

Orias (Handout), early China
Michael Nylan

**Tentative Translation of Strips 180-96
in the "Zouyan shu" 《奏讞書》**

[section A, Citation of Relevant Precedents]

An old statute says: "At the death of a husband, one takes the male child as heir. If there is no son, the man's father or mother are taken as heir. If there are no parents, then the wife is taken. If there is no wife, then one takes a daughter as heir."

The statutes say: "In each and every case where an officer is engaged in business in connection with the imperial offices set up in the counties, if that officer's parents or wife dies, he is permitted for thirty days to go home to settle his affairs, and if it is the officer's grandparents or siblings who die, then he has fifteen days leave."

"A person who commits a crime out of arrogance or anger (*aohan* 傲悍) has the head shaven and he or she is sentenced to hard labor [literally wall-building or grain-pounding]. The feet are to be shackled in iron, and the offender is to be transported to a county in Ba 巴 commandery to work in the salt mines."

"By the statutes, to lead or encourage others to commit an unfilial act is a crime one degree lower than acting in an unfilial manner oneself. Those who act in an unfilial manner are to be executed in the marketplace. Perpetrators of second-degree unfiliality are to be condemned to tattooing and forced labor as wall-builders or grain-pounders. When it is the case of a man or his wife at the rank of *gongshi* 公士 on up, those who would otherwise be condemned to tattooing are to be shaven instead."

"Those who engage in illicit sex, whether male or female, are to be shaven and made bondservants. Those who apprehend those engaging in illicit sex must present a case against them and send it up to the proper authorities for adjudication."

[Section B, The Case Adjudicated]

In the present case, A, a woman of Du prefecture was married to D, a *gongshi*, who died suddenly. The coffin was in the main room of the [two-room?] house. He was not yet buried, and A (?) and D's mother, Su 素, were mourning at night, walking around the coffin and wailing. A then went together with male C into the room behind the one in which the coffin had been placed, and they engaged in consensual illicit sex. At daybreak the next morning, Su reported (*gao* 告) A to the officer. The officer apprehended A, but he was in some doubt about what crime to charge A with. The Superintendent of Trials (*tingwei* 庭尉) Xiao, the Trial Judge (*tingzheng* 庭正) Shi, the Inspector (*jian* 監) Hong, the Court Scribe (*tingshi* 庭史) Wu, and others – thirty men altogether – discussed [the precedents] that fit the case.

All said, "According to the statutes, the order of succession after death has the wife following the parents. [Moreover], at the death of a wife, the husband [engaged in official business] may return home to settle his affairs for the same amount of time that he uses for his parents. If we are to judge this case from the point of view of the statutes ordering the succession, the husband is honored differently from the wife. The wife serves her husband, and when it comes to mourning the dead, she adopts [the style and degree of mourning suitable to] the person next in line *after* the parents [of her husband], as the statutes mandate. The wife inherits [property and the position of head of household] after her parents-in-law. Let us consider the case where one of the parents-in-law died. Were the wife then to engage in illicit sex in the vicinity of the corpse before it was buried, this would be adjudged "unfilial," and that unfilial act would deserve execution in the marketplace. A second-degree unfilial act would deserve tattooing and a sentence of wall-building [if male] or grain-pounding [if female]. If the crime

was committed through arrogance or anger [rather than with malice aforethought], the guilty parties are to be punished by hard labor without mutilation.

C. The Judgment]

In considering the sentence, [the consensus was],

A woman is to honor her husband. Her place comes after his parents. But here, when A's husband died, she expressed no deep sorrow; neither did she wail. Quite the contrary. She engaged in consensual sex in the vicinity of the dead. She should be charged according to the two statutes about unfilial conduct and "crimes committed through arrogance or anger." And even though the officer who apprehended her did not prepare a proper case against her for adjudication his superiors, A ought to be shaven and sentenced to grain-pounding.

And they reported [their finding] to the Du county authorities who were to sentence Widow A.

[D. Reversal of the Judgment]

Now, the court scribe Shen was out on corvée duty [when the foregoing sentence was rendered]. After his return, he disputed the sentence pronounced by the *tingwei*. His reasoning was: "The sentence was incorrect. According to the statutes, 'A person who is unfilial deserves execution in the marketplace.' If a living father had a [the son] who failed to feed him for three days, how should an officer of the court sentence the son?"

"He should be executed in the marketplace," said the *tingwei* Xiao and others.

"Let us suppose that the father has died, and his son does not offer cult in his house for three days. What sentence does the son deserve?"

"He ought not to be sentenced."

"And suppose there were a son who ignored his father's injunctions while his father still lived? Who is reckoned to have committed the more serious crime: a son who disobeyed his dead father's injunctions or a son who ignored the injunctions of his father while alive?"

"We would not hear a case involving a dead father's injunctions; [the son] would have committed no crime."

"Supposing the husband were to be alive and his woman married herself off [to another man]. Is this crime more serious than that of the woman who marries herself off when the husband has died?"

"If a wife marries herself off while her husband is alive, then both partners in the second marriage are tattooed and sentence to wall-build or grain-pound, but when a husband dies and the wife marries herself off, neither she nor the man she takes in marriage have committed a crime."

"Which is more serious, to cheat a living husband or to cheat a dead husband?" "One who cheats on a dead husband commits no crime."

"Now let us suppose that a husband was an officer living in official quarters, and his wife lived at home. Were she to engage in illicit sex with a male on a daily basis, and [her husband], the officer, went to apprehend them, but he failed to catch them in the act, ¹ [but he beat (?)] her, how would she be sentenced?"

"It would not be considered a crime to be adjudicated."

"The *tingwei* and his officers are unanimous in their belief that cheating a dead father is a lesser crime than offending or cheating a living father, and that cheating a living husband is a [greater] crime than doing the same to a dead husband. [seven missing characters]. [A] with a male engaged in illicit sex in the vicinity of a coffin, and the person who apprehended her did not

¹ A single illegible character, for which I have supplied in brackets one possibility.

prepare a case to be sent up to the authorities. Then, as a single exception [meaning, contrary to all the relevant precedents], the woman was shaven and made a grain-pounder. Is that not too heavy a sentence?" Xiao and the others said: "In truth, we [now] judge it [our earlier consensus position] to be a faulty decision."

analysis by Nylan:

This Zhangjiashan case of a widow's hasty "remarriage" is a spectacular piece of evidence attesting to the vast differences in family law in early and late imperial China. It supports an earlier (but often forgotten) conclusion that the hesitant process usually dubbed the "Confucianization" of the law (by which is meant the "moralization" of the law) did not make significant inroads until Tang and Song, many centuries after Western Han, and was not "complete" until the 18th c. It is common among scholars of China in every discipline to assume that adherence to mourning obligations, more than any other single feature of Central States (Zhongguo 中國) culture, defined what it meant to be "Chinese," at least from the time of Mencius, in the fourth century BC. Yet, by unanimous decision, the judges declined to intervene in a case that involved paying cult to the dead members of the mourning circle, even where relations were closest. The Zhangjiashan case now confirms a distinct possibility already raised in other materials dating to the period – to wit, that at many at different levels of society, for a variety of reasons deemed to span the range from ethically acceptable to morally wrong, people evaded or ignored the prescribed mourning obligations. Contrary to the common wisdom, which holds that "a marked inability to disentangle private obligation from public duty" prevailed during the two Han dynasties, the Zhangjiashan materials support a revisionist view that a strict separation between public and private, penal and civil law, legal and ethical, could prevail sometimes in early China. It was not only that the social practice of the law did not invariably adhere to the moralists' dicta, but also that Han moralizing *did not precisely match* the "Confucian" moralists of modern imagination.

Two interesting cases, drawn from writings ascribed to Dong Zhongshu, a noted Confucian (d. 104 BC?), suggest a tendency to focus on the "socially constructed" nature of family ties, rather than their biological basis ("flesh-and-blood" kin):

Case 1: A had a son B, who was given to C. B was raised until he was an adult by C. Once, A in his cups revealed to B that he was his son. B, in his fury, beat A with a staff, for a total of 20 blows. A, unable to contain his anger since B was his own son, reported him to the prefectural officials. By Han law, a son who beat his father merited public execution. However, when Dong Zhongshu (ca. 100 BC), a "Confucian" expert, judged he case he ruled that while A had sired B, A was unable to raise him and so he handed him over to C. A had already severed the obligations binding father and son. Even though B beat A, B does not warrant adjudication.

Case 2: A had no son. He came upon a baby boy (B) abandoned by the side of the road. A raised B as his own son, and then B, when an adult, murdered a man. He told A about it, and A hid B [as the law allowed close family members to do]. Dong ruled that A, although he was not B's sire, would not have exchanged B for another.... A was right to conceal his [adopted] son and does not warrant adjudication.