticeably peripheral character, taking up only a small proportion of the judgment text. As early as the 12th century, Hong Mai 洪邁 (1123–1202) considered Zhang’s judgments tiresome and unreadable because “they only know how to accumulate stories from the past, but when it comes to sentencing or discussions of the law, they cannot go deep” 但知堆垜故事，而於蔽罪議法處不能深切. The 18th-century editors of the Siku quanshu 四庫全書 (Complete Library of the Four Treasuries) classified the Longjin fengsui pan among “encyclopedic compendia” (leishu 類書), treating it as a repository of allusions. This chapter examines Zhang’s use of literary and historical allusions as a rhetorical strategy in which erudition becomes a means of persuasion. I argue that a singular focus on Tang formal law or a too-narrow conception of law tends to overlook an essential feature of Zhang’s judgments, which use classical learning and literary display to complement the formal law when legal rules are clearly applicable and as a recourse when they are not.

THE COLLECTION

Despite the fact that over one thousand judgments, mostly from the Tang, are collected in the Wenyuan yinghua 文苑英華, the Longjin fengsui pan is our only example of judgments that were composed expressly for the purpose of aiding candidates in their preparation for the selection examinations. Not a single judgment from the Longjin fengsui pan is included in the

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3 There are a total of 76 complete judgments in the collection, out of which 56 rely at least in part on formal Tang law. See Xia, Tangdia nizhi panjue zhong de falü faxian, 188–90.

4 Hong Mai, Rongzhai suibi 容齋隨筆 (Shanghai: Shanghai guji chubanshe, 1978), 12.358.

5 The Zhizhai shulu jieti 直齋書錄解題 (Annotated Book Catalog of the Zhi Studio) describes the Longjin fengsui pan as “a preparation tool while awaiting selection” 待選預備之具. See Chen Zhenxun 陳振
Wenyuan yinghua, suggesting that Zhang’s collection might have been too well-known to warrant inclusion. Both official and private book catalogs beginning from the mid-11th century list Zhang’s work, with the earliest mention of it being in the *Chongwen zongmu* 崇文總目 (General Catalog of the Chongwen Academy).⁶

The earliest and best text of the *Longjin fengsui pan* is a Ming dynasty block-print edition made in 1504, which is divided into two *juan* and includes 76 full judgments, three incomplete judgments, and one case heading.⁷ We know that a substantial portion of the original collection is lost based on the fact that book catalogs from the Song dynasty list Zhang’s collection as containing one hundred judgments. The Song dynasty *Shiwen leiju* 事文類聚 (Collected Records and Literary Works by Categories) also contains excerpts of two judgments attributed to Zhang that do not appear in the 1504 edition.

The cases in the *Longjin fengsui pan* are arranged according to the bureaucratic offices from which they arise. The collection begins with cases from the four most prominent organs of the central government:⁸ the Secretariat (Zhongshu sheng 中書省) and the Chancellery (Menxia sheng 門下省), the chief advisory and policy-making organs; the Censorate (Yushi tai 御史臺), the

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⁶ The bibliographical treatise in the *Xin Tangshu* 新唐書 (New History of the Tang) also lists it. By the Southern Song, several private works mention it, such as the bibliographical treatise in the *Tongzhi* 通志 (Comprehensive Treatises), the *Junzhai dushu zhi* 邑齋讀書志 (Records of Books Read in the Provincial Studio), the *Suichutang shumu* 遂初堂書目 (Titles of Books in the Suichu Hall), and the *Zhizhai shulu jieti* 直齋書錄解題 (Annotated Book Catalog of the Zhi Studio).

⁷ This edition forms the base text for the *Longjin fengsui pan jianzhu* 龍筋鳳髓判箋注, edited by Jiang et al.

⁸ Two cases arising from the “Princess’s [Establishments]” (Gongzhu 公主) are placed between the cases from the Chancellery and the Censorate. These may have been misplaced early on. The Gongzhu fu 公主府 was established in the early 700s in the model of the Princely Establishments (Wangfu 王府). See Charles O. Hucker, *A Dictionary of Official Titles in Imperial China* (Stanford: Stanford University Press, 1985), 3410 (291). I give the entry number, with the page in parentheses.
principal office responsible for bureaucratic oversight; and the Department of State Affairs (尚書省 Shangshu sheng), the chief executive arm. Subsequent cases are divided into the separate ministries and bureaus under the Department of State Affairs. Following these, we have cases from the various directorates (jian 監), military guards (wei 衛), and other specialized offices. There are clear indications of missing cases: for example, only five of the six ministries under the Department of State Affairs, and a handful of the bureaus under those ministries, are represented.\(^9\)

Zhang’s judgments focus exclusively on matters related to the Tang bureaucracy and to the conduct of bureaucrats. Most prominent are cases involving the prosecution of official misconduct, such as the unauthorized disclosure of state secrets, drunkenness leading to failure to publish an edict, robbery of objects selected for presentation to the emperor, robbery of an


\(^10\) The Ministry of Punishment (Xingbu 刑部) is conspicuously absent. It might be a coincidence that not a case from this ministry was preserved, but it might also be that Zhang intentionally excluded this ministry. The latter would suggest that the cases that would have come under the jurisdiction of this ministry were treated differently from the bureaucratic matters that are the focus of this collection.

\(^11\) The Ministry of Personnel (Libu 吏部) is the most complete, with two cases from each of the ministry’s four bureaus: the Libu 吏部 (same name as the ministry as a whole), the Bureau of Evaluations (Kaogong 考功), the Bureau of Merit Titles (Sixun 司勳), and the Bureau of Honors (Zhujue 主爵). The Ministry of Rites (Libu 礼部) is the next most complete, with two cases each under Libu 礼部, the Bureau of Sacrifices (Sibu 祀部), and the Bureau of Reception (Zhuke 主客). It is likely that the fragmentary judgment after the Bureau of Reception belongs to a case arising from the fourth bureau, the Catering Bureau (Shanbu 膳部). The Ministry of Revenue (Hubu 户部) has only one case under Hubu 户部 and two under the Bureau of Granaries (Cangbu 賄部), placed erroneously after the Ministry of Works (Gongbu 工部). The Ministry of Works and the Ministry of War (Bingbu 兵部) have only one case each.

\(^12\) *LJFSP* 1.3.


\(^14\) *LJFSP* 33.92.
imperial seal,15 and the fraudulent bestowal of merits.16 Other cases involve grievances against an
act or policy,17 recommendations for a course of action,18 and special requests.19

We do not have a precise date of composition, but all evidence suggests that the collection
was completed in the early eighth century. Two studies have argued persuasively that a few of the
cases in the Longjin fengsui pan reflect actual events as late as in the reign of Emperor Zhongzong
中宗 (r. 705–710).20 Two pieces of evidence in the text itself establishes a terminus post quem of
705: in Case 2 from the Bureau of Granaries (Cangbu 倉部), we are told that the case occurred in
the first year of the Shenlong 神龍 reign (i.e., 705);21 another case is supposed to have involved the
Zuoyou tunwei 左右屯衛,22 a name used from 705 to 711.23 A difficulty in determining when Zhang
might have started this work comes from the fact that he appears to use the historical titles of the
offices based on the time when the cases arose. The clearest example of this is the fact that Zhang

\[\text{LJFSP 34.95.}\]

\[\text{LJFSP 15.42.}\]

\[\text{LJFSP 5.15 (costly wedding expenses for a princess); LJFSP 11.31 (unfair evaluation in the}\]
\[\text{selection examinations); LJFSP 17.47 (improperly granted honors); LJFSP 24.67 (tax exemptions to}\]
\[\text{households with exemplary acts of filial piety); LJFSP 26.73 (costly construction of a large Buddha).}\]

\[\text{LJFSP 23.65 (ritual offerings in response to auspicious signs); LJFSP 42.121 (construction of}\]
\[\text{additional palaces within the imperial park); LJFSP 57.170, 58.172, 59.174, and 60.177 (strategies for military}\]
\[\text{defense).}\]

\[\text{LJFSP 5.18 (princess requests an office for her son); LJFSP 27.76 (Tibetan envoys request}\]
\[\text{permission to purchase Tang goods); LJFSP 68.204 (the Imperial Office of Percussions and Winds requests}\]
\[\text{the repair of old instruments).}\]

\[\text{likao” 《龍筋鳳髓判》史源例考, Fazhi bolan (2015.11b): 40–42.}\]

\[\text{LJFSP 21.59.}\]

\[\text{LJFSP 55.164.}\]

\[\text{Hucker, Dictionary, 7418 (550).}\]
refers to the Bureau of Honors as Zhujue 主爵, even though it was known as Sifeng 司封 after 662.24

ZHANG ZHUO AND HIS JUDGMENT STYLE

Zhang Zhuo’s life is defined both by extraordinary successes in the examinations and by a mediocre career in the bureaucracy.25 Both of these make possible a work like the Longjin fengsui pan, which would have required consummate literary skill as well as familiarity with bureaucratic operations and a good knowledge of the formal law. Zhang passed the most prestigious of the civil service examinations (the jinshi 進士, or “Presented Scholar”) at the age of 17,26 and around the age of 19 (i.e., at the age of ruoguan 弱冠, around 20 years old by the Chinese count), he passed the “Astounding Facility in Composition” (Xiabi chengzhang 下筆成章) decree examination27 and was awarded the post of defender (wei 尉) of Xiangle County in Ningzhou 宁洲.28 A post near the northwestern frontier where Ningzhou was located was not usually desirable, but to step into officialdom at the age of 19 is impressive nonetheless. For the next decade or so, Zhang’s career

24 Ibid., 1379 (180).

25 Several brief biographical sketches with considerable overlapping material form the extent of our knowledge about him. The two Tang sources are Liu Su’s 劉肅 (fl. 807) Da Tang xinyu 新唐書 (New Accounts from the Great Tang) and Mo Xiufu’s 莫休符 (fl. 899) Guilin fengtu ji 桂林風土記 (Records of the People and Land of Guilin). The most important post-Tang sources on Zhang are the two standard histories of the Tang.

26 Hong, Rongzhai suibi, 12.359.

27 “Decree examinations” (zhiju 制舉) were given at the emperor’s pleasure to seek out candidates with special qualifications to serve in the bureaucracy. Unlike regular keju, those who passed in the highest rankings were immediately appointed to office. See TD 15.357. For details, see Fu Xuancong 傅璇琮, Tangdai keju yu wenxue 唐代科舉與文學 (Xi’an: Shanxi renmin chubanshe, 1986), 134–59.

28 Mo Xiufu 莫休符 (fl. 899), Guilin fengtu ji 桂林風土記 (in Congshu jicheng chubian 叢書集成初編, v. 318) (Beijing: Zhonghua shuju, 1985), 1.16.
stalled, as several sources state that he held the post of county defender at least three more times in three different counties.29 In his mid-30s, Zhang managed to secure a post at the prestigious Censorate, serving as an Investigating Censor (Jiancha yushi 監察御史), but by 700, he had been dismissed from this post.30 Only in 711 do we hear of him taking and passing the “Virtuous and Talented, Square and Proper” (Xianliang fangzheng 賢良方正) decree examination.31 If Zhang started composing the Longjin fengsui pan in the early 700s, his experience as a county defender and censor would have served him well.

Zhang’s literary skill is the focus of all of his biographical accounts. Due to this skill, he passed a total of eight civil service examinations on the top list and had the highest marks in four selection examinations.32 Though remarkable, we should remember that the most successful officials did not spend so much time in the examinations but rather advanced through their merits in office. The Tang histories describe Zhang’s writings as highly regarded, as envoys from Korea, Japan, and other nations would pay for his works in gold.33 Both accounts in the Tang histories end with the anecdote that when Qapaghan Qaghan of the Turks found out that Zhang had been removed from the Censorate, he said: “When your nation has this man and yet does not

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30 See Liu Su 劉肅 (fl. 807), Da Tang xinyu 大唐新語, ed. Xu Denan 許德楠 and Li Dingxia 李鼎霞 (Beijing: Zhonghua shuju, 1984), 8.129.
31 Hong, Rongzhai suibi, 12.359.
32 Jiu Tang shu (Beijing: Zhonghua shuju, 1975), 149.4023 (hereafter JTS); Xin Tang shu (Beijing: Zhonghua shuju, 1975), 161.4979 (hereafter XTS). But see Mo, Guilin fengtu ji, 1.16, which records that Zhang passed seven examinations.
33 JTS 149.4024; XTS 161.4980. Emphasizing Zhang’s popularity among foreigners could have had a political purpose. If Zhang’s writings, steeped in Confucian learning and composed in the official prose style, were of interest to foreigners, it must be because the Tang possessed the literary and cultural capital desired by all nations. The claim that someone’s writings could attract the admiration of foreigners was apparently not an uncommon one, since Yuan Zhen 元稹, in his preface to Bai’s collected works, also tells of how Bai’s writings were similarly in demand. See JTS 166.4357; XTS 119.4304.
employ him, the Han Chinese will not accomplish anything.” 国有此人而不用，汉无能为也。34 On the other hand, the Jiu Tang shu 舊唐書 (Old History of the Tang) describes Zhang’s works as “facetious” (huixie 谩諧) and claims that “those lacking virtue and worthless fellows would memorize and recite his writings” 無賢不肖，皆記誦其文。35 The Xin Tang shu 新唐書 (New History of the Tang) criticizes Zhang’s writings as “elaborate on the surface but lacking in reasoning; their discussions are mostly slanderous and vicious, and yet for a time they were widely circulated, and of later generations none failed to transmit them” 浮豔少理致，其論著率詆誅蕪猥，然大行一時，晚進莫不傳記。36 This passage makes a distinction between the ornamentation and substance of compositions. While acknowledging that Zhang’s writings were attractive and hence popular among contemporaries, it disapproves of the fact that they fail to exhibit careful reasoning. It also faults the contents of Zhang’s writings as being belligerent, which is consistent with what we are told about his personality: that he was “rash in temperament” 性褊躁 and “did not hold to the conduct of a gentleman” 不持士行。37 He was also “dissolute and incapable of restraining himself, seldom getting along with upstanding men” 儗蕪無檢，罕為正人所遇。38 The histories suggest that it was his inability to hold his tongue that led to his political troubles: early in the reign of Emperor Xuanzong 玄宗 (r. 712–56), Zhang was impeached by the Censorate because “his words often ridiculed current times” 言多譏刺時 and because he “often

34 JTS 149.4024; see also, XTS 161.4980.
35 JTS 149.4023.
37 JTS 149.4023.
38 XTS 161.4979.
39 JTS 149.4023.
mocked and criticized the current administration” 多口語訕短時政. 40 We can see in these
descriptions a cantankerous attitude that made Zhang hard to get along with.

It is possible that Zhang’s confidence in his literary talents made him disdainful of others. His name is derived from a supposedly prophetic dream that he had as a child, which must have fed his pride: Zhang once dreamed of a “purple phoenix” (yuezhuo 鴎鶻) landing in the family courtyard, which convinced his grandfather that his grandson would one day “bring favorable auspices upon the bright imperial court by means of his compositions” 以文章瑞於明廷. 41 It is also possible that Zhang never found a way to successfully bridle his talents in response to the practical demands of office. We do not know whether he wrote anything even resembling the literary judgments of the Longjin fengsui pan in his official duties. But if he had to write in a plain and unadorned prose as an official, which is reasonable to suppose for routine cases, he might not have been entirely satisfied with the waste of his talents. 42 If so, the Longjin fengsui pan can be read not merely as display pieces, but as Zhang’s ideal examples of how the classical tradition, which he had mastered, could be used to make judicial and administrative decisions.

Individual cases in the Longjin fengsui pan are structured rather strictly and all are highly ornate. The cases are stated in a way that give them plausibility as real cases: we are always given the names of the parties involved (even if they are clearly pseudonyms), their official titles, and sometimes additional information such as a location or a date. 43 Every judgment begins with a

40 XTS 161.4979.
41 JTS 149.4023.
42 The Guilin fengtu ji mentions an essay attributed to Zhang entitled “A Discussion of Talent and Fate” (Caiming lun 才命論). We can perhaps speculate that it might have expressed his bitterness at his lack of recognition despite his talents.
43 See LJFSP 15.42 (naming a defendant as being from Luoyang), 40.113 (giving the date as the first day of the first month).
statement of the case in unadorned prose. For example, in a case from the Imperial Medical Office (Taiyi 太醫), we read:

Palace Physician Zhang Zhong is skilled at prescribing medication. When he presented medicine [to the throne], he added three doses, which differed from the classical prescription. He has been sentenced to strangulation. He contests, saying that the specific condition of the illness called for adding this dosage. I respectfully plead for judgment.

太醫令張仲善處方，進藥加三味，與古方不同。斷絞。不伏，云：病狀合加此味。仰止處分。44

In the statement of the case, the way by which the case has arrived for consideration or review is sometimes given. For the case above, we are only told that a previous decision had been made. But in the case from the Left and Right Swordsman Guards (Zuoyou qianniuwei 左右千牛衛), we learn that the official had been impeached by the Censorate:

Du Jun was on guard duty and left arrows within the guarded area for imperial ceremonies. The Censorate impeached him and he is handed over for punishment.

杜俊對仗，遺箭於仗內。御史彈。付法。45

In several cases, the Censorate plays a role in the prosecution; in others, it is officials from the Court of Judicial Review (Dali si 大理寺) who rendered the prior decision that is now being reviewed.46 In over a dozen cases, we are told explicitly that a party is “contesting” (bufu 不伏) a previous ruling.

Following the statement of the case, the judgment usually begins with an expository section that describes the history and importance of the department or office from which the case


45 LJFSP 52.156.

46 See LJFSP 2.7, 15.42, 33.92, 65.193.
arose. This section can range from several lines to more than half of the judgment text. Case 1 from the Censorate, for example, begins thus:47

棲鳥之府， The Hall of Nesting Crows48—
地凜冽而風生; so severely cold are the grounds that winds rise up!
避馬之臺, The Terrace of Avoiding the Horse [Patrol]49—
氣威稜而霜動。 so awe-inspiring is the vital energy that frost stirs!
懲奸疾惡, While punishing crimes and reviling wickedness,
實藉嚴明; it indeed relies upon strictness and clarity;
肅政彈非, while establishing reverence for the government and impeaching wrongdoing,
誠宜允列。 it is truly proper for it to be fair and upright.

Beginning a judgment with historical allusions is very common, and the vivid and exaggerated language is characteristic of Zhang’s judgments as a whole. Following this expository section, Zhang usually treats the case specifically by referring to the alleged offender as well as to the charge, and puts forth an argument by using literary and historical allusions. The rhetorical strategies are case-specific. For example, in the case above from the Imperial Medical Office, Zhang lists famous doctors and royal physicians from antiquity, emphasizing the importance both of following established medical practice and of new discoveries in treatment. In the case from the Left and Right Swordsman Guards (a judgment that lacks an expository section), Zhang describes the character of the guard Du Jun and compares him to figures from antiquity:

杜俊幼乏過庭, Du Jun lacked discipline from his parents when he was a child,
少虧函丈。 and as a youth he did not receive sufficient instruction from his teachers.

47 LJSFSP 7.21.

48 The Han Censorate was known to have thousands of crows nesting upon the cypress trees in its yard. See Han shu (Beijing: Zhonghua shuju, 1962), 83.3405. For the many allusions in the Longjin fengsui pan, I have consulted not only Jiang et al.’s Longjin fengsui pan jianzhu 龍筋鳳髓判箋注, but also Tian Tao 田濤 and Guo Chengwei's 郭成偉 Longjin fengsui pan jiaozhu 龍筋鳳髓判校注.

49 Huan Dian 桓典 (d. 201), a censor known to patrol on horseback, was so feared that many tried to avoid him on patrol. See Hou Han shu (Beijing: Zhonghua shuju, 1965), 37.1258.
He unworthily carried the privileges of the hemp plant and floss-grass,\(^{50}\)
and unfairly stood under the shade of the thoroughworts and osmanthus trees.\(^{51}\)
He thereby obtained the archer's thimble and the service of the Dragon Chariot,
and with a whip in his belt [he served within] the Phoenix Palace.

He did not know to tuck in his shoulders and draw in his breath
or to face the decorated curtains and have his spirit alarmed,
[nor did he know] to humble his head and bend his waist,
or to come upon the jade stairs and stop his steps.

He did not have a battle-ready and vigilant heart?
While serving the heavenly majesty,
how did he dare to laugh in derision?
Shi Qing, cautious and reliable,
had not yet stood out in court ceremonies,\(^{52}\)
when Deng Tong, scornful and unruly,
already buried under the laws of the state.\(^{53}\)
The crime of irreverence
must be given over to Shi Que of Wei for punishment;\(^{54}\)
those who do not act with propriety
must be reproved after [the example of] Jin Midi.\(^{55}\)

\(^{50}\) Hemp plant and floss-grass were used to bundle a portion of the soil to symbolize conveyance of land from the ruler to his subjects.

\(^{51}\) Metaphors for worthy gentlemen.

\(^{52}\) Shi Qing 石慶 (d. 103 BC), known for his exemplary governance of the state of Qi, was appointed Counsellor in 112 BC under Emperor Wu of Han. See Shiji (Beijing: Zhonghua shuju, 1959), 103.2764; Han shu, 46.2194.

\(^{53}\) Deng Tong 鄧通 served under Emperor Wen of Han (r. 180–157 BC) and was highly favored because the emperor had a vision of him in a dream, in which Deng helped him ascend to heaven. He amassed a great fortune under the emperor's patronage, but after the emperor's death, his fortune was confiscated on charges of illegal export of coins. See Shiji, 125.3192; Han shu, 93.3721.

\(^{54}\) Shi Que 石碏 (fl. late 8th c. BC), a minister of the state of Wei 衛, arranged to have his own son put to death after his son associated with one who assassinated his lord, Duke Huan of Wei (r. 734–719 BC). He is held as an example of “exterminating one's kin out of great righteousness” 大義滅親. See Zuozhuan 左傳, Duke Yin 4.5. For the Zuozhuan, I use the reference numbers from Zuo Tradition/Zuozhuan: Commentary on the “Spring and Autumn Annals,” trans. Stephen Durrant, Wai-yee Li, and David Schaberg (Seattle: University of Washington Press, 2016).

\(^{55}\) Jin Midi 金日磾 (d. 86 BC) killed his eldest son upon discovering his licentious conduct with the women of the palace, thus earning Emperor Wu’s respect. See Han shu, 68.2959.
The argument is that Du received his post through a hereditary privilege and hence took it for granted. He failed to treat the throne with the proper reverence, and is therefore compared to unruly, even treasonous, officials in history. Irreverence toward the throne is shown to be a grave matter, since Shi Que and Jin Midi even had their own sons killed for treason against their ruler.

After this penultimate section, a judgment would end with a decision, usually given with little literary embellishment, which might approve or disapprove of a prior decision (if one exists) or ask for further investigation. For the palace physician sentenced to strangulation for adding unauthorized dosages, the judgment requests a reconsideration due to the severity of the sentence:

刑獄之重，
人命所懸。
宜更裁決，
毋失權衡。

Because of the weightiness of the punishment, on which a life is hanging, it is proper to consider this further, and not fail to achieve the proper balance [between a too-heavy and too-light sentence].

When a case falls clearly within a provision of the Code, the judgment invariably follows the Code. For example, the case of the guard Du Jun is governed by Article 65, which prohibits leaving behind weapons in an area that has been cleared for ceremonies, but explicitly requires that both the bow and the arrows be present in a guarded area to count as an offense. The judgment therefore concludes:

雖仗內落箭，
未見遺弓，
律有正條，
相須乃坐。

the bow and the arrows must be present for there to be punishment.

Although arrows fell in the guarded area, there was no sign of a discarded bow. The Code has a standard rule:

二罪俱發，
自合從重而論，
一狀既輕，
不可累成其過。

If both crimes [leaving the bow and the arrows] happened at once, it would naturally be proper to impose a heavy penalty, but since one element is missing, we cannot build up a case for error.

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56 *Tang Cod. 65 (126).*
Here, we see an explicit reference to the Code using language from the Code. This is not common in cases in this collection, but we see it here probably because the facts of the case are exactly what is contemplated by this provision of the Code. The decision to absolve Du stands in contrast to Zhang’s vehement disapproval of the guard’s irreverence toward the throne. This tells us that, for Zhang, the formal law could not be ignored regardless of other considerations. Since the Code clearly requires a condition that was not met, it shields Du from punishment, but the judgment does not for that reason have to approve of Du’s conduct.

**WHEN THE FORMAL LAW APPLIES: THE CLASSICAL TRADITION IN A COMPLEMENTARY ROLE**

For a minority of cases in the *Longjin fengsui pan*, like the case of Du Jun, the solution is straightforward according to the formal law. In these cases, Zhang shows detailed knowledge of Tang law, but does not always cite it or pay much attention to it. It is clear, however, that the provisions of the formal law are determinative. In these cases, the classical tradition bolsters the conclusion of the formal law especially when the law itself is based on values derived from the tradition, though sometimes it also serves as a way to characterize the case so that the formal law is more clearly applicable.

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57 The case of Du Jun is unique in that the formal law seems to abruptly step in and ignore the arguments based on the classical tradition. Because the judgment lacks an expository section, it might not be complete. Another section could have made it clear that the formal law, in requiring both bow and arrows, is in fact following a tradition at least as far back as the Han. A case decided by Dong Zhongshu asks what should be the punishment for one who stole a powerful crossbow, although bowstrings and the bow were in different places. It was decided: “When one steals the body of a crossbow, and the bowstrings and pegs are elsewhere, [the offense] should not be ranked as theft of weapons from the armory. The Analects [2.22] says, “When a large carriage is lacking the crossbars [for the oxen], or a small carriage is lacking the poles [for the horses], by what means can it go?” The case is found in *juan* 91 of the *Baishi liutie* 白氏六帖事類集 (Mr. Bai’s Categorized Reference Collection for the Six Examinations). An annotated version can be found in *Gudai panci sanbaipian*, 3–4.
We see a good example of how Zhang combines familiarity with the Code and knowledge of the classical tradition in Case 1 from the Directorate for Imperial Manufactories (Shaofu jian 少府監). Here, an official has been caught stealing 30 cushions that were to be presented to the throne and has been sentenced to life exile at 2,500 li. He defends himself on the grounds that the objects were not actually presented to the throne and hence were not imperial objects. This argument fails because the Commentary to Article 271 of the Code provides that “all [objects] must be categorized and intended for presentation by an inspecting official to count as imperial objects” and the case states clearly that cushions have been “categorized” (bufen 部分). Therefore, the judgment concludes that “since [the cushion were] intended for presentation, they are hence imperial objects”. This is a ruling based directly on the text of the Code. Before reaching this conclusion, however, Zhang spends some time describing the Directorate and the kinds of objects under its charge:

隱隱內藏，
掌其山海之資；
沈沈少府，
職在瓌奇之貨。
玳瑁象牙之寶，
萬里雲奔；
珊瑚瑪瑙之珍，
三邦輻湊。

Bottomless is the Inner Treasury,
in charge of the resources from the mountains and seas;
luxuriantly deep is the Directorate for Imperial Manufactories,
whose duty is to keep possessions that are costly and rare.
Treasures such as giant tortoise shells and elephant tusks—
from ten thousand li, like clouds they rush on;
riches such as corals and agates—
the three tribes converge like spokes on a wheel.

And later:

祇如桃笙象簟，
擬進乘軒；
翠被鸞裀，
咸供御用。

Just like “mats of peach-bamboo and ivory” presented to the royal carriage, and blankets decorated by kingfisher feathers and mandarin duck covers, all offered for imperial use—

58 LJFSP 33.92.

59 Tang Cod. 271 (296–97).

豈得外為鼠盜，
內縱狼貪。

how can they be robbed as by mice outside,
or allowed [to satiate the] greed of wolves from within?

By listing these objects, the judgment emphasizes the preciousness of the royal treasury, and by comparing thieves to mice and wolves, it shows how much of an outrage a theft is that deprives the sovereign of his possessions. When it comes to sentencing the official, Zhang describes him as “having the trifling cleverness that is so shallow it only fills a water jar and the mediocre talent of one carrying a straw basket” 搭瓶小智，荷蕢庸才. 61 Such is one who deserves punishment.

Two other relatively straightforward cases in terms of the formal law are from the Office for the Imperial Ancestral Temple (Taimiao 太廟) and the Office of National Altars (Jiaoshe 郊社). In former case, 62 an official paid a condolence call during the period of a “loose abstinence” (sanzhai 散齋) for a great sacrifice, expressly forbidden by Article 99. 63 The only issue in this case is the prior tribunal’s sentence, which imposed a fine of five jin of copper. According to Article 99, the penalty for such a violation is 50 blows with the light stick. In general, Article 1 allows monetary redemption in lieu of corporal punishment in the amount of one jin of copper per ten blows with the light stick. 64 The prior tribunal had also noted that the official was permitted a reduction of the penalty by one degree due to his official status—hence, he should receive 40 blows with the light stick. 65 Therefore, Zhang’s judgment points out that four jin of copper is the appropriate penalty, not five. The judgment, however, does not dwell on this technicality and

61 See Analects 14.39. A man carrying a straw basket, upon hearing Confucius playing the stone chimes, remarked that those were the sounds of one who was frustrated in his purpose, and that he (Confucius) should just give up. For the Analects, I use the reference numbers in Lun yu 論語, trans. Yang Bojun 杨伯峻 and D. C. Lau (Beijing: Zhonghua shuju, 2008). Translations are mine.

62 LJFSP 65.193.

63 Tang Cod. 99 (155).

64 Tang Cod. 1 (4).

65 See Tang Cod. 8 (19).
spends more time emphasizing how proper sacrifices can bring auspicious signs and therefore why a violation of the “loose abstinence” ought to be taken seriously. For example:

若嚴禋有則，
若严禋有则，
赤雁降於祠宮；
crimson geese will descend upon the altar;
祭謁無虧，
if sacrificial worship is not lacking,
白鶴翔於清廟。
white cranes will circle the pure temple.

In the case from the Office of National Altars,\(^{66}\) where an official failed to disclose that he was in mourning for a relative while performing sacrifices to the Altar of Soil and Grain, another detail in the Code is at issue: Article 101 prohibits those in mourning from taking charge of court festivals, but expressly allows them to perform sacrifices to the Altar of Soil and Grain.\(^{67}\) The official was handed over for punishment, but Zhang’s judgment disagrees based on the Code. The most prominent part of the judgment, however, is a description of the importance of sacrifices to the Altar of Soil and Grain. The expository section where this description is found is lengthy and focuses especially on the role of the sovereign in establishing these sacrifices as a means of bringing prosperity to the state:

社為土主，
The Altar of Soil is the lord of the soil;
稷是穀神。
the Altar of Grain is the spirit of the grains.
侑以姬周之祖，
[The offerings] were urged upon the ancestor of the house of Zhou,
配以烈山之子。
and were suitable for the son of Lieshan.\(^{68}\)
納籙受圖之哲，
The sages who received the diagram and obtained the register;\(^{69}\)
乘乾執契之君。
the lords who rode upon the Pure Yang trigram\(^{70}\) and held the tally—
莫不崇上其道，
none did not revere their ways
肅恭其事。
and reverentially attend to their affairs.

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\(^{66}\) LJFSP 66.196.

\(^{67}\) Tang Cod. 101 (155–56).

\(^{68}\) See Zuozhuan, Duke Zhao 29.4b. A son of Lieshan, named Zhu 柱, was in charge of the Altar of Grain and received sacrifices to his spirit until the Xia dynasty.

\(^{69}\) See “Rhapsody on the Eastern Metropolis” (Dongjing fu 東京賦), Wenxuan, 3.96. There, the reference is to Emperor Gaozu of Han.

\(^{70}\) The Pure Yang trigram (qian 乾) symbolizes the Son of Heaven. See Zuozhuan, Duke Zhao 32.4b.
夏殷履運，
仍開松柏之禋；
漢祖登朝，
復設枌榆之祭。
分其玉帛，
建五色之靈壇；
薦以牲牢，
具三重之芳酎。
八音間發，
六舞交馳，
社主享而呈休，
明靈歆而降福。
命三老，
率百神，
應瑞雀於青疇，
掃飛蝗於翠畝。
則千倉歲積，
三農之蓄有餘；
萬庾年登，
九載之儲斯溢。

When the Xia and Shang dynasties fulfilled their destiny, they established the offering of pines and cedars; when Emperor Gaozu of Han ascended the throne, he restored the sacrifice of white-barked elm. He separated the jade and brocades and built the spirit platform of five-colored earth; and prepared the fragrant wine of the three weighty matters. The eight instruments rang out periodically; the six dances continued one after another. The lord of the soil enjoyed [the offering] and sent auspicious signs; the bright spirits smelled [the aroma] and sent down blessings. Commanding the three elders, and leading the hundred spirits, they sent the auspicious yellow sparrows upon the lush fields and swept away the flying locusts from the lands that were kingfisher-green.

Hence, there was an annual accumulation of a thousand storehouses, and the yield of the farmers had a surplus; there was an annual harvest of ten thousand granaries, and the in-gathering of nine years was plentiful.

Looking to Emperor Gaozu of Han as the archetype of the benevolent sovereign, the judgment describes the steps Gaozu took to restore the sacrifices and the plentiful harvest that resulted. The detailed description of the sacrifices and their efficacy justifies the Code’s exception that allows these sacrifices to be performed even during a mourning period.

71 The Xia used pines to construct the altar, the Shang used cedars. See Analects 3.21.
72 Shiji, 28.1378.
73 See “Tribute of Yu” 禹貢, Shangshu zhengyi 尚書正義 (in Shisanjing zhushu, 1815 (Beijing: Zhonghua shuju, 1980)), 6.148b. The commentary explains that five-colored earth was used by the ancient kings to construct the Altar of Soil.
74 See “Summary Account of Sacrifices” 祭統, Liji zhengyi 禮記正義 (in Shisanjing zhushu), 49.1604a: “At a sacrifice there were three things specially important. Of the offerings there was none more important than the libation; of the music there was none more important than the singing in the hall above; of the pantomimic evolutions there was none more important than that representing (king) Wu’s (army) on the night (before his battle). Such was the practice of the Zhou dynasty” 夫祭有三重焉，獻之屬，莫重於裸，聲莫重於升歌，舞莫重於《武宿夜》，此周道也. Translation by James Legge.
75 Probably elder spirits.
A case from the Bureau of Honors (Zhujue 主爵) implicates a law that is on point, but Zhang does not refer to it at all.\(^7\) In this case, a nephew had inherited his uncle’s title of nobility because his uncle had no son from his principal wife. The uncle, however, did have a son from a concubine. Article 371 sentences those to penal servitude who are not in the correct line of succession through the principal wife and yet make a claim to inherit a title, but does not clearly say what happens when there is no surviving son from the principal wife.\(^7\) However, the Subcommentary to Article 371 directs us to the text of the Statute on Enfeoffment and Titles (Fengjue ling 封爵令), which gives the precise order of succession for a noble title. According to this statute, the son of a concubine has a better claim to the title than a nephew when there are no sons from the principal wife.\(^8\) The judgment does not mention this statute, even obliquely, though the ruling is in accordance with the statute. Instead, the judgment decides in favor of the concubine’s son by citing historical examples of renowned sons of concubines and arguing that ancestral worship cannot properly be maintained by a nephew. It is likely that Zhang felt that his case was more effectively made by appealing to the classical tradition rather than the statute. The order of hereditary succession is a technical rule, but the judgment shows that there is a rationale behind that order.

The cases above are outliers. In most cases in the Longjin fengsui pan, the facts do not clearly lead to a decision required by the law. These cases can be divided into two groups. In one group are cases where we are not given enough facts to apply the law. Consequently, the judgment may request for more information or make factual findings that are not expressly stated. In the other group are cases where we have the essential facts to make a decision, but it is

\(^7\) LJFSP 18.50.

\(^7\) Tang Cod. 371 (396–97).

\(^8\) Tang Stat. 12.2 (219).
unclear what the outcome should be as a matter of law because the formal law applies to the facts imperfectly. The latter group will be treated in the next section, on what happens when the formal law is insufficient by itself to reach a decision.

Cases that are missing essential information to apply the law give Zhang a lot of freedom to characterize the case as he likes, apparently not looked down upon in judgments. For example, in the case from the Ministry of War,\(^79\) a prefectural military general is prosecuted under what appears to be Article 224, which provides that if enemy troops are about to attack and an official does not immediately provide troops to confront them, he may be punished.\(^80\) In this case, we are told that the general decided to stay put and guard the city rather than attack enemy troops. Whether to attack enemy troops or to defend one’s position is a strategical decision based on many factors, but we are not told any of the circumstances in this case. We do not know the number of troops on either side, the number of weapons, or whether or not reinforcements from either side were available. We have no facts to evaluate whether the general acted out of cowardice or incompetence, or based on sound military strategy. Nevertheless, Zhang decides that the general should be prosecuted because he should have engaged the enemy, since by not doing so, he gave the enemy time to regroup. Behind this decision is the assumption that engaging the enemy made sense. Another example of missing facts is Case 1 from the Department of State Affairs, where an official is charged with delay in copying an imperial edict, but defends himself on the grounds of an illness.\(^81\) Such a delay is punishable under Article 111,\(^82\) but an illness could possibly be a mitigating circumstance. The Code does not mention mitigating

\(^79\) LJFSP 30.82.

\(^80\) See Tang Cod. 224 (252–53).

\(^81\) LJFSP 9.26.

\(^82\) Tang Cod. 111 (162).
circumstances, so this might have been a more difficult case if the official was telling the truth. Zhang, however, simply notes that there is no evidence of illness and decides against the official. In such a case, Zhang invents the facts that justify his decision.

Zhang, however, does not always make up facts; sometimes he asks for more information. One example is Case 1 from the Secretariat, which deals with an unauthorized disclosure of state secrets:

Secretariat Drafter Wang Xiu disclosed state secrets and is sentenced to death by strangulation. Xiu contested and testified that he had received the information from Zhang Hui, the officer in charge, and that he ought to be deemed an accessory. Hui testified that it is true he had disclosed the information, but it was not an important matter. He contests the sentence.

Two officials are implicated in the unauthorized disclosure of some matter. Wang Xiu, who had received the sentence of strangulation, sought to have his sentence reduced by accusing Zhang Hui of being the principal culprit who had first disclosed the information to him. Zhang Hui defends himself on the grounds that the information disclosed was not an important matter. Article 109 provides that when a state secret is disclosed, “the one who disclosed the information” is treated as the principal while “the one who transmitted it [to the prohibited parties]” is treated as an accessory; matters that are both unimportant and non-confidential can be disclosed with impunity. The full judgment is as follows:

凤池清切，
鹅树深严。

The Phoenix Pond is pure and near [to the throne], the roost trees secluded and austere.

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83 LJFSP 1.3.

84 Tang Cod. 109 (160).

85 A name for the Secretariat. See TD 21.561.

86 Roost trees were poetically resonant with the Secretariat. See Wenyuan yinghua (Beijing: Zhonghua shuju, 1966), 190.934b, for a poem by Wei Chengqing 葛承慶 (640–706) with the opening
敷奏帝俞，
It memorializes the throne
對揚休命。
and displays abroad the sacred charge.
邵為內史，
When the Duke of Shao was Royal Secretary,\(^87\)
流雅譽於周年；
his worthy reputation flowed through the age of Zhou;
荀作令君，
when Xun Yu held the office of Director of the Secretariat,\(^88\)
振芳塵於魏闕。\(^{89}\)
his fragrant traces permeated the imperial court.
張會掌機右掖，
Zhang Hui conducted affairs through the Right Entryway,\(^90\)
務在便蕃；
his duties numerous and unending;
王秀負版中書，
Wang Xiu held the maps of the foreign states in the Secretariat,\(^91\)
情惟密勿。
which naturally required strict confidentiality.
理宜克清克慎，
It is reasonable to expect that they should be pure and attentive to
慕金人以緘口；
the utmost,
一德一心，
[they should be] of one virtue and one mind,
仰星街而捲舌，
beholding the asterism and curling their tongues.\(^92\)
溫樹之號，
As for the name of the trees by the palace,
問且無言；
when [Kong Guang was] asked, there was no answer;\(^93\)
惡木之陰，
as for the shade of foul trees,

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couplet: “Pure and near is the Phoenix Pond,/Flourishing are the branches of the roost trees” 清切鳳凰池，
扶疏鷄樹枝.

\(^87\) Ji Shi 姬奭 (d. ca. 1000 BC), brother of King Wu of Zhou 周武王, held the influential office of Royal Secretary (neishi 内史). In the Tang, from 618–620 and 684–705, the Secretariat was called Neishi sheng 内史省 and the Director of the Secretariat called neishi. See Hucker, Dictionary, 4236 (350).

\(^88\) Xun Yu 荀彧 (163–212) was Cao Cao’s 曹操 political and military advisor.

\(^89\) The weique 魏闕 are the guard towers that flank the gates of a palace, here used as a metonym for the imperial court.

\(^90\) The Secretariat was located on the right side (i.e., west) of the Xuanzheng Hall 宣政殿 in the Daming Palace 大明宮 in Chang’an.

\(^91\) A story from Liu Xiang’s 劉向 Shuo yuan 說苑 (Garden of Tales). Once, Confucius went to the Zhou ancestral temple and took note of a statue whose lips were thrice sealed and whose back was carved with a warning against talkativeness. See Liu Xiang 劉向 (79–8 BC), Shuo yuan jiao zheng 說苑校證, ed. Xiang Zonglu 向宗魯 (Beijing: Zhonghua shuju, 1987), 10.258–60.

\(^92\) Curled Tongue (Juanshi 捲舌) is an asterism consisting of six stars in the lower part of the Perseus constellation. See Gustave Schlegel, Uranographie Chinoise, 1875 (Rpt, Taipei: Ch’eng-wen Publishing Co., 1967), 363. The Jin shu states that this asterism “governs the words of the mouth, and can be used to know flattery and slander. [When] curled, [the times are] auspicious; [when] straight or twinkling, all under heaven will have disasters of the mouth and tongue” 主口語，以知佞讒也。曲，吉：直而動，天下有口舌之害. Jin shu (Beijing: Zhonghua shuju, 1974), 11.297.

\(^93\) This story of Kong Guang 孔光 (65–5 BC) is recorded in Han shu, 81.3354.
過而不息。 pass by and do not rest in it.\textsuperscript{94}

豈得漏秦相之騎乘， How could it be that one should disclose [the matter of] the Qin counsellor’s carriages,\textsuperscript{95}

故犯疏羅， and willfully violate the large meshes of the law’s net,

盜魏將之兵符， [or that one should] steal the Wei general’s military seal,\textsuperscript{96}

自輕刑典， and disdain the legal sentence?

張會過言出口， When Zhang Hui’s transgressive words were let out of his mouth,

驟馬無追， the carriage horses could not chase it down;

王秀轉泄於人， when Wang Xiu transmitted it to others,

三章莫舍。 the three articles\textsuperscript{97} should not be abandoned.

若潛謀討襲， If [the disclosed matter involved] planning a covert military strike,

理實不容; correct principles certainly cannot countenance it;

漏彼諸蕃, if [information] is leaked to foreign states,

情更難恕。 natural sentiments will find it even harder to pardon.

非密既非大事, the law permits that there be no prosecution in accordance with the law:\textsuperscript{98}

法許準法勿論, we must wait for an examination of the facts

待得指歸， and only then can we make our decision.\textsuperscript{99}

\textsuperscript{94} A reference to a line in Lu Ji’s \textit{陸機} (261–304) “Ballad of the Fierce Tiger” (\textit{Menghu xing} 猛虎行), collected in \textit{Wenxuan}, 28.1293–94. The ballad begins with the lines: “Though thirsty, he does not drink from the waters of Robber’s Spring;/though hot, he does not rest in the shade of evil trees” 矧不飲盜泉水，熱不息惡木陰.

\textsuperscript{95} See \textit{Shiji}, 6.257. The First Emperor once happened to see from the heights of Mount Liang the numerous carriages and attendants of the grand counsellor. Seeing his displeasure, one of the eunuchs informed the counsellor, who reduced the number of carriages and attendants. The emperor realized that someone had disclosed his words (and therefore location), and when no one confessed, ordered all who had been in attendance to be put to death.

\textsuperscript{96} See \textit{Shiji}, 77.2379–82. When the Qin army surrounded the capital of the state of Zhao, Zhao requested aid from the state of Wei, but the Duke of Wei ordered his general to stay put. The Crown Prince of Wei, desperate to save Zhao, had the military seal stolen from the duke and brought it to the general, seeking to replace him in command. When the general nevertheless refused to turn over command of the troops, the crown prince had him killed. The situation is summed up well by one of the crown prince’s retainers, who warns him: “When you issued a false order from the duke, and took over the troops of [the general] Jinbi in order to save Zhao, though you have merit with respect to Zhao, as regards Wei, you have not been a loyal subject” 矯魏王令, 奪晉鄙兵以救趙, 於趙則有功矣, 於魏則未為忠臣也.

\textsuperscript{97} See \textit{Shiji}, 8.362–64. The founder of the Han once made a promise to those under Qin rule that should he succeed in becoming ruler, he would abolish Qin law and enforce only three articles: death penalty for murderers and punishment for wounding and robbery.

\textsuperscript{98} \textit{Tang Cod. 9} (160).

\textsuperscript{99} Jiang et al. punctuate these four lines as 非密既非大事，法許準法。勿論待得指歸，方可裁決. I follow Tian and Guo because “let there be no prosecution” (\textit{wulun} 勿論) is a clear reference to Article 109 and should therefore go with the previous clause.
It is easy to get lost in the flood of allusions which make up the first two-thirds of the judgment, but we can summarize the argument thus: ever since the days of the Duke of Shao and Xun Yu, the role of those who memorialize the throne and issue imperial edicts has been of utmost importance; as officials in the Secretariat, Zhang Hui and Wang Xiu were entrusted with numerous confidential responsibilities and ought to have guarded their tongues according to Confucius’ exhortation in the story of the metal statue and Kong Guang’s example; however, they committed a wrong comparable to the disclosure of the First Emperor’s location and the theft of the military seal of Wei.

In the final third of the text, the judgment makes several references to the Code. “Planning a covert military strike” 潛謀討襲 is defined by the Commentary to the Code as an important matter that must be kept confidential; under the provision dealing with “unimportant matters that are nevertheless confidential” 非大事應密者, “leaking information to foreign envoys” 漏泄於蕃國使者 is an offense that merits a one-degree increase in punishment.¹⁰⁰ Both of these is mentioned in the judgment to demonstrate Zhang’s knowledge of the Code. The Code also provides that “for unimportant matters, there should be no prosecution” 非大事者, 勿論.¹⁰¹ From these provisions, we can infer that if a matter is not confidential, then it is unimportant (the converse is not necessarily true), and hence Zhang correctly states: “When it is not confidential, and thus not an important matter, the law permits that there be no prosecution in accordance with the law” 非密既非大事, 法許準法勿論. But in this case, there are not enough facts to decide whether the disclosed matter was in fact non-confidential and unimportant.

¹⁰⁰ Tang Cod. 109 (160).
¹⁰¹ Ibid.
Zhang’s judgment does not make a final ruling and does not inquire into the actual matter that had been disclosed, but devotes much time to a general discussion of the severity of this alleged misconduct by means of literary and historical allusions. It seems to be a quintessential examination answer, whose goal is not to render an actual decision but to demonstrate knowledge of a wide range of texts. But let me suggest that it can make sense beyond the examination context if we understand the argument that Zhang is making and how he is making it.

The judgment begins with archaic and formalized language. The line “[The Secretariat] memorializes the throne and displays abroad the sacred charge” 敷奏帝俞，對揚休命 adopts formulaic phrases from the *Shangshu* 尚書 (Classic of Documents).102 The judgment then refers to two examples from antiquity, the Duke of Shao and Xun Yu, who were advisors to their ruler and whose roles are seen as akin to that of officials in the Tang Secretariat. Zhang traces the function of the Secretariat all the way back to the Zhou and Han dynasties and thereby emphasizes its importance based on its heritage.

Zhang’s judgment then makes use of four allusions that do not contribute directly to the argument but demonstrate the writer’s learning: the story of the metal statue with thrice-sealed lips from Liu Xiang’s 劉向 (77–6 BC) *Shuoyuan* 說苑 (Garden of Tales); the Curled Tongue asterism; the story of Kong Guang 孔光 in the *Han shu* (History of the Former Han), who refused to name the trees surrounding the imperial audience hall; and a line from Lu Ji’s 陸機 “Ballad of the Fierce Tiger” (Menghu xing 猛虎行): “even when it is hot he does not rest in the shade of foul

102 For *fuzou* 敷奏, see “Canon of Shun” 舜典, *Shangshu zhengyi* 尚書正義, 3.127c; for *diyu* 帝俞, see, for example, “Canon of Yao” 堯典, *Shangshu zhengyi*, 2.123a: “The thearch (di 帝) said, ‘Yes (yu 俞), I have heard [of Shun]’ 帝曰：俞，予聞; for *duiyang xiuming* 對揚休命, see “Charge to Yue” 說命, *Shangshu zhengyi*, 10.176a: “I venture to respond to and display abroad the Son of Heaven’s sacred charge” 敢對揚天子之休命.
trees” 熱不息惡木陰. The allusions function in pairs, the sealed lips and the curled tongue in one, the unnamed trees and the foul trees in another. The historical, literary, and astrological references create a network of associations not obvious to outsiders but easily understandable to those among the social and literary elite. They testify to the learning and credibility of the writer in the eyes of those whose values have been shaped by the same texts.

Following these allusions, Zhang presents two historical precedents—the stories of the Qin counsellor’s carriages and the Wei general’s military seal—by which we may judge the misconduct in question. They come in the form of two parallel phrases introduced by “How could it be that”:

豈得 How could it be that
漏秦相之騎乘, one should disclose [the matter of] the Qin counsellor’s carriages
故犯疏羅, and willfully violate the large meshes of the law’s net,
盜魏將之兵符, [or that one should] steal the Wei general’s military seal,
自輕刑典。 and disdain the legal sentence?

The first two clauses, by comparing the disclosure of state secrets to the story of the Grand Counsellor Li Si’s 李斯 carriages, suggest that heavy punishment is warranted in such cases—the First Emperor had all of his servants executed who might have disclosed his location to Li Si. The next two clauses compare the disclosure of state secrets to the Crown Prince of Wei’s theft of the military seal. The point seems to be that unauthorized disclosure of secrets is an act of treason against one’s ruler. The two stories themselves do not necessarily fit neatly into Zhang’s argument. The Shiji 史記 (Records of the Historian) does not say how we should judge the First Emperor’s execution of all who could have disclosed his location or what we are to think of the Crown Prince of Wei’s theft. But Zhang’s use of history is only a means to an end. History is carved into simplified and digestible units of truth, to be inserted where potentially appropriate.

Taken as a whole, Zhang’s allusions are not merely for embellishment, but are meant to lead a future decision-maker toward a particular view of the case. More fact-finding is needed to
make the decision on whether or not the disclosed matter was confidential, but this fact-finding might not be straightforward. Assuming that the document was not explicitly marked as confidential, how does one determine if it was meant to be? The Code gives examples of confidential matters, but these examples are not meant to be exhaustive. Hence, one’s determination of whether or not a matter was confidential, especially when it is a close call, may very well depend on one’s view about whether one ought to treat Secretariat officials with leniency or severity. The judgment, by portraying the breach of duty by a Secretariat official in a highly critical light, encourages a finding that the disclosed matter was in fact confidential.

When the Formal Law Falls Short: The Classical Tradition as Recourse

In some cases in the Longjin fengsui pan, all of the essential facts are uncontested, but there remains an interpretive question. We have already seen the case from the Imperial Medical Office, where the Code does not perfectly address the given scenario. Whereas the Code punishes those who incorrectly prepare medicine for the throne, the case involves a physician who changed the dosage intentionally because he considered it more effective. It is possible to read Article 102 to mean that all who prepare medicine must never deviate from a prescription. By this very literal interpretation, the physician should be punished. But another possibility is to apply Article 102 by analogy.103 Therefore, depending on how we look at it, the physician’s failure to follow the prescription can be considered either a more serious infraction than the one contemplated in Article 102 since it was not by mistake but intentional, or a less serious one since it was made in good faith rather than through carelessness. In such a case, the judgment, though it makes no

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103 Article 50 allows sentencing by analogy to cover scenarios that are not addressed specifically by the Code. See Tang Cod. 50 (108–09).
final decision, shapes how we are predisposed to view the infraction. Zhang’s judgment encourages leniency:

If ruler and subject cooperate with one another, natural sentiment and correct principles can sometimes be reconciled;

if with fear and loathing they threaten one another, punishment and formal stipulations should not be remitted.

How a subject relates to his ruler is used as a metaphor for how added dosages aid the primary medication. Thus, the judgment argues that the added dosages should be evaluated based on whether the physician was a trusted and dependable subject. If he was, leniency should prevail in such a case because of the ambiguity in what the formal law demands.

Take the two cases from the Censorate as two more examples where it is not clear what result is required by the law. The first case reads:

Censor Wang Quan is given temporary administrative power over Hengzhou by imperial edict. Assistant Administrator Zhong Jian failed to return [to make a report of] a mission [he was sent on] by decree and involved himself in other affairs without authorization, dismissing Zhang Qin, the County Magistrate of Leiyang. Qin contests [before the Censorate].

The matter, rather elliptically stated, is most closely governed by Article 119, which requires that officials sent on a special mission carry out that mission without overstepping their jurisdiction and return to make a report. The case assumes that Zhong Jian’s dismissal of the county magistrate was outside the bounds of his original mission. We should also assume that the

104 The “ruler” refers to the primary medication and the “subject” refers to supplementary medication. See *Huangdi neijing suwen yijie* 黃帝內經素問譯解 (in *Zhongguo yiyao congshu* 中國醫藥叢書), trans. Yang Weijie 杨维杰 (Taipei: Tailian guofeng chubanshu, 1984), 74.668.

105 Reading 舍 as 赦.

106 *LJFSP* 7.21.

magistrate did commit an impeachable offense, in which case his appeal arises not from a substantive claim but a jurisdictional one; this, at least, is the most interesting way to read what is going on. The question therefore is whether a magistrate like Zhang Qin, who committed an impeachable offense, should be permitted to appeal based solely on the fact that Zhong had no jurisdiction to hear his case. While the Code punishes overreaches of jurisdiction, it does not automatically nullify decisions made outside of one’s jurisdiction. The judgment, by emphasizing the power and impartiality of the Censorate, acknowledges both its power to impeach Zhong for his offenses (failure to make a report and overreach of jurisdiction) and its power to confirm Zhong’s dismissal of Zhang Qin even though the dismissal had been made without jurisdictional authority.

The second case from the Censorate raises the question of what happens when there is improper motive behind an otherwise authorized action.\(^{108}\) Yan Xuan used to be a county magistrate, and while serving in that office, the Vice Prefect Tian Shun had occasion to have him whipped. Now as censor, Yan impeached Tian for taking bribes. The ensuing investigation found that Yan did have a personal vendetta, but also that Tian did in fact take bribes.\(^{109}\) The judgment decides that the impeachment was valid despite Yan’s motive. Article 342—on false accusations—punishes a censor who covers up or falsifies a matter for private reasons.\(^{110}\) In this case, however, nothing was falsified, but the censor did have a private grudge. The judgment does not want to invalidate the impeachment, seeing that Tian had been found guilty of taking bribes, but not doing so would seem to encourage censors to more closely investigate the affairs of their personal enemies. The judgment comes up with this solution: it decides that although there was a personal

\(^{108}\) LJFSP 8.23–24.

\(^{109}\) Article 138 covers punishments for bribery. See Tang Cod. 138 (183–84).

\(^{110}\) See Tang Cod. 342 (366–68).
grudge, this was not in fact the reason for the impeachment. It refers to the examples of Qi Xi 祁奚 (fl. 6th c. BC) in the Zuozhuan 左傳 (Zuo Tradition to the Spring and Autumn Annals) and Bao Yong 鮑永 (d. ca. AD 42) in the Hou Han shu 後漢書 (History of the Later Han), both officials who did not let private considerations sway their actions. Qi recommended a personal enemy, Xie Hu 解狐, to succeed his office; only when Xie died did he recommend his own son and so that he could not be accused of partiality toward him.111 Bao was known for not being afraid to prosecute even the emperor’s relatives.112 The judgment concludes:

贪殘有核，
贓狀非虛。
此乃為國鋤兇，
豈是挾私彈事。

Greed and ruthlessness are evident;
the charge of bribery is not false.
This is eliminating wickedness on behalf of the state;
how is it a case of impeachment due to private motives?

By comparing the censor to Qi Xi and Bao Yong, the judgment argues that private considerations played no part in his impeaching his personal enemy. It is suggested that the censor had more to lose than gain in impeaching Tian, since he must have known that he would be accused of acting on private motives. In this way, the judgment avoids having to decide what happens when a censor does pursue a case because of personal vendetta.

In the case from the Directorate of Astrology (Taishi 太史), we have a judgment that consciously resists a certain interpretation of the Code.113 The Grand Astrologer Du Yan privately taught his son astronomy and gave him possession of astronomical instruments. Article 110 prohibits private possession of “astronomical instruments” 玄象器物 and “private study of the

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111 One can read the original story in the Zuozhuan skeptically. Although Qi Xi recommended his enemy, the enemy died before taking office. One can interpret this recommendation merely as a way to justify Qi Xi’s recommendation of his son to succeed him. Afterward, sons succeeding their fathers’ positions became the norm. See Zuozhuan, Duke Xiang 3.4.

112 Hou Han shu, 29.1020.

113 LJFSP 71.214.
heavens” 私習天文."114 The judgment must decide whether this prohibition extends to the case of a father teaching his son. It begins with a long and dense section on the importance of astrology, especially in the calculation of calendars. Then follows a section on how the study of the stars can predict the rise and fall of rulers and states:

星聚東井,  When the stars gather at the Eastern Well,  
逆辨休徵;  one anticipates discerning an auspicious portent;115  
月犯少微,  when the moon encroaches upon the Minor Subtleties,116  
懸知應變。 one preoccupies oneself with the knowledge that one must prepare for changes.  
使星已發,  When the Envoy Stars had been sent forth,  
無違寸景之期;  [the envoys] did not miss the [appointed] date by the smallest margin,117  
劍氣莫關,  when the vital energy of the swords did not cease,  
不爽分毫之信。 they did not deceive in the least.118  
宮居太后,  The empress dowager residing in the celestial office—  
夙已上聞;  early on it was already seen from above;119  
宋起真人,  a True Man arising from the state of Song—  
預為先覺。 before it came to be, it was foreseen.120

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114 Tang Cod. 110 (161–62).
115 See Shiji, 5.1348. When the stars gathered at the Eastern Well, the Han dynasty was established.
116 The Shaowei 少微 is an asterism consisting of four stars in the Leo and Leo Minor constellations and is considered the seat of scholars and counsellors. Schlegel, Uranographie Chinoise, 461–62. See Jin shu, 11.299: "[when these stars] appear large and yellow, virtuous scholars will be raised [to positions of power]; when the moon or [any of the] five planets trespasses upon them, scholars not in office and the empress will be in anxiety, and there will be changes in the grand counsellors" 明大而黃, 則賢士舉也。月、五星犯守之, 處士、女主憂, 宰相易。
117 In 89, Li He 李郃 predicted the arrival of two imperial envoys who had been sent in secret to gather popular songs to gauge the sentiments of the people. See Hou Han shu, 82A.2717–18.
118 The gist of the story of Zhang Hua 張華 (fl. 170s) and the spirit swords is as follows: Zhang observed a purple energy in the heavens in the shape of a sword, and with the help of one learned in astrology, succeeded in recovering two swords at the location where the purple energy pointed to. After Zhang died, the two swords reverted into the form of dragons. See Jin shu, 36.1075–76.
119 Hou Han shu, 100.3220. During the reign of Emperor Guangwu, Venus was seen approaching the asterism Xuanyuan 軒轅 (see Schlegel, Uranographie Chinoise, 452–53). The brightest star in the asterism (alpha-Regulus) is thought to be the seat of the empress. The approach of Venus meant ill for the empress, who indeed lost favor and her position, taking the honorary title of empress dowager.
120 Sanguo zhi (Beijing: Zhonghua shuju, 1959), 1.22. A prediction of the rise of Cao Cao 曹操 (155–220), Emperor Wu of Wei.
As for Qiao Zhou’s prediction that the Kingdom of Shu will be destroyed,
and Du Qiong’s prediction that the House of Cao will triumph—
this is what is revered by every age
and [what is in] the essential books of the state.

The importance of astrology leads Zhang to conclude that the Code’s prohibition does not apply to this case, and that the son should be able to learn from the father. If not, the art of astrology might fail to be passed down. The judgment concludes:

The father is the Grand Astrologer,
and the son studies the heavens.
The son successfully follows the father’s trade,
and the family tradition continues without fail.
If in a private household we do not permit parents to raise their children as they wish,
the office of astrology would no longer continue on.

In some cases, no specific provisions of the Code can be said to apply, and the classical tradition becomes the only authority. These cases are not necessarily difficult; some, in fact, are completely uncontroversial. For example, in the case where a princess’s wedding expenses exceeded those of a senior princess, though it is stated that there were doubts among the officials about the propriety of the matter, there is really no doubt that the cost of the wedding was exorbitant. In Case 2 from the Bureau of Sacrifices (Sibu 祀部), a complaint criticizes the proposed construction of a large Buddha, citing the resentment of monks and nuns who would have to pay for the project and noting that true worship is about the sincerity of the worshipers

121 For Qiao Zhou (201–270), see *Sanguo zhi*, 42.1027–33. For Du Qiong (ca. 180–250), see *Sanguo zhi*, 42.1021–22.

122 Note that Article 450 of the Code prohibits acts that “ought not to be done” 不應得為. *Tang Cod.* 450 (445). The expansiveness of this catch-all provision makes it hard to say whether any offense ever truly falls outside of the Code. The punishments allowed under this provision, however, is limited (up to 80 blows with the heavy stick).

123 *LJFSP* 5.15.
and not the size of a statue.\textsuperscript{124} It is clear that the project should be abandoned, and the difficulty is only in how to present the case delicately.

One case that is straightforward on its face but requires a tactful argument is Case 1 from the Directorate-general of the Imperial Parks (Yuan zongjian 苑總監).\textsuperscript{125} In this case, we are told that old imperial grounds in Xin’an 新安 County (northwest of Luoyang) have long been used by commoners, but there is a request that the grounds be re-admitted under imperial possession. In this judgment, Zhang is most indebted to Zhang Heng’s 張衡 (78–139) “Rhapsody on the Eastern Metropolis” (Dongjing fu 東京賦). The judgment begins:

伊洛瀍澗，
八溪九谷之津;
少室嵩高，
五嶽三塗之險。
邵公相宅，
灼龜墨以定王畿;
光武建都，
因鳳集而成帝業。
濯龍芳苑，
The Yi, Luo, Chan, and Jian River,
and the water paths for the Eight Streams and Nine Valleys;\textsuperscript{126}
the Shaoshi peak of the Lofty Mountain,\textsuperscript{127}
and the precipitous passes of the Five Great Mountains and Mount Santu.

邵公相宅，
灼龜墨以定王畿;
光武建都，
因鳳集而成帝業。

濯龍芳苑，
By the Lustrous Dragon Pond and the Fragrant Garden\textsuperscript{130}

\textsuperscript{124} \textit{LJFSP} 26.73. Toward the end of the reign of Empress Wu, the construction of a large statue of the Buddha was abandoned to help increase her popularity, making this a case of likely contemporary interest. See Richard W. L. Guisso, “The reigns of the empress Wu, Chung-tsung and Jui-tsung (648–712),” in \textit{The Cambridge History of China}, 3:320.

\textsuperscript{125} \textit{LJFSP} 41.118.


\textsuperscript{127} In Henan, also known as the Central Great Mountain (Zhongyue 中嶽), one of the Five Great Mountains (Wuyue 五嶽).

\textsuperscript{128} See “Announcements Concerning Luo” 洛誥, \textit{Shangshu zhengyi}, 15.214b.

\textsuperscript{129} See \textit{Dongguan Hanji jiaozhu 東觀漢記校注}, ed. Wu Shuping 吳樹平 (Beijing: Zhonghua shuju, 2008), 1.1.

\textsuperscript{130} See \textit{Wenxuan}, 3.104: “Lustrous Dragon [Pond] and Fragrant Forest” 濯龍芳林.
走馬交衢； the galloping horses crossed each other's paths;
寶蓋成陰， in the royal canopies that formed shades
金錢滿埒。 strings of copper coins filled the riding course.\textsuperscript{131}
謻門曲榭， The Separate Gate and the winding terrace\textsuperscript{132}—
從來別館之基； of old they were the foundations of the summer palace;
壽安永寧， the Halls of Longevity and Peace and of Everlasting Tranquility\textsuperscript{133}
舊是離宮之地。 used to form the grounds for the detached palace.\textsuperscript{134}

There is no question that Zhang's descriptions of Luoyang are inspired by the “Rhapsody on the Eastern Metropolis.” First, we are given the rivers that mark the boundaries of the city, just as the rhapsody states: “[Luoyang] had the Luo River to the south, the Yellow River to the north, the Yi River to the east, and the Chan River to the west” \textit{泝洛背河，左伊右瀍}.\textsuperscript{135} To the east of the city was the Lofty Mountain (Songshan 嵩山), also known as Dashi 大室, which according to the rhapsody “served as a buttress” (\textit{zuozhen 作鎮}).\textsuperscript{136} The “Rhapsody on the Eastern Metropolis” tells the story of King Cheng of Zhou’s 周成王 (r. ca. 1042–1021 BC) planning of the city as a precursor to Emperor Guangwu’s 光武 (r. 25–57) establishing the capital at Luoyang. Zhang’s judgment takes both events as precursors to Luoyang’s status as the eastern capital of the Tang. Borrowing more language from the rhapsody, the judgment names the Han palaces and gardens as precursors to the imperial grounds of the Tang.

\textsuperscript{131} See Liu Yiqing 劉義慶, \textit{Shishuo xinyu jianshu 世說新語箋疏}, ed. Yu Jiaxi 余嘉錫 (Beijing: Zhonghua shuju, 1983), 30.9 (883). In this story about extravagant display, Wang Ji 王濟 (fl. mid-3rd c.) bought a plot of land for a riding course and marked out the boundaries of the course with strings of copper coins.

\textsuperscript{132} See \textit{Wenxuan}, 3.104. For a discussion of the meaning of “Separate Gate” (Yimen 謻門), see Knechtges, \textit{Wenxuan}, 258, notes on l. 203.

\textsuperscript{133} See \textit{Wenxuan}, 3.103.


\textsuperscript{135} \textit{Wenxuan}, 3.99. The Jian River mentioned in the judgment is further west from the Chan River.

\textsuperscript{136} \textit{Wenxuan}, 3.100.
Reaching the present controversy, the judgment continues with a description of the disputed land and its location with respect to Luoyang:

眷兹穀水，俯瞰神州。斜連四會之郊，迥控兩京之路。都人接畛，桑棗成林；逆旅分區，閭閻撲地。雖其原是苑內，不合輙訴人居。

四邊皆有業恒，百姓若

The land is described as a bustling and central location. Situated northwest of Luoyang and east of Chang’an, it can be said to lie between the two Tang capitals. It is lush and well-settled, and there would be extreme hardship for the people if they had to relocate. The judgment continues with its main argument:

天田大小，先有規模；御圃短長，非無制度。

The size of the Heavenly Plot has its borders in the beginning; the size of the imperial parks is not without regulations.

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137 The Gu River eventually merges with the Jian River, which flows east near Luoyang and into the Luo River. See Li Daoyuan 郭道元 (d. 527), Shuijing zhu jiaoshi 水經注校釋, ed. Chen Qiaoyi 陳橋驛 (Hangzhou: Hangzhou daxue chubanshe, 1999), 15.280, 16.286.

138 I.e., Luoyang.

139 Cf. Wenxuan, 3.101: “The capital was well-proportioned, gazed upon by the four directions” 京邑翼翼，四方所視. The suburbs would be where the emperor made offerings.

140 The Quan Tang wen has 苦. See Quan Tang wen (Beijing: Zhonghua shuju, 1987), 173.1763a.

141 Or “would be bitterly swallowed up.”

142 See Wenxuan, 3.117. Technically, the “Heavenly Plot” refers to σ and τ Virginis, stars that had control over the Sacred Field, but here it refers to the field itself. The field supplies the grain for offerings to the Supreme Lord. See Knechtges, Wenxuan, 280, notes on ll. 434–35.
The judgment notes that the Sacred Field has boundaries, as do the imperial parks. The kings of antiquity likewise had gardens with set limits. But when the sovereign was generous in allowing people to enter his land, the sovereign’s land was not considered too large by the people. When the sovereign imposed strict rules against trespass, even a small parcel of land was considered too large. By making the case not about the sovereign’s ownership of land but his relationship with the people, Zhang follows Mencius’ rhetoric. The judgment hence functions as a remonstrance, and Zhang’s referring to himself as “the foolish man” at the end is a standard term of humility used before a sovereign.

In other cases where no formal laws apply, facts might be so lacking or vague that the judgment simply pronounces a general policy stance. For example, the first case from the Ministry of Personnel arises from a memorial to the throne that claims that responses from the selection examinations had not been evaluated fairly. We are not told in what particular ways the evaluations were unfair, only that good writing had not been recognized. The judgment

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143 See *Mengzi zhushu* 孟子注疏 (in *Shisanjing zhushu*), 2.2674b/c. In a conversation with Duke Xuan of Qi 齊宣公 (r. 455–405 BC), Mencius tells the king that King Wen’s garden was considered small because he allowed people to enter it to gather firewood, to hunt, and to make use of generally. But Duke Xuan’s garden, although smaller in area than King Wen’s, is considered too large because of his extremely strict rules against poaching.

144 *LJFSP* 11.31.
emphasizes the importance of discovering talent, but does not say how to better implement fair evaluation. Cases involving military strategy in the *Longjin fengsui pan* invariably raise the question of whether it is advisable to invest in building costly defenses. In a series of judgments on defense proposals, the consistent position in Zhang’s judgments is to argue that such defenses are ineffective.\textsuperscript{145} The two cases from the Ministry of Rites involve a debate about the trustworthiness of auspicious signs. In the first case, two auspicious signs—the gathering of crimson geese and the appearance of a white unicorn—lead to a call for the emperor to make ritual offerings, but there is some doubt about the reliability of the news of these signs.\textsuperscript{146} The judgment, which focuses mainly on articulating the importance of auspicious signs, decides that no action should be taken until further evidence is furnished. In the second case, a memorial to the throne casts doubt on households that have reported supernatural signs corresponding to acts of filial piety and seeks to remove their tax privileges.\textsuperscript{147} For the most part, the judgment reads like an encomium for filial piety. In one passage, we read:

天地所生, 人為萬物之貴；
人倫所重, 孝為百行之原。

Of all born between Heaven and Earth
human beings are the most prized of the myriad things;
of the human relations that are highly regarded,
filial piety is fundamental to the hundred virtuous conducts.

昔傳曾閔之名, 今有荀何之譽。
孝通厚載,
In ancient times they transmitted the names of Zeng and Min,\textsuperscript{148} while today there is the fame of Xun and He.\textsuperscript{149}
When filial piety permeates the generous bearer [of life].\textsuperscript{150}

\textsuperscript{145} *LJFSP* 57.170 (proposal to erect a defense wall), 58.172 (proposal to plant wooden stakes and nails over the northern pass), 59.174 (proposal to push apart accumulated ice to prevent crossing), and 60.177 (proposal to construct a moat).

\textsuperscript{146} *LJFSP* 23.65.

\textsuperscript{147} *LJFSP* 24.67.

\textsuperscript{148} Disciples of Confucius. Zeng Shen 曾参 (505–436 BC) is the purported author of the *Xiaojing* (Classic of Filial Piety). Min Sun 閔損 (523–487 BC) was also known for his filial piety.

\textsuperscript{149} Xun Yi 荀顗 (d. 274) and He Zeng 何曾 (fl. 220).

\textsuperscript{150} I.e., the earth.
則白兔呈休；
孝感圓穹，
則丹鳥結慶。

The white hares send a favorable sign; when filial piety moves the circular heavens, the crimson birds build an auspicious sign.  

The final decision fully supports the trustworthiness of these signs while rebuking the official who wrote the memorial for his doubts.

One case that showcases the use of the classical tradition in a situation beyond the coverage of the formal law is Case 1 from the Left and Right Guards of the Forest of Plumes (Zuoyou yulinwei 左右羽林衛), involving a situation where the emperor was endangered by rebels in the palace interior:

This military guard reports: Not long ago, there was an emergency in the palace interior. General Jing Wei of the Forest of Plumes, not avoiding danger, split the doors and smashed the gates, killing the rebels and pacifying the forbidden area. His great service and exalted merit are fit for recognition and reward.

Unauthorized entry into the imperial palace and audience halls is governed under Articles 59 and 60 of the Code, but these provisions clearly do not apply under the special circumstances here. The statement of the case assumes that the guard ought to be rewarded, suggesting that this might have been one of those uncontroversial cases for which the correct judgment was not supposed to be in doubt. It has been noted that this case was almost certainly inspired by a real event during the reign of Empress Wu, when the guards of the Forest of Plumes killed the two brothers Zhang Yizhi 張易之 and Zhang Changzong 張昌宗, who had become the empress's most

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151 See Chang Qu 常璩 (ca. 291–361), *Huayang guozhi jiaobu tuzhu* 華陽國志校補圖注, ed. Ren Naijiang 任乃強 (Shanghai: Shanghai guji chubanshe, 1987), 3.175: “The filial son Wu Shun supported his mother, and red birds nested before their gates” 孝子吳順養母，赤鳥巢其門.

152 *LJFSP* 49.147.

153 *Tang Cod.* 59 (120–22), 60 (122).
favored courtiers and wielded extensive influence over her. For his role in slaying the Zhang brothers, Jing Hui 敬晖, a commander of the Forest of Plumes, was rewarded. Zhang’s judgment, however, concludes by punishing Jing Wei (no doubt a pseudonym for Jing Hui) for entering the palace interior without permission.

The judgment goes back and forth between the merit that Jing Wei earned by protecting the sovereign and the crime of his trespass. It begins by describing the Cavalry of the Forest of Plumes established by Emperor Wu of Han (r. 141–87), one of five elite units that defended the palaces in the capital:

期門騎士，
五營驍健之夫;
羽林孤兒,
六郡良家之子。
既兼都尉，
實號嚴郎。

The Cavalry of the Appointment Gate are fierce and strong men of the Five Units; the Orphans of the Forest of Plumes are sons of respected households from the Six Prefectures. They held concurrent offices as commanders and were indeed called Gentlemen of the Grotto.158

154 Huo, “Longjin fengsui pan panmu poyi,” 21–22. For an account of the event, see JTS 91.2928–29: “Winter of that year, [Empress Wu] Zetian was ill, and Zhang Yizhi and his younger brother Changzong were admitted into her private chambers to attend to her, but secretly plotted rebellion. Zhang Jianzhi and Huan Yanfan, Vice Directors of the Phoenix Chamber (i.e., the Secretariat), and Jing Hui, a Right Aide in the Central Pavilion (i.e., the Department of State Affairs), and others devised a plan to kill them. Jianzhi immediately recommended that Yanfan and Hui both take the role of commanders of the Left and Right Guards of the Forest of Plumes, and gave them command of the Imperial Armies, and plotted the matter with them.” 155 See Hucker, Dictionary, 8150 (891).

155 See Hucker, Dictionary, 8150 (891).

156 See Han shu, 28B.1644: “When the Han dynasty rose, the sons of respected households from the Six Prefectures were selected to the Forest of Plumes and Appointment Gate, serving as officials by means of their courage; many famous generals came out of them.” 漢興，六郡良家子選給羽林、期門，以材力為官，名將多出焉。The Appointment Gate was where Emperor Wu of Han gathered men who were skilled in horsemanship and archery. See Han shu, 65.2847.

157 Emperor Wu selected as members of the Forest of Plumes the sons and grandsons of soldiers who died honorably in battle. See Han shu, 19A.727.

158 After accompanying Emperor Wu on his hunts, the Forest of Plumes guards would spend the night in the grotto beneath the stairs of the imperial audience hall. See Hou Han shu, 115.3576.
甘延壽之武勇，
傅介子之趫捷。
如貔獷烈，
莫之與爭；
如鳴衝飛，
死而無退。
如貔獷烈，
莫之與爭；
如鳴衝飛，
死而無退。
自非鄧彪貴胄，
竇固名家，
豈可濫廁戎麾，
叨居武禁。

The military boldness of Gan Yanshou,\(^{159}\)
the fleet-footed agility of Fu Jiezi;\(^{160}\)
like ferine raveners\(^{161}\) in ferocity,
none could contend with them;
even if they should die there was no retreat.
If they were not descendants of a nobleman like Deng Biao,\(^{162}\)
nor of the illustrious household of Dou Gu,\(^{163}\)
how could they mix with the military standards
or take their stand among the imperial armies?

After praising the boldness, skill, and illustrious heritage of the Forest of Plumes, the judgment proceeds to describe the budding rebellion:

頃者騐梟反噬，
蜂蠆成妖。
薊發床褥之間，
災生肘腋之下。
虹穿白日，
星孛紫微。
Not long ago, the owls were treacherous,
and the wasps and scorpions became demons.
Bloody works emerged under the bed covers,
and disaster arose from among intimate confidantes.
A rainbow pierced the bright sun,
and a comet passed by the Celestial Purple Palace.\(^{164}\)

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\(^{159}\) Gan Yanshou 甘延壽 (d. 24 BC), who served in the elite Forest of Plumes, is best known for his swift military action, along with Chen Tang 陳湯, against Zhizhi Shanyu 齊支單于. Zhizhi had killed a Han envoy and had ambitions that threatened Han interests. The two men, without waiting for imperial authorization, assembled troops and attacked Zhizhi, defeating him. See \textit{Han shu}, 70.3007ff.

\(^{160}\) Fu Jiezi 傅介子 (d. 65 BC) is known for assassinating the non-Chinese king of Loulan 樓蘭 (later Shanshan 鄯善), who had put to death several Han envoys and was friendly toward the Xiongnu. He presented him with gifts and lured him to meet him at his tent outside the capital of Loulan, where he had him stabbed to death. See \textit{Han shu}, 70.3001–02.

\(^{161}\) A mythical animal resembling an ash-gray tiger, leopard, or bear. See Paul Kroll, \textit{A Student’s Dictionary of Classical and Medieval Chinese} (Leiden: Brill, 2015), 341.

\(^{162}\) Deng Biao 鄯彪 (d. 93) is known for his uprightness. Upon his father’s death, he granted the fief due himself to his half-brother. See \textit{Hou Han shu}, 44.1495–96.

\(^{163}\) Dou Gu 窦固 (d. ca. 83) was Emperor Guangwu’s son-in-law and a prominent official. See \textit{Hou Han shu}, 23.809–11.

\(^{164}\) The Celestial Purple Enclosure (Ziwei yuan 紫微垣) is a collection of 15 stars, seven in the Draco constellation, and others in the constellations Ursa Major, Cepheus, Camelopardalis, and Rangifer. See Schlegel, \textit{Uranographie Chinoise}, 508–10. “Enclosure” (yuan 垣) refers to a group of stars that form the boundary of a celestial region. According to the \textit{Jin shu}, the Ziwei yuan forms “the seat of the Great Emperor and the constant dwelling of the Son of Heaven” 大帝之坐也, 天子之常居也. \textit{Jin shu}, 11.290. A comet passing through this region forebodes ill for the emperor.
時驚觸瑟之虞，

Now there is the alarm of the deceit of brushing against the zither;\textsuperscript{165}

遽有獻圖之變。

soon there would be the mutiny of presenting a map.\textsuperscript{166}

The urgency of the matter seems to justify Jing’s trespass, but surprisingly we find the following:

敬偉不承製敕，

Jing Wei did not receive a special edict

輙入宮闈。

and entered the palace interior without authorization.

騎列青規，
The cavalry lined the inner court

兵交黃屋。

and weapons clashed under the yellow canopy.\textsuperscript{167}

犯龍苑之禁，

When one commits trespass of the dragon gardens,

尚拱嚴刑；
even then he is given over to strict punishment;

斬鹿門之關，

when [Zang Wuzhong] smashed the crossbar at Deer Gate,

猶思干紀。

it was still considered a violation of the rules [of the state].\textsuperscript{168}

豈有白鷗飛閣，

How could the pavilion painted with the white fireback pheasant

列闔長駭；

have its gates breached,

玄武仙樓，
or the immortal towers of Xuanwu Gate

衝扉直進。

be entered directly by charging through the doors?

侮弄兵器，

Carelessly wielding his weapons,

震動乘輿。

he shook the royal chariot.

論功雖則可嘉，

If we consider his service, it is praiseworthy,

議罪便當不敬。

but if we discuss his misconduct, then it ought to be treated as irreverence.

以勤補拙，

[Though he might] overcome his lack of ability by his effort,

終過重而勞輕；
at the end, his error is grave while his accomplishment is slight;

以力酬愆，

[though he might] use his strength to atone for his mistake,

即罪大而功小。
yet the misconduct is great while his service is small.

何者？

How so?

經綸秘算，
The secret art of weaving the threads of government

\textsuperscript{165} An assassination attempt on Emperor Wu of Han was foiled when the assassin brushed against the zither in the emperor’s chambers. See \textit{Han shu}, 68.2960–61.

\textsuperscript{166} Jing Ke 荊軻 (d. 227 BC), on the pretense of presenting a map to the First Emperor of Qin, tried to assassinate him with the blade hidden in the scroll of the map. See \textit{Shiji}, 86.2526–38.

\textsuperscript{167} See \textit{Han shu}, 43.2116. Lu Jia 陸賈 (d. 170 BC) was sent by Emperor Wen of Han to the kingdom of Nanyue 南越 “to remove the yellow canopy and the exercise of imperial authority” 去黃屋稱制, that is, to secure the nominal submission of the king of Nanyue to the Han. Yan Shigu’s 顏師古 (581–645) commentary states that \textit{huangwu} 黃屋 is the canopy of a carriage, a symbol of royal power.

\textsuperscript{168} Zang Wuzhong 臧武仲 (fl. 550 BC) (=Zangsun He 臧孫紇) was forced to break down the crossbar at Deer Gate (the eastern gate of the Lu capital) after Meng Xiaobo 孟孝伯 (d. 542) (=Jie 羯) accused him of being about to cause a disturbance by not allowing him (Jie) to bury his father. It is suggested that Zang had disputed Meng’s claim to be his father’s successor. Zang’s offense was officially deemed a violation of the rules of the state, namely, trespass of the gate and breaking down of the crossbar. See \textit{Zuozhuan}, Duke Xiang 23.5d/e.
does not despise hidden ploys;
the constant rule between the sovereign and his subjects
has its principle in the greater good.
Therefore, Bo Di cut off the sleeve [of Duke Wen of Jin]
and yet the Duke of Jin [later] received his loyalty;\(^\text{169}\)
Guan Zhong shot an arrow into the belt buckle [of Duke Huan of Qi],
and yet Huan of Qi made him his Grand Counsellor.\(^\text{170}\)
When [Emperor Gaozu of the Han] begrudgingly enfeoffed Yong Chi,
he encouraged unity among his subjects;\(^\text{172}\)
when he beheaded Ding Gong in tears,
he warned the army against irresoluteness.\(^\text{173}\)
When the Marquis of Yanling gave his command [to refuse the First Emperor],
he managed to guard the glory of old;\(^\text{174}\)
after Li Ke granted favor [to Yi Wu],
he later received condemnation.\(^\text{175}\)

\(^{169}\) Bo Di 勃鞮 (fl. 636 BC) (= Eunuch Pi 披) had been sent on two occasions to assassinate Chong’er 重耳 (later Duke Wen of Jin) and on one of those occasions had succeeded in cutting off his sleeve. Nevertheless, Bo Di convinced Chong’er to give him an audience after reminding him of the story of Guan Zhong and Duke Huan of Qi. During the audience, Bo Di revealed to him a plot on his life. See Zuozhuan, Duke Xi 24.1b.

\(^{170}\) Guan Zhong 管仲 (d. 645 BC) had shot an arrow into the belt hook of Xiaobo 小白 (later Duke Huan of Qi), who feigned death. Later, Duke Huan of Qi nevertheless chose to employ him for his talent. See Shiji, 32.1485–86.

\(^{172}\) The 1504 edition has \textit{nu} 怒, but as Jiang et al. note, \textit{yuan} 怨 fits better in the context and is supported by two block-print editions. See LJFSP 49.147.

\(^{173}\) Yong Chi 雍齒 (d. 192 BC), a commander under Liu Bang, had betrayed Liu Bang by handling over the city of Feng 豐 to rival forces. After the defeat of Xiang Yu 項羽, the (now) Emperor Gaozu enfeoffed Yong Chi, the man he most hated, in order to quiet the unrest among his supporters, reassuring them that they would receive their rewards as well. See Shiji, 55.2043.

\(^{174}\) The Marquis of Yanling refused to surrender his territory to the state of Qin, even though he was offered ten times the amount of land. He sent Tang Ju 唐且 to Qin to deliver the message that he had to guard the land because it had been granted by his former prince. The mission was a success when Tang managed to threaten the king of Qin with a blade. See Liu Xiang 劉向, \textit{Zhanqiu ce 戰國策} (Shanghai: Shanghai guji chubanshe, 1978), 25.922–23.

\(^{175}\) Li Ke 里克 (d. 650 BC) had set Yi Wu 夷吾 (later Duke Hui of Jin 晉惠公) on the throne after killing the two favorite sons of his ruler, Duke Xian of Jin 晉獻公. Duke Hui, however, later insinuated that
In one of the longest sustained arguments in any judgment, Zhang tries to explain why Jing Wei should be punished. He describes the unauthorized trespass of the palace interior and does not give any credit to Jing's intentions. He cannot disregard the fact that Jing succeeded in slaying the rebels, but weighing the good that Jing did against his trespass, Zhang finds that “his error is grave while his accomplishment is slight” 過重而勞輕. Yet, as though not satisfied that he has made a sufficiently compelling case, Zhang poses a rhetorical question, “How so?”

Six historical examples follow. Bo Dì and Guan Zhong both made assassination attempts against their future sovereign, but in each case the sovereign chose to employ them in his service afterward. Emperor Gaozu of Han, in order to appease his subjects who were complaining about not being rewarded, first rewarded Yong Chi, his enemy (thus reassuring the others that they would be rewarded in time); in order to emphasize his stance against treachery, he slew Ding Gong, who had earlier betrayed Xiang Yu to help Gaozu. The Marquis of Yanling, out of loyalty to his defeated prince, refused to surrender his land to the First Emperor. Li Ke, on the other hand, betrayed his prince to set up another on the throne, only to be compelled to commit suicide by the very man he helped.

The judgment appears to argue through these examples that it is not always the case that the sovereign should reward those who have served him well while punishing those who have opposed him: Duke Wen of Jin and Duke Huan of Qi employed the very men who had once attempted to kill them; Gaozu had good reasons to reward his enemy and kill his benefactor; the First Emperor did not kill the one who opposed him, while Duke Hui of Jin drove the one who
helped him ascend the throne to suicide. The judgment hence justifies why the sovereign might still wish to make an example of Jing Wei by punishing his trespass, even though he had saved the sovereign from the rebels.

Zhang might or might not have written this judgment out of sympathy for the Zhang brothers, but the judgment could easily have been read as a criticism of the coup that killed the brothers and effectively dethroned Empress Wu. We are told in the *Guilin fengtu ji* and the Tang histories that Zhang was especially despised by the Grand Counsellor Yao Chong 姚崇 (651–721),\(^\text{176}\) who had acquiesced in the plot against the Zhang brothers.\(^\text{177}\) It is possible that this judgment contributed to Yao’s dislike of Zhang. If it did, Zhang certainly went out of his way to make his judgment offensive to Yao and his cohort, since he did not have to present such a convoluted argument. It would have been far simpler to argue that the trespass should be forgiven because the sovereign was saved. This judgment shows, probably better than any other in Zhang’s collection, how the classical tradition could be marshalled, with sufficient creativity, to make any argument for almost any case. But as for why Zhang decided to devote his energies in this particular case to the more difficult (and perhaps more politically dangerous) side, we can never know for sure.

Such a case also reveals how, though the classical tradition is a repository of moral norms, it should, whenever possible, be anchored to the formal law. The two are complementary, as the preface to the Code states: “Virtue and ritual form the foundation of governance and instruction,”\(^\text{178}\) punishment and penalties are the means of governance and instruction. Like night

\(^{176}\) Mo, *Guilin fengtu ji*, 1.16; *JTS* 149.4023; *XTS* 161.4979.

\(^{177}\) See *JTS* 96.3022.

\(^{178}\) See *Liji zhengyi*, 61.1684b: “As for the institution of ritual in antiquity . . . this was the foundation of governance and instruction” 古之制禮也 . . . 政教之本也.
and day, yang and yin, they depend on one another and bring [each other] to perfection” 徳禮為政教之本，刑罰為政教之用，猶昏曉、陽秋相須而成者也. The classical tradition works with the formal law and never against it, filling its gaps as necessary, and supporting its conclusions to present the image of morality and law as a seamless whole. When the formal law is entirely unavailable, the classical tradition may be exposed in its inability to reach definitive solutions because it is more amorphous than the formal law.

CONCLUSION

Judgments occupied a different sphere of concern than that of the formal law, since the fundamental task of judgments was to defend a decision, not to assign a precise punishment. We can come to a deeper understanding of the judgments in the Longjin fengsui pan, and judgments in general, if we see them as rhetorical complements to the formal law. Zhang’s judgments show how classical learning can be used to defend a position, whether or not the formal law is clear about what the outcome should be in a case. They evoke images and recall stories in ways that do not necessarily make direct arguments, but rather encourage a certain perspective on a case. For Zhang, an exhaustive accumulation of literary, historical, geographical, philosophical, and cultural references is the principal strategy to make a reader predisposed toward a specific outcome. When there is a case where the Code applies unambiguously, it is the judgment’s task to explain why the Code’s provision reaches a proper result. In cases where the applicability of the formal law is in doubt or where there is no formal law on point, the judgment must convince its readers based on arguments drawn from the classical tradition that the right decision is being made or will be made when more facts become available.

179 Tang Cod. preface (3).
Shaped by the literary tendencies of men whose minds were saturated with the classical tradition, judgments such as those in the *Longjin fengsui pan* are alienating to us because, in some ways, we can never fully appreciate them as they were meant to be appreciated, by men for whom the canonical texts contained the very language they lived and breathed. Through the lens of these texts, these men saw and understood the world far more than through the lens of the formal law. Their familiarity with the language of these texts allowed them to articulate arguments in *de facto* shorthand in four- and six-syllable lines. By using this language, Zhang’s judgments become for us a good example of how decisions both routine and complex are inevitably influenced by the texts one reads.
Chapter Five

Moral and Ritual Propriety in the *Hundred Judgments* of Bai Juyi

Punishments can be used to restrain people’s transgressions, but cannot guard against people’s feelings; the rites can be used to guard against people’s feelings, but cannot guide people’s inner nature; the Way can be used to guide people’s inner nature, but again cannot restrain people’s transgressions. They act alternately on the exterior and the interior, and are to be used in turns. Therefore, kings observe the measure of order and chaos and put punishments and the rites in the right sequence.

夫刑者可以禁人之惡，不能禁人之情。禮者可以防人之情，不能率人之性。道者可以率人之性，又不能禁人之惡。循環表裏，迭相為用。故王者觀理亂之深淺，順刑禮之後先。1

In a letter to his friend Yuan Zhen 亞稹 in 815, Bai Juyi 白居易 (772–846), born about a generation after the death of Zhang Zhuo, described his successes in the examinations with pride:

When I first went in for the *jinshi*, I did not even have distant relatives at court, nor a passing acquaintance with any official. I went along as though whipping a lame donkey on a road marked by fleet-footed steeds and fought with bare hands on the literary battlefield. Within ten years I passed three examinations, my name rang in every ear, and my footsteps rose to the pure offices.2 I made friends with outstanding talents and entered into the service of the crown.

初應進士時，中朝無緦麻之親，達官無半面之舊。策蹇步行於利足之途，張空弮於戰文之場。十年之閒，三登科第。名入衆耳，跡升清貫，出交賢俊，入侍冕旒。3

1 “Punishments, the Rites, and the Way” 刑禮道, *BJYJ* 64.3525.

2 I.e., the most promising offices for career advancement.

3 “Letter to Yuan Ninth,” *BJYJ* 45.2793.
Bai had reason to be proud. He grew up in a time of political unrest (the An Lushan rebellion, which almost destroyed the Tang, had ended only nine years before his birth) and in his early teens lived through the rebellion of the Hebei governors (781–786), a blow to the central government’s attempt to reassert control over the provinces.⁴ Hard times (including a drought) forced the Bai family to split up, and several of Bai’s early poems describe the sorrow of separation and the hardship of making a living.⁵ His father died when Bai was 22, and Bai, his mother, and younger brother apparently became dependent on the care of relatives.⁶ For Bai, as for only a relatively small number of men who were not in the Tang upper class, the examinations made all the difference. He qualified to sit for the keju at the capital at the age of 28, which was unusually late (the cause was probably financial, certainly not lack of talent),⁷ and passed the prestigious jinshi.⁸ Two years later, he sat for the “Composition of Judgments, Plucking the Finest” (Shupan bacui), a special selection examination that allowed candidates to waive their waiting periods.⁹ After passing this examination by successfully completing three judgments,¹⁰ Bai

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⁴ Michael T. Dalby, “Court politics in late T’ang times,” in The Cambridge History of China, 3:582–86.

⁵ See Waley, Life and Times of Po Chü-i, 12–15.

⁶ Ibid., 15.

⁷ See “Letter to Yuan Ninth,” BJYJ 45.2792.

⁸ According to the Tongdian, one or two in every hundred passed the jinshi. See TD 15.357. There was also a saying in the Tang that “to pass the mingjing at the age of 30 is considered old, but to pass the jinshi at the age of 50 is considered young.” 三十老明經，五十少進士. See Wang Dingbao 王定保, Tang zhiyan jiaozhu 唐摭言校注, ed. Jiang Hanchun 姜漢椿 (Shanghai: Shanghai shehui kexue chubanshe, 2002), 1.10.

⁹ With the rank of jinshi, Bai would otherwise have had to wait three years to take part in the selection examinations. See Wang, Tangdai quanxuan yu wenxue, 52.

¹⁰ See TD 15.362.
received his first post as Collator of Texts in the Palace Library (Mishu sheng jiaoshulang 祕書省校書郎)."

It was most likely in preparation for the Shupan bacui that Bai wrote a number of hypothetical judgments, now collected in juan 66 and 67 of the Baishi Changqing ji 白氏長慶集.\textsuperscript{12} Though we do not have many extant judgments that were written as practice pieces for the examinations, they must have been common. Yuan Zhen, who passed the Pingpan 平判 examination (which also required the composition of judgments) in the same year Bai passed the Shupan bacui, probably prepared himself in the same way, but not many of his judgments survive.\textsuperscript{13} Bai’s judgments are commonly known as the Baidao pan 百道判 (Hundred Judgments) or the Jiayi pan 甲乙判 (Anonymous Judgments, since the hypothetical parties are referred to by jia 甲 (“A”), yi 乙 (“B”), and like designations).\textsuperscript{14} In his preface to Bai’s collected works, Yuan notes that after Bai passed the Shupan bacui, his judgments were circulated in the capital among the jinshi graduates awaiting selection.\textsuperscript{15} Bai himself, in his letter to Yuan in 815, mentions that candidates would use the judgments that he composed privately as their templates.\textsuperscript{16}

\textsuperscript{11} Bai’s career would include stints as imperial censor, governor of several provinces, and Vice President of the Ministry of Punishment, spanning the reigns of seven Tang emperors. For a list of all of Bai’s offices, see Eugene Feifel, Po Chü-I as a Censor: His Memorials Presented to Emperor Hsien-tsung During the Years 808–810 (The Hague: Mouton & Co., 1961), 20–21.

\textsuperscript{12} Bai’s entire literary collection was originally in 50 juan and later supplemented with 25 additional juan. The earliest extant version is a Southern Song print edition in 71 juan. It is the best preserved of all personal collections from the Tang edited by the author himself. See discussion in BJYJ xiii–xiv.

\textsuperscript{13} For Yuan’s judgments, see Yuan Zhen, Yuan Zhen ji jiaozhu 元稹集校注, ed. Zhou Xianglu 周相錄 (Shanghai: Shanghai guji chubanshe, 2011), add. supp. 3.1615–30.

\textsuperscript{14} There are two additional judgments, which appear anonymously in the Wenyuan yinghua, but are attributed to Bai in the Quan Tang wen. These two judgments can be found in BJYJ supp. 3.3934–36, but will be considered spurious for our purposes.

\textsuperscript{15} BJYJ app. 2.3972.

\textsuperscript{16} “Letter to Yuan Ninth,” BJYJ 45.2793.
collected his judgments in the form we now have them after passing the Shupan bacui, since one judgment question from that examination (“Smoothing the Rough Edges”) is mixed in with the rest. As a practical matter, his collection of judgments probably would have been highly regarded only after he proved himself by passing the Shupan bacui.

Bai’s judgments cover a wide range of subjects, in stark contrast to the judgments of Zhang Zhuo, which are exclusively concerned with bureaucratic matters. There are cases on marriage and the family, examinations and the bureaucracy, mourning and burial rites, administrative and military matters, and so on. There is little reason to doubt that Bai was following the conventions of the genre. Many of his cases involve common scenarios drawn from canonical stories. For example, the judgment question “Interpreting a Cow’s Bellowing” 解牛鳴, inspired by the story of Gelu of Jie 介葛盧 in the Zuozhuan, is found both in Bai’s collection and in the Wenyuan yinghua with a response by an anonymous writer. Unlike the Longjin fengsui pan, many of Bai’s judgments (52 out of 101) are included in the Wenyuan yinghua, which suggests that these judgments were not as well known in the early Song. In his study of Bai’s judgments, Chen Dengwu 陳登武 divides the cases into four categories: those involving Tang law, those involving Tang law and ritual, those involving ritual alone, and those involving neither law

17 For a discussion of this case, see Appendix III.

18 For a breakdown of all of Bai’s cases, see Fu Xinglin 付興林, Bai Juyi sanwen yanjiu 白居易散文研究 (Beijing: Zhongguo shehui kexue chubanshe, 2007), 39–78.

19 Gelu of Jie understood from the bellowing of a cow that three of her calves had been sacrificed. See Zuozhuan, Duke Xi 29.4.

20 BJJY 66.3598–99.

21 Wenyuan yinghua, 547.2794b–2795a. Bai’s response to this judgment question is also found in Wenyuan yinghua, 547.2797a.

22 Bai has by far the most number of judgments included in the Wenyuan yinghua compared to any other writer.
nor ritual.23 These categories, by identifying cases on “law” as those involving the formal law (57 of the 101 cases) and cases on “ritual” as those involving ritual questions treated in the canonical texts, are useful but are clearly oversimplifications. I take a different approach by regarding all of Bai’s cases as being about “law,” with the formal law and the canonical texts being different expressions of it. I focus specifically on cases dealing with private conflicts and with marriage and the family, not only because these are the kinds of cases that the Longjin fengsui pan neglects, but also because they demonstrate most clearly how Bai uses discussions and descriptions of moral and ritual propriety to introduce “humane moral feelings” (renqing 人情) to law.

**COMPARSED WITH ZHANG’S JUDGMENTS**

Written about a century after the Longjin fengsui pan, Bai’s judgments show how much the genre had changed. The Tongdian claims that over the course of the Tang, cases for judgment were increasingly derived from the canonical texts rather than from legal or real-life sources:

In the beginning, when the Ministry of Personnel made its selection of talent, it personally examined the candidates and reviewed their administrative ability. At first it chose from case records and unresolved controversies from the prefectures and counties, and tested their decision-making abilities, observing whether they were capable. These were [the topics] judgments were on. Afterward, as the days and months went by, selection candidates greatly increased; the case records were simple and did not present sufficient difficulty. Thereupon, it selected from the Classics and ancient commentaries, posited hypothetical litigants jia and yi, and had candidates decide these cases. Soon, those who came afterward were even more numerous, and the whole of the Classics and the standard works failed to provide sufficient ways to come up with questions. So it gathered unorthodox books, esoterica, and subtle principles and asked about them, only fearing that candidates would understand them.

脚上，吏部選才，將親其人，覆其吏事，始取州縣案牘疑議，試其斷割，而觀其能否，此所以為判也。後日月寛久，選人猥多，案牘淺近，不足為難，乃采經籍古義，假設甲乙，令


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Zhang’s collection, from an earlier period, seems to belong to the first stage, with cases that could have been drawn from real sources. In contrast, Bai’s cases seem to belong to the second stage. Some of them clearly evoke well-known stories from the classical tradition. The case of “Interpreting a Cow’s Bellowing” has been mentioned already. To name a few others: there is the case of the envoy criticized for refusing to avenge his brother while on an official mission, a situation posed to Confucius in a story in the *Liji* (Records of Rites), with Confucius concluding that such a man should prioritize his mission; there is the case of the son ordered by his ill father to bury the father’s favorite concubine with him when he dies, inspired by the story of Viscount Wu of Wei 魏武子 (fl. 7th c. BC) and his son in the *Zuo zhuan*; in another case, an official is charged with wrongdoing for not punishing his carriage driver for being intoxicated and vomiting in the carriage, recalling the story of Bing Ji 丙吉 (fl. 1st c. BC), who sought pardon for his carriage driver for the same offense; there is also the case of the prefect, who, upon seeing two brothers taking each other to court, withdrew to reflect on how he could have allowed morals

24 *TD* 15.361–62.

25 For a list of such cases in Bai’s collection, see Wu Juan 吳娟, “Bai Juyi Baidao pan yu Tanglü shuyi ji rujia jingdian duying yanjiu” 白居易《百道判》與《唐律疏議》及儒家經典對應研究 (MA thesis, Jilin daxue, 2007), 23.

26 *BJYJ* 66.3568.

27 See *Liji zhengyi*, 7.1284c.

28 *BJYJ* 67.3652.

29 *Zuo zhuan*, Duke Xuan 15.5.

30 *BJYJ* 67.3626.

31 *Han shu*, 74.3146.
to degenerate to such an extent,32 imitating Han Yanshou 韓延壽 (d. 57 BC) in a story in the Han shu.33

These cases differ from Zhang’s cases in the extent to which they were obviously inspired by stories in the canon. But it is a difference in degree, not in kind. For many of Zhang’s cases, we cannot rule out the possibility that they were also inspired by traditional stories, only less obviously so. For example, Case 1 from the Chancellery involves an official who miswrote a name in a memorial to the throne,34 which could have been inspired by an anecdote in the Shiji about Shi Jian 石建 (d. 123 BC), who once miswrote a character in a memorial, a story to which the judgment alludes.35 Shi’s story was probably one in a repertoire of stories that stressed vigilance in serving the throne. Case 2 from the Princess’s Establishments, on a princess’s private request for an office for her son, could have been inspired by any number of private requests for offices recorded in the histories, many of which are mentioned in the judgment itself.36 From this, it is reasonable to think that Zhang’s cases were not all inspired by real-life sources. On the other hand, not all of Bai’s cases are obviously identifiable with specific stories in the canon, and we have to at least acknowledge that some could have been inspired by real-life sources. The narrative of the Tongdian is not to be taken at face value; most likely throughout the Tang, cases for judgment were drawn from both real-life and literary sources, with some periods (and authors) preferring one over the other.37

32 BJYJ 66.3573.
33 Han shu, 76.3213.
34 LJFSP 3.10.
35 See Shiji, 43.2766.
36 LJFSP 6.18.
37 For a more detailed description of the evolution of literary judgments in the Tang, see Tan, Tangdai pantiwen yanjiu, 55–84. Tan’s analysis relies heavily on the judgments in the Wenyuan yinghua, in
Stylistic differences more clearly distinguish the judgments of Zhang and Bai. Hong Mai preferred Bai’s judgments to Zhang’s, noting that the former “did not contradict humane moral feelings and conformed to the law’s intentions, drawing from the Classics and citing the histories, with abundantly clear analogies—not what the ‘Copper Coin Academician’ [i.e., Zhang Zhuo] could match” 不背人情，合於法意，援經引史，比喻甚明，非「青錢學士」所能及也. Hong’s emphasis on how Bai’s judgments took note of both humane moral feelings and the law’s intentions is especially telling. It appears that for Hong, Bai’s judgments, while citing the histories and the Classics just as Zhang’s judgments did, were of a higher quality because of their handling of the formal law with a humane empathy that emphasized the law’s intentions rather than its literal rules. In contrast, Hong regarded Zhang’s judgments as accumulations of stories from the past whose principal (and inferior) method of persuasion was in putting forth a learned display.

In comparison to Zhang’s judgments, Bai’s judgments are more concise and to the point, though his pieces show no less familiarity with the classical tradition or the formal law. Take, for example, the following case involving an official charged with unsealing an imperial decree, a situation similar to Zhang’s case involving the disclosure of state secrets:

Received: A unsealed an imperial decree without authorization. The officials in charge sentenced him according to the punishment for disclosure of state secrets. A pleads that

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38 Hong, Rongzhai suibi, 12.359.

39 BJYJ 67.3632. Cf. LJFSP 1.3.

40 The punishment for unsealing a decree is provided for in Article 439 of the Code. If the matter in the decree is confidential, the sentence is calculated by reducing two degrees from the punishment for the disclosure of state secrets (Article 109). According to the example given in the Subcommentary, since disclosing a matter that is important and confidential is punished by strangulation, unsealing an imperial decree on a matter that is important and confidential would be punished by a reduction of two degrees
the matter was not confidential and asks to receive the punishment pertaining to the present offense.\footnote{I.e., for unsealing an imperial decree, which would call for 80 strokes with the heavy stick.}

得丁私發制書，法司斷依漏泄坐，丁訴云，非密事，請當本罪。

君命是專，\quad\quad\quad\quad\quad\quad The sovereign’s command answers to no one—
刑其無小；\quad\quad\quad\quad\quad\quad it punishes [offenses] none too small;\footnote{See \textit{Shangshu zhengyi}, 4.135c: “You forgive [negligent] errors—there are none too great. You punish intentional offenses—there are none too small.”}
王言非密，\quad\quad\quad\quad\quad\quad but when royal words are not confidential,
罪則從輕。\quad\quad\quad\quad\quad\quad the offense is subject to a lighter sentence.
丁乃攸司，\quad\quad\quad\quad\quad\quad A had charge of an office;\footnote{See \textit{Shangshu zhengyi}, 18.236a: “All you gentlemen of mine who occupy an office, reverently attend to your charges” 凡我有官君子，欽乃攸司.}
屬當行下。\quad\quad\quad\quad\quad\quad his duty should be to convey documents to those below.
不慎厥德，\quad\quad\quad\quad\quad\quad Not vigilant and lacking in virtue,
擅發如綸之言；\quad\quad\quad\quad\quad\quad he released without authorization words that are as cords;\footnote{See \textit{Liji zhengyi}, 55.1648a: “The words of the king are like silk; their going forth are as cords” 王言如絲，其出如繃.}
自災於身，\quad\quad\quad\quad\quad\quad having brought disaster upon himself,
難求疏網之漏。\quad\quad\quad\quad\quad\quad it is hard to request escape from the wide meshes of the law.\footnote{See \textit{Laozi jiaoshi} 老子校釋, ed. Zhu Qianzhi 朱謙之 (Zhonghua shuju, 1984), 73.288: “The meshes of Heaven’s net are all-encompassing; they are wide and yet lets nothing pass through” 天網恢恢，疏而不漏.}
然則法通加減，\quad\quad\quad\quad\quad\quad Yet the law knows to increase and decrease [its punishments],
罪有重輕。\quad\quad\quad\quad\quad\quad and offenses are heavy or light.
必也志在私行，\quad\quad\quad\quad\quad\quad If his intention was to carry out a private act,\footnote{See \textit{Liji zhengyi}, 4.1259c. The subcommentary explains that \textit{sixing} 私行 means an act not on behalf of the sovereign.}
唯當專達之責；\quad\quad\quad\quad\quad\quad he should take the blame for making a [wrong] decision [on a small matter];\footnote{See \textit{Zhou li zhushu} 周禮注疏 (in \textit{Shisanjing zhushu}), 3.653a: “In great matters, follow your superiors; in small matters, make a decision on your own” 大事則從其長，小事則專達. In context, this would mean that the official would be sentenced for the lesser offense, resulting in 80 strokes with the heavy stick.}
如或事關樞密，\quad\quad\quad\quad\quad\quad if the matter implicated a state secret,
則科漏泄之辜。\quad\quad\quad\quad\quad\quad he should be sentenced according to the offense of disclosure.

from strangulation, that is, three years of penal servitude. (Apparently, the three degrees of life exile count as one degree for the purposes of reduction.) See Tang Cod. 439 (439).

\footnotesize{\footnote{I.e., for unsealing an imperial decree, which would call for 80 strokes with the heavy stick.}}

\footnotesize{\footnote{See \textit{Shangshu zhengyi}, 4.135c: “You forgive [negligent] errors—there are none too great. You punish intentional offenses—there are none too small.”}}

\footnotesize{\footnote{See \textit{Shangshu zhengyi}, 18.236a: “All you gentlemen of mine who occupy an office, reverently attend to your charges” 凡我有官君子，欽乃攸司.}}

\footnotesize{\footnote{See \textit{Liji zhengyi}, 55.1648a: “The words of the king are like silk; their going forth are as cords” 王言如絲，其出如繃.}}

\footnotesize{\footnote{See \textit{Laozi jiaoshi} 老子校釋, ed. Zhu Qianzhi 朱謙之 (Zhonghua shuju, 1984), 73.288: “The meshes of Heaven’s net are all-encompassing; they are wide and yet lets nothing pass through” 天網恢恢，疏而不漏.}}

\footnotesize{\footnote{See \textit{Liji zhengyi}, 4.1259c. The subcommentary explains that \textit{sixing} 私行 means an act not on behalf of the sovereign.}}
I request that you examine the writing within the purple clay and only then decide the punishment by the crimson brush.

As in every case in Bai’s judgment collection, this case begins with the character 得 (“received”) and is followed by a statement of the case in unadorned prose. The response is written in the four-six style and has a similar structure to Zhang’s judgments. There is the expository section setting out the broad principles, followed by specific references to the offense and a conclusion that mentions the formal law. In a style far barer than Zhang’s, Bai begins with formulaic language from the Shangshu that lays out the prerogative of the throne to punish intentional offenses. The particular offense is summarized by lines 7–10. Two parallel images are found in lines 8 and 10: “words that are as cords” (or literally “cord-like words”) are set against “escape from the wide meshes of the law” (or literally “wide-meshed escape”). Lines 11–16 deal with the formal law and how it decides between a heavy or light punishment. The last two lines, containing two more parallel images (purple clay and crimson brush), ask for a determination of whether the matter in the decree was confidential.

Unlike judgments in the Longjin fengsui pan, Bai’s judgment does not indulge in elaborate displays of learning or ornate language. There are verbal echoes to the classical tradition in almost every line, but most do not draw attention to themselves. The fact that Bai’s judgments are shorter in length than Zhang’s might be a reflection of the examination practice in Bai’s days. We know that Tang examination responses in Bai’s days had minimum word counts; we can imagine that they might have had maximum word counts as well, or that, at the very least, candidates had an idea how long their responses ought to be. The claim that Bai’s simpler style is a consequence

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48 Purple clay was used to seal imperial decrees.

49 See Fu, Tangdai keju yu wenxue, 57–58.
of the “ancient-style writing” (guwen 古文) movement of the mid-Tang is not persuasive.\(^5\)

Though the movement called for a return to an unadorned style supposedly characteristic of ancient writing, judgments were written in parallel prose, the very style decried by guwen advocates. Despite the different lengths, what has not changed in both men’s judgments is the lack of interest in the formal law. The response above exhibits knowledge of a wide range of canonical texts and draws its language from them. It knows the Code provisions well, but shows little concern about how to apply the formal law; indeed, the decision asks for a separate factual determination just like in Zhang’s case on the disclosure of state secrets. In terms of rhetorical display, it is clearly not as impressive in comparison with Zhang’s judgment, but its simpler style has its own merits, which Hong Mai obviously preferred.

It is fair to say, however, that Bai’s cases are, on the whole, less open to straightforward solutions than Zhang’s. His cases are not necessarily complex: a frontier general is accused of incompetence;\(^5\) the official in charge of a waystation is reported for not dealing effectively with thieves;\(^5\) a commander of an outpost is reported for carrying out unauthorized capital punishment;\(^5\) a magistrate is accused of depleting the public treasury and granary.\(^5\) But whereas in Zhang, an accused official usually has no justifications for his conduct, or none are imputed to him in the judgment, officials in Bai’s cases have more to say in their own defense. The frontier general denies charges of incompetence because he attributes his ineffectiveness to the lack of


\(^5\) BJYJ 66.3591–92.

\(^5\) BJYJ 67.3611.

\(^5\) BJYJ 67.3615.

\(^5\) BJYJ 67.3622.
provisions for his troops and his need for further military support; the official at the waystation
blames the keepers of the highways for not keeping thieves in check; the outpost commander
claims to have special authorization that permits the executions; the magistrate asserts that the
treasury and granary are empty because the people have retained all the wealth. Bai’s judgments
rule in favor of the frontier general and the outpost commander, but against the other two; it is
clear that the results in each case could have gone the other way.

In other cases, an official sometimes justifies his alleged misconduct by claiming to have
had a more pressing competing obligation. One example is the case of a prefect who is accused of
distributing grain from the granary to the people during a bad harvest year without first
memorializing his superior, but defends himself on the grounds that it had to be done to prevent
the people’s starvation.55 This offense might have fallen under the Code’s provision that assigns 80
strokes with the heavy stick to those who fail to memorialize a matter that ought to be
memorialized.56 The core of the argument in Bai’s response is as follows:

使以未有君命,
何其速歟?
郡以茍利國家,
專之可也。
恤貧賑廩,

When an envoy has not yet received the ruler’s order,
why such hurry [to carry it out]?57
If a prefect had an opportunity to benefit the state,
it is permissible to act by his own authority.58
When he was anxious over the people’s poverty and distributed
grain [without memorializing],

55 BJYJ 66.3578.
56 Tang Cod. 117 (166–67).
57 See Zuozhuan, Duke Xi 24.1b. Chong’er accuses Eunuch Pi, who had been sent to kill him, of
being overzealous in following his ruler’s order, because (he suggests) the ruler actually wanted to give
Chong’er a chance to escape: “Though you had your ruler’s order, why such hurry [to carry it out]?” 雖有君
命，何其速也. One way to interpret this line to reconcile it to the Zuozhuan account is: “When an envoy
has not yet received the ruler’s order [to immediately carry out the mission], why such hurry?”
8.2236a: “Beyond the border, when there is opportunity to pacify the realm and benefit the state, it is
permissible to act by your own authority” 出竟有可以安社稷、利國家者，則專之可也.
Bai’s response recognizes that there is sometimes tension between an official’s duty to the sovereign and his responsibility to the people. More fundamentally, there is tension between the formal law that would find this official guilty and the canonical texts that could be used to absolve him on grounds of equity. Bai’s response focuses on four precedents. The first, the story of Eunuch Pi, who too hastily carried out his ruler’s order to kill Chong’er, appears to stand for the principle that one should not rigidly follow orders without knowing the heart behind the order. The second, from the *Gongyang zhuan* 公羊傳 (Gongyang Tradition to the Spring and Autumn Annals), shows that sometimes an officer may act on his own authority if his action benefits the state. The last two are the stories of Ji An and Deng You, who both opened granaries without authorization in exigent circumstances.

Zhang’s judgments, on the other hand, are generally not interested in the tension between law and equity, though some cases inevitably raise the issue. Case 2 from the Left and Right Valiant Guards (Zuoyou xiaowei 左右驍衛) involves a commandant who used public funds meant to purchase horses to buy food for starving troops, which is similar to the case above in creating a conflict between an officer’s duty to the throne and responsibility to those under his supervision. In his judgment, Zhang mentions Ji An as an example for why the commandant’s offense might be

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59 See *Jin shu*, 90.2339. As the governor of Wu Commandery 吳郡, Deng You (d. 326) opened the granary before receiving authorization in order to feed the people in a time of famine. He was impeached by the Censorate, but pardoned by the emperor. This story, or the one below, probably inspired this case.

60 See *Shiji*, 120.3105. While on a tour through Henan Commandery 河南郡, Ji An (d. 112 BC) distributed rice from the granary without authorization in order to relieve a severe famine. The emperor considered him worthy and pardoned him.

61 *LJFSP* 62.182.
pardoned, but that is the only reference to a precedent that could justify the commandant’s action. Ji’s example is set in contrast with the story of Gongsun Jingsheng 公孫敬聲, the son of a high official in the time of Emperor Wu of Han and a relative to the empress, who illegally used military funds and was imprisoned.\textsuperscript{62} Zhang ends the judgment undecided about whether the commandant should be pardoned and requesting more facts about what had happened. In another case, where the Palace Physician added dosages to a set prescription for the emperor because they were needed,\textsuperscript{63} Zhang could have made it a case about the inequity of punishing the physician based on a too rigid interpretation of the law. However, he once again chooses to leave the case undecided until more facts are available.

Other cases in Bai’s collection are almost indistinguishable from examination essays,\textsuperscript{64} and resemble some of the cases in the \textit{Longjin fengsui pan} where facts are so lacking that the case, in effect, asks for a general policy stance. In the case on whether “smoothing the rough edges” (in other words, mixing in with the crowd) is a valid principle in education, what is asked is a policy question, not a legal one.\textsuperscript{65} The case of an official who submits a memorial asking for amnesties to be permanently suspended is not a case against any particular grant of amnesty, but a general policy proposal.\textsuperscript{66} The case involving a complaint by the Ministry of War against a commander who selected literary men as his military officers boils down to the question of whether it is proper to prize literary skills over military experience.\textsuperscript{67} Cases such as these could have easily been

\textsuperscript{62} \textit{Han shu}, 66.2878.

\textsuperscript{63} \textit{LJFSP} 70.210.

\textsuperscript{64} See, e.g., Bai Juyi’s \textit{Celin} 策林 (Forest of Examination Essays), 75 essays written in preparation for the decree examination of 806, in \textit{juan} 62–65 of his collected works.

\textsuperscript{65} See Appendix III.

\textsuperscript{66} \textit{BJYJ} 66.3566.

\textsuperscript{67} \textit{BJYJ} 66.3568.
rephrased as essay questions, and the answers to them would depend on one’s interpretation and application of canonical sources.

We will not focus on these cases, but rather on cases where specific controversies lead to conflicts between private parties. Some of the most interesting of these controversies involve marriage and the family. Some could be resolved by the formal law alone, while others pit the formal law against equitable considerations. But in all these cases, Bai’s use of the classical tradition humanizes the law by making law a matter of moral principles and humane feelings rather than of formal rules.

**WHEN THE FORMAL LAW IS CLEAR: THE ROLE OF HUMANE MORAL FEELINGS**

In this section, we will look at a number of cases where the requirements of the formal law are straightforward, but where Bai nonetheless avoids relying solely on the law and focuses rather on directing us toward a moral conviction that the legal result is sound. All of these cases involve matters that are more personal in nature than Zhang’s cases, and it is because they are personal that the classical tradition is especially effective in highlighting the human beings and emotions behind the conflicts rather the legal rules that govern them.

In one case that involves breaking off a marriage engagement, the family of a bride-to-be has received the bridal gifts, but now wishes to break its promise. The situation falls under Article 175, which penalizes a breach of the marriage agreement after the bridal gifts have been received.\(^68\) Bai’s response is notable for its attention to the rites and only secondarily to the formal law.\(^69\)

\(^{68}\) *Tang Cod.* 175 (213–24).

\(^{69}\) *BJYJ* 66.3589.
女也有行，
義不可廢；
父兮無信，
訟所由生。
雖必告而是遵，
豈約言之可爽？
乙將求佳壻，
曾不良圖。
入幣之儀，
既從五兩；
御輪之禮，
未及三周。
遂違在耳之言，
欲阻齊眉之請。
況卜鳳以求士，
且靡咎言；
何奠雁而從人，
有乖宿諾？
婚書未立，
徒引以為辭；

When a young woman is conducted to her groom, righteousness cannot be discarded; when her father did not keep his faith, an accusation was therefore lodged. Though the requirement of the informing her parents should be obeyed, how can a pledge be renounced? A would seek a fine son-in-law, but then he changed his plans. The ceremony of submitting the bridal gifts had been followed according to the five double rolls; but in the rite of driving the carriage [to lead the bride away], [the wheels] did not complete three revolutions. He immediately repudiated words that sound in the ears and wished to obstruct the request for level brows. Moreover, when divining a phoenix in search of a groom, there were no inauspicious signs; how can it be that after the wild goose was presented and she was to follow her husband, one should break an unfulfilled promise? The fact that a marriage contract had not been drawn up is cited as a defense to no avail;

70 See, e.g., "Odes of Bei 邳風: Spring Water 泉水" (Mao 39), Mao Shi zhengyi 毛詩正義 (in Shisanjing zhushu), 2C.309b: “When a young woman goes on her way [to her groom], she distances herself from her parents and brothers” 女子有行、遠父母兄弟.

71 See “Odes of Qi 齊風: Southern Hill 南山” (Mao 101), Mao Shi zhengyi, 5B.352c: "How does one take a wife? One must tell her father and mother" 取妻如之何？必告父母.

72 See Li ji zhengyi, 43.1569c: “In submitting the bridal gifts, there should be one bundle of silk, which contains five double rolls” 納幣一束：束五兩.

73 See Li ji zhengyi, 61.1680b–1682a.

74 See Zuozhuan, Duke Wen 7.4a: “words still in the ears” 言猶在耳.

75 A common phrase describing the proper respect between husband and wife, from the account of Liang Hong 梁鴻. See Hou Han shu, 83.2768: “Every time he returned home, his wife set out the food; she did not dare to raise her eyes before Hong, and held the tray level with her brows” 每歸，妻爲具食，不敢於鴻前仰視，舉案齊眉.

76 See “Odes of Wei 卫風: The Peasant 民” (Mao 58), Mao Shi zhengyi, 3C.324c: “You had divined and you had used the stalks; the patterns showed no inauspicious signs. You came with your carriage and took me away with my dowry” 爾卜爾筮、體無咎言。以爾車來、以我贿遷.

77 Lit., “a promise made a night ago” from Analects 12.12.
Once the bridals gifts have been submitted, it is too late for a change of mind.

I ask that the lustrous jade’s\(^{78}\) suit be granted, so that time of the peach blossoms\(^{79}\) is not passed over.

To understand this judgment, some familiarity with the traditional marriage ceremony is needed. One of the most detailed descriptions of ancient marriage rites is found in the chapter “Nuptial Rites of the Ordinary Officer” (Shi hunli 士昬禮) in the Yili 儀禮 (Ceremony and Rites), which lays out the steps leading from the betrothal to the wedding ceremony in what comes to be known as the six rites. The first rite, “sending the colors” (nacai 納采), requires that a messenger be sent with a wild goose by the father of the young man to make known his intentions to arrange a match. In the second, “inquiring the young lady’s name” (wenming 問名), a messenger is sent again and requests permission to ask the bride-to-be’s name. In the third rite, “sending the auspicious divination” (naji 納吉), a favorable divination is announced by the messenger. After these preliminaries, the fourth rite involves the “sending of the evidences” (nazheng 納徵)—a bundle of black and red silks and a pair of deer-skins. In the fifth rite, “requesting the date” (qingqi 請期), a date for the wedding ceremony is announced. On the day of the ceremony, in a rite eventually known as “welcoming in person” (qinying 親迎), the groom personally arrives at the bride’s home, enters her ancestral temple, leads the bride to her carriage, drives the carriage for three revolutions of the wheels, and then dismounts and drives his own carriage to his door to wait for the bride’s arrival.\(^{80}\)

\(^{78}\) I.e., the groom. See Jin shu, 36.1067: “The son-in-law, a lustrous jade” 女壻玉潤.

\(^{79}\) See “Odes of Zhou and the South 周南: Peach-Tree 桃夭” (Mao 6), Mao Shi zhengyi, iB.279c: “The peach-tree, luxuriant, dazzling are its flowers! Going to her husband and home, it is the right time [for establishing] the rooms and the household” 桃之夭夭，灼灼其華。之子于歸，宜其室家.

Bai’s judgment is structured in a way that downplays the formal law, which clearly penalizes a breach in such circumstances, and emphasizes the frustration of the rites, alternating between those rites that the groom has completed and those that the bride’s father refuses to complete. We are told in lines 5–6 that the groom has requested the permission of her parents, but the bride’s father, who had agreed, has now broken his pledge. A line from the ode “Southern Hill” from the *Shijing* (Classic of Odes) is alluded to in line 5, but the subject matter of the ode resonates with the entire case. The ode is traditionally interpreted to be addressed to a man who is unwilling to stop thinking about a young woman now married to another. The first two stanzas of the ode emphasize the physical distance now between the man and the young woman, reprimanding him for continuing to follow her, and the last two emphasize the proper marriage rites that have already been performed, warning him not to give in to his desires. In Bai’s judgment, the father may be considered in light of the addressee of “Southern Hill”—one still holding on to his daughter even when the rites have properly begun. The judgment continues by describing a couple of the specific rites: the giving of the five double rolls of silk and the groom’s conducting three revolutions of the wheels of the bridal carriage. The former has been performed satisfactorily by the groom, but the latter cannot be performed because of the breach by the young woman’s father. Two more references to the rites follow: the sending of the auspicious divination (with a reference to another ode from the *Classic of Odes*, “The Peasant”) and the groom’s presenting a wild goose to his father-in-law. Once again, the former has been performed, but the latter, which would have taken place on the day of the ceremony, cannot be completed because of the father’s recalcitrance. When the Code is finally mentioned at the end, it is merely a formality. The case has already been made for why it is improper to allow this betrothal to be broken off. The judgment ends with a line from the ode “Peach-Tree,” which supplies the image of the peach flower that symbolizes a happy marriage.
In this judgment, Bai uses words and images especially from the Liji and Shijing to make the case more about the human beings and the transgressed rites behind the conflict than the rules that assign penalties for a broken contract. Bai emphasizes the faithlessness of the father and the foiled rites that prevent the groom from taking his bride. Though the Code considers bridal gifts to be the equivalent of a marriage contract, the judgment sees these gifts as the beginning of a series of traditional ritual obligations which should be followed through from beginning to end.

The case above is one of a number of conflicts in Bai’s collection that are situated in the intersection between the legal and domestic spheres, and bring together considerations from both the formal law and moral propriety within the family (or between families). Another such case asks: if a divorced mother requests to use her son’s official privilege (through which she might enjoy rights that could mitigate her punishments under the Code), but the father refuses, should the son obey his father? Article 15 provides that a wife who has been divorced may still use her son’s privilege. The Subcommentary to the Code even quotes from the Yili, stating that the tie of the mother and son cannot be broken. The Code is on the mother’s side, but a father’s command to his son is not to be taken lightly. Bai writes the following judgment:

二姓好合，

In the delightful union of two surnames,

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81 BJYJ 66.3561–62.
82 Tang Cod. 15 (28).
83 Yili zhushu 儀禮注疏 (in Shisanjing zhushu), 30.1104c. The Yili is addressing in particular the mourning rites, holding that the son of a divorced wife should wear the mourning for his mother as usual. Zheng Xuan’s 鄭玄 (127–200) commentary notes: “The relationship between mother and son is the most intimate and is never broken” 母子至親無絕道.
84 See Liji zhengyi, 61.1680b: “The ritual of marriage is meant to unite the delight of two (different) surnames” 昏禮者，將合二姓之好.
the relationship sometimes comes to an end;\textsuperscript{85}

after three years of nurturing,\textsuperscript{86}
gratitude from this kindness must not be left behind.

Though the phoenixes were hindered from harmonious sounds,

how could the crow forget to feed its parents in return?\textsuperscript{87}

He turned and looked at his resented spouse;
in no time she would come under the bright law.

Wang Ji divorced his wife,

but broken strings had not been repaired;\textsuperscript{88}

Confucius’ household sent away the mother,

but wide nets were applied.\textsuperscript{89}

Truly her nurturing and support should be reflected upon;

how could her distress and difficulty not be relieved?

Moreover, your household is not at peace,

but fulfilling his filial piety still comforts his mother’s heart.\textsuperscript{90}

“Though he accompanied me only for a short while to the

\begin{footnotes}
\item[85] The Tang Code provides that under certain conditions, such as when the wife has tried to injure her husband, a marriage is not permitted to continue. The term used for this type of divorce was *yijue* 義絕, lit., “the cutting off of right relationship.” See *Tang Cod.* 190 (224–25).
\item[86] The first three years of a child’s life are when the child is most dependent on his or her parents; hence the mourning period for a parent is three years. See *Analects* 17.21.
\item[87] A common trope. See, e.g., Emperor Wu of Liang’s 梁武帝 (r. 502–549) “Rhapsody on Filial Thoughts” 孝思賦, preserved in the *Yiwen leiju* 藝文類聚 (Anthology of Literary Excerpts Arranged by Categories): “the loving crow feeds its parents in return in order to repay them” 慈烏反哺以報親. See Ouyang Xun 歐陽詢, *Yiwen leiju* 藝文類聚 (Shanghai: Shanghai guji chubanshe, 1999), 20.374.
\item[88] I.e., Wang had not married another before taking his wife back. For the story of Wang Ji’s (d. 48 BC) wife, see *Han shu*, 72.3066: “[Wang Ji’s] landlord had a large date tree [whose branches] drooped into Ji’s courtyard. Ji’s wife picked some dates to give them to Ji to eat. Later, Ji found out about it and divorced his wife. When his landlord heard about it, he wanted to cut the tree down. All the neighbors stopped him and thereupon pleaded earnestly for Ji to allow his wife to return. The people in neighborhood had a saying about this: ‘When the landlord had a date-tree, Wang Ji’s wife was sent away; when the landlord’s dates were gone, the sent-away wife returned’” 東家有大棗樹垂吉庭中，吉婦取棗以啖吉。吉後知之，乃去婦。東家聞而欲伐其樹，鄰里共止之，因固請吉令還婦。里中為之語曰：東家有樹，王陽婦去；東家棗完，去婦復還.
\item[89] See *Liji zhengyi*, 6.1274b. In Confucius’ family, the son would mourn for his divorced mother and thus treat her generously (with wide nets), a practice that continued until Zishang 子上, Confucius’ great-grandson.
\item[90] See “Odes of Bei 邳風: Genial Wind 凱風” (Mao 32), *Mao Shi zhengyi*, 2B.302a: “there are seven sons; none comforts his mother’s heart” 有子七人、莫慰母心. The original context is seven sons who could not comfort their mother after causing her a lot of suffering.
\end{footnotes}
to atone for my crime, would he decline to allow my son’s protection privilege?”

Though the man at the foot of the hill is angry, how could one have no compassion toward the mother whom one thinks of while climbing the barren hill?

Remembering the song of “The Plantain,”

we hear of her delight in having children;

considering the meaning of [the ode] “Dolichos and Vines,”

how can one not, with tolerance, shelter one’s roots?

It is difficult to deny her appeal;

I request and urge you not to cease [your filial piety toward her].

The judgment begins by contrasting the relationships between husband and wife and between parents and children. Though a husband and wife may separate, a child’s relationship to his parents does not thereby end; he is still expected to repay his parents. What happens then when a father resents his former wife and forbids her use of their son’s protection privilege? The judgment approaches it from a few angles. First, the story of Wang Ji’s wife reminds us that a
divorced wife may eventually be restored, and so the husband-and-wife relationship is inherently changeable, unlike the relationship between parent and child which does not change. Second, Bai gives the example of how Confucius’ household used to mourn for their divorced mother, evidence for how a child’s obligation to his mother does not end with her divorce. The mother’s pitiable condition is then described. The second half of the judgment focuses on the father’s heartlessness, switching to the first-person voice from the ode “Valley Winds,” which accuses the husband for only accompanying his divorced wife to the threshold of the house. The next two lines sets the father’s anger (literally, the anger of one at the foot of the hill, in reference to the poem “I Ascend the Hill and Pick the Aromatic Plant”) in contrast to the image of the barren hill in the ode “Ascending the Lush Hill,” where a son climbs a barren hill and remembers his mother’s words. Recalling the ode “The Plantain,” Bai shows that children should be a joy to their parents, and follows that with a reference to “Dolichos and Vines,” an ode which expresses the loneliness of a sojourner who has no parents or family to call upon. Yin 蔭, the word for the protection privilege, is literally understood as the shade that a grown plant (the grownup child) offers its roots (the mother). The judgment concludes by urging the son to show his filial piety toward his mother by letting her use his privilege, or alternatively, urging the father to withdraw his objection. There is not one mention of the formal law in this judgment. Instead, Bai employs language from the canon to portray the father in an unflattering light and to show the feelings that a son ought to have toward his mother.

In another case that involves the legal and domestic spheres, a prisoner requests that his wife be admitted to care for him, but is denied. The prisoner contests the decision on the grounds that he is “a nominal official of the third rank or above” 三品以上散官. According to the “Treatise on Punishments and Law” in the Xin Tang shu, officials with nominal ranks of three or

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97 BJYJ 66.3598.
above are allowed two visitors from his immediate family to tend to his illness while in prison.98

Bai’s judgment makes only a general reference to the formal law, but focuses on the prisoner’s pitiable condition and on the relationship between spouses:

獄雖慎守，
Though a prison is cautiously guarded,
病則哀矜。
illness ought to be grieved over and pitied.99
苟或無瘳，
If there is no recovery,
如何罔詔?
what can be done with nowhere to appeal?100
甲罪抵刑憲，
A’s crime brought upon punishment,
身從幽縶。
and his body is secluded and shackled.
憂能成疾，
Sorrow can develop into disease—
膏肓之上未痊；
between the heart and diaphragm, there is not yet healing;101
危則思親，
in danger, one longs for one’s family—
縲絏之中有請。
in the midst of chains there comes a request.102
勢窮搖尾，
His situation has gotten to the point of wagging the tail—
念切齊眉。
he deeply misses the level brows.103
臥或十旬，
He has been lying down for some hundred days—
既軫彌留之懼；
already he painfully fears that [the illness] will take hold;
官惟三品，
his office is of the third rank,
宜從侍執之辭。
so it is proper to grant him his request to be waited upon [by his wife].105

98 XTS 56.1410.
99 See Analects 19.19. Master Zeng tells an officer of law: “When you have gotten the truth of the situation, grieve over and pity them and do not rejoice” 如得其情,則哀矜而勿喜.
100 See Shangshu zhengyi, 10.178a. “The crimes belong to all as one; many suffer and have nowhere to appeal” 罪合于一, 多瘠罔詔.
102 See Analects 5.1. Confucius said of Gongye Chang 公冶長 that he would be a suitable husband, because even though he was in chains, he was not guilty of wrongdoing. Hence, Confucius gave his own daughter to him as wife.
103 Possibly a reference to Sima Qian’s 司馬遷 (ca. 145 or 135–86 BC) letter to Ren An, where he compares those imprisoned as tigers wagging their tails and begging for food while in a trap or cage. See Han shu, 62.2732.
104 See note 75 above.
105 See Zuozhuan, Duke Xi 22.5. The wife of the heir apparent of Jin tells him that though he should escape to Jin, she, who was ordered by the ruler of Qin “to wait upon him with handkerchief and comb” (shizhi jinjie 侍執巾櫛), would remain in Qin.
This relatively short judgment is full of images that elicit sympathy for the prisoner. Though the formal law would allow his wife to attend to him, Bai seeks to convince the official in charge to grant the request, not by force of law, but by stirring his compassion. Bai begins with a reference to the Analects, where Master Zeng counsels a law officer not to rejoice at finding out a crime but to pity the offender. The prisoner is described as secluded and shackled, whose sorrow has only added to his suffering. The reference to Gongye Chang 公冶長 in line 10 suggests that the prisoner might be innocent of wrongdoing, since Gongye was considered innocent by Confucius even though he was imprisoned. Since imprisonment was not itself a punishment under Tang law, it might be that the guilt of this prisoner had not yet been determined. The image of wagging the tail reminds us of Ren An, who had written to Sima Qian from prison to ask for him to intervene in his case with the emperor—in his famous letter in reply, Sima Qian compares those in prison, specifically Ren An, to tigers wagging their tails. The judgment ends with the image of the dutiful wife of the heir apparent of Jin and calls for the official in charge to give the prisoner’s wife access to her husband.

In all three cases above, the judgment does not pronounce a decision as a matter of law as much as it pleads for the right outcome in accordance with propriety and compassion. The formal law is not treated as the final word, and in the second case above is not mentioned at all. Even though in these three cases the formal law’s requirement is clear, the judgment seeks to get the parties to acquiesce in its decision not only because they are made to by the law, but because they agree that the decision is the right one. In this way, the formal law is only one piece of the evidence for what is moral and proper.
The reach of the law is sometimes formally limited in cases that involve the family. In one case, a husband was beaten by his wife and his neighbors reported her.\textsuperscript{106} The Code, however, requires that the husband himself must report such an offense if a prosecution is to be valid.\textsuperscript{107} Bai's judgment makes the case for why the state should choose to stay out of these situations:

禮貴妻柔，
則宜禁暴;
罪非夫告，
未可麗刑，
何彼無良？
於斯有怒。
三從罔敬，
待以庸奴之心;
一杖所加，
辱於女子之手。
作威信傷於婦道，
不告未爽於夫和。

The rites value a wife's gentleness—
it is proper to forbid violence;
but the offense was not reported by her husband—
we cannot subject her to punishment.
How is it that she has no good qualities?
There is anger within him.
The three obediances were not respected\textsuperscript{108}
when she treated him with the heart of a fool;
the stroke given by one blow of the stick
is ashamed to come from the hands of a woman.
To take up a tyrannical posture truly does damage to the proper conduct of a wife,
but to refrain from reporting it does not contradict a husband’s mildness.\textsuperscript{109}
Having elicited the complaint of the neighbors,
it is surely humiliating for such news to be heard outside the home;
contesting a sentence of penal servitude
is according to [the principle of] “uprightness is to be found therein.”\textsuperscript{110}

雖昧家肥，
難從縣見。

Though she offended the fecundity of the household,\textsuperscript{111}
it is difficult to follow the magistrate’s view.

\textsuperscript{106} BJYJ 67.3643–44.
\textsuperscript{107} Tang Cod. 326 (351).
\textsuperscript{108} Lit., the “three followings,” mentioned in Liji zhengyi, 26.1456c: “The woman is one who follows. As a youth, she follows her father and elder brother; after she marries, she follows her husband; after her husband dies, she follows her son” 婦人，從人者也；幼從父兄，嫁從夫，夫死從子.

\textsuperscript{109} See Zuozhuan, Duke Zhao 26.11: Yan Ying, in expounding upon ritual propriety and its relationship to governing, focuses on how right relationships are formed. Among these, he argues that “when the husband is mild, the wife is gentle” 夫和，妻柔.

\textsuperscript{110} See Analects 13.18: “Fathers cover up for their sons, sons cover up for their fathers. Uprightness is to be found therein” 父為子隱，子為父隱，直在其中矣.

\textsuperscript{111} See Liji zhengyi, 22.1427a: “With affection between father and son, peace between brothers, and harmony between husband and wife, this is the fecundity of the household” 父子睦，兄弟睦，夫婦和，家之肥也.
The sentence against the wife cannot stand because her husband had not reported the offense—this much is clear from the very first lines of the judgment. It is contrary to the proper conduct of a wife and an affront to the dignity of women for a wife to strike her husband, and yet the state would not step in to enforce its laws unless the husband asks it to. As Bai notes, it is no doubt humiliating to both husband and wife for such news to become public without their consent. Finally, he appeals to the principle of familial concealment found in *Analects* 13.18, which can be thought of as the basis for this provision of the Code that allows the husband, in effect, to conceal his wife’s offense. We should note that in general, concealment of the offenses of family members, treated under Article 46, is permitted but not required in most cases. (It is not permitted when the offense is against the state; it is required for crimes committed by one’s parents or paternal grandparents, as long as it is not rebellion, sedition, or treason.) In concealment cases, such as this one, the law would allow individuals to determine the extent of the law’s reach.

The following case, involving a father who did not conceal his son’s theft, shows that allowing the law to reach into the domestic sphere is not always preferred even when it is based on the conscious decision of a father:

Received: A reported his son for theft. Some criticize him for not abiding by the provision of mutual concealment between fathers and sons. A says, this is “exterminating one’s kin out of great righteousness.”

得甲告其子行盜, 或誚其父子不相為隱。甲云: 大義滅親。

法許原親, 慈通隱惡。 俾恩流於下,  The law permits being lenient to one’s kinsmen, and mercy allows concealment of offenses. Causing gracious favor to flow to those below—

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112 *Tang Cod.* 46 (104–05).

113 *Tang Cod.* 345 (370–71).

114 *BJYJ* 67.3638.

115 See *Zuozhuan*, Duke Yin 4.5.
indeed “uprightness is to be found in this.”  

A has shamefully done violence to human relations, and could bear to harm heavenly nature.  

Having failed to teach righteousness, he did not feel ashamed of a father’s obstinate foolishness; [when his son] committed theft and completed wickedness, he still did not conceal for him.

As for the Way, he was already deficient in giving instruction in the home; as for the rites, he thereupon fell short of the fecundity of the household.  

Moreover, his feelings can be compared to that of Yue Yang: it can be said that, not having virtue, he failed in instructing; indeed, the offense is not that of Shi Hou: in vain, he says that “out of great righteousness, he extinguishes his kin.”

This is “not being capable of having feelings” — it is that which has properly led to criticism.

The judgment begins by acknowledging that concealment is part of the law and part of “mercy” (ci 慈). Though the Code would permit the father to report the theft, the judgment goes to the alleged source of the issue and criticizes the father’s failure to properly instruct his son. Now that his son has committed this offense, how could the father not at least conceal for his son, knowing that he, the father, was in part responsible? The example of Yue Yang’s drinking the stew made of

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116 See note 110 above.

117 See “Government of the Sages” 聖治, *Xiaojing zhushu* 孝經注疏 (in *Shisanjing zhushu*), 5.2554a: “The way of father and son conforms to the heavenly nature” 父子之道, 天性也.

118 See note 111 above.

119 A general of the state of Wei 魏 in the fifth century BC. When the enemy presented him with the stew made with the flesh of his own son to intimidate him, he drank it to show his determination. See Liu, *Shuoyuan jiaozheng*, 5.113.

120 Shi Que’s son, who took part in the assassination of Duke Huan of Wei 衛桓公. See Chapter 4, note 54.

121 See Liu, *Shishuo xinyu jianshu*, 17.4 (638). In this anecdote, when Wang Rong 王戎 (234–305) lamented the death of his son, he was asked why his grief was such for a babe in arms. He replied that although the sages forget feelings, and the lowest beings are incapable of having feelings, feelings are most focused in people like him.
his son’s mincemeat is given to paint a picture of unnatural heartlessness toward one’s child. The story of Shi Que’s sending his son to death is distinguished from the present case because there the son had committed treason. Still, the Code does not compel a father to conceal his son’s crime. The judgment, therefore, goes beyond the Code and argues that, in this case, the father showed himself incapable of feelings and could not acknowledge his own responsibility for his son’s behavior. The judgment approves of the criticism that the father received, but probably would not go against the Code to impose a legal punishment on the father. This case shows that judgments are not necessarily meant to mete out punishment; they are also capable of handing out moral chastisement.

Another case that I would like to look at where the formal law has a set rule, but the judgment treats that rule as a peripheral matter, is a case of ox-goring. The case is stated as follows:

Received: A’s ox gored B’s horse to death; a request is made for the price of the horse. A claims that the goring happened in an open grazing field and requests that he compensate half the price. B contests.

得甲牛觝乙馬死，請償馬價。甲云，在放牧處相觝，請備半價。乙不伏。122

Article 206 provides that when domestic animals kill or wound each other, the owner of the killed or wounded animal is entitled to half his loss. The Subcommentary even gives an example, which closely fits the facts of this case: “Suppose an ox from household A gores to death a horse from household B. The horse was originally worth ten pi of silk. Having been gored to death, the hide and flesh are valued at approximately two pi of silk. Hence there was a loss of eight pi of silk. A repays B four pi of silk” 假有甲家牛，觝殺乙家馬，馬本直絹十疋，為觝殺，估皮肉直絹兩疋，即是減八疋絹，甲償乙絹四疋。123 In this case, A agrees to compensate half the price of the horse

122 BJYJ 67.3626.

123 Tang Cod. 206 (239).
presumably according to this provision, but B demands a higher compensation. The judgment is as follows:

馬牛于牧， When horses and oxen are let out to pasture,
蹄角難防。 [injuries due to] hooves and horns are difficult to guard against.
苟死傷之可徵, If killing can be differentiated from wounding,
在故誤而宜別。 then it ought to be by distinguishing an intentional act from a negligent one.
況日中出入, How much more so that they were entering and leaving [the grazing field] in the day,
郊外寢訛。 and in the suburbs were lying down or roaming.
既谷量以齊驅, So many to herd that their number is measured by the hills they cover;\textsuperscript{124}
或風逸之相及。 at times they run into one another while in heat.\textsuperscript{125}
爾牛孔阜, “Your ox is enormous:
奮骍角而莫當; it wielded its earth-red horns and none could withstand it;
我馬用傷, my horse was wounded by it:
踠駿足而致斃。 it collapsed on its noble legs and met its death.”
情非故縱, The event did not come about from [A’s] intentionally releasing [his ox];
理合誤論。 it is reasonable to count it as negligence.
在皂棧以來思, If [the goring] came about in the stables,
罰宜惟重; the penalty indeed ought to be heavy;
就桃林而招損, but if by the forest of peach trees\textsuperscript{126} it obtained its wounds,
償則從輕。 the recompense should be light.
將息訟端, To put to rest this accusation,
請徵律典。 I request that you look at the provision of the Code.
當陪半價, He ought to compensate half the price—
勿聽過求。 do not heed an excessive demand.

\textsuperscript{124} A reference to a story in \textit{Shiji}, 129.3260, where a merchant raised much livestock and sold them for precious silk to be presented to the king of the Rong tribe. In turn, the king gave him ten times the worth of the silk and so many horses and cattle that they could only be counted by the hills they covered.

\textsuperscript{125} A play on a phrase from a story in \textit{Zuozhuan}, Duke Xi 4.1. When the Marquis of Qi was about to attack Chu with an allied army, the Viscount of Chu sent word to the marquis asking why he had launched an invasion when Qi and Chu were so far apart that “even when our horses and oxen are in heat, they do not cross one another” 風馬牛不相及.

\textsuperscript{126} The Forest of Peach Trees (Taolin 桃林) is mentioned in “Completion of the Campaign” 武成 in the \textit{Shangshu}, where King Wu of Zhou, after defeating the last king of the Shang, proclaimed peace by sending horses and cattle to the open country.
The judgment begins by differentiating between an intentional act and a negligent one. Letting one's ox out to pasture but failing to restrain it with the result that it gores a horse to death is not considered intentionally causing the death of the horse. The judgment uses an image from a story in the *Shiji* to describe the many horses and oxen let out to pasture (their number is measured by the hills they cover) such that it is to be expected that an animal might injure another. Nevertheless, the judgment is sympathetic to B; it gives us four lines in the voice of B to convey the loss that he suffered. Despite this, the circumstances in this case make it impossible to charge A with anything more than negligence. If the goring had occurred in a stable, the penalty would have been more severe. Perhaps in an enclosed space, the owner of an ox would have been expected to take more precaution or would not be able to claim that he could not control his ox. The judgment ends by referring to the Code, but by that point, it has articulated both the loss suffered by the owner of the horse and the lack of culpability of the owner of the ox. The judgment has made the case for why the Code’s result, half-damages, is reasonable.

I would like to close this section with a divorce case, where the law, though straightforward, is clearly inadequate to deal with the situation. This is another case where the legal and domestic spheres intersect. The case involves a wife who has been childless for three years and who is being forced out of the house by her in-laws. Although being childless is one of the grounds for divorce, the Code prohibits a husband from divorcing his wife when she has no family to return to, which is the case here. Bai’s judgment, instead of relying on the Code to convince the husband’s parents to not send away their daughter-in-law, presents an emotional appeal:

承家不嗣，

When [a wife] receives the management of the household and yet bears no children,

127 *BJYJ* 67.3628.

禮許仳離；
去室無歸，
義難棄背。景將崇繼代，
是用娶妻。百兩有行，
既啟飛鳳之兆；
三年無子，遂操別鵠之音。
若去舅姑，終鮮親族。
雖配無生育，
誠合比於斷絃；
而歸靡適從，庶可同於束蘊。
固難効於牧子，宜自哀於鄧攸。
無抑有辭，請從不去。

the rites permit a separation;
if being divorced, there is no place for her to return to,
righteousness makes it difficult to abandon her.
A intended to fulfill his duty to continue the family line;
therefore, he took a wife.
One hundred pieces of money [prepared for] the marriage union—
already the portents of flying phoenixes were revealed;
three years without children—
thereupon the “Song of Parting Cranes” was played.
If she should leave her parents-in-law,
at the end she lacks any kinsmen.
Though in this match she did not bear a child
and it is truly proper to compare it to broken strings;\(^{129}\)
yet since she has no one to rely on when she returns,
[to treat her thus] is like “making a torch of hemp.”\(^{130}\)
It is indeed hard to imitate Muzi;
it is proper to lament like Deng You.\(^{131}\)
Do not suppress the fact that she has a claim;
I request that you do not send her away.

It is possible, even likely, that the case was inspired by the story of Muzi. Muzi was compelled by
his parents to divorce his wife when she was childless after five years. The judgment
conspicuously does not mention the law; instead, it is moral propriety that should make it hard
for her parents-in-law to send her away. The judgment suggests that not having children can be
compared to a broken marriage, but notes that sending the wife away when she has no place to

\(^{129}\) When a man’s wife dies, it is called broken strings, since the marriage relationship is often symbolized by lutes, an image that goes back to the first ode in the Shijing. See “Odes of Zhou and the South 周南: Cry of the Ospreys 關雎” (Mao 1), Mao Shi zhengyi, 1.274a: “The beautiful young lady, with zithers and lutes we befriend her”窈窕淑女，琴瑟友之.

\(^{130}\) See Han shu, 45.2166. Kuai Tong 蒯通, a famous rhetorician, tells a story about how to use a pretext to achieve a goal: a wife was sent away by her mother-in-law after being accused of stealing a cut of meat. Later, the wife’s friend, an old woman who wanted to help her, made a torch of hemp and went to the mother-in-law to request a fire, explaining that on the previous night, her dogs were fighting over a cut of meat, and that she needed a fire to cook a dog that had died in the brawl. In this way, she convinced the mother-in-law that her daughter-in-law did not steal the meat.

\(^{131}\) See Jin shu, 90.2339. Deng You, while fleeing the devastation caused by the Yongjia Rebellion of 310, had to choose to save either his own son or his brother’s son. Because his brother was dead, he chose to save his nephew to preserve his brother’s line at the cost of his own son’s life. After this Deng You’s wife did not have a child again.
return to is especially harsh because it might as well be a pretext to killing her, like the pretext of requesting a fire for a torch of hemp in the story of Kuai Tong 蒯通. The judgment ends with the story of Muzi and Deng You. When Muzi was forced to divorce his wife, he is said to have written the “Song of Parting Cranes,” which goes as follows:132

将乖比翼兮隔天端, About to lose the one with whom I used to fly side by side—
apart on opposite ends of Heaven.
山川悠远兮路漫漫, The mountains and streams are far away—the roads stretching into the distance.
揽衣不寐兮食忘餐。Taking up my clothes and not going to sleep—I eat and forget to swallow.

Bringing this song to mind, the judgment expresses the husband’s pain and lays it before his parents, trying to convince them to not let their son become a second Muzi. What solution then? Instead of divorce, Bai writes that it would be right for the family to accept the situation and lament as Deng You did. While fleeing invaders, Deng had the choice of abandoning his own son or his nephew and chose to leave behind his son because his brother was dead and so could not have more children. However, he and his wife were not able to have children again, and the people lamented on his behalf: “Heaven’s way is blind, that it would cause Deng Bodao to have no son!” 天道無知, 使鄧伯道無兒.133 Using this story, the judgment makes the case that if a righteous man had to endure such a fate, what right do the husband and his parents have to complain? The judgment understands that in such a case, technical legal arguments might end up helping no one. What is more important is to get the parents to sympathize with their son and daughter-in-law and to allow them to continue their marriage despite the fact that they might never have children.

132 The Yuefushi ji 樂府詩集 (Collection of Music Bureau Poetry) of the 12th century records the story of Muzi and his “Song of Parting Cranes” 別鶴操. See Xian-Qin Han Wei-Jin Nanbeichao shi, 305.

133 Jin shu, 90.2340.
In this section, I focus on cases where Bai employs moral and ritual principles to elucidate the law’s intention when the letter of the law does not give a clear answer for a case. Just like cases in the previous section, Bai is concerned about leading us to a moral conviction about the right outcome, but the difference is that the formal law now requires clarification.

For example, there is the case where a prefect took as his wife a woman from a county within his jurisdiction.\(^{134}\) The Statutes allow this only if there had been a betrothal prior to the prefect’s taking office.\(^{135}\) For the purposes of this law, what counts as a betrothal? The prefect claims that his marriage is valid because he had sent the colors (the first of the six rites) prior to taking office. The judgment focuses on why the law does not allow marriages between officials and those under their jurisdiction and argues that having sent the colors is sufficient to be counted a betrothal based on the law’s intention:

諸侯不下，
用戒淫風；
君子好求，
未乖婚義。
甲既榮為郡，
且念宜家。
禮未及於結褵，
貴已加於執憲。
求娶於本部之內，
雖處嫌疑；

The feudal lords ought not to go below their station\(^{136}\)—
this is in order that they might refrain from licentious customs;
“[she is] a good match for our lord”\(^{137}\)—
this does not transgress the righteous principle of marriage.
A is already honored with the title of prefect,
but he still longs to establish a household.\(^{138}\)
The rites have not reached the tying of the bridal veil,
but blame has already been assigned by legal enforcers.
When he sought a wife within his own jurisdiction,
he found himself under suspicion, and yet,

\(^{134}\) *BJYJ* 67:3648.

\(^{135}\) See *Tang Stat.* 9.34 (162).

\(^{136}\) See *Liji zhengyi*, 51.1622c: “The princes do not sink beneath their station to fish for beauties” 諸侯不下漁色.

\(^{137}\) See “Odes of Zhou and the South 周南: Cry of the Ospreys 關雎” (Mao 1), *Mao Shi zhengyi*, 1A.273b–274b.

\(^{138}\) See note 79 above.
since the betrothal occurred before he received his post, it was not from letting his passion go unchecked. Moreover, the rites were commenced by sending the colors, which is sufficient to show his desire for a lovely wife. “When there is the rite of betrothal, one became a wife” — this is far from a government of brute force.

We should heed the plea of the eagle banner and find it difficult to prosecute him for the crime of fishing for a wife.

The judgment identifies the law’s intention as prohibiting licentiousness and abuse of power. It starts by contrasting two phrases from the Classics. The first comes in the context of Confucius’ warning against licentiousness; the second is from the ode “Cry of the Ospreys,” where a beautiful young woman who is “a good match for our lord” is sought as a consort. Analects 3.20 contains Confucius’ judgment that “the ‘Cry of the Ospreys’ expresses joy without licentiousness, sorrow without self-injury” 關雎，樂而不淫，哀而不傷. The contrast is between transgressive passion and ritual propriety. The language of the statute governing this situation is reproduced faithfully in line 11 (“since the betrothal occurred before he received his post”) but whereas the statute does not make explicit why that makes all the difference, the judgment argues that this is evidence that the marriage was not the product of unchecked passion. The prefect’s desire for a wife did not come suddenly. By sending the colors, he had already properly expressed, in accordance with the rites, the wish to marry the woman. His abiding by the rites is evidence of the propriety of his conduct.

Two divorce cases show how considerations based on the rites can clarify ambiguities in the formal law. The Code lists the seven grounds for divorce (not bearing a son; immorality; not serving one’s parents-in-law; talkativeness; thievery; jealousy; and leprous disease), as well as

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139 See Liji zhengyi, 28.1471b: “When there is the rite of betrothal, one became a wife; without it, one became a concubine” 聘則為妻，奔則為妾.

140 i.e., the prefect.
several conditions that make a divorce automatic. Some of the grounds for divorce, however, are so vague that any determination of whether the grounds are met must have relied on considerations beyond the formal law. The following two cases raise the question of what counts as “not serving one’s parents-in-law.” I set them side-by-side for comparison:

Received: A’s wife yelled at the dog in front of her mother-in-law. A was angry and divorced her. She pleads that this is not one of the seven grounds for divorce. A responds that she was disrespectful.

得甲妻於姑前叱狗, 甲怒而出之。訴稱非七出。甲云, 不敬。142

細行有虧, 信乖婦順; 小過不忍, 旨謂夫和; 甲孝務恪恭, 奉豚明順; 餉豚明順, 未聞爽於聽從; 叱狗愆儀, 盍勿庸於疾怨?

Being amiss in minute conduct; is indeed a breach of the obedience expected of wives; but when one does not tolerate small faults; how can that be called a husband’s mildness? As for A, when it comes to filial piety, he pursues respectfulness and reverence; She had set before [her mother-in-law] a whole pig to show her obedience144—

未聞爽於聽從; 叱狗意儀, 豈不庸於疾怨?

I have never heard of her failing to obey and follow; she yelled at the dog and violated ceremoniousness—

141 Tang Cod. 189 (223–24).

142 BJYJ 66.3594. For this scenario, see the story of Bao Yong 鮑永 (d. ca. 42) in Hou Han shu, 29.1017: “[Bao] Yong from a young age had ambition and integrity. He studied the Shangshu [as transmitted] by Ouyang [Sheng]. He served his stepmother with utmost filial piety. His wife constantly yelled at the dog before his stepmother, so Yong divorced her” 尤少有志操，習歐陽尚書。事後母至孝，妻嘗於母前叱狗，而永即去之. For the idea that disrespect invalidates outward displays of filial piety, see Analects 2.7.

143 See Analects 13.2: [When asked about how to govern] the Master said, “Set an example for your officers, show leniency toward small faults, promote worthy and talented men” 子曰: 先有司, 赦小過, 舉賢才.

144 See Liji zhengyi, 61.1681a.

145 See Liji zhengyi, 27.1462c: “When sons and their wives are not filial and respectful, [the parents] should not be bitter and resentful, but for the time being instruct them. If they cannot be instructed, then they can be resentful toward them” 子婦未孝未敬, 勿庸疾怨, 姑教之; 若不可教, 而後怒之.
雖然言是昧，
我則有尤；
若失口而不容，
人誰無過？
雖敬君長之母，
宜還王吉之妻。

得乙出妻，妻訴云，無失婦道。乙云，父母不悅則出，何必有過。151

孝養父母，
有命必從；
禮事舅姑，
不悅則出。
乙親存為子，
年壯有妻。
兆啟和鳴，
授室之儀雖備；
德非柔淑，
宜家之道則乖。
若無爽於聽從，
曷見尤於譴怒？
信傷婉娩，
理合仳離。

146 Liji zhengyi, 27.1461c: daughters-in-law were supposed to address their in-laws “with bated breath and gentle tone” 下氣怡聲。
147 See Zuozhuan, Duke Xuan 2.3a.
148 I.e., Bao Yong.
149 See note 88 above.
150 See Liji zhengyi, 27.1463a.
151 BJYJ 67.3617.
152 See note 79 above.
Moreover, I have heard that she did not comfort their mother’s heart.  

so it is right for her to be divorced.

Why is it necessary for her to be amiss in wifely virtue 

and only then send her away?

Since chatter [about this matter] has not ceased, 
please examine stories of the past:

when Jiang Shi let his spouse go, 
it was for a minor fault;
when Bao Yong dismissed his wife, 
it was also not due to a big error.

These are clear precedents—  
why this insubstantial claim?

In the first case, the judgment defends the wife and argues that she cannot be accused of “not serving her parents-in-law” because her misconduct was only a small fault. The second judgment goes to more length to argue that the woman in that case may be divorced because she failed to serve her parents-in-law properly. Bai could have easily chosen to rule in favor of divorce in the first case, given that the scenario is taken straight from a story in the biography of Bao Yong, who did divorce his wife for yelling at the dog in front of his stepmother. Bai, however, chooses to emphasize the overall obedience of the wife and the virtue of tolerating small faults, both on the part of the husband and on the part of the mother-in-law. In the second case, Bai focuses on a pattern of disobedience that has led to much criticism and resentment on the part of the parents-in-law, and hence, he uses the *Liji* passage to support divorcing such a wife. To make his arguments in both cases, Bai has to posit some facts that are not explicitly stated. In the first case,

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153 See note 90 above.

154 On Jiang Shi’s (ca. 1st c.) wife, see *Hou Han shu*, 84.2783: “Shi treated his mother with the utmost filial piety, and his wife served and obeyed [her mother-in-law] with great reverence. [Shi’s] mother liked drinking water from the River, which was six to seven li [approx. one to two miles] from their house; his wife frequently went upstream to fetch water. Later one time, she encountered winds and did not return in time. His mother being thirsty, Shi rebuked [his wife] and sent her away” 詩事母至孝，妻奉順尤篤。母好飲江水，水去舍六七里，妻常泝流而汲。後值風，不時得還，母渴，詩責而遣之.

155 See note 142 above.
he writes that he has never heard of the wife failing to obey and follow; in the second, he writes that there must have been a persistent failure to obey and follow. We can reconcile the two cases by seeing the first case as one about an isolated incident and the second as one about persistent disobedience. “Not serving one’s parents-in-law” is interpreted to mean a pattern of disobedient behavior.

The two cases feature the use of two sets of historical precedents—Bao Yong and Wang Ji in the first case, and Bao Yong and Jiang Shi in the second—which shows their flexibility. The story of Bao praises him for his filial piety and makes it clear that his wife showed disrespect toward her mother-in-law by repeatedly yelling at the dog in front of her. Although the judgment acknowledges that Bao’s wife was divorced for a small fault, it simultaneously points to how Wang Ji took back his wife after divorcing her for a single error: picking dates from a neighbor’s tree. Considering the wife’s misconduct in light of her otherwise obedient conduct, the judgment criticizes the husband for being overly devoted to his mother at the cost of neglecting his relationship with his wife and asks the mother-in-law to restrain her resentment. In the second case, using the exact same story of Bao’s wife, Bai makes a different argument: Bao’s wife was sent away because of a small fault, so why not in the case, though the fault be small as well? In comparison, Jiang Shi’s wife was even more innocent: she was delayed in bringing water to her mother-in-law because of a storm, and because of that, her husband divorced her; and yet, she harbored no resentment and continued to send delicacies to her mother-in-law through a neighbor. If such a woman may be divorced, why not the wife in this case? Historical precedents can be manipulated to fit the argument that the judgment would make.

Another divorce case imagines a situation that the law does not contemplate. In this case, the filial devotion that a wife owes to her own father is set in conflict with the duty she owes to her husband:
Received: A was in the field. His wife was bringing him food, but had not arrived. On the road, she met her father who told her he was famished. She gave him the food to eat. A was angry and immediately divorced his wife. His wife contests.

The situation is contrived and is meant to make it impossible for the wife to serve both her husband and her father. She decides to serve her father—is this a cause for divorce? On the one hand, she has disobeyed her husband, but on the other hand, her filial devotion toward her father is praiseworthy. Nothing in the Code contemplates this precise scenario. Holding to the view that a marriage should be preserved if possible, the judgment argues that under such circumstances a husband, even if he was wronged, ought to take his wife back:

象彼坤儀，妻惟守順；根乎天性，父則本恩。饌宜進於先生，饎可輟於田畯。夫也望深饁彼，方期相敬如賓；父兮念切囂然，旋聞受哺於子。義雖乖於齊體，

In accordance with proper feminine conduct, a wife abides by obedience; rooted in heavenly nature, a father is the source of grace. Food ought to be served to one’s elder, and provisions can be left to the surveyor of the field [i.e., the husband]. Her husband was looking into the distance for one bringing food to him, and was just then anticipating the mutual respect [that husbands and wives show each other] as guests; her father was anxious and famished, but it was soon heard that he was being nourished by his child. Though propriety was lacking from one who is together with oneself in body,

156 BJYJ 66.3607–08.
157 Reading 儀 as 宜.
158 See note 117 above.
159 See Analects 2.8: “When young men have wine and food, they serve them to their elders” 有酒食，先生饌.
160 See Zuozhuan, Duke Xi 33.6b. This story of Xi Que’s wife, who carrys food into the field for her husband, and who treats him (and is treated) as a guest, probably inspired this case.
孝則見於因心。filial piety is shown in a full heart.

盍嘉陟岵之仁, Why not rejoice in the benevolence shown to the father whom one thinks of while ascending the lush hill?\textsuperscript{162}

翻肆送畿之怒。On the contrary, you unleash the anger of accompanying only to the threshold.\textsuperscript{163}

孰親是念, The question of who should be held dearer is on your mind—
難忘父一之言; difficult is it to forget the words “one has only one father”;\textsuperscript{164}
不爽可徵, that there was no fault is clear—
無效士二其行。do not imitate “doubling in your ways.”\textsuperscript{165}
犬馬猶能有養, Even dogs and horses are given nourishment\textsuperscript{166}—
爾豈無聞? how can you not have heard of this?
鳳凰欲阻于飛, The phoenixes would hinder each other in flight;
吾將不取。I shall not choose it.

The first four lines contrast the woman’s relationship to her husband with her relationship to her father: the former relationship is defined by the wife’s obedience, the latter, by her father’s claim to her filial devotion because of his status as the source of grace. From these abstract principles, the judgment moves to the specifics of this case, portraying the dilemma in vivid terms: the husband, working in the field, was gazing into the distance waiting for his wife to come, when the father presented himself famished before his daughter. Bai does not decide whether filial piety is

\textsuperscript{162} I.e., the wife. See Ban Gu 班固 (32–92), Baihutong shuzheng 白虎通疏證, ed. Chen Li 陳立 (1809–1869) (Beijing: Zhonghua shuju, 1994), 10.490: “’Wife’ means ‘together,’ being together in body with the husband” 妻者，齊也，與夫齊體.

\textsuperscript{163} See “Odes of Wei 魏風: Ascending the Lush Hill 陟岵” (Mao 110), Mao Shi zhengyi, 5.358a/b: “I ascended that lush hill, and gazed afar toward my father. My father said: O my son, away on military service! Dawn and dusk he never rests. Take caution there, that he may still return and not remain” 陟彼岵兮，瞻望父兮。父曰嗟予子行役，夙夜無已。上慎旃哉，猶來無止.

\textsuperscript{164} See note 91 above.

\textsuperscript{165} See Zuozhuan, Duke Huan 15.2. The son-in-law of Zhai Zhong 祭仲 was sent to assassinate his father-in-law. When Zhai Zhong’s daughter caught wind of it, she asked her mother whether a husband or a father is dearer. The mother responded that any man can be a husband, but one has only one father.

\textsuperscript{166} See “Odes of Wei 魏風: The Peasant 民” (Mao 58), Mao Shi zhengyi, 3C.325a: “I, the woman, has not erred; you, the man, have been duplicitous in your ways” 女也不爽，士貳其行.

\textsuperscript{166} See Analects 2.7: “The Master said, ‘Filial piety nowadays means to provide nourishment [to one’s parents]. Even dogs and horses can be provided nourishment. Without reverence [for one’s parents], where is the difference?’” 子曰：今之孝者，是謂能養。至於犬馬，皆能有養；不敬，何以別乎.
always more important than one’s duties as a wife. Instead, his judgment is that in this case, the
husband, despite having been disobeyed, ought to have rejoiced in his wife’s show of filial piety.
Bai contrasts the image of one ascending the lush hill and remembering the words of a loving
dad father, with the image of a heartless husband who accompanies his divorced wife only to the
threshold (a similar contrast to the one used in the case of the divorced mother who requests to
use her son’s official privilege). The focus is more on the husband’s lack of empathy than on the
wife’s virtue. When even dogs and horses are given nourishment, how can the husband be upset
at his wife for giving support to her father? The judgment seeks to move the husband’s
compassion and upholds the importance of marital harmony.

Another case where the law is silent about a scenario involves a broken marriage
agreement where the young woman’s family has married the young woman to another groom and
refuses to return the bridal gifts. 167 In such a case, the Code imposes a heavy penalty: penal
servitude of a-year-and-a-half to be sentenced against the person responsible for the breach, that
is, the young woman’s father, and a one-degree reduction of that penalty to be sentenced against
the second young man’s family, if that family acted with knowledge of the first betrothal. 168 The
young woman’s family in this case, however, defends themselves on the grounds that the groom’s
family had refused to complete the marriage for three years without cause. The Code provides
that if the young man’s family breaks its promise to complete the marriage, they cannot recover
the bridal gifts, 169 and presumably the young woman’s family would be free to marry her to a
second suitor. But here, the young man’s family apparently had not formally broken its promise,
but had delayed the marriage ceremony for three years. Since the Code does not lay out a specific

168 Tang Cod. 175 (214).
169 Tang Cod. 175 (213).
time period within which a marriage has to be completed, the young man’s family might have planned to take advantage of this ambiguity to delay the marriage indefinitely. What should the result be? Bai’s judgment is as follows:

義敦好合，
禮重親迎。
苟定婚而不成，
雖改嫁而無罪。
景謀將著代，
禮及問名。
二姓有行，
巳卜和鳴之兆；
三年無故，
竟愆嬿婉之期。
桃李恐失於當年，
榛栗遂移於他族。
既聞改適，
乃訴納徵。
揆情而嘉禮自虧，
在法而聘財不返。
女兮不爽，
未乖九十之儀；
夫也無良，
可謂二三其德。
去禮逾遠，
責人斯難。

Righteousness reveres the marriage union;
the rites esteem “welcoming in person.”
If an engagement is not completed by marriage,
even if she is married to another there is no offense.
[The young man’s family] had planned to carry out the exchange of roles,
and the rites had reached inquiring the name.
For this union of two surnames,
signs of harmonious sounds had been divined;
[but by delaying] three years without cause,
he would indeed squander the time of the young woman’s loveliness.
Peach and plum blossoms fear being diminished compared to years past;
the fruit of the hazel and chestnut hence traveled to another clan.
Upon hearing that she had married another,
he filed suit that he had sent the evidences.
If we measure [his action] by humane feelings, he himself was amiss in this felicitous rite,
while in accordance with the law, the bridal gifts are not recoverable.
As for the young woman, “there has been no erring”—
she did not disobey the ceremony of ninety;
as for the groom, there is no good quality—
it can be said that “he has divided his virtue into pieces.”
Having gone so far from the rites,
how difficult it is to blame others!

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170 This is a ritual during which the wife takes over the role of manager of the household from her mother-in-law. See Liji zhengyi, 61.1681a.
171 See note 165 above.
172 See “Odes of Bin 衛風: Eastern Hills 東山” (Mao 156), Mao Shi zhengyi, 8B.397a: “[The bride’s mother] has tied her sash, all the parts of the ceremony is complete” 親結其緋，九十其儀. The commentary explains that ninety means many, and refers to the many instructions with which a daughter is sent off to her new home.
173 “Odes of Wei 衛風: The Peasant 民” (Mao 58), Mao Shi zhengyi, 3C.325a: “You, the man, have exceeded all bounds, so variable in your conduct” 士也罔極，二三其德.
The judgment interprets the Code according to humane feelings (*qing* 情), as mentioned in line 15. The emotional core of Bai’s argument comes from the ode “The Peasant,” which he quotes at the very end. “The Peasant” has been traditionally understood as being about a woman who, after three years of marriage, addresses her unfaithful husband as she is divorced by him. The following lines immediate precede the two lines that Bai quotes in the judgment (“As for the young woman, ‘there has been no erring’” and “it can be said that ‘he has divided his virtue into pieces’”):

*桑之落矣,* The mulberry tree has withered,
*其黃而隕.* [leaves] yellow and falling.
*自我徂爾,* Ever since I came to you,
*三歲食貧.* for three years I have endured poverty.
*淇水湯湯,* The waters of the Qi River swelling,
*漸車帷裳.* wetting the carriage curtains.\(^{174}\)

The mulberry tree, with its glossy leaves, had symbolized the love between the woman and her husband, but now the leaves are withered. The woman returns home across the Qi River, where they had first met, the waters now precarious, splashing against the curtains. This voice of an abandoned woman, proclaiming her faithfulness but helplessly leaving behind a faithless husband, concludes the judgment. The Code does not require that a marriage be completed within three years, but the three-year period in the ode (never expressly alluded to in the judgment) is used to make the case that a betrayal of three years is long enough. A three-year delay also hurts the young woman’s future marriage prospects, which the judgment mentions in lines 10–11: “he would indeed squander the time of the young woman’s loveliness” and “peach and plum blossoms fear being diminished compared to years past.” But the emotional impact of the ode is what settles the question of why such a delay is unacceptable to the point that even the bridal gifts ought to be relinquished.

\(^{174}\) Ibid.
Three revenge cases in Bai’s collection provide a good opportunity to discuss what happens when the formal law is difficult to reconcile with the dictates of propriety. The classical tradition clearly allows, even requires, certain types of vengeance. The Gongyang zhuan states: “When the sovereign is killed, and a subject does not go after the perpetrator, he is no subject; when a son does not avenge his father, he is not a son.”

Two ritual texts also discuss vengeance. In the Liji, Confucius is said to have answered the question of vengeance thus:

[The man whose father or mother was killed] should sleep on straw, with his shield for a pillow; he should not take office; he must be determined not to live with the slayer under the same heaven. If he meet with him in the market-place or the court, he should not have to go back for his weapon, but (instantly) fight with him. . . . [The man whose brother was killed] may take office . . . but not in the same state with the slayer; if he be sent on a mission by his ruler’s orders, though he may then meet with the man, he should not fight with him. . . . [The man whose paternal cousin was killed] should not take the lead (in the avenging). If he whom it chiefly concerns is able to do that, he should support him from behind, with his weapon in his hand.

It is not clear whether Confucius was addressing cases of intentional homicide only or if these answers also applied to unintentional homicide. The Zhou li 周禮 (Rites of Zhou), in what must be cases of unintentional homicide, requires that a slayer should avoid a potential avenger; the closer the relationship of the avenger was to the person killed, the farther the slayer should flee (for example, in the case of a son whose father was killed, the slayer ought to “flee beyond the seas.”

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Presumably, if the slayer does not flee, the avenger may take vengeance with impunity when he encounters him.

The conflict between the requirements of the formal law and of propriety in cases of revenge was a well-known and well-discussed one in the Tang. The formal law, of course, had provisions to deal with both intentional killings and unintentional killings. But vengeance carried out in accordance with the dictates of the classical tradition (especially vengeance for one's father) often frustrated a strict application of the law. The early Tang emperors, for example, often commuted the death sentences of children convicted of avenging their fathers. The most famous case in the Tang involving a revenge killing is that of Xu Yuanqing during the reign of Empress Wu, where a compromise was reached such that Xu, who had avenged his father, was executed, but a special commendation was given to him posthumously for his filial piety. The case is celebrated largely due to the fact that Liu Zongyuan, writing about a century later, famously criticized this compromise on the grounds that the requirements of the formal law and of ritual propriety should never conflict—either Xu should have been rewarded or he should have been punished, not both. But the difficulty of deciding between the

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177 Zhou li zhushu, 14.732b.


179 See Tang Cod. 6 (esp. 8–10, 14–16), 259 (281–82), 265 (289–90).


181 The compromise was proposed by Chen Zi’ang. See Quan Tang wen, 213.2159a–2160a.

formal law and ritual propriety in revenge cases was so intractable that Han Yu 韓愈 (768–824), Liu’s contemporary, could only suggest a case-by-case treatment.  

None of Bai’s judgments support taking vengeance, but significantly, they do not discourage vengeance on the grounds that it is against the dictates of the Code. In all three revenge cases, vengeance is discouraged by reason of a competing moral or ritual obligation.

For example, in the following case, a woman whose husband was killed has promised herself in marriage to anyone who will avenge her husband. Bai’s judgment reads:

親以恩成， An intimate relationship is formed by gracious favor;
有讎寧捨？ when there is an enemy, how can she disregard it?
嫁則義絕， Remarriage means the end of their relationship;\footnote{BJYJ 66.3563.}
雖報奚為? though she avenges him, what of it?
辛氏姑務雪寃, A is now preoccupied with washing away injustice;
雖報奚為? she does not consider that she is transgressing the rites.
勉釋憾之志, She rouses her determination to dissolve her hatred,
將殄萑蒲; ready to slay the one hiding in the reeds;
蓄許嫁之心, she harbors the intent to promise herself in marriage,
則乖松竹。 forsaking the pines and bamboos.\footnote{See note 85 above.}
況居喪未卒, Moreover, her mourning period has not ended;
改適無文。 for her to seek another husband has no precedent.\footnote{See note 85 above.}
苟失節於未亡, If she abandons her duty of chastity in her widowhood,\footnote{“Pines and bamboos” is here used as a metaphor for chastity. Note the clever juxtaposition of reeds, referring to the hideout of thieves, and pines as metaphors.}
未足為非; that is not enough to be a wrong;
婦道有虧, if a wife’s proper conduct is amiss,
誠宜自恥。 it is truly right to feel ashamed of herself.

\footnote{See “Memorial on Vengeance” 復讎狀, in Han Yu 韓愈, Han Yu guwen jiaozhu huiji 韓愈古文校注彙輯, ed. Luo Liantian 羅聯添 (Taipei: Guoli bianyiguan, 2003), 8.3111ff.}

\footnote{BJYJ 66.3563.}

\footnote{See note 85 above.}

\footnote{The mourning period for parents and husband must be observed before remarriage. See Tang Cod. 179 (216–17).}

\footnote{See Zuozhuan, Duke Zhuang 28.3: “The soon-to-perish one” (weiwangren 未亡人) is a term used by widows to refer to themselves.}
In this judgment, Bai comes down against the widow’s decision to avenge her husband by focusing on the impropriety of her promising herself in a new marriage. The Code does not prohibit remarriage, unless it is within the mourning period for one’s husband, but does not encourage it either. The judgment makes the case easier by positing that the wife is still within her mourning period (a fact not mentioned in the original statement of the case), which clearly brings her within the terms of the Code’s prohibition. However, even if we take the case outside the coverage of the Code by assuming that the woman was beyond her mourning period, Bai’s

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189 “Odes of Yong 鄔風: The Cypress-Wood Boat 柏舟” (Mao 45), Mao Shi zhengyi, 3A.312a: “till death I swear to have no other” 之死矢靡它. The traditional interpretation is that this was the poem of Gong Jiang, a widow forced to remarry by her parents.

190 I.e., 百世可知, with 世 being a taboo character because of the personal name of Emperor Taizong, Li Shimin 李世民. The reference is Analects 2.23.

191 Liji zhengyi, 26.1456b: “Once she is united with her husband, she will not change for the rest of her life; therefore, when her husband dies, she will not remarry” 故夫死不嫁.

192 See Analects 2.2.

193 Most likely the widow of Ju, mentioned in Zuozhuan, Duke Zhao 19.7, who avenged her husband (who had been killed by her ruler) by helping invaders take the capital of her own state.

194 The account of Gong Jiang is given in the minor preface to “Odes of Yong 鄔風: The Cypress-Wood Boat 柏舟” (Mao 45), Mao Shi zhengyi, 3A.312a: “’The Cypress-Wood Boat’ is the oath of Gong Jiang. When the Heir Apparent of the State of Wei, Gong Bo, died young, his wife kept her chastity. Her parents wished to take her and marry her to another, but she took an oath and did not permit [them to do so]. So she composed this ode to refuse them” 柏舟,共姜自誓也,衛世子共伯蚤死,其妻守義,父母欲奪而嫁之,誓而弗許,故作是詩以絶之.

195 Tang Cod. 179 (216–17).

196 Tang Cod. 184 (221) allows widows to withhold consent to remarry.
judgment still holds since it does not consider the mourning period to be the only reason why her action was improper. By arguing that remarriage, no matter when it takes place, is a contravention of the rites as expressed in the *Liji*, the judgment considers the chastity of widowhood to be a higher principle than vengeance for one’s husband. To further his case, Bai uses two examples from the Classics. The story of the woman of Zhu is most likely from the *Zuo zhuan* account of a widow who avenged her husband (who had been killed by her ruler) by helping invaders enter her city. This story is used to show how the desire for vengeance could spiral out of control to the point that one would be willing to do anything to accomplish it. The second example is from the ode “The Cypress-wood Boat,” which is traditionally attributed to Gong Jiang, a woman who refused to remarry after her husband died despite pressures from her parents. It reads in part:

汎彼柏舟，
在彼中河。
髧彼兩髦，
實維我儀。
之死矢靡它。
母也天只，
不諒人只。

Floating, that cypress-wood boat,
in the middle that River.
Drooping, those two locks of hair,
truly he is my match.
Until death I swear to have no other.
O mother, O Heaven,
you do not trust [my resolve]!

By the example of the resolve of Gong Jiang, Bai’s judgment argues that the wife would show more faithfulness to her deceased husband by not remarrying than by seeking to avenge him. The ode functions in this judgment as the emotional counterpart to the passage in the *Liji* that discourages a widow from remarrying.

The second case on vengeance involves a man whose elder brother had been killed, but upon encountering the slayer, did not try to take vengeance.\(^{197}\) Accused of not fulfilling his obligation as a younger brother, he defends himself on the grounds that his brother had been

\(^{197}\text{BJYJ 66.3579.}\)
killed “according to propriety” (yìyì 以義). The reference is to a passage in the *Zhou li*: “In all cases where there is a killing according to propriety, [let avenger and slayer] not stay in the same state, and command that no vengeance be taken; otherwise, the avenger shall be put to death” 凡殺人而義者，不同國，令勿讎，讎之則死. The commentary on the *Zhou li* explains that killing “according to propriety” means killing in response to shameful treatment of one’s parent, sibling, or teacher. In such cases, a reasonable way to read the rule is that an avenger should not seek out the slayer in another state and the slayer should not venture into the same state as the avenger. The rule is clearly meant to impose a distance between the slayer and avenger, with the assumption being that if the slayer ventures into the same state as the avenger, he loses all protection. This might be what is going on in this case. If the brother went into the “same state” as the slayer (whatever being in the “same state” meant in the Tang), he cannot take vengeance—that much is clear, and the case would be simpler. If, however, the slayer went into the “same state” as the brother, then there is a question of whether the brother, now permitted to take vengeance, is required to. The judgment, which does not say whether this case belongs to the first or second scenario, argues simply that the brother was right not to take vengeance:

| 舍則崇讎， | Abandoning [vengeance] raises up one’s enemy, |
| 报為傷義。 | but taking vengeance offends propriety. |
| 當斷友之愛， | One ought to cut off the affection between brothers |
| 以遵王者之章。 | in order to obey the decree of the king. |
| 戊居兄之仇， | A is in a position of having to avenge his elder brother— |
| 應執兵而不返； | he should grasp his weapon and have no need to go back for it; |
| 辛殺人以義， | but B killed according to propriety— |


199 “Not staying in the same state” would obviously have been anachronistic in the Tang. Those who would update this requirement to fit the Tang context might have understood it as imposing a long distance between the slayer and avenger.

200 See *Analects* 2.21: “Be friendly to one’s brothers” 友于兄弟.

201 *Liji zhengyi*, 3.1250b: “As for the enemy of one’s brother, do not put away one’s weapon [so as to be ready to take vengeance]” 兄弟之讎不反兵.
將倳刃而攸難。
to impale him with the dagger [in vengeance]

離魯策垂文，
Though the stratagems of Lu [i.e., the Zuozhuan] handed down this text:

不可莫之報也;
“it cannot be that there should be none to take vengeance,”

而周官執禁，
the Rites of Zhou has a prohibition:

安得苟而行之？
how could one be careless in one’s actions?

將令怨是用希，
If one should wish to have resentments be few,

實在犯而不校。
[the means to do so] truly is “to suffer offense and yet not to enter into altercation.”

揆子產之誡，
Look into the warning of Zichan:

損怨為忠；
tearing down resentment is tolerance;

徵臾駢之言，
take as evidence the words of Yu Pian:

益仇非智。
adding to the number of one’s enemies is unwise.

難從不悌之責，
It is hard to agree with the criticism that he failed in his obligation as a younger brother.

請聽有孚之辭。
I request that you heed the credible defense.

For Bai, the choice to take or refrain from taking vengeance is a matter of ritual propriety, and the ritual rule is found in a royal decree in the Zhou li. The Zhou li is not Tang law, but the principle

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202 See Shiji, 89.2574. Kuai Tong 蒯通 (fl. late 3rd c. BC) counseled the magistrate of Fanyang 范陽 to surrender to anti-Qin forces because the magistrate had been so cruel in his rule that many people in his own county would like to impale him in the stomach with a dagger to avenge their fathers.

203 From Zuozhuan, Duke Zhao 20.2b. When the father of Wu Zixu 伍子胥 was seized on the charge of plotting rebellion, his sons were called to appear if they wanted their father pardoned. Knowing that if they went, they would all be killed, the elder brother went, while reminding Wu Zixu that “having received the command that would spare our father, it cannot be that there should be none to rush to obey; but when our kinsman is killed, it cannot be that there should be none to take vengeance” 閻免父之命，不可以莫之奔也；親戚為戮，不可以莫之報也.

204 See note 177 above.

205 See Analects 5.23: “The Master said, ‘Bo Yi and Shu Qi did not take to heart former wrongs; therefore, resentments toward them were few’” 子曰：伯夷、叔齊不念舊惡，怨是用希.

206 From Analects 8.5. The speaker, Zengzi 曾子, is traditionally thought to be speaking about Confucius’ favorite disciple, Yan Hui’s 颜回, virtue.

207 See Zuozhuan, Duke Xiang 31.11. When Zichan 子產, the minister of the state of Zheng, was advised to close down the meeting places in the villages because people were criticizing the government there, he said: “I have heard that tolerance and benevolence are a means to diminish resentment; I have not heard that a tyrannical posture is a means to prevent resentment” 我聞忠善以損怨,不聞作威以防怨.

208 See Zuozhuan, Duke Wen 6.8. When advised to put to death the whole clan of one who had punished him, Yu Pian said: “I have heard in a former record that it is said, favor or wrong cannot be repaid to the descendants—that is the principle of tolerance” 吾聞前志有之曰，敵惠敵怨，不在後嗣，忠之道也.
behind the rule still holds: killing with propriety makes the slayer less culpable. The slayer, however, is still obligated to flee. Let us suppose that in this case it was the slayer who ventured into the “same state,” and the brother could have taken vengeance but did not. The Zuozhuan story of Wu Zixu and his father and brother would suggest that vengeance for one’s kinsmen is required, at least when it is not otherwise prohibited. The judgment, in order to argue that it was right for the brother to not take vengeance, explains that a higher principle should be followed, which it derives from passages in the Analects: 1) do not take to heart wrongs done to oneself, as in the examples of Bo Yu and Shu Qi, and 2) do not enter into altercations even when offended, as in the example of Yan Hui 颜回. Two more examples are given from the Zuozhuan, where Zichan discouraged causing unnecessary resentment and Yu Pian counseled against adding to the number of one’s enemies. Based on these examples, the brother did no wrong to refrain from taking vengeance. In his situation, Bai argues, the better choice was to show mercy and not to perpetuate a cycle of vengeance.

The third revenge case is inspired directly by an account in the Liji and goes as follows:

Received: A was sent as an official envoy. He met his brother’s enemy and passed him by without engaging him in a fight. He is criticized by friends. He defends himself saying that he had been sent by the ruler on a mission.

得辛奉使,遇昆弟之仇,不斗而過,為友人責。辭云,銜君命。209

In the Liji, Zixia 子夏 asks Confucius about this exact scenario and Confucius answers that if the man whose brother was killed has been sent on a mission, though he meets the slayer, he should not fight with him.210 The judgment builds off of this injunction:

居兄之仇, 避為不悌; 銜君之命, When one is the position of having to avenge one’s elder brother, to avoid [the slayer] is to fail in one’s obligation to him; but when sent on a mission by the sovereign,

209 BJYJ 66.3568.

210 See Liji zhengyi, 7.1284c.
斗則非忠。 to engage in a fight is to be disloyal.
将滅私而奉公， In order to extinguish private interests and serve public interests,
宜棄小而取大。 it is proper to abandon the slight and choose the weighty.
辛時惟奉使， A was at that time sent as an official envoy,
出乃遇讎。 and going out he met the enemy.
斷手之痛不忘， The pain as of losing a hand cannot be forgotten—
誠難共國; truly it is hard to be in the same state;
飲冰之命未復， but not having carried out the decree before “drinking ice water,”
安可害公? how could one be amiss in one’s public duty?
節以忠全， Propriety is fulfilled by means of loyalty;
情由禮抑。 feelings are suppressed by means of the rites.
未失使臣之體， Since he was not amiss in following the regulations governing an envoy,
何速諍友之規? why urgently insist on the admonitions of a forthright friend?
臾駢立言， Yu Pian established his words,
嘗聞之矣; which have all been heard;
子夏有問， Zixia had an inquiry—
而忘諸乎? can it be forgotten?
是謂盡忠， This is called fulfilling one’s loyalty—
于何致責? for what reason do you assign blame?

The judgment identifies a conflict between public and private duty. A has a private duty to avenge his elder brother, but has a public duty to carry on his mission from the sovereign. The most important lines in the judgment are: “Propriety is fulfilled by means of loyalty; feelings are suppressed by means of the rites.” It is proper to submit oneself to the sovereign’s will, even if it means that one’s brother might go unavenged. One’s personal desire to take vengeance for “the pain as of losing a hand” has to yield to a higher principle of propriety: obeying one’s ruler on a

211 See Hou Han shu, 74.2410: “Brothers are like the left and right hands” 兄弟者，左右手也.
212 See note 176 above.
213 A reference to a story in “World Among Men” 人間世, Zhuangzi jishi 莊子集釋, ed. Guo Qingfan 郭慶藩 (Shanghai: Shanghai guji chubanshe, 1995), 2.152–53. Having been sent on a mission to the state of Qi, Zigao said: “Today I received my orders in the morning and am drinking ice water in the evening. Am I not feeling the heat within?” 今吾朝受命而夕飲冰，我其內熱與.
214 See note 208 above.
215 Analects 15.1.
216 See note 210 above.
mission. This case is easy because of Confucius’ direct injunction in the *Liji*, but it does raise an interesting question. Why does this argument not work with respect to the formal law? Why can one not say that A must yield to the Code’s general prohibitions against killing, and therefore suppress his desire for private vengeance? From one perspective, this argument does not work simply because there is no classical text that supports the argument. Confucius did not answer the question of whether one can take vengeance when the law of the land prohibits killings in general. But from another perspective, this argument does not work because a subject owes no loyalty to the formal law; he owes his loyalty to the sovereign. The formal law is not something to which one can pledge one’s loyalty. But when one’s duty to the sovereign conflicts with one’s duty to one’s brother, the judgment argues that the former trumps the latter in this particular case.

CONCLUSION

In Bai’s judgments on private conflicts and on marriage and the family, the formal law is downplayed in favor of moral and ritual principles. Sometimes, the law clearly dictates a result, but despite this, Bai’s judgments focus on the human beings behind the conflict rather than the rules that govern it. When the law is unclear in its applicability or is silent with regard to a scenario, Bai’s judgments use the classical tradition to uncover the law’s intention or to fill in the gaps. A certain amount of creativity in dealing with the sources may be required in such cases. In revenge cases, where the formal law and ritual propriety are in direct conflict, Bai’s judgments avoid addressing that conflict. Instead, they set side-by-side competing moral and ritual principles. Some principles, such as chastity, forbearance, and duty to the sovereign, outweigh other principles. In all the cases that we have looked at, law is not seen as a system of rules, but a means whereby individual cases, and the parties behind them, are analyzed through the lens of
the proper relationships and obligations between human beings, between husbands and wives, parents and children, neighbors and enemies, etc. Thus, Bai’s judgments emphasize the humanity behind law and see law as foremost an ordering of human relationships.
In our legal culture, moral considerations are treated with some suspicion. It brings to mind the picture of the nullification of law, whether by a capricious jury or an unscrupulous judge. It suggests the frustration of reasoned judgment in favor of irrational impulse. But moral considerations are always present in law, although what forms our sense of fairness may be difficult to identify. These considerations are treated in opening and closing statements in court, discussed in jury rooms, elaborated in doctrines of equity, and taken into account in enforcement, prosecution, and sentencing. They are not often irrational, but are based upon principles of justice that are shared in our culture.

It should not surprise us, therefore, that in the Roman Empire, students continued to flock to the rhetorical schools to be trained in declamation even when schools of law had long been established, or that the Tang selected officials for the bureaucracy according to their ability to decide cases based on the classical tradition rather than on formal sources of law. Both societies understood the importance of moral considerations and knew that what informed these considerations was not to be found in the formal law.

Controversiae and literary judgments, by creating a language of equity from classical sources and moral norms, dominated in these societies even though technical legal knowledge was, without a doubt, important to the day-to-day operation of law in both Rome and the Tang. This language of equity, which showcased well-roundedness rather than technical expertise, spoke to its intended audience. For the Roman and Tang literary elite, it is clear that well-roundedness was the primary virtue. For Cicero, the ideal orator would have knowledge of law,

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history, geography, and philosophy;² Quintilian encouraged using the words of the poets and philosophers as sources of auctoritas as long as one could convincingly apply them in the current legal dispute.³ In the Tang, those who mastered the classical tradition with its philosophical, literary, and historical texts were given the most coveted offices in the bureaucracy, including legal offices, instead of those who had specialized expertise. Those who trained in controversiae and literary judgments knew that they would be appealing to a relatively small group of literay elite in their work. Most of the iudices in the late Republic and early Empire were men with an elite education and from the upper classes; most of the officials of the Tang bureaucracy were made up of either the learned literati or those with aristocratic backgrounds. Arguing before an elite audience of iudices and magistrates, those who mastered the same texts and had facility in the same moral tradition familiar to that audience would have had a distinct advantage.⁴ It is no wonder that it was in the major social transformations of the late Empire and the Song dynasty, when sociopolitical power in both societies became more diffused so that there was no longer a small literary elite, that both genres became obsolete.

In controversiae, epigrams were the basic units of argument. As Alexander Schubert has noted in his study of the Oratorum et rhetorum, the appeal of epigrams “lay in their specious clarity and precision, their promise of neat and absolute solutions to moral problems—an attractive substitute for analysis”; they were “autonomous and interchangeable sense-units, their utility sprang precisely from their non-originality [and] they were judged on the effectiveness and

² Cicero, De oratore 1.246.

³ Inst. orat. 5.11.36, 39. 44.

⁴ It is true, however, that controversiae would have been comprehensible (though perhaps not fully) even to an audience without an elite education, whereas literary judgments would have been entirely incomprehensible to one without a similar level of education as the writer. The nature of the audience, therefore, distinguishes the two genres: on the one hand, we have trial judges who would make a decision based on what they heard, while on the other hand, we have appellate judges, who would approve a decision from a subordinate official based on a written document.
elegance with which they captured commonplaces of moral wisdom.”5 Another unit of argument was the historical exemplum, which appealed “to a fund of communal knowledge, a common heritage and genealogy.”6 The units of argument in literary judgments were, of course, the four-and six-syllable lines filled with references to the Classics, histories, and other canonical texts, presented with little context or explanation. They were so truncated that precise arguments were difficult to convey, but they were elegant and authoritative because of their source material. They were not themselves original, but could be creatively applied to many cases. They would not contradict the clear dictates of the formal law, but they would have it known that it was the formal law that actually conformed to them. Where the formal law fell short, they stepped in and filled in the gaps the best they could with the wisdom of a common heritage.

For an elite audience, the ability to give a declamatory speech or compose a literary judgment would have been an indication of cultural competence and would have granted the speaker or writer the right to be part of an exclusive group. Why should we not consider the exclusivity inherent in both genres natural to the operation of law? Since legal jargon today excludes all but the experts (that is, the members of the bar), with the result that a client in court usually cannot tell whether his or her lawyer is making the best case, and since judges and lawyers routinely exclude the jury and the parties in sidebar conferences, why should it not be the case in the Roman Empire and the Tang that the elite decision-makers and adjudicators of propriety and justice chose to construct and train in a language that was exclusive? The only difference is that this language was a moral and general one, of the kind one might expect to use beyond a legal and administrative setting, rather than a technical one.

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6 Ibid., 21.
The power of this moral language is really a separate matter from developments in the formal law, but our biases against moral rhetoric in law and in favor of the formal law tend to make us think that the decline of the former is the result of the maturation of the latter. Therefore, we are led to believe that oratory lost its influence in the Roman Empire when the jurists’ law matured and that literary judgments disappeared after the Tang because a specialized legal prose became widespread in the Song. We are tempted to agree with some of the ancient authors that oratory reached its peak in the late Republic, but disappeared in the Empire as the Roman judicial system finally began “to assume in general the outward characteristics of a modern judicial system.”\(^7\) Roman law, so goes this narrative, finally grew out of the rhetorical training that was characteristic of a primitive legal system. We are also tempted to agree with some of the post-Tang writers that the literary judgment was a product of its time, inefficient and indulgent, unlike the concise and fact-based decisions that developed later and were better able to apply the law to facts. The Tang-style judgment, so the narrative goes, had been the criterion for selecting officials because the understanding of law was still shallow. Reality, however, challenges these narratives.

In the Roman Empire, rhetorical advocacy continued to play an important role even after its so-called decline. Even the *Dialogus de oratoribus*, often read as supporting the view of Maternus (who gives its last speech) that forensic and senatorial oratory had declined, is framed as a debate between various views that were probably prevalent at the time. There were no doubt people like Aper (just as there were people like Maternus) in the first century, who defended contemporary oratory. Quintilian, to whom Tacitus might have been responding in the *Dialogus*, proclaimed that the best advocates of his age could still match the ancients.\(^8\) Maternus’ account

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\(^7\) B. W. Frier, “Why Did the Jurists Change Roman Law,” 142.

\(^8\) Crook, *Legal Advocacy*, 185; *Inst. orat*. 10.1.116–18, 122.
of the disappearance of oratory may be doubted from evidence that rhetorical advocacy thrived in the Roman courts at least in the first century—though of course we know nothing about its quality. Tacitus’ account might have more to do with politics than oratory, as it uses the so-called decline of oratory to indirectly criticize the so-called peace of the Empire, where “the discipline of the princeps had also altogether pacified eloquence itself just as it had everything else” (maxime principis disciplina ipsam quoque eloquentiam sicut omnia alia pacaverat).

It might be countered that all this evidence suggests is that the claim of oratory’s decline was simply premature (or in Tacitus’ case, perhaps prescient) in the first century, but that after the first century, when law reached its “classical” period (in the late second to early third century), its decline was real. But law also did not simply “evolve” from point A to point B: different procedures and practices co-existed depending on the preferences of Roman magistrates and emperors. Even in the Republic, the formal law was not considered unsophisticated. Cicero, despite being an orator, had a high opinion of law, calling it (via Antonius) “indisputably . . . a noble art, extending far and wide and touching the concerns of many, while it has ever been held in the highest repute, and even now the most illustrious citizens are the leaders in that field” (sine controversia . . . magna . . . , et late patet, et ad multos pertinet et summo in honore semper fuit, et clarissimi cives ei studio etiam hodie praesunt). Cicero did not view law as ancillary to oratory, having Antonius caution Crassus not to think that just because the orator often employs the law in court, he should treat legal knowledge “as a little maid to follow at [eloquence’s] heels” (tanquam ancillulam pedisequamque). J. A. Crook has even argued that, for many Roman lawyers, the true

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9 Parks, Roman Rhetorical Schools, 54–56.
10 Tacitus, Dialogus 38.
12 Ibid., 1.236.
“classical” period of Roman law was not the age of the classical jurists, but the late-middle and late Republic. Just as the “decline of oratory” can be questioned, so can the “rise of law” in the Roman Empire.

In the Tang, contemporary sources do not usually mention law unless they are talking about how law is established for the sake of its own annihilation. The opening section of the Tang Code, quoting from the Shangshu, declares that “by means of punishments, punishments shall cease, and by means of killing, killing shall cease” 以刑止刑, 以殺止殺. This negative view of law makes it hard to know how developed legal science was. But even though we know almost nothing about the study of law during the Tang (apart from the fact that a college of law existed in the capital), we can gather from the complexity of Tang codified law and a document like Bai Juyi’s petition in the case of Yao Wenxiu that the Tang had a sophisticated legal culture. Hong Mai’s claim that cases in the Song were decided in a concise manner is not really a claim that law has matured, but that extravagant rhetoric has been checked.

In the use of literary judgments in the selection of Tang officials, we see an instance where rhetorical display was emphasized to the detriment of other evaluative methods that better measured day-to-day administrative ability. Instead of being the result of the lack of legal sophistication, the literary judgment might have been a product of institutional resistance to change. Misgivings about the prominent role of literary display in the examinations and criticisms of the practice of selecting officials based on their ability to produce ornate prose were raised.

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13 Crook, Legal Advocacy, 176.


15 Hong, Rongzhai suibi, 10.127.
throughout the Tang, but none seemed to make a big difference.\textsuperscript{16} The \textit{Tongdian} records debates in the early Tang about the suitability of using literary ability to measure administrative ability.\textsuperscript{17} The \textit{Tang huiyao} (Institutional History of the Tang) reports an attempt to reform the examinations under Emperor Taizong 太宗 (r. 626–649) to reward "officials learned in the law" (\textit{fali} 法吏) and curb "(excessive) literary refinement" (\textit{wenya} 文雅),\textsuperscript{18} as well as an edict by Emperor Xuanzong 玄宗 (r. 712–756) in 750 that discouraged using "calligraphy and judgment" (\textit{shupan} 書判) as the sole criteria for selecting officials.\textsuperscript{19} Another edict by Xuanzong called for restraint in rhetorical display in examination pieces:

> Recently, when those taking part in the selection examinations have been tested in judgments, and those taking the \textit{keju} examinations have composed essay responses, in dissecting and analyzing case files, and giving detailed discussions in memorial form, they often do not address the matter at hand, but extensively increase literary embellishment. How insufficient this is for great elegance! It is rather a showing off of small ability. Henceforth, let this not continue.

\textit{比來選人試判, 舉人對策, 剖析案牘, 敷陳奏議, 多不切事宜, 廣張華飾。何大雅之不 足, 而小能之是衒。自今已後, 不得更然。}\textsuperscript{20}

The debate over literary examinations continued throughout the dynasty, with the literary side maintaining an edge.\textsuperscript{21} The fact that Tang intellectuals stuck with them, just as the schools of

\begin{itemize}
  \item \textsuperscript{16} For a discussion of this, see David McMullen, \textit{State and Scholars in T'ang China} (Cambridge: Cambridge University Press, 1988), 215–17.
  \item \textsuperscript{17} See, e.g., \textit{TD} 15.363, where Emperor Taizong complains that candidates were being selected for their literary abilities rather than talent and moral conduct. See also \textit{TD} 17.402, where an examiner placed two candidates in the lowest grade in an examination in 648 because "these men in truth have rhetorical flourish, but their content is trivial and shallow, their writing is superficially ornate; they will certainly not become good vessels [i.e., talents]". In 674, another official memorialized the throne complaining that the literary talent is a poor measure for ability to govern and transform the people. \textit{TD} 17.406.
  \item \textsuperscript{18} Wang Pu 王溥 (922–982), \textit{Tang huiyao} (Beijing: Zhonghua shuju, 1990), 74.1344.
  \item \textsuperscript{19} Ibid., 75.1361.
  \item \textsuperscript{20} \textit{Quan Tang wen}, 27.313a.
\end{itemize}
rhetoric stuck with declamations, probably had much to do with the fact that there were no clearly better alternatives. It was far from the case that literary display was favored in the early Tang and became slowly disfavored. There were doubts about ornate prose from the very beginning of the Tang, and there were those who were still fond of it even in the early Song. Otherwise, the *Wenyuan yinghua* compilers would not have collected so many ornate pieces. Hong Mai’s preference for Bai Juyi’s judgments as opposed to Zhang Zhuo’s also shows that he did not object to judgments in the four-six style per se, but only the overly indulgent style that Zhang was known for.

It is because of our modern bias against moral rhetoric in law (and to an extent, the bias of extant sources) that when we look at *controversiae* and literary judgments, we tend to see degenerative pieces. We are inclined to take the side of those writers in the Principate who, perhaps due to their discontent with the political changes, ridiculed the fantastic themes of declamations and the decline of oratorical training in the schools. We are also inclined to stand with those post-An Lushan intellectuals who criticized highly adorned parallel prose and were determined to see it as a manifestation of moral decay. Because we are told by Suetonius that the declamatory themes evolved from cases originally anchored in real life, and because the *Tongdian* testifies that judgment questions were originally derived from real cases, we are led to believe that both genres, had they stayed true to their “original” purpose, might have developed in the direction of formal case law. But these were genres that were never interested in the formal law. They are “degenerative” only because we compare them to what we think they ought to have been, closer to legal documents than rhetorical pieces.

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21 See a description of this debate in the Tang shortly after the An Lushan rebellion in Bol, “This *Culture of Ours,*” 115.
But we must evaluate them on their own merits. Whatever their faults (largely due to their extravagance), they reflect how, in both Rome and the Tang, moral arguments were seen to have a legitimate role in influencing legal outcomes. *Controversiae* taught future advocates, who might also become future judges (a possible career path in the late Empire at the latest\(^{22}\)), how to make moral arguments through a variation of common scenarios. Literary judgments taught future magistrates and officials how to make cases based on a standard corpus of texts. *Controversiae* and judgments were clearly storehouses of stories, epigrams, conventional arguments, and moral values, but these were not just for show. These became the units of a moral corpus, as vital to a society’s concept of justice and propriety as a formal legal corpus.

By questioning the narrative of a teleological move toward a “modern” legal culture and away from a “primitive” rhetorical culture, this dissertation has shown that the genres of the *controversia* and the literary judgment should be understood in their own right as showcasing a side of law more interested in considerations of equity than formal rules. Moreover, these genres were not neutral toward the legal corpus, but exposed its limitations and doubted its adequacy, as previous chapters have shown. Far from degenerative texts, *controversiae* and literary judgments responded to and interacted with the formal law in ways that showed a sophisticated legal consciousness.

Roman *controversiae* and Tang literary judgments have often been made to stand on the margins of legal studies. They are literary pieces that survived when many actual legal documents have perished; they are treated as the “next best thing.” There is always the desire to glean from them some information about Roman and Tang law and legal systems. When those efforts reach an impasse, there is the desire to give up and treat them as literary pieces that tell us foremost about the literary culture of both societies. We ought to resist both temptations. Law is not only a

\(^{22}\) Crook, *Legal Advocacy*, 190.
mechanism for resolving disputes or a set of rules, but a framework for normative order. Not that
the rules and the mechanical details of the legal process are not important—without them,
neither controversiae nor literary judgments could exist. But we should see that these were the
texts that offered a means by which the normative order could be articulated.
Appendix I: Pleadings in the Roman Empire

No speeches other than those of Cicero survive from the Roman Republic except in fragments.¹ We know even less about the pleadings that were given in the courts of the early Empire, though information for the late Empire is more plentiful. Since there are numerous studies of Roman advocacy from the Republic to the late Empire,² this appendix serves only to highlight a few points on imperial-era pleadings.

First, our best source in the literary tradition for the content of forensic oratory in the Principate is Quintilian. In his rhetorical handbook, the *Institutio oratoria*, he not only tells us how an advocate should prepare for trial, but also what kinds of arguments he should use in his speeches and how to speak persuasively. His description of the legal practice focuses on the advocate, whereas the extant sources centuries later tell us much more about the judge. The part of the trial over which an advocate had the most control was the set speech. Quintilian tells us that advocates would write down the essentials while leaving room for extempore elaborations, after the manner of Cicero.³ We know from the elder Seneca that Cassius Severus wrote out the whole of his speeches⁴ while Lucius Vinicius pleaded extempore,⁵ but those were probably the


³ *Inst. orat.* 10.7.30.

⁴ *Contr.* 3.pr.6.

⁵ *Contr.* 2.5.20.
extremes. Quintilian encourages memorizing the speech, though he allows notes. He introduces the five parts of the forensic speech—Prooemium, Narrative, Arguments, Refutations, and Epilogue—and treats them each in detail. In his discussion of “nontechnical proofs”—those not based on the art of oratory (e.g., prior decisions, documents, oaths)—he has occasion to address the examination of witnesses. The strategies that attended this part of the trial must have been at least as important as the set speech, since that was when most of the evidence would have been presented. In his discussion of “technical proofs,” Quintilian spends a lot of time on the loci of arguments, before turning to the use of examples as part of an argument. He encourages advocates to draw arguments from history, poetic fables, proverbs, similitudes, and sources of authority such as the opinions of nations, peoples, wise men, and famous citizens and poets, as well as common sayings and beliefs. Moreover, advocates should have a knowledge of local laws, customs, and religious practices. Quintilian also describes how an advocate can convey all this

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6 Inst. orat. 10.7.31–32. In Epistles 4.16.2 and 6.2.5, Pliny tells of speeches lasting from less than an hour to seven hours.

7 Inst. orat. 3.9–6.5.

8 Inst. orat. 5.7.9–37.

9 Inst. orat. 5.10.20–94.

10 Inst. orat. 5.11.9–10, 12.4.

11 Inst. orat. 5.11.17–20.

12 Inst. orat. 5.11.21.

13 Inst. orat. 5.11.22–35.

14 Inst. orat. 5.11.36–37.

15 Inst. orat. 12.3.
content convincingly. He should have a good voice\textsuperscript{16} and good appearance.\textsuperscript{17} His delivery—tone\textsuperscript{18} and pace\textsuperscript{19}—is crucial. So are his facial expressions\textsuperscript{20} and hand gestures.\textsuperscript{21} In short, he should have the skills of a stage actor, with the difference that what he pleads is real.\textsuperscript{22} The advocate should ultimately develop his moral character on his way to becoming a good orator.\textsuperscript{23}

Unfortunately, despite Quintilian’s comprehensive treatment of forensic oratory, we do not have surviving legal speeches from the imperial period, or detailed accounts of legal proceedings, through which we can see Quintilian’s advice put into action. The historical sources give us some clues about the procedures of legal advocacy, especially the \textit{Dialogus de oratoribus}, and also Dio Cassius, but they are limited to brief remarks, and in any case, treat cases that were not typical. Legal sources such as the \textit{Codex Theodosianus} and the \textit{Corpus iuris civilis} are late and, though useful in filling out the picture of late imperial legal procedures, do not preserve actual pleadings. Mention should be made of the so-called martyr-acts,\textsuperscript{24} which depict the trials, of Christians on the one hand, and of Alexandrian Greeks on the other (the two, though similar in form, were probably produced independently), before Roman officials in the early centuries. In

\begin{enumerate}
\item \textit{Inst. orat.} 11.3.13.
\item \textit{Inst. orat.} 12.5.5.
\item \textit{Inst. orat.} 11.3.43–46.
\item \textit{Inst. orat.} 11.3.52.
\item \textit{Inst. orat.} 11.3.72–81.
\item \textit{Inst. orat.} 11.3.85–87.
\item \textit{Inst. orat.} 11.3.4–5.
\item \textit{Inst. orat.} 12.2.1.
\end{enumerate}
both cases, it is debated to what extent the texts preserve the official reports and to what extent they include imaginative elements. Purely imaginative accounts, such as the mock-trial of Lucius in the *Metamorphoses* of Apuleius (ca. 124–170), also provide a portrait of legal practice in the early centuries.

The best source of actual court records from the imperial period is—as is the case for the Tang—manuscripts that survived fortuitously in an imperial outpost, in this case, Roman Egypt. The records are all in Greek; the procedure followed was the *cognitio*. Here, we are looking at cases that involved men with some property who could afford advocates. The matters include, among many others, taxation appeals, assault, theft, loans, and the marriage of soldiers. *Exordia*, *narratio*, and *peroratio* can be identified in the texts, but are sprinkled throughout with interruptions by the judge and opposing counsel. Speeches are recorded verbatim or in abstract form. I encourage the reader to consult J. A. Crook’s detailed study of these papyri.

Finally, apart from Cicero, the only full length legal speech to survive in the literary tradition from antiquity is the *Apologia* of Apuleius, given in defense of a charge of criminal magic. The published text might little resemble the speech that was actually delivered, but the *Apologia* must have at least read like a plausible speech. It shows some familiarity with Roman law and procedure, though it is clearly meant to be a showpiece. It was heard before the governor and his *consilium*, and if the governor was of the same mind as the younger Pliny, who always allowed as much time as the pleader asked, he might have even let Apuleius deliver it without interruption. Though it is often assumed that the charge against Apuleius was brought under

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26 Crook, *Legal Advocacy*, 58–118.

the *lex Cornelia* on assassins and poisoners, Apuleius never mentions this statute or any other criminal statute, and avoids law altogether except for a reference to the Twelve Tables. Apuleius might have had little to say about the law because he left the technical matters to a professional advocate. Or perhaps there was no use for law since there was no statute (that we know of) against magic. Apuleius’ defense relies on convincing the judge of the trustworthiness of his character—why he could not be the kind of person who would use magic—and his many learned allusions to the poets and philosophers would have shown himself as a cultured man with whom the governor and his *consilium* could sympathize.

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28 Given the length of the speech, and an average of two-and-a-half minutes to read aloud a double-spaced text on 8 ½ x 11 in. paper, it would take approximately three to four hours to read out the *Apologia*.


30 Apuleius, *Apologia* 47.4.
Tang judgments written for real cases in the four-six style are very rare and must be distinguished from the decisions that were most likely written in the day-to-day operations of the Tang bureaucracy. Outside of the literary tradition, the term *pan* 判 seems to refer generally to decisions made by officials in the course of their judicial and administrative duties. Jidong Yang’s study of Manuscript No. 2836 in the Ōtani collection,¹ containing several *pan* on an administrative matter processed by the Dunhuang County in 703, confirms that *pan* were issued in concise unadorned prose by bureaucrats above the rank of clerk (*dian* 典).² (The fact that this document comes from a military administration, however, potentially limits our confidence in drawing broad conclusions from it with regard to the rest of the bureaucracy.) According to the *Tongdian*, the highest official in a department such as the Chancellery (Menxia sheng 門下省) is given the duty of making overall judgments on matters concerning the department, the second highest, of making general judgments, and the third highest, of making particular judgments.³ On the county level, this bureaucratic hierarchy translated to the magistrate (*ling* 令), assistant magistrate (*cheng* 丞), and county defender (*wei* 尉) (somewhat akin to a police chief). The Ōtani manuscript, which contains a “memorandum” (*die* 戴) submitted by a clerk and approved successively by the defender, assistant magistrate, and magistrate, bears this out. The defender wrote the first judgment in straightforward prose; the assistant magistrate Yu responded:

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³ *TD* 21.549, 551.
“Judgment approved; review requested; Yu gives instructions” (依判。咨。餘示); and the magistrate Bian confirmed: “Judgment approved; Bian gives instructions” (依判。辯示).

Although the majority of the legal and administrative manuscripts recovered from Dunhuang and Turfan shows that Tang decisions (at least from these outposts) were not written with any literary embellishments, a small minority testifies to the possibility that some cases were singled out for more attention and more literary treatment. There is no easy way to tell whether a particular case was real, since even cases where the parties’ names were clearly invented or borrowed from historical persons (as in the Wenming 文明 collection) could be actual cases that were redacted in the process of transmission. A collection of six cases from around the year 665 is one of the more compelling candidates for being real Tang decisions composed in four-six prose.
The manuscript, likely part of a collection of official documents from the Anxi Protectorate in northwest China, consists of six cases, five of which deal with administrative and military matters that were of concern to the Tang outpost (for example, supervision of guards in charge of the beacon fires). The one other case involves a husband and his former wife, who had previously left him and married another. Now a widow from her second marriage, she wished to go back to her former husband. It is unclear what the objections to this remarriage were. Perhaps it had to do with the traditional notion that widows should avoid remarrying, though Tang law certainly did not forbid remarriage; more likely, it had to do with popular indignation that the wife had left her

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5 The Wenming panji canjuan 文明判集殘卷 (Fragmentary Fascicle of a Judgment Collection circa the Wenming Reign Period in 684), now in the Bibliothèque nationale de France as manuscript P (Pelliot) 3813. See Dunhuang Tulufan Tangdai fazhi wenshu kaoshi, 436–63. This collection of judgments exhibits some examples of polished literary prose.

6 The Linde Anxi panji canjuan 麟德安西判集殘卷 (Fragmentary Fascicle of a Judgment Collection circa the Linde Reign Period, 664–665, in the Protectorate to Pacify the West), now in the Bibliothèque nationale de France (P2754). See Dunhuang Tulufan Tangdai fazhi wenshu kaoshi, 464–78.
former husband apparently when he had been ill and now wanted to return to him. We have no sure answer for why such a case received a lengthy judgment in polished parallel prose. It might be because it was a family law case, an area where officials probably had more discretion (if our modern legal system's approach to family law is any indication). There is no reference in the judgment to any legal provision, and the decision is made with appeal to common sense and natural sympathy. The text is relatively well-preserved:

高頭、阿龍，
久諧琴瑟。
昨因貧病，
遂阻參商。
龍遊蕩子之家，
忽悲鸞而獨儛；
頭寄隅之徼，
恆驚鵲以空栖。
事非出於兩情，
運以徵於隻意。
無夫之媛，
不可空擲春宵；
闕妻之男，
A woman without a husband cannot cast away the spring evenings by herself; a man lacking a wife


The use of 阿 to refer to a married woman by her maiden name was common in official documents. See Zhao Yanwei 趙彥衛 (fl. 1163–1206), Yunlu manchao 雲麓漫鈔 (Beijing: Zhonghua shuju, 1996), 10.168.

See Chapter 5, note 129.

The Chinese divided the sky into twenty-eight lunar lodges (xiu 宿). The Shen 參 xiu is a group of seven stars in the Orion constellation, including the three on Orion's Belt, in the western part of the sky. Shang 商 refers to the Xin 心 xiu, which contains the star Antares and two other stars of Scorpius, on the eastern part of the sky. See Schlegel, Uranographie Chinoise, 138, 391. By the Tang, “to be separated like Shen and Shang” was a well-known idiom.

See Ouyang, Yiwen leiju, 90.1560. The Yiwen leiju 藝文類聚 (Anthology of Literary Excerpts Arranged by Categories) takes this story from Fan Tai’s 范泰 preface to the “Poem on the Simurgh.” The story goes that the king of Kophen (modern day Central Asia) once captured a simurgh that refused to sing for three years. The queen had the idea to place a mirror in front of it so that, seeing its own kind, it might sing. The bird saw its reflection in the mirror, sang with exceeding sorrow, and leapt up and died.
實是難窮秋夜。 finds it truly difficult to exhaust the autumn nights.
遠念和鳴之緒， We consider far back the beginning of their harmonious sounds
近詢鰥寡之由。 and examine now the reason for their bachelor- and widowhood.
頭緣疾病頓身， Because Tou had a serious illness throughout his body,
龍遂猖狂[己]自困。 Ms. Long soon became frantic and found herself in dire straits.
不能拘制， She could not restrain him
惟恐孤危。 and only feared facing disaster alone.
倚官“豈敢致尤， How could he blame her?
抑從棄薄。 So he let her leave him.
生人之婦， As for a living person’s spouse,
昔時尚被奪將； even she could be taken away in times of old;
死鬼之妻， as for a dead ghost’s wife,
今日何須不理。 what need is there today to consider this [remarriage] an
impropriety?
況有一女， Moreover, there is a daughter,
見在掌中， seen in her arms;
既曰分腸， since it is as though separating their innards,
誠悲眼下。 true sorrow is before their eyes.
合之則兩人全愛， If we allow them to marry, then two people complete their
affections;
離之則一子無依。 if we separate them, then a child has no one to rely on.
見子足可如初, We see that the child can be fully restored to how she was [with her
father],
憐妻豈殊於舊。 and we pity the wife, that she would be parted [from him] as before.
何勞採藥, What need is there to pick medicinal herbs?
自遇下山。 She herself has met him at the foot of the hill.¹³
己囑槁砧, She already belongs to her husband,¹⁴
以狀牒知, By memorandum I make [this decision] known;
任為公驗。 let it be examined by the public.

¹² I delete yiguan 倚官 even though Liu Junwen keeps it. Without it, we maintain the 4-4-4-4 structure in the lines beginning with 不能 and ending in 棄薄. The subjects of these lines are unclear and I have offered a tentative translation that best preserves the parallelism. Alternatively, keeping yiguan would give the sense of “[with her] having relied on the official, how could he etc.”

¹³ See Chapter 5, note 92. The mǐwu蘼蕪 is an aromatic, but can also be used for medicinal purposes.

¹⁴ A reference to another poem from the Yutai xinyong. See Xian-Qin Han Wei-Jin Nanbeichao shi, 343. The gāozhēn槁砧 is tool for cutting grass, also called a fu 銓. Its hidden meaning is husband (fu 夫).
Much of this judgment relies on generating a sense of pity on the part of the readers. The fact that the decision was to be publicized seems to suggest that it was not only meant for review by a higher tribunal, but would serve to convince the public at large that this remarriage was proper. The fact that a woman who left her husband while he was ill would be permitted to return to him might have raised some outcry. The judgment skillfully uses evocative literary references, especially in the beginning and end, and states the facts in the light most favorable to the woman. If the audience is still unconvinced, there is the child who would lose her chance to be with her father again.

In addition to the Dunhuang and Turfan manuscripts, judgments of real cases are sometimes included in Tang anecdotes, recorded in various “miscellaneous notes” (biji 筆記). The reliability of these stories varies, and the judgments recorded are usually short excerpts.\(^\text{15}\) For example, the Yunxiyou yi 雲谿友議 (Amicable Discussions in the Cloudy Valley) of Fan Shu 范攄 (fl. late 9th c.) is a Tang biji that contains several excerpts of judgments, including a somewhat substantial one attributed to Yan Zhenqing 颜真卿 (709–785) during his term as administrative-delegate (neishi 内史) of Linchuan County (in modern-day Jiangxi). We are given this background to the story:\(^\text{16}\)

In the village was a man named Yang Zhijian, who loved to study but lived in poverty, unknown to his fellow villagers. His wife became tired of the scanty porridge and soup and requested a document for divorce. Zhijian wrote a poem to send her away, saying:

邑有楊志堅者，嗜學而居貧，鄉人未之知也。山妻厭其饘臛不足，索書求離；志堅以詩送之曰：

平生志業在琴詩，
頭上如今有二絲。

For my whole life, my ambition has been in music and poetry;
now my head is streaked with white hairs.

\(^\text{15}\) For a list of Tang anecdotes containing excerpts of judgments, see Tan, Tangdai panwen yanjiu, 18–22.

\(^\text{16}\) Fan Shu 范攄 (fl. late 9th c.), Yunxi youyi 雲谿友議 (Shanghai: Gudian wenxue chubanshe, 1957), 1.3.
Even a fisherman knows that the valleys are dark [where fish are plentiful].
but my "wife of the hill"17 does not believe that my official status is but late in coming.
The bramble-wood hairpin carelessly brushes against the newly-combed locks;
in the clear mirror, casually, she parts the painted brows.
After today she is but a passerby;
when we meet, it is when she "descends the hill."18

His wife took the poem and went to the prefecture asking for a public memorandum in order to request remarriage.

The judgment that follows, assuming that it is genuine, provides us with a glimpse of how an official could use his decision on a matter to influence public morality:

Yang Zhijian has long been a Confucian scholar
and has thoroughly read the nine Classics.19
When he composes poetry and odes,
he could gather from the "Airs" [from the Classic of Odes] and "Sorrows" [from the Songs of Chu].

His foolish wife, seeing that he has failed to obtain office,
eventually had her heart set on divorce.
Wang Huan’s rice pot was already empty,
how could [his wife] tolerate the yellow scrolls [i.e., his books]?20
Elder Zhu’s wife demanded a divorce,
how could she foresee the brocade robes [of an official]?21

17 A humble term for the wife of a man who has no public office.
18 See Chapter 5, note 92.
19 See Endymion Wilkinson, Chinese History: A New Manual (Cambridge: Harvard University Asia Center for the Harvard-Yenching Institute, 2012), 369. The nine are: the Shu 書 (Documents), Yi 易 (Changes), Shi 詩 (Odes), Liji 禮記 (Records of Rites), Zhouli 周禮 (Rites of Zhou), Yili 儀禮 (Ceremonies and Rites), Zuozhuan 左傳 (Zuo Tradition [to the Spring and Autumn Annals]), Guliang zhuan 殳梁傳 (Guliang Tradition), and Gongyang zhuan 公羊傳 (Gongyang Tradition).
20 See Jin shu, 91.2366. Wang Huan’s wife, frustrated by her husband’s lack of achievement, burned all his books and demanded a divorce. Wang later achieved renown.
21 I.e., Zhu Maichen 朱買臣. See Han shu, 64.279ff. One day, while carrying firewood with his wife, Zhu was chanting the Classics and his wife repeatedly told him to stop. He chanted even louder, and his wife demanded a divorce. Zhu told his wife that if she would give him a few more years, he would become wealthy and repay her for all that she had had to suffer with him. His wife did not believe him and so he let
The petitioner has dishonored her village and has done injury to public morality. If there is no criticism to distinguish right and wrong, those who desire what they should not have will be many.

The final section of the judgment, given in looser prose, allows the divorce, but punishes the wife and rewards the husband:

Let Ms. Wang be given 20 strokes; afterward let her remarry as she wishes. Let the scholar Yang Zhijian be given 20 rolls each of cloth and silk, and 20 piculs of rice, and then let him be assigned as Attendant Officer.²² Let everyone far and near know and comply.

阿王²³決二十，後任改嫁。楊志堅秀才，贈布絹各二十疋、祿米二十石，便署隨軍，仍令遠近知委。

Two historical precedents determine the outcome of this case. The story of Zhu Maichen (d. 115 BC), recorded in the Han shu, is the earlier of the two. Wang Huan’s story, in the Jin shu, has a reference to Zhu Maichen’s wife, suggesting that by this time this was a well-known story used to describe the undoubtedly common situation of literati who did not manage to obtain office and their resentful wives. Yan Zhenqing cites both stories before permitting the divorce; since Yang has apparently agreed to the divorce, there is no legal reason to deny it. Nevertheless, Yan finds a reason to punish Yang’s wife, likely under Article 450 of the Code, “Doing What Ought Not Be Done” 不應得為而為. This article assigns 40 blows with the light stick for such violations, so Yan probably showed Ms. Wang some leniency in assigning only 20 blows. Yang, on the other hand, is rewarded 20 rolls of cloth and silk, 20 piculs of rice, and, to cap it off with the perfect ending, an official post. The account ends with a description of how this incident became a

her go. Later, Zhu found favor with the emperor and stayed true to his promise: he sought out his former wife and her new husband, allowed them to live in his rear courtyard, and provided them with clothing and food. After a month, his former wife committed suicide.

²² See Hucker, Dictionary, 5864 (462).

²³ The editor takes 阿王 with the preceding clause (hence, 僥倖者多阿王), but that is difficult to make sense of. I take the Quan Tang wen reading. See Quan Tang wen, 337.3410b. For the specialized use of 阿, see note 8 above.
cautionary tale: “For over ten years east of the Yangtze River, there was no one who dared to leave her husband” 江左十数年来，莫有敢棄其夫者.
Appendix III: Examination Judgments on “Smoothing the Rough Edges”

One of Bai Juyi’s judgments was written in response to an actual examination question, and for that case alone, we have four responses by others who did not all agree with Bai’s decision. These give us an example of how the different sides of an actual examination case were argued. The *Dengkeji kao* (A Study of Examination Records from the Tang) lists Bai as a candidate who passed the Shupan bacui in 803 and notes that in that year “Smoothing the Rough Edges to Unite with the Potsherds” was one of the examination questions.1 Bai’s response is recorded in his literary collection, but another version of it (almost identical) is found in the *Wenyuan yinghua*, which preserves four other responses to the same question.2 The question was: “An instructor from the Directorate of Education used to teach students the principle of ‘smoothing the rough edges to unite with the potsherds.’ The vice director considered this to be an improper foundation for instruction and disallowed it” 太學官教胄子毁方瓦合，司業以為非訓導之本，不許.3

Though formulated as a controversy between an instructor and a vice director of the Directorate of Education, the question was, at the core, a way to elicit the examinees’ views on an ambiguous text. If the question had been posed without reference to any party—for example, “Discuss whether or not to apply the principle of etc. in the Directorate of Education”—it would not have been essentially different. The five responses to this question were divided three to two, three in favor of the instructor and two in favor of the vice director. The phrase “smoothing the

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1 Xu Song 徐松 (1781–1848), *Dengkeji kao buzheng* 登科記考補正, ed. Meng Erdong 孟二冬 (Beijing: Beijing Yanshan chubanshe, 2003), 647.

2 These four responses were not for the Shupan bacui, but for the Pingpan, which apparently shared one of the judgment questions with the Shupan bacui. See Wang, *Tangdai quanxuan yu wenxue*, 298.

3 *Wenyuan yinghua*, 512.2622b.
rough edges to unite with the potsherds” is taken from the *Liji*. The Tang subcommentary on this phrase explains its meaning thus:

Angular objects have corners—these are the rough edges. ‘Uniting with the potsherds’ refers to when an earthenware is broken and put together again; that is to say, a Confucian gentleman, though his manner is square and proper, breaks and bends his own squareness and properness, bringing himself down to the level of the whole crowd, which is like smoothing out the corners and uniting with the earthenware.

The reason a gentleman might make such compromises is to fit in with others. This raises an obvious question: to what extent should a Confucian gentleman make compromises? The subcommentary explains that the gentleman should break the large corners (unimportant principles) but preserve the small ones (the principles that distinguish him): “In trifling and small matters he ought to adapt himself to others, but in matters of great principle, he should not always adapt himself” 於細碎小事而相合也，則大義之事不皆合也. The subcommentary, however, does not explain what a “matter of great principle” is.

From the responses, we see that a successful judgment for this question required familiarity with a number of canonical texts on the topic of learning and education, as well as creativity in building an argument as to how the present passage could or should be applied to students in their learning. Bai’s response, given in full below, maintains that the instructor, who taught his students this principle, was correct.

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4 See *Liji zhengyi*, 59.1670b: “[The Confucian gentleman] exalts the worthy, but countenances all; he breaks the sharp edges to unite with the pieces of earthenware. His leniency and tolerance are like that” 舉賢而容眾，毀方而瓦合。其寬裕有如此者.

5 Ibid.

6 Ibid.

7 *BJYJ* 67.3642–43. For a French translation, see Rotours, *Le Traité des Examens*, 345–47.
Teaching advances only by imperceptible increments;\(^8\) the Way is reached by constant adaptation to variations.\(^9\)

To follow man’s natural inclination\(^10\) in order to delight in the company of others,

it is necessary to smooth the rough edges and fit in with the crowd.

Moreover, transforming people requires learning,

and perfecting their nature depends on teachers.

Though one tempers one’s brightness in order to be in accord with the obscurity of others,\(^11\)

one’s virtue is not at the end diluted;

if the hole is round and the peg is square,\(^12\)

how can they fit with one another?

The Way considers it most important to be without corners;\(^13\)

there is nothing more that defines righteousness than not being cutting.\(^14\)

The vice director prized distinction [between students’ abilities] by his method of instruction,

and was concerned about them who merely echo;

the instructor showed indulgence by his benevolence toward all—

what harm would come from uniting with the potsherds?

[The way of] teaching has not yet fallen—

just as what Confucius had once said;\(^15\)

these words have confirmation

in the Classic of Mr. Dai [i.e., the *Liji*].

Regarding those who spur others on to learn,

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\(^8\) See *Zhou Yi zhengyi* 周易正義 (in *Shisanjing zhushu*), 1.18a/b. The words *xunzhi* 馴致 are used in the *Yi* to describe how the frost that one treads on eventually becomes solid ice.

\(^9\) See *Zhou Yi zhengyi*, 7.77c. The words *qucheng* 曲成 are used to describe how the sage adapts to the variations of the myriad things and so omits nothing.

\(^10\) See *Shangshu zhengyi*, 10.175c. The commentary explains that man’s natural inclination is toward the good.

\(^11\) See *Laozi jiaoshi*, 4.19, 56.228: “[The Way] softens their (the myriad’s) brightness and unites with their dust” 和其光,同其塵. Translation by James Legge.

\(^12\) A metaphor first found in Song Yu’s “Nine Arguments” 九辯. See *Chu ci buzhu* 楚辭補注, ed. Hong Xingzu 洪興祖 (Beijing: Zhonghua shuju, 1983), 8.189.

\(^13\) See *Laozi jiaoshi*, 41.171–72: “The great square has no corners” 大方無隅。

\(^14\) See *Liji zhengyi*, 63.1694b: “[The jade] is angular, but not cutting, [symbolizing] righteousness” 廉而不劌,義也.

\(^15\) *Analects* 19.22: “The Way of King Wen and King Wu has not yet fallen to the ground; it is with men” 文武之道,未墜於地,在人. This is said, not by Confucius, but by Zigong 子貢.
I approve what is suitable.

Bai's judgment begins with language from the Yi (Classic of Changes), from contexts that are quite far from the subject at hand. But to take words from the Classics out of context is apparently not a fault, but a sign of creativity. Bai clearly does not treat the wisdom of the Classics as being confined to a single context. The images of slowly solidifying frost and of the sage bending and twisting to adapt to the myriad things are used to teach a lesson about how to teach and to study: by means of patient endurance and constant adaptation. Then, the phrase “smoothing the rough edges to unite with the potsherds” is applied to how a student should study. The answer: he should learn patiently and not stand out. Two images round out the first part of the argument: the student ought to “temper his brightness in order to be in accord with the obscurity of others” and to avoid being a square peg to a round hole, from Song Yu's 宋玉 (ca. 298–222 BC) “Nine Changes” (Jiubian 九辯).

In the second half of the judgment, Bai claims that while the vice director was not entirely wrong (his concern about not being able to distinguish the truly talented from the mediocre is legitimate), the position of the instructor ought to be favored because it is the more generous one. He makes his argument by means of two pairs of perfectly parallel lines, literally, “the vice director, by his method of instruction, prized distinction—at times he was concerned about those who merely echo”司業以訓導貴別, 或慮雷同, while “the instructor, by his benevolence toward all, practiced indulgence—what harm would come from uniting with the potsherds?”學官以容眾由寬, 何傷瓦合. The four lines succinctly bring out the crux of the argument: for the vice director, the concern is “uniformity” (tong 同); for the instructor, the greater value is “unity” (he 合). The judgment ends with a nod to a passage in the Analects which states that the true Way has not yet fallen (though Bai now means the way of teaching), and a reference to the Liji itself—it
might have been an accepted practice to demonstrate in this way that one knew the source of the original question.

Of the four other responses, two disagree with Bai and two agree with him. Lü Ying, who disagrees with Bai, ultimately fears that if students are instructed according to the principle of “smoothing the rough edges,” they will be deprived of their natural inclination toward the good. He writes in conclusion:

苟訓導以生常，
懼毁方之易性。

If one’s method of instruction is to nourish a constancy, I fear “smoothing the rough edges” will change [the students’] nature.16

Cui Xuanliang, also in favor of not applying the principle, is someone whom we might call an idealist. He believes that to achieve the highest virtue means to leave behind mediocrity of any sort. He writes:17

誠宜警不及之誡，
懼將落之辭。
苟毀方以為心，
雖容眾而奚用？

Truly it is proper to heed the caution of “lagging behind,” and fear the words of “about to wither.”18 If smoothing the rough edges is placed at the core, even if you countenance all, what use is it?

The two others take the same position as Bai, but do so with different emphases. Ge Shuhuan makes the case that to adapt oneself to others is a way to show humility, which he claims is one of the essential features of Confucianism:20

以為公侯之胤，
自伐淹中。

When one considers himself the descendant of dukes and marquises, one boasts of knowing the core principles.

16 Wen yuan yinghua, 512.2622b.
7 Ibid.
18 Analects 8.17: “Learn as though you are lagging behind, [but even after reaching it] fear that you might lose it” 學如不及，猶恐失之.
19 See Zuozhuan, Duke Zhao 18.5, where Min Zima 閔子馬 of the state of Lu speaks of studying: “As for studying, [it is like] planting. If one does not study, he shall wither away” 夫學，殖也。不學，將落.
20 Wen yuan yinghua, 512.2623a.
When one claims that one belongs to a household of rites and music,
it is hard to be below others.
Therefore, “smoothing the rough edges to unite with the potsherds”
is to inherit the desire of the sages;
to cause [students] “to revere the worthy and to countenance all”
attains to the precepts of Confucianism.

Lastly, Yuan Zhen focuses more on the gentleman’s ability to adapt as an essential Confucian virtue and believes that true virtue would not thereby be compromised. Hence, he writes:

Moreover, “using lowliness to nourish himself”—
Confucius constantly said that this was what it meant to be a gentleman;
the use of the rites prizes harmony:
Zizhang indeed disapproved of “rejecting me.”
Righteousness is found where there is lack of pride;
If the principle of “developing strengths [in students]” is not violated,
why fear the words of the “royal college”?

We might find this kind of argumentation to be entirely contrived. It is possible that even to contemporaries these responses sounded artificial. After all, the candidate’s goal was to

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21 See note 4 above.
22 Wenyuan yinghua, 512.2623a.
23 See Zhou Yi zhengyi, 2.31a.
24 The Wenyuan yinghua text has 貴用, but the sense is clarified by reversing the two characters. See Analects 1.12: “Of the effects of the rites, harmony is most prized” 禮之用，和為貴.
25 See Analects 19.3. “Zizhang said: ‘... The gentleman exalts the worthy, but countenances all. He praises the good, but has compassion for those who are not capable. If I were a great worthy, who among men could I not countenance? If I were not worthy, men would reject me; how can it be that I should reject others?” 子張曰: ...君子尊賢而容眾，嘉善而矜不能。我之大賢與，於人何所不容?我之不賢與，人將拒我，如之何其拒人也.
26 Liji zhengyi, 36.1523c: “Teaching is to develop strengthens and rescue [students] from faults” 教也者，長善而救其失者也.
27 Liji zhengyi, 20.1406b. Here, “royal college” refers to the vice director.
demonstrate his knowledge of the classical tradition by making as many references to its texts as he could reasonably fit in his judgment. But if all it took to pass the Shupan bacui was to identify the source of the question and allude to several passages from canonical texts, it is hard to imagine many who would not pass. (Those who sat for the Shupan bacui in particular would have been the elite among the elite.) What then made these responses exemplary? Rhetorical excellence must have been the distinguishing feature: how an argument is developed, how vivid the images and metaphors, how striking the turns of phrase, etc. We perhaps underestimate the difficulty of writing polished parallel prose under time constraint.\(^{28}\) Regardless, it is likely that candidates were awarded for their ability to make original connections. Bai’s ability to tie together disparate texts such as the Yi, the Shangshu, the Liji, the Laozi, and the Analects in developing his argument is impressive, demonstrating not only the range of his learning, but also his ingenuity in seeing connections across texts.

\(^{28}\) We do not know much about time constraints in Tang examinations, but it is most likely that they took at least a full day. The Tang liudian唐六典 (Institutions of the Tang by the Six Divisions) describes selection candidates gathering in the examination hall in the morning. See Tang liudian (Beijing: Zhonghua shuju, 1992), 2.27. P. A. Herbert notes that the selection might have taken more than a day, based on an account in the Sui Tang jiahua隋唐嘉話 (Delightful Stories from the Sui and Tang) that mentions a request for beds and quilts for the candidates. See Herbert, Examine the Honest, 30–34, 352. But there is no reason to suppose that this was not just a case of providing temporary lodging to candidates who have traveled from afar. Provincial examinations apparently took a full 12-hour day. See LJFSP 32.89. Bai Juyi also mentions in a memorial that jinshi candidates were given two candles’ worth of time, but he may have meant after nightfall, with the exam beginning in the day. See BJYJ 60.3393–94 and notes thereafter.
Appendix IV: List of Cases in the *Dragon Sinews, Phoenix Marrow Judgments*

*note that bracketed [ ] cases are fragmentary*

<table>
<thead>
<tr>
<th>Number</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Secretariat (Zhongshu sheng 中書省)</td>
</tr>
<tr>
<td>2</td>
<td>Ibid.</td>
</tr>
<tr>
<td>3</td>
<td>Chancellery (Menxia sheng 門下省)</td>
</tr>
<tr>
<td>4</td>
<td>Ibid.</td>
</tr>
<tr>
<td>5</td>
<td>Princess’s Establishments (Gongzhu 公主)</td>
</tr>
<tr>
<td>6</td>
<td>Ibid.</td>
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<tr>
<td>7</td>
<td>Censorate (Yushi tai 御史臺)</td>
</tr>
<tr>
<td>8</td>
<td>Ibid.</td>
</tr>
<tr>
<td>9</td>
<td>Department of State Affairs (Shangshu dusheng 尚書都省)</td>
</tr>
<tr>
<td>10</td>
<td>Ibid.</td>
</tr>
<tr>
<td>11</td>
<td>Ministry of Personnel (Libu 吏部)</td>
</tr>
<tr>
<td>12</td>
<td>Ibid.</td>
</tr>
<tr>
<td>13</td>
<td>Bureau of Evaluations (Kaogong 考功)</td>
</tr>
<tr>
<td>14</td>
<td>Ibid.</td>
</tr>
<tr>
<td>15</td>
<td>Bureau of Merit Titles (Sixun 司勳)</td>
</tr>
<tr>
<td>16</td>
<td>Ibid.</td>
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<td>17</td>
<td>Bureau of Honors (Zhujue 主爵)</td>
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<tr>
<td>18</td>
<td>Ibid.</td>
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<td>19</td>
<td>Ministry of Revenue (Hubu 戶部)</td>
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<td>20</td>
<td>Ministry of Works (Gongbu 公部)</td>
</tr>
<tr>
<td>21</td>
<td>Bureau of Granaries (Cangbu 倉部) [properly under the Ministry of Revenue]</td>
</tr>
<tr>
<td>22</td>
<td>Ibid.</td>
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<td>23</td>
<td>Ministry of Rites (Libu 禮部)</td>
</tr>
<tr>
<td>24</td>
<td>Ibid.</td>
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<td>25</td>
<td>Bureau of Sacrifices (Sibu 祀部)</td>
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<tr>
<td>26</td>
<td>Ibid.</td>
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<tr>
<td>27</td>
<td>Bureau of Receptions (Zhuke 主客)</td>
</tr>
<tr>
<td>28</td>
<td>Ibid.</td>
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<tr>
<td>29</td>
<td>[Untitled fragment] Catering Bureau? (Shanbu 膳部?)</td>
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<td>30</td>
<td>Ministry of War (Bingbu 兵部)</td>
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<td>31</td>
<td>Directorate of Education (Guozi jian 國子監)</td>
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<tr>
<td>32</td>
<td>Ibid.</td>
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<tr>
<td>33</td>
<td>Directorate for Imperial Manufactories (Shaofu jian 少府監)</td>
</tr>
<tr>
<td>34</td>
<td>Ibid.</td>
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<tr>
<td>35</td>
<td>Directorate for Palace Buildings (Jiangzuo jian 將作監)</td>
</tr>
<tr>
<td>36</td>
<td>Ibid.</td>
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<tr>
<td>37</td>
<td>Directorate of the Waterways (Shuiheng jian 水衡監)</td>
</tr>
<tr>
<td>38</td>
<td>Ibid.</td>
</tr>
</tbody>
</table>
Directorate of Domesticated Animals (Shayuan jian 沙苑監)
Ibid.
Directorate-general of the Imperial Parks (Yuan zongjian 殿總監)
Ibid.
Palace Domestic Service (Neishi sheng 内侍省)
Ibid.
Institute of State Historiography (Xiushi guan 修史館)
Ibid.
Guards of the Imperial Insignia (Jinwu wei 金吾衛)
Ibid.
Left and Right Guards of the Forest of Plumes (Zuoyou yulin wei 左右羽林衛)
Ibid.
[51] Left and Right Guards (Zuoyou wei 左右衛)
Left and Right Swordsman Guards (Zuoyou qianniu wei 左右千牛衛)
Left and Right Guards of the Palace Gates (Zuoyou jianmen wei 左右監門衛)
Ibid.
Left and Right Encampment Guards (Zuoyou tunwei 左右屯衛)
Ibid.
Left and Right Militant Guards (Zuoyou wuwei 左右武衛)
Ibid.
Left and Right Metropolitan Guards (Zuoyou lingjun wei 左右領軍衛)
Ibid.
Left and Right Valiant Guards (Zuoyou xiaowei 左右驍衛)
Ibid.
Left and Right Defense Guard Commands (Zuoyou weishuaifu 左右衛率府)
Ibid.
Office for the Imperial Ancestral Temple (Taimiao 太廟)
Office of National Altars (Jiaoshe 郊社)
Imperial Music Office (Taiyue 太樂)
Imperial Office of Percussions and Winds (Guchui 鼓吹)
Imperial Divination Office (Taibu 太卜)
Imperial Medical Office (Taiyi 太醫)
Directorate of Astrology (Taishi 太史)
Directorate of the Water Clock (Kelou 刻漏)
Office of Fine Wines (Liangyun 良醞)
Banquets Office (Taiguan 太官)
Office of the Seasoners (Zhanghai 掌醢)
Office of Delicacies (Zhenxiu 珍羞)
Sacred Fields Office (Jitian 籍田)
Office for the Silkworm Rites (Qincan 親蠶)
Office of Grain Supplies (Daoguan 導官)
Office of Imperial Parks Products (Goutun 勾盾) (heading only)
[81] Left and Right Guards of the Generals (Zuoyou jiangjun wei 左右將軍衛) (from the Shiwen leiju 事文類聚)
[82] Directorate for Armaments (Junqi jian 軍器監) (from the Shiwen leiju)
Bibliography

Common Abbreviations in Notes

BJYJ Bai Juyi 白居易, Bai Juyi ji jianjiao 白居易集箋校
D. Digest of Justinian
LJFSP Zhang Zhuo 張鷟, Longjin fengsui pan jianzhu 龍筋鳳髓判箋注

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