Confucianization of Qing Law II

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CONFUCIANIZATION OF THE LAW:
A STUDY OF SPEECH CRIME PROSECUTION IN CHINA

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April 1, 2004

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A primary problem of comparative jurisprudence is, therefore, to seek out jural postulates of different legal systems and to determine how they find expression in juridicial institutions of the societies under consideration.

Hoebel, The Law of Primitive Man (1968)

INTRODUCTION

In traditional China, the Confucians proposed to govern people with li (rites) and by means of ren (benevolence). The legalists wanted to govern the people with fa (law) and with the use of xing (punishment). Confucianization of the law integrated these two schools of contending philosophical thoughts, i.e., Confucian (“ru jia”) vs. legalist (“fa jia”), in search of a better way to govern China. Confucianization of the law in merging these two schools of thought proposed that: firstly, law should adopt Confucian ethical values and principles, and, secondly, Confucian ethical rules should be enforced by law. Though the Confucianization of law has been variously observed and confirmed as a dominant organization principle to Chinese society.

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3 “For Confucius the term li, which basically means “rites,” embraces all the traditional forms which provided an objective standard of conduct. Thus, while li may in given instances refer to “rites,” “ceremonial,” or “rules of conduct,” it has the general meaning of “good form” or “decorum.” See Wm. Theodore De Bary, Wing-tsit Chan, and Burton Watson, Sources of Chinese Tradition Vol. I (N.Y.: Columbia University, 1960), p. 28. (Sources of Chinese Tradition)
5 See “‘Fa’ zai Han Fei sixiang zhong de yi yi” (The meaning of ‘Law’ in Han Fei’s thinking.) In Wang Yaopo, Yufa xixiang lunji (Compendium on Confucians and Legalists thought) (Taipei: Shibao chubanshe, 1983), pp. 168-186. (Zhongguo faju yu zhongguo shehui)
6 For a historical account of the debate between “fajia” and “rujia” resulting in their ultimate union beginning with the Han dynasty (206 BC – 220 AD), see Qu Tongzhu, Zhongguo faju yu zhongguo shehui (Beijing: Zhonghua shuju, 1981), pp. 328-346. (Zhongguo faju yu zhongguo shehui)
7 See “Sun Kuan de faju xiang” (The legal thought of Sun Kuan) in Liu Hai-nian and Yang Yi-fang, Zhongguo gudai faju-shi zhishi (Knowledge in Chinese legal history) (Helungjian remin chubanshe, 1984), p. 69-75. (Zhongguo gudai faju-shi zhishi)
law, the application and manifestation of the Confucianization of law in imperial courts have not been studied systematically and investigated empirically. This research of first impression investigated how Confucianization of law worked in practice; particularly how the Confucian ethical values, principles, and rules informed judicial decision making norms in the prosecution of Qing speech crime cases. The specific research question posed was whether the “jun-zhi” (“gentlemen”) - officials, scholars, gentry (hereinafter “cultured people”) - as speech crime offenders were treated to more favorable judicial decision norm as suggested by some Confucian scholars.

There are four parts to this research report. Part One “Research Method” described the analytical method and database used in this research. Part Two - “The Philosophical and Legal Context of the Research” described the philosophical (“The Cultured and Confucian ethics”) and legal (“The Cultured and Qing law”) context that informed the current research. Part Three - “Qing Judicial Decision Making Norms” reported the research findings of how the cultured people were exposed to different and more restrictive Qing judicial making norms. Finally, Part Four “Conclusion” summarized and interpreted the research findings. The paper concluded by observing that the Confucianization of the law has the effect of subjecting the cultured speech


10 The original research also covers “Judicial Procedure Rules” as applied to cultured vs. non-cultured.

11 For example, see Derk Bodde, "Age, Youth, and Infirmity in the Law of Ch’in China" 121 University of Pennsylvania Law Review 437-470 (1973) (Derk Bode). See also Wang Yaopo, Yufa xixiang lunji (Compendium on Confucians thought) (Taipei: Shibao chubanshe, 1983), pp.150-152 and Qu Tongzhu Zhongguo falu yu zhongguo shehui (Beijing: Zhonghua shuju, 1981, pp. 197-220. (Zhongguo falu yu zhongguo shehui)
crime offenders to more restrictive judicial decision-making norms as a result of their elevated status.

PART ONE
RESEARCH LITERATURE AND METHOD

Literature

Literary inquisition has been extensively studied in the past. For example, in 1938 Goodrich translated Ku Chieh-Kang’s pioneer work on various types of literary persecution as found in memorials of congratulation presented to the sovereign (piao-chien), memorials on questions of empire (tsou-su), civil examinations (k’o-ch’ang), preparations of books (hsiu-shu), explanation of books to his majesty (chin-chiang) and poetry (shih-chu). In 1971, Lawrence Kessler studied how Emperor Kangxi (1662 - 1722) with the help of the Northern Chinese scholars-officials at Qing court engaged in a political struggle to purge the southeastern scholars and gentry who refused to submit to the Manchu rule of their powers and influences by means of literary inquisition and tax delinquency charges. The most recent study into Qing’s literary inquisition is conducted by Jonathan D. Spence. The book, *Treason by the Book*, is a detail, blow by blow, case study of the literary inquisition process. Specifically, it traces the Emperor Yongzheng’s personal investigation into the treasonous writings of Zeng Jing from beginning to the end. This brief review of literature informs that, thus far, all scholarly investigations into Qing literary inquisition have been descriptive studies of the nature,

type and process of literary inquisition. The literary inquisition cases have never been used to support or invalidate a theory of law.

Research focus

This study dealt with two main questions (1) What kind of judicial decision norms were used in the prosecution of cultured speech crime offenders? (2) Whether such judicial norms were applied in favor of the cultured? The hypothesis of this paper is that they are not. Specifically, it is hypothesized that the cultured people were treated to more restrictive judicial decision making norms.

Conceptual definitions

For the purpose of this study, “jun-zhi” (cultured) were identified by their education-official standing; they were respectively officials, gentry, and scholars. The “xiao-ren” (“small people”) (hereinafter less-cultured people) were the students, commoners and eccentric. Judicial decision making norms are defined as “behavior standards and expectations used by the emperor or judicial officials to adjudicate or impose punishment in a speech crime case.” Restrictive law and norm are “conduct norms which were expansive, restrictive, and demanding.”

Research method

The exposition of Confucian ethics applicable to the cultured in Qing courts was achieved by the analysis of sixty-eight literary inquisition (speech crime) cases during emperor Qianlong rein (1736-1796) in the Qing dynasty (1644-1911) for evidence of favorable/restrictive treatment of the cultured.

16 Unless otherwise specified I will be using less cultured, non-cultured, and no cultured interchangeably.

17 An expansive normative system is one that covers many aspects of a person’s conduct. It describes the scope of applicable norm. A restrictive normative system is one that set forth a limited range of acceptable conducts. It describes the limitations and specificity of the applicable norm. A demanding normative system is one which has a low tolerance for lack of performance. It describes the standard and expectation of the applicable norm.

18 In 1772, in the 37th year of Qianlong’s rein, the emperor ordered the collection of all Chinese books and literature in the country to be included in Ssu-k’u Ch’uan Shu (The four set of complete books) - a national depository of literary books. The effort to collect books also invited censorship by collecting officials. Censorship leading to prosecution for speech crime became official policy on August 31, 1774 when the Emperor issued an edict to that effect. For historical
This research seeks to demonstrate with quotations from Confucian teachings and references to facts and circumstances from various cases how the cultured were expected to live up to more restrictive judicial decision making norms.

This study is based on 68 literary inquisition (speech crime prosecution) cases disposed of during the Qianlong rein. The 68 complete speech crime case files were collected and published by the Beijing National Museum in 1931-1934. The version used in this research was reprinted in *San Zao Shi An* (Historical Cases from Three Dynasties). The 68 cases constituted more than 50% of all speech crime cases dealt with during the Qianlong period. Speech crime prosecution is chosen as the investigation site because speech crimes implicated the cultured people more and were taken most seriously by the Qing officials, thus making a revealing process to understand the judicial policy of the Qing officials towards the cultured.

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20 Censorship has a long history in China. As early as the ninth century the great scholar Han Yu has called for the elimination of Buddhism and Taoism to promote the development of Confucianism. *The Literary Inquisition of Ch’ien-lung*. Op. Cit., note 12, supra.

21 *Ch’ing Tai Wen Tzu Yue Tang* (*Ch’ing dynasty literary inquisition files*) (Shanghai Book Store, 1986), 2 volumes.

22 *San Zao Shi An* (Jiangsu guangling guji keyin she, 1993). 3 Volumes. The series contained other cases not pertinent to this research. The series also contained 4 more cases than the *Ch’ing dynasty literary inquisition files*.

23 According to one source there were about 10 cases of speech crime in each of the Kangxi (1662 - 1722) and Yongzheng period (1722 - 1735). There were however over 130 cases during the Qianlong period (1736-1795). Zhou Zongqi, *The uncovering of wrongful Qing literary crimes* (Zhongguo youyi chubanshe, 1992), p. 11. According to another source, there were only 84 cases of literary inquisition cases with names during the whole of Qing empire, being 2 cases in the Shunzhi period, 2 cases in the Kangxi (1662 - 1722) period, 4 cases in the Yongzheng period (1722 - 1735) and 74 in Qianlong period. See *Zhongguo gudai falu-shi zhishi* Op. Cit., note 6, supra., p. 398 citing Liu Zhi-cheng, *Zhongguo er-qian nian* (China 2000 years). There is no easy way to reconcile the two since the method of classification is not made available.


25 A speech could be found objectionable for a number of reason leading to speech crime prosecutions:

1. *Was it anti-dynastic or rebellious?* Many books, poems and plays written between 1590 and 1660 were overtly anti-Manchu.
PART TWO
THE PHILOSOPHICAL AND LEGAL CONTEXT OF THE RESEARCH

The Cultured People and Confucian ethics

Traditional, Confucian ethics organized the Chinese society under the principle of structured inequality.26 As observed by Professor Bodde:

Probably the most conspicuous single Confucian influence on imperial Chinese Law is the principle of inequality. Prior to the revolution of 1911, Chinese law endlessly differentiated its treatment according to individual rank, relationship, and special circumstances. ... Entire social groups - notably the officials - enjoyed special legal privileges differentiating them from the great mass of commoners. Punishments were carefully graduated according to the social status of the wrongdoer and his victim." 27

The stratified social structure reflected the natural order of things. 28 The distribution of duties and privileges, rights and responsibilities was based on ascribed social status at birth. Ideologically, both Confucian and Mencius drew a clear distinction between two classes of people - the jun-zhi (gentlemen) and xiao-ren (little people). The gentlemen ruled and instructed while the little people served and obeyed. There was a great social distance between the two

(2) Did it insult previous dynasties which were ancestral to the Ch’ing?
(3) Did it concern the northern and northwestern frontiers and military or naval defense?
Geographic works were scrutinized for sensitive military information.
(4) Did it contain heterodox opinion on the Confucian canon?
(5) Did it give a biased, or, in Manchu eyes, unfavorable account of any incident or series of events in the Chinese-Manchu period of conflicts of the seventeenth century?
(6) Was the style unliterary?
(7) Did it concern such political parties as the Tung-lin and Fu-she that flourished at the end of Ming?

See The Literary Inquisition of Ch’ien-lung, Op. Cit., note 12, supra, pp. 42-52. For an investigation into what kinds of books were considered “offensive”, see also Wu Zhefu, Qingdai jinhui shemu yanjiu (A research into prohibited and burned books in the Qing dynasty (Guoli zhengzhi daishe zhongguo wenxue yanjiuzhuo 1969) ref Z 1019 W9.

27 See Derk Bodde, op. cit., note 9, supra., p. 437.
28 See Law and Society in Traditional China., p. 230, n. 11. (Li is the institutionalization of proper behavior to all things in life as reflecting the principles governing the larger cosmic order.)
groups. The gentlemen - officials, gentry, and scholars who passed the provincial examinations - were social superiors. They labor with their mind. The little people – commoners and mean people - were social inferiors.  

The Cultured People and the Qing law

The Qing Code followed the Confucian admonition that “Li is not applicable to the common people, punishment is not applicable to the ta-fu (officials).” As a general rule, the nobles and officials were beyond the reach of the law. Thus the Qing law provided that when an official committed an offense the emperor must be informed. Officials could not be interrogated or punished without the prior approval of the emperor. Officials under investigation also have a power to complain to the emperor about abusive and oppressive investigative process. 

It was also possible for the officials to redeem the punishment with money payment or rank reduction. Thus when an official committed a private offense punishable with 10 strokes of the light bamboo he could be fined two month’s salary instead. When an official committed a public offense punishable with 10 strokes of light bamboo he could redeem himself with one month’s fine.

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29 See Zhongguo falu yu zhongguo shehui, op. cit, supra, note 9.
30 See Legge, Texts of Confucianism, III, 90.
32 Article 4 to the Great Qing Code provided: “In all cases where members of the pa-i commit offenses, (prepare a memorial setting out the circumstances) send it sealed to the Emperor and await a rescript. It is not permitted to decide to bring (the alleged offender) in for interrogation without authority....When the consideration is concluded (then the basis for the offense that was considered) are to be set forth in a report (to the Emperor). The final decision in the case will be received from the Emperor.” See also Article 8: “In all cases where high or low officials commit offenses ... the superior officials having jurisdiction will send a memorial under seal with a statement of facts, requesting rescript.”
33 Article 7 to the Great Qing Code provided for a redemption schedule for public offenses committed by officials. Article 8 to the Great Qing Code provided a redemption table for private offenses committed by officials. For example, Article 8 provided:

<table>
<thead>
<tr>
<th>Punishment</th>
<th>Redemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 strokes</td>
<td>two months salary</td>
</tr>
<tr>
<td>20 stokes</td>
<td>three months salary</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>90 strokes heavy</td>
<td>reduction of four ranks</td>
</tr>
<tr>
<td>100 strokes heavy</td>
<td>dismissal</td>
</tr>
</tbody>
</table>
The privilege against corporal punishment also extended to the scholars: chin-shih, chu-jen, kung-sheng, chien-shien, and sheng yuan.34 Kung-sheng, chien-shien, and sheng yuan were not under the jurisdiction of the local officials. In minor cases, the magistrate would request the presence of the chia kuna (the director of studies) to chastise the scholar. In cases of serious crimes, he has to report the case to the governor-general, the governor, or the provincial director of studies to seek permission to have the guilty person deprived of his degree or title, before proceeding to investigation.35

The law operated in favor of the officials in disputes between officials and commoners. The higher the officials the more legal protection was afforded them. Thus when a commoner beat a third rank official he was punished with two years of imprisonment if there were no injuries and three years if there were. For serious injuries the punishment was banishment of three thousand li. If the beaten official was of the fourth and fifth rank, the punishment was reduced by two degrees. If the official being beaten was sixth rank and below, the punishment was mandated at two degree above beatings of ordinary people.36

Summary

This cursory review of the Chinese philosophy and law shows that the Qing law favored the cultured persons as required by Confucian ethics. The question remained how did the Qing legal system operated in practice in the handling of the cultured. More specifically, in what way can it be said that the Qing legal system and judicial process in giving force and effect to Confucian ethical value, principles, and rules was more restrictive of the cultured? To this research question we now turn.

34 These were titles given to students passing various stages of the imperial examination, which ultimately qualify them of appointment to office. Chin-shih were metropolitan graduates. Chu-jen were provincial graduates. Kung-sheng were senior licentiates. Chien-shien were students of Imperial Academy. Sheng yuan were qualified students. See Ping-ti Ho, The Ladder of Success in Imperial China (Columbia University Press, 1962).

35 The elaborate legal process in favor of the officials, gentry, and scholars has grave sociological implications. As demonstrated by accounts of retired officials, officials were reluctant to take action against officials, gentry, and scholars for fear of courting the displeasure of the Emperor. Huang, Liu-hung. (1984) A Complete Book Concerning Happiness and Benevolence (ed. and trans. Djang Chu.) University of Arizona Press.(Unprincipled members of the gentry often abused their special privileges. The magistrate must deal with them with tact and be prepared to compromise.) p. 186.

36 Ching Lu li, 27, 31a-32a.
PART TWO
THE DECISION MAKING NORMS

Introduction
This part of the paper reported on how the Confucianization of the law operated in practice when the cultured people were prosecuted for speech crime offenses in the Qing courts. In the discussion to follow relevant passages and material circumstances in the speech crime cases will be referenced to illustrate how the Qing emperor and officials disposed of the cultured speech crime offenders according to Confucian ethical values and principles. Particularly: in section on “Judicial Decision Making Norms” discusses at length and illustrates with representative cases how the cultured speech crime offenders were treated to more restrictive judicial decision making norms.

Judicial Decision Making Norms

I. The cultured person and Confucian ethical norms
The whole foundation of Chinese (Confucian) ethical order was based upon the ideal of self-cultivation. It was believed that “self-cultivation alone could solve all political problems and usher in the perfect society.” More specifically: “Wishing to govern well in their states, they would first regulate their families. Wishing to regulate their families, they would first cultivate their persons. Wishing to cultivate their persons, they would first rectify their minds….”

The Confucian scholar, as a standard bearer of the ethical order, was expected to possess a strong ethical conviction and refined moral sensitivity, in thought as well as in action. The Master said, “To subdue one’s self and return to propriety, is perfect virtue.” This included sacrificing himself to promote virtue: “The determined scholars and the man of virtue will not seek to live at the expense of injuring their virtue. They will even sacrifice their lives to preserve

37 Sources of Chinese Tradition, op. cit., note 2, supra, p. 114.
38 Id., p. 115.
39 The Master here refers to Confucius.
their virtue completely.”\textsuperscript{40} Lastly, to strive for virtue is a relentless pursuit and enduring affair. The Master said: “The superior man does not, even for the space of a single meal, act contrary to virtue.”\textsuperscript{41} For example, in Case \textbf{67}\textsuperscript{42} the speech offender Feng Qi-yin (FQY) was an unemployed Shangxi province shengyuan. FYQ was infatuated with his two cousins. He tried to impress them with his literary ability by annotating the two classics of \textit{The Book of Changes} and \textit{The Book of Songs}. The Direct administration governor-general in sentencing him observed that:

\textit{“FQY as a scholar should have a duty to obey ethical instructions.} As a result of not being able to marry, he behaved half crazily in annotating the two classics of \textit{The Book of Changes} and \textit{The Book of Songs}. He meant to insult the heaven above in broad daylight. One who has such audacity knows no law.”\textsuperscript{43}  (\textit{Italics supplied}.\textsuperscript{44}

This case makes clear that the cultured person has an affirmative duty to follow “ethical instructions”. If he failed to do so he would be considered to have a flawed personal character or defective mental capacity. In this case, since FQY has breached an apparent ethical rule in defiance of “heaven above in broad daylight”, he was deemed to have acted in a “half-crazy” manner.\textsuperscript{45} In this regard the governor-general observed that FQY has allowed “female sexuality” (“nui si”) to lead him astray in “barking furiously.” In so doing FQY did not only violate an ethical rule in publishing the “offensive” materials, he displayed a lapse of judgement in allowing sexual appeal (unwholesome desire) to overcome his ethical reasoning (proper bearing).

An ethical person was expected to conduct himself with the purity of thought and sincerity in purpose, at all times and under all circumstances. He was not only expected to abide by Confucian ethical rules, he was to live and personify them in his daily intercourse. Theoretically, there was no distinction between the principle and practice of Confucianism. In practice, there is no distinction between knowing and actualizing Confucianism. If a cultured person failed to live

\textsuperscript{40} \textit{The Analects}, Book XV, Chapter 7.
\textsuperscript{41} \textit{The Analects}, Book IV, Chapter 5:3.
\textsuperscript{42} 3.285.1 to 3.312.11
\textsuperscript{43} 3.285.12 to 3.286.1
\textsuperscript{44} Unless otherwise stated all the \textit{italic} or \textit{italic} or underlined sentences in the quoted text are supplied by the author in order to show the relevant points under discussion.
\textsuperscript{45} In historical time, Socrates, Jesus, and later Saint Joan of Arch was variously persecuted for speaking their mind and were all considered as heretics afflicted with devilish character. See Alan A. Stone and Sue Smart Stone, \textit{The Abnormal Personality Through Literature} (Prentice Hall, 1966), p. 1. See also “The myth of Mental Illness,” in \textit{Studies in Abnormal Behavior} (Chicago: Rand McNally Co., 1971), pp. 28-29.
up to Confucian ethics, he would be called a “hypocrite.” For example in Case 57\textsuperscript{46} Yun Jia-quan (YJQ), the minister of Dai Li Si, petitioned the emperor to honor his deceased father Yun Hui-yi posthumously with an honorary title (shi) and entitled to public tribute. During the investigation, YJQ was found to have committed a number of ethical transgressions and official indiscretions. In YJQ’s twelfth confession, YLQ was questioned as to why he wanted peacock feathers from the emperor.

“[The Interrogator] You requested the emperor at that time to award you with peacock feathers ("lingzi"\textsuperscript{47}) to be worn on your head. You stated that if you were not given them, you would not be able to return home and explain to your wife. \textit{This is false learning and hypocrisy ("jia dao-xue")... [YLQ]} I intended to obtain the peacock features to show off. Later when the emperor did not bestow them on me, I felt ashamed in going home to see my wife. This is false learning resulting from being fearful of my wife.”

The emperor described YQL as engaging in “jia dao-xue” because as a cultured person and senior official, YQL has failed to live up to his high ethical calling in the following regards:

1. A cultured person should be humble. He should not seek honor for himself. \textsuperscript{49} In publishing the \textit{Records of Speech and deeds of famous officials} (Ming chen yinxing lu), YJQ conceded that he was trying to establish a name and legacy for himself (“qi tu zhuan shi”).\textsuperscript{50}  
2. A cultured person should be fair-minded. He should not seek undeserved award and honor. YJQ has published \textit{Heng Shan wei yan zha} in which he mentioned himself as the descendant of Meng-zhi and perpetuator of Kongzi. YJQ conceded that he did so because he wanted undeserved fame for himself (“qishi dao ming”).\textsuperscript{51}
3. A cultured person (official) should be concerned with acting ethically and justly, i.e., “pingyun.”\textsuperscript{52} YJQ should follow law and compassion (“qingfa zi ping”) in handling cases. He should not try to “earn public recognition from the ignorant people” by

\textsuperscript{46} 3.121 to 3.222  
\textsuperscript{47} \textit{PYCED} 434R.  
\textsuperscript{48} 3.143.3-7  
\textsuperscript{49} \textit{The Analects}, Book IV, Chapter 16.  
\textsuperscript{50} 3.142.9-10.  
\textsuperscript{51} 3.142.1  
\textsuperscript{52} \textit{PYCED} 524L.
showing undue leniency.\textsuperscript{53} In all of these instances, YLQ has failed to live up to his ethical callings and was engaging in “false learning and hypocrisy” deserving of sanction.

In traditional Chinese society, being a cultured person and being a virtuous person was one and the same thing. In this regard, the Master said: “Riches and honors are what men desire. If it cannot be obtained in the proper way, they should not be held. Poverty and meanness are what man dislikes. If it cannot be obtained in the proper way, they should not be avoided.”\textsuperscript{54} A cultured person who failed to act virtuously was without the family of man; literally an outcast of the civilized world. For example in \textbf{Case 6}\textsuperscript{55} Hu Zhong Zao (HZZ), the Guangxi director of studies (xuezheng), was described as acting “unlike a human being” (“fei renlei zhong suo ying you”) for publishing his offensive writings \textit{Jian Mo Sheng Shi Chao}:

\begin{quote}
“HZZ is the son of an official’s servant … He is lucky to pass the imperial examination and given important posts. However, he is still not grateful and posses a heart to repay the country. (“ganyin buguo zhi xin”). Instead all his conduct were \textit{degenerated}. He sought to enhance his position by conspiring with the rich and famous clan members. \textit{He resembles an animal}, (“qizhou kebi”).\textsuperscript{56} He has committed high treason and cannot made amend with a million death.”\textsuperscript{57}
\end{quote}

Finally, a cultured person acted not only to his own personal detriment when he committed an unethical act, his family was also implicated. In China, a person was an inseparable part of a much larger whole, his family, clan, community, and state. In this regard, the unethical act suggested a character flaw and further evidenced poor family upbringing or association.

\textsuperscript{53} “Yun Jia Quan nianpu wangxing jizai yu” (Decree on Yun Jia Quan making inappropriate entry in the geneology) (3.166.10 to 3.168.2).
\textsuperscript{54} \textit{The Analects}, Book IV, Chapter 5
\textsuperscript{55} 1.245.1 to 1.302.13
\textsuperscript{56} In traditional China, the imagery of animalism was used to describe offenders who were deemed totally lacking in human qualities. It is common even today to hear people refer to those who has blatantly disregard social, moral, and legal norms as “not even to be compared with animal.” More specifically, in the Chinese language, petty criminals are described as “filch like rats and snatch like dogs” (“shueqie-goutou”) \textit{PYCED} p. 637L. The Chinese are not alone in describing criminals as animal. Cesare Lombroso, \textit{Crime, Its Causes and Remedies} (Montclair, N.J.: Patterson Smith, 1968). (Criminals suffered from atavistic anomalies, i.e., they were throwbacks to a more primitive time when people were savages.)
\textsuperscript{57} 1.262.12-14. Still later, his house was described as “shu xue” or rats den (\textit{HYDCD} 12:1467L) See “Hu Bao Quan dao ren hou zai yan cha Hu Zhong Zao jian shu zhe.” (\textit{Memorial of Hu Zhong Zao on repeated search of Hu Zhong Zao’s home on assume of office}). 1.262.9 to 1.265.6.
For example, in Case 60 the Zhao’s family members were found to be publishing and concealing “offensive” books. The Min Zhe governor accused the Zhao’s family members of suffering from a gross deficiency in virtue and a completely lack of moral character:

“[After summing up the respective culpability of the Zhao members, all cultured persons.] The whole family (“yi jia”) was without a trace of conscience (“sang jin tian liang”) in destroying all heavenly ethical principles (“tianli”). This is not tolerated in heaven above and earth below (“fuzzai bu ron”).”

There are a number of sociological insights we can draw from this accusation:
First, the governor did not just accuse the Zhao’s family members of acting illegally or unethically but also of being “without a trace of conscience”. The implication is clear, the goodness and badness of a cultured person’s act could not be considered separate and apart from the cultured person’s moral character. This echoed the Confucian thought that at the origin, root, and foundation of all evils, was a depraved heart. Second, the governor did not only accuse the Zhao’s family members individually of wrongdoing, but also considered the family as a whole (“yi jia”) of being without a conscience. This suggested that in Qing court the individual was not properly considered as an act alone moral agent but an inseparable part of a larger collective, a corporate whole bounded by blood - the family was naturally implicated as a social-moral accounting unit. This registered the Chinese idea that the individual and the family are made out of the same cloth. Third, the governor considered Zhao’s family to have offended “heaven above and earth below”, i.e., they have acted unnaturally and should be universally condemned as being abnormal.

58 3.229.1 to 3.232.4
59 3.234.12-14
60 In this regard, Aristotle and Confucian shared similar ideas. Aristotle observed that justice as virute was “that kind of state of character which makes people disposed to do what is just and makes them acts justly and wish for what is just.” Nichomachean Ethics. Vol V, I, 1129a. Cited in Edwin W. Patterson, Jurisprudence (N.Y.: Brooklyn, Foundation Press, 1953), p. 31.
61 In traditional China and still is true today, moral accounting is considered as dualistic in nature. Moral accounting is divided into two separate but integral parts – moral agency and moral responsibility. While moral agency rests with the individual (e.g., “xiu shen” or “self-cultivate”) but moral responsibility is shared by the collective the individual belonged, i.e., family, clan, community, state. This way of structuring moral accountability is directly opposite to the western liberal political-economical-ethical ideal of atomistic individualism.
Lastly, having a good character and reputation could be a valuable asset. For example, in Case 262 Xie Ji-shi (XJS), a scholar and Qing official, was found guilty of publishing books critical of Cheng-Zhu’s classical work.63 Particularly, the emperor observed that XJS, as a learned (cultured) person, should not be critical of classical writings embodying established ideas and orthodox learning. Notwithstanding the seriousness of the substantiated charges, the emperor decided to absolve XJS because he has conducted himself in a most diligent and exemplary manner as an official in the past. This case shows that a good reputation took a lifetime to build and was useful for a lifetime. In a country where face (reputation) and honor (character) was considered more important than money and life, being an “ethically correct person” served as a powerful social control devices.

In contrast, the non-cultured were considered capable in conforming to ethical norms. For example, in Case 464 the speech offender, Ding Wen-bin (DWB) was not formally educated. He taught himself to read the *Analects*. The Shandong governor Yang Yingju found that DWB had committed high treason in four ways: First, he tried to establish a new kingdom with a new emperor’s title (“jain hao cheng huang”). Second, he issued imperial titles and bestowed nobility upon his relatives without proper authority (“shan jia feng zheng”). Third, he fabricated books of constitution (state charter and rules) (“weizao xian shu”). Fourth, he fabricated coins (“weizao qian shi”). In his opinion, the Shandong governor described DWB as “a poorest and meanest person” (“pin ji jian ren”).65 As “a mean and base person” (“wei jian bu”),66 DWB was characterized as being obsessed with money and fame (“wang xiang fu gui”) and crazed after female and sex (“nu si chi xin”).68 He was given to boastfulness (“xiao xi chen yan”) and self-promotion (“zi xu qi cai”).69 He was restless and was not contented with his station in life (“bu kan lin ding”). This view of DWB as an offender, conformed to the caricature of the “mean people” in Confucian ethical order. This stereotypical view of the “mean people” calls to mind a

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62 *Xie Ji-shi zhu-shu an* (The case of Xie Ji-shi compiling books) 1.197.1 to 1.196.9
63 Cheng-Zhu’s work referred to the “li-xing” school of thought (or the school of nature and reason) during the Song dynasty (420 to 497). The “li-xing” school was one of the three grand Chinese intellectual school of thoughts. See *Zhongguo xueshi sixiang shi*, Vol. 4 (A History of Chinese intellectual thoughts) (H.K.: Bo Web Chubanshe, 1979), pp. 346-364.
64 *Ding Wen-bin nici an* (The case of Ding Wen-bin rebellious writings), 1.207.1 to 1.236.14
65 1.221.5.
66 1.221.7.
67 1.221.6.
68 1.221.6
69 See 1.221.5.
certain image of deviance: a person who is not given to moral consideration and driven only by hedonistic calculus and obsessed with evil desires. More significantly, the “mean person” does not belong to the established moral order. He was an outsider. The only way to deal with him was by severe and painful punishment. Since he did not understand reason and was otherwise not amenable to education or moved by moral example, he should be locked away and isolated from society, i.e., removal not re-integration. Once sentenced, he lost all semblance of humanity. He was treated as a penal objects, fulfilling whatever purpose the criminal justice apparatus assigned, e.g., as an example of deterrence or justice.

The treatment of DWB in this case shows how such a “mean” person was looked upon and reacted to – such social misfits did not deserve full judicial attention and consideration. In this case DWB was repeatedly subjected to torture during interrogation while in custody. Indeed the only “proper” way to get information from a commoner was by coercion, inducement, and trickery, not with reason or persuasion. None of these were practiced on the gentlemen. This was made clear by the governor Yang Ying Jun: “This official has used all effort to search for the truth. At times I used torture interrogation, at times I used persuasion, and at times I send someone to induce him to talk.”

II. The cultured person was subjected to a higher moral standard

There were two normative standards for the same proscribed conduct, one for the cultured and the other for the non-cultured. The cultured person was subjected to a higher moral standard. Confucius said, “The gentleman reaches upward; the inferior man reaches downward.” Thus, the cultured person was expected to display more effort in being ethical;

71 This was usually achieved by execution or banishment to the border.
72 This calls to mind Becker’s insightful observation that deviance is less the nature of an act as much as it is the reaction of the people to an act. Howard Becker, Outsider (N.Y.: Free Press: 1963)
73 1.210.13 (DWB should be interrogated by torture so that he does not put up an excuse.) 1.215.1 (DWB claimed that he suffered torture because of god. Even if more torture were to be applied, he would not change his testimony.)
74 1.221.4. See also Case 12, Lin Zhi Gong niezao Zhu Ge biwen an (The case of Lin Zhi Gong fabricating Zhu Ge inscription on a tablet case ) 1.327.2 to 1.330.10.
75 The Analects, Book XIV, Chapter 23.
failing that, he deserved heavier punishment for being in a higher status position.\textsuperscript{76} For example, in Case 57\textsuperscript{77} Yun Jia-quan (YJQ) was found to have committed a number of ethical transgressions and official indiscretions. During his confession, YJQ conceded that it was inappropriate for him to: (1) reference the old order to ridicule the new; (2) to seek to establish a name and legacy for himself; (3) to equate himself with the sage in order to earn undeserving fame (”qishi dao ming”).\textsuperscript{78} In his guilty plea for leniency, YQL recognized that he has failed the extra-ordinary duty imposed upon him as a result of being a high official:

\begin{quote}
“When ignorant commoners engage in these kinds of behavior, they are deemed inexcusable (“zui wu ke huan”). What about me who has been a senior official and has benefited much from the country’s benevolence (“shi shou guo en”). A person with a depraved heart like me can only beg the emperor to impose heavy punishment as an example to others.”\textsuperscript{79}
\end{quote}

A cultured person was a trustee and defender of his endowed class interests, privileges and status. As a fiduciary\textsuperscript{80} the cultured person undertook an affirmative duty to set an example for others and a negatively duty to avoid bringing the cultured class into disrepute. In this regard, the cultured person was expected to act in an above reproach manner and to avoid the appearance of impropriety. Failing that, the cultured person could be punished for the appearance of impropriety notwithstanding the lack of any actual wrongdoing. At times, the appearance of impropriety might be deemed to be a more serious transgression than the impropriety itself. Again, in Case 57\textsuperscript{81} discussed above, Yun Jia-quan (YJQ), the minister of Dai Li Si, was rebuked for proposing to an unmarried woman who intended upon keeping her chastity in her 50s. In his defense, YJQ stated that he has no intention of courting the virgin lady and was in fact most solicitous of her welfare. In any event, the proposed relationship never materialized. Nevertheless the emperor was quick to rebuke YJQ: “This virgin lady has decided

\begin{flushright}
\textsuperscript{76} In modern time and in the West, this is akin to holding people in “public trust” to higher conduct standard, e.g., judges, police officers, priests.\textsuperscript{77} 3.121 to 3.222\textsuperscript{78} 3.142.1.\textsuperscript{79} 3.142.13 to 14.\textsuperscript{80} A fiduciary is “a person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking ... refer to a person having duties involving good faith, trust, special confidence, and candor towards another.” See \textit{Black's Law Dictionary} (abridged sixth edition) (St. Paul, Minn: West Publishing, 1991), p. 431.\textsuperscript{81} 3.121 to 3.222.10
\end{flushright}
not to marry and is now in her 50s. Why did you ask your wife to be a go between and solicited her as your concubine? *This is most despicable ("lianchi"). Was this something a right, honorable person would do?* 82

The emperor’s rhetorical question above showed that the emperor was upset with YJQ’s “apparent” indiscretion, though no actual harm resulted. In the present context, a cultured person, especially a high official in YJQ’s position, was supposed to assist others in achieving honor and dignity, and not try to undermine others’ ethical commitment. For it was said: “Now the man of perfect virtue, wishing to be established himself, seeks to establish others; wishing to be enlarged himself, he seeks also to enlarge others.” 83 In this case YJQ, in seeking the 50 years old virgin lady to be his concubine, not only did not help other people to achieve virtue, he actively undermined the old virgin lady’s commitment to do so. 84

Another key tenet of Confucian ethics is that of having the cultured people to lead the common people by example. Thus it was said: “On his deportment there is nothing wrong; he rectifies all the people of the state. Yes; when the ruler, as a father, a son, and a brother, is a model, then the people imitate him.” For example, in *Case 18*, 85 Qi Zhao-nan (QZN), a libu shilang (a high official), wrote a prologue for his cousin Qi Zhou-hua (QZH)’s “offensive” book. The Zhenjiang xuezhezheng justified QZN’s punishment as follows:

“The state set up the official selection process in order to encourage people to improve themselves. The original purpose was to make people understand the eternal principles of loyalty and filial piety, so as to set an example for the community. Now QZN, as a senior official, has a perverse and rebellious QZH as a clan member and has failed to report him. *This brought the educated officialdom into ill repute.*” 86

In this case, QZN was punished not only for endorsing an “offensive” book, he was also punished for bringing “the educated officialdom into ill repute.” QZN, in acting indiscreetly, demonstrated to the public that the official selection process was flawed in selecting a less than ethical person. More significantly, QZN set himself up as a bad example for others to emulate.

82 3.141.2-4
84 “The gentleman seeks to enable people to succeed in what is good but does not help them in what is evil. The inferior man does the contrary.” *The Analects*, Book XII, Chapter 11.
85 2.1.1 to 2.34.3
86 2.14.4 to 6.
III. The cultured person was expected to be knowledgeable about his moral obligations

The cultured person was subjected to a higher standard conduct norm because he was charged with more knowledge ethics, law, and worldly affairs. It was said:

Those who are born with the possession of knowledge are the highest class of men. Those who learn, and so, readily, get possession of knowledge, are the next. Those who are dull and stupid, and yet compass the learning, is another class next to these. As to those who are dull and stupid and yet do not learn; they are the lowest of the people.

A cultured person was considered more knowledgeable, and thus more ethically responsible, in the following ways:

A cultured person was considered more knowledgeable about the law and moral principles. For example, in Case 46 Feng Wang Sun (FWS), an alternate assistant education officer (“xundao”), compiled the Simplified Five Classics Recitation in order to make the learning of the five classics (“wujing”) more easy. The emperor in confirming FWS’s death sentence observed that: “FWS … has long been an educator at the school. He should know that he have to abide by the law and keep to his place (“ying zhi shou fa an fen”).”

87 In western law and jurisprudence, the relationship between knowledge and criminal responsibility is an inseparable one. The “first principle” (Herbert Packer, The Limits of Criminal Sanctions, 1968) of criminal responsibility (culpability) is knowledge. Thus, the principle of legality – “Nullum crimen sine lege; nulla pena sine lege” (“no crime without (pre-existing) law, no punishment without pre-existent law”) holds that a person cannot be held liable unless he is put on notice about an offense. See discussion in Joshua Dressler, Criminal Law (West, 1994), p. 64ff. See also ALI Model Penal Code, SECTION 2.02 GENERAL REQUIREMENTS OF CULPABILITY, (2)(b) Knowingly. A person involves knowingly with respect to a material element of an offense when: (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that circumstances exist; and (ii) if the element involves a result of the conduct, he is aware that it is practically certain that his conduct will cause such a result. Finally, the M’Naghten rule excused a mentally insane person from criminal responsibility if “at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.” Daniel M’Naghten’s Case, House of Lord, 1843, 10 Cl. & F. 200, 8 Eng. Rep. 718.

88 The Analects, Book XIV, Chapter 9

89 In American tort law, an expert is held to a higher standard of care commensurate with his expertise and knowledge in the field. Morris, “Custom and Negligence” 42 Columbia Law Review 1147, 1164-5 (1942).

90 2.371.1. to 2.384.9
91 2.382.7-8
In this case, the Hebei governor who made clear that the depravity of FWS’s conduct ultimately rested in his knowingly publishing “offensive” materials. 92 In fact, when FWS claimed that he was not able to comprehend the offensiveness of his own writing because of his poor literary skills and have no one to turn to for help when he wrote, his defense was immediately rejected. 93 In essence, the cultured person could not claim ignorance of the law as a defense.

More importantly, in imperial China and with the cultured person, knowledge of moral obligations demands virtuous action and non-virtuous action presupposed intentional wrongdoing. 94 Thus in Case 46 referred to above, Feng the emperor in confirming FWS’s death sentence observed: “The said offender has been a literary person … How is it that he does not know how to avoid taboo!? This is most absurd and preposterous. This cannot be unintentional and demonstrated wantonness.” 95

The cultured person was charged with the understanding of his words and deeds. For example, in Case 50, 96 the Anhui governor reported that Dai Shi-dao (DSD), a gongsheng, was in possession of a copy of absurd and perverse book of Yue Ting Wei Shi written by DSD’s grandfather, Dai Kun (DK). The Anhui governor ruled that, notwithstanding DSD’s plea of ignorance (“because of my shallow education, I did not know that the poetic words and phrases were perverse” 97 ) he was guilty: “as an educated gongsheng, how can he (DSD) claimed to be ignorant of the meaning of words and letters ... this is not believable.” 98 Thus DSD was sentenced to death by beheading immediately for knowingly concealing high treason, notwithstanding his plea of ignorance.

This case demonstrated that the cultured people were “presumed” to know the content of all written materials within their possession, irrespective of their “factual” ignorance. In this case DSD was not allowed to excuse himself even though other senior members of his clan he was obligated to obey, informed (instructed?) him that there was nothing “offensive” about the book

92 2.374.6-7.
93 2.373.1
94 “The leaving virtue without proper cultivation ... not being able to move towards righteousness of which a knowledge is gained ...these are things which occasion me solicitude. ” The Analects, Book VII, Chapter 3.
95 2.373.3-4
96 3.21.1. to 3.55.4
97 3.23.9
98 3.24.6
and after a high ranking official of the state he was required to give deference to wrote a preface approving of the content.\textsuperscript{100} The opinion pointed to a strict liability rule imposed upon the educated people to personally inspect all materials coming within their preview; failing that they would be held absolutely liable for possessing offensive materials.\textsuperscript{101} In essence, the cultured could not claim the ignorance of facts as a defense.

IV. The cultured person was expected to keep to his role and place in society

A cultured person was expected to keep to his place (“shoufen”). This meant three things:

First, he should be comfortable in whatever station of life he found himself. Thus it was said:

The superior man does what is proper to the station in which he is, he does not desire to go beyond this....In a position of wealth and honor, he does what is proper to a position of wealth and honor. In a poor and low position, he does what is proper to a poor and low position...The superior man can find himself in no situation he is not himself.\textsuperscript{102}

Second, he ought not to aspire beyond his assigned place (role) in the society. Thus it was said: “The superior man, in his thoughts, does not go out of his place.”\textsuperscript{103} Third, he should not over-reach into other people’s office, and affairs. “He who is not in any particular office has nothing to do with plans for the administration of its duties.”\textsuperscript{104}

In Chinese the character “shou” is to keep. The character “fen” refers to one’s rightful entitlement. The phrase “shoufen” thus means to keep to what one is entitled to, i.e., not reaching beyond one’s limit or craving beyond one’s means.\textsuperscript{105} The complementary idea is “anfen”. The character “an” is to be at peace with a given state of being; including one’s station in life. Thus “anfen” is to be at ease with one’s place in society, i.e., be satisfied with what one has.\textsuperscript{106} “Anfen” stands for “anfen-shouji” meaning “abide by the law and behave oneself”. While “anfen” is to abide by the law or not go beyond one’s bounds (i.e., keeping with external social

\textsuperscript{99} 3.22.12
\textsuperscript{100} 3.22.13
\textsuperscript{101} One fact may have argued against the absoluteness of such a rule. In this case, DSD was given some money by an official to publish the materials. DSD’s involvement in the publication process made him factually more knowledgeable and legally more culpable.
\textsuperscript{102} The Doctrine of the Mean Chapter XIV: 2.
\textsuperscript{103} Analects Book XIV. Chapter 28.
\textsuperscript{104} Analects Book XIV. Chapter 27.
\textsuperscript{105} See Ci Yuan, 433 “shoufen.”
\textsuperscript{106} See Ci Yuan 435 for “anfen.”
norms), “shouji” is to keep to one’s place or know one’s station in life (i.e., stick to one’s internal moral compass).  

At a philosophical level, “anfen-shouji” reflected and reinforced the traditional Chinese view of the world - there was a place for everything and everyone in the cosmic order. A person’s place in the society was provided for by nature and given at birth. A cultured person was to follow the law of nature and not disrupt it. Continuity was preferred over change. Harmony was stressed over asserting oneself. Stoicism in the face of adversity was better than doing something to change the order of things. Thus it was said: “Let the states of equilibrium and harmony exist in perfection, and a happy order will prevail throughout heaven and earth, and all things will be nourished and flourish.”

There were many ways a person could be considered as not “anfen” in the Qing court. These included showing discontent, expressing resentment, being critical of the state, emperor or administration, seeking change to the establishment, or causing trouble in one’s community. All of these were seen as acting contrary to the natural order and personal duty.

The anfen cultured person was not expected to openly and publicly challenge the political authority in any way. For example, in Case 46 Feng Wang Sun (FWS) was an alternate assistant education officer (“xundao”) convicted of compiling the Simplified Five Classics Recitation in which he advocated for the return of the Ming dynasty. The emperor in confirming the Hebei governor’s sentencing of FWS to death by slicing observed that: “FWS was an

107 PYCED, p. 202
108 “HARMONY is the universal path which they all should pursue.” The Doctrine of the Mean, Chapter I:4.
109 “While there are no stirrings of pleasure, anger, sorrow, or joy, the mind may be said to be in the state of EQUILIBRIUM.” The Doctrine of the Mean, Chapter I:4.
110 The Doctrine of the Mean, Chapter I.
111 The Doctrine of the Mean, Chapter I:1.
112 For the cultured person, the most fundamental duty was to defend and promote the status quo. Any signs of discontent or any effort to change the system by the cultured were severely dealt with. The cultured person, being more educated, were by implication more thoughtful, observant and articulate. As a prominent class they were social and community leaders. The combination of the two spelled potential problems for the emperor who was intending on maintaining the status quo and peaceful rule. This critical analysis of the political function of Confucian rule was most strongly advocated by the PRC scholars, see Wu Shu Chen (ed.) Chinese Traditional Legal Culture (Beijing: Beijing University Press, 1990), p. 61. Another more neutral social functional analysis is possible, i.e., Confucian culture was conducive to the maintenance of a self-supporting agricultural community. Id. P.56.
113 2.371.1. to 2.384.9
alternate instructor appointed as a result of contribution. He also graduated from the imperial college. He has long been an educator at the school. He should know to abide by the law and keep to his place (“ying zhi shou fa an fen”).“114

In this case FWS’s “place” was circumscribed by his institutional role as an education official and prescribed by his social position as a member of the educated class. Both required of him to support and promote, not undermine and challenge, the legitimacy and authority of the Qing dynasty by “advocating for the return of the Ming dynasty.” As an official he was to wholeheartedly support the Qing rule by not casting aspersions on the Qing political authority. As an educated class he was to show respect to the Qing emperor by avoiding the transgression of a taboo. To the extent that FWS was not acting according to his role as an official and behaving incompatible with his status as an educated class member, he was not “keeping to his place.” These were separate and distinct offenses, apart from the publication of “offensive” materials.

The anfen cultured person was not supposed to be critical of the civil administration. In Case 24115 wusheng Li Chaohai (LCH) was accused of compiling Wusheng Libenji (Anthology on Establishing Martial Character) in which he suggested that men of letters and martial arts should be treated equally and given the same prospect in the imperial administration. In deciding upon LCH’s culpability, the Anhui academic officer De Feng observed 116 that LCH as a martial-scholar had failed to appreciate the importance of keeping within his place. LCH was punished for speaking out against established official practices (“guan chang”): “On reflection (fuxi), the bad student, is amongst the scholarly rank, he should keep to his rightful place (“shoufen”). However, he has the audacity to compose “preposterous” commentaries on official practices. This is not legal.”117

The anfen cultured person was expected to deal with his personal problems and frustration privately and not displayed his anger publicly. He was further expected to assume responsibility for his own failures and not blame others for his own shortcomings. For example, in Case 56118 a Hubei, Xiao Gan county shengyuan Cheng Ming-yin (CMY) was found to have compiled “offensive” speech critical of the emperor’s

114 2.382.7-8
115 2.81.1 to 2.83.13
116 The memorial of Anhui governor-general (xunfu), Fu Nihan (FNH) Anhui xunfu Fu Naihan zouzhe.  2.82. 13. to 2.84.1.
117 2.82.3 to 5
118 3.103.1. to 3.120.15
emergency relief policy. In his defense, CMY confessed to writing the “offensive” speech because:

“Since this offender has began his study he made his living by teaching. The rich people did not show this offender respect. This offender was full of resentment and thus circulated the words ...(as to the other “offensive” phrases) ... This offender has attempted the imperial examinations many times without success, and resented the examiners for not being able to distinguish the good from the bad. Also he has bad luck and was held up by the examination such that he could not be preposterous. Although he has little problem with food and shelter he was not happy ... (he thus wrote the “offensive” phrases) ... to air his grievance (“laoso”). He did not know his place when committing the crime of high treason. He has nothing more to say.” 119

In this case, CMY confessed to not knowing his place in acting out of frustration due to his academic failures, by complaining about the emperor’s policy. The “rightful place” for CMY was to acknowledge his own examination failures and work silently to overcome his academic deficiency.

The anfen cultured person was expected to be content with his own station in life and not tried to gain recognition through unscrupulous mean. In Case 51120 Shengyuan Wu Ying (WY) stopped a county education official to submit a policy paper (“ce shu”) calling for the reform of government in a number of areas. The Guangxi governor in sentencing WYL to death by slicing for high treason observed that: “WY was born to a sage era and was within the ranks of student-scholar. He was given status recognition (“yiding”), and yet he did not keep to his place. He sought undeserved recognition by preposterous submission of a policy book.” 121

In this case, WY was punished for not keeping to this place, and not only for the content of the policy statements.

V. The cultured person was expected to bao

The concept of “bao” or “requital” was a fundamental postulate in the Confucian ethical scheme.122 The idea of bao generally required that the benefactor who received benefits from

119 3.109.6-10
120 3.57.1 to 3.55.10
121 3.59.3-4
122 The concept of bao is a central idea under the Confucian global idea of “ren. See Sources of Chinese Tradition, Vol. I, p.26. For a seminal discussion of the concept of “bao” see ‘Bao – zhongguo shehui guanshi de yige jiqu’ (“Bao – the foundation of relationships in the Chinese
Confucius said: “How will you then requite kindness? Requite injury with justice, and kindness with kindness.”  

The idea and ideal of bao permeated every kind of relationship in China - emperor and subject, father and son, husband and wife, brother and brother, and between friends. In the case of the emperor-cultured relationship this meant that the emperor’s kindness, benevolence, and special considerations be repaid with gratitude and appreciation, manifested as loyalty and dedication by the cultured. Affirmatively this meant being supportive of the emperor’s rule. Negatively this meant refraining from doing anything that might be construed as detrimental to the emperor or the state’s interests. Failing to bao in the manner and degree as expected attracted legal sanctions, either independently or as an aggravating circumstance.

The cultured owed an ethical duty of bao as a result of the opportunities and concessions they received as a privileged class. These included the enjoyment of food and shelter (welfare), peace and order (security), educational opportunity (personal development), official appointments (status and privileges), and criminal pardons (compassion). For example, in Case 47, Shen Ron-ying (SRY) surrendered the “offensive” book Jie Shou Chi Shi Guo Lu written by his father, magistrate Shen Dai-shou’s (SDS), to the county education officer Liu Huang-jia. The Hunan governor in finding that SDS has committed high treason observed that:

“SDS was born to the dynasty and enjoyed the shelter and food off the land ("si mao zhan tu"). He was a juren and served as an officer. He has received much benevolence. He has the audacity to compile preposterous and rebellious materials and circulated them. This was a most heinous crime.”

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123 The theoretical foundation for bao as a “moral system of indirect reciprocity” was provided by Richard D. Alexander who postulated that the “beneficent individual” (in this case the emperor) in extending benefits to others (in this case the cultured) is necessary engaging in a utilitarian calculus, i.e., what can he gain, through direct or indirect “reciprocity,” by acting benevolently act. See Richard D. Alexander, The Biology of Moral System (N.Y.: Aldine De Gruyter, 1987), pp. 93-94.

124 Analects XIV: 36.

125 Bao is not just a tit-for tat exchange process, though its manifestation invariable involved the exchange of material goods. Bao was mostly a return of “human compassion” (“ren qing”) or “good will”. What was exchanged was not as important as the “good feeling” of “thoughtfulness” being engendered. Bao is also functional in serving critical intergeneration exchange as well as economic re-distribution needs. Studies in Chinese Thought pp. 349-373.

126 2.385.1. to 2.409.10

127 2.399.9-11
In another example, **Case 45**, Zhu Ping-zhang (ZPZ) alleged that the deceased shengyuan Zhu Ting-zheng (ZTZ) had composed *Xu San Zhi Jin* that spoke ill of prior dynasties (“bao-bian”). The Jiangxi governor in ordering ZTZ’s dead body to be mutilated for high treason stated:

“ZTZ has been brought up in this dynasty since the days of his grandfather. They have enjoyed the shelter and food of the land (“shi mao zhan tu”) for over 100 years. They also were amongst the official ranks and received an education. They have the audacity to lose their conscience and publish the “offensive” books defaming the empire.”

In this case ZTZ violated the ethical duty of *bao* by speaking ill of the Qing (emperor) rule, including showing dissatisfaction with “having the hair draped over the side” (“fa pie zuo”) and expressing frustration over “difficulty to change clothing” (“yiguan geng nan”). ZTZ was also guilty of spreading rumor that the general public was discontented with Qing state policies leading to many Chinese people becoming monks - “the Chinese state has a lot of Buddhist monks” (“Hua Xia bian di seng”). ZTZ’s speech has the potential of inciting the people. This constituted grave disloyalty to the emperor and the state who sheltered, fed, educated, and provided him with educational opportunities, official appointment, economic well being, and social status.

**VI. The cultured person was judged by his motive**

All personal virtues started with the sincerity of thought: “It is he who is in possession of the most complete sincerity that can exist under heaven, who can give its full development to his nature.” More practically: “the superior man regards the attainment of sincerity as the most

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128 2.357.1. to 2.369.10
129 2.362.11-12
130 2.360.11
131 2.360.12
132 With some ethical theories, the primary criteria of rightness or wrongness of an act is the motive and intent of the actor. For example Immanuel Kant has observed that “to perform one’s promise when no compulsion can be applied to enforce it is a virtuous action, since the actor’s motivation is to perform an ethical duty; to perform because motivated by to external compulsion of law is to perform a juridical duty.” *Patterson*, p. 32.
133 *The Doctrine of the Mean*. Chapter XXII.
important thing.” Motive was considered important to assess a cultured person’s sincerity. In practical terms, this meant that a cultured person was not to be judged by his action alone but also with respect to his intent and motive, and with a still larger compass, his character; which was deemed revealing of the true meaning and ultimate purpose of his conduct. The Master said, “1. See what a man does. 2. Mark his motives. 3. Examine in what things he rests. 4. How can a man conceal his character?”

Sincerity started with doing the right thing for the right reason. Thus, acts and conducts which were otherwise legal, e.g., praising the emperor, might become inappropriate, if they were not done or motivated for the right reason, e.g., reporting speech crime to seek revenge. Unwholesome and inappropriate motives in speech crime cases involving the cultured included: publishing materials for personal gain, e.g., seeking profit or recognition or advancement, exposing “offensive” materials to hurt others, e.g., seeking revenge, or investigating “offensive” materials to demonstrate administrative proneness.

Case 22 illustrated how important the issue of purity of motive was in Qing courts. In that case shengyuan Xu Ding (XD) was sitting for the examination when he tried to commit suicide. Before he attempted the suicide he compiled an “essay of praise” (“biao wen”) extolling the virtues of the emperor.XD conceded that he had written the essay in order to gain recognition and to leave a name for himself. It is important to note that the Zhejiang governor found did not find XD’s writing to be objectionable in content, specifically it was not intentionally “offensive” nor literally objectionable (“bijing”). Nevertheless XD was punished for acting inappropriately, i.e., motivated by a desire to seek personal recognition by improper means - paying compliments to the emperor. This was deemed improper because it was said: “In a low situation, he does not court the favor of his superiors....”

This case is a good example of how important intent and motive was in determining a cultured person’s culpability and liability in speech crime cases. Particularly, how a most laudable speech act (praising the emperor) could be considered as inappropriate and objectionable given the less than honorable (and pure) motive of the cultured offender (ingratiate himself with

134 *The Doctrine of the Mean.* Chapter XXZV:2.
136 See Case 22 at 2.65.1 to 2.72.8.
137 See “E. Seeking revenge as a bad motive” infra.
138 2.65.1 to 2.72.8
139 2.68.7, 2.70.5
140 *Doctrine of the Mean,* Chapter XIV: 3.
the emperor in order to leave a good name). The decision-making norm in speech crime cases was clear and simple: to the cultured, why a speech was made was as important as what was said.  

XD’s motivation was deemed inappropriate in four regards: XD should be concerned with virtue and righteousness, not fame and fortune; XD should be concerned with personal integrity, not career advancement; XD should be seeking recognition by way of meritorious distinction through personal effort and not sought personal recognition by appealing to other people’s vanity; and XD’s attempt to ingratiate the emperor was considered to be too crude and obvious.

The cultured person must not only act within the law, his action must be “motivated” by the right reason. For example, in Case 47 wusheng Shen Ron-ying (SRY) surrendered his father’s “offensive” Shen Dai-shou’s (SDS) Jie Shou Chi Shi Guo Lu to the county education officer as called for by the emperor. The Hunan governor in finding that SRY has failed to surrender the book in a timely manner opined:

“The offensive book has been read for years. Said offender has concealed and failed to surrender it. In November last year when (he was) informed by Chen Mei that the book was offensive, he then conspired to collect and destroy them privately. Later when there was a two years amnesty from the emperor, he then decided to surrender the book, hoping to be spared. This is evidence that he was not conscientious (“zhenxin”) in surrendering the book.”

In this case even though SRY has turned in the “offensive” materials well within the amnesty period established by the emperor, he was nevertheless considered to have failed to have surrendered the materials in a “timely” manner, i.e. in the first opportune moment. SRY should

141 See Wayne R. LaFave, Modern Criminal Law (St. Paul, Minn.: West, 1988), p. 105 (“motive is not relevant in substantive criminal law except as circumstantial evidence bearing on intent.”)
142 “I am not concerned that I am not known, I seek to be worthy to be known.” Analects Book IV, Chapter 14.
143 “The mind of the superior man is conversant with righteousness, The mind of the mean man is conversant with gain.” Analects Book IV, Chapter 16.
144 “I will not be concerned at men’s not knowing me; I will be concerned at my own lack of ability.” Analects Book XI, Chapter 27.
145 I thank Professor Toch for making this suggesting to me.
146 2.385.1. to 2.409.10
147 2.407.1 to 3.
have surrendered the “offensive” book when first found, not years later when there was a general legal pardon. The Hunan governor correctly observed that, as a cultured person, it was not enough for SRY to surrender the book as required by the emperor, it was more important that he did so for the right reason, i.e. to be driven by his own conscience and not moved by expediency in avoiding punishment.

Inasmuch as intent and motive was determinative of guilt and punishment, Chinese officials were preoccupied with ascertaining the true intent and motive, i.e., speech offender’s mind set and thought process, in each case. For example, in Case 25 a Jizhou shengyuan An Nengjing (ANJ) turned in an examination paper which contained criticism and slander. The Shuntian fu academic officer who interrogated ANJ was much concerned about the intent and meaning behind the “offensive” writings. “You have to disclose your intent (“yi”149) and the reasoning (“gu”) in making the poem step by step?”150

VII. The cultured person was expected to exercise self-control

The cultured person under Confucian rule was expected to be always in self-control. This means that he was expected to know what was right from wrong and act accordingly. Confucius said: “The gentleman understand what is right….”151 This also means that the cultured was always reflective and self-critical, i.e., to exercise personal and internal self-control. The Master said rhetorically: “I have not yet seen one who could perceive his faults and inwardly accuse himself.”152 “The gentleman makes demands on himself; the inferior man makes demands on others.”153 When the cultured person failed himself he is expected to take steps to ratify his own mistakes, including seeking internal-sanction and self-reform. “The gentleman thinks of sanctions; the inferior man things of personal favors.”154 In practical terms, diligent self-control serves three functions: (1) a cultured person needs to control his own conduct and to correct his own mistakes in order to be an example to others. “If he cannot rectify himself, what has he to do

148 2.87.1 to 2.90.2
149 Yi can mean “yisi” which is “meaning” or “yitu” which means “motive and intent”. Here it means the later. See Ci Yuan 618.
150 2.88.10
151 Analects IV:16.
152 Analects. Book V. Chapter 26. Confucius was lamenting that his students were not able to “nei zi song” which literally means “litigate inside oneself”. Legge has translated this as “to bring himself before the bar of his conscience.” The Four Books, p. 184, n. 26.
153 Analects XV:20.
154 Analects IV:11.
with rectifying others?” 155 (2) Collaterally, “[b]efore a man can regulate and discipline others he
must learn to regulate and discipline himself.” 156 (3) Self-examination promotes self-confidence
as it earned others’ respect and enhanced one’s public image. “When internal examination
discovers nothing wrong, what is there to be anxious about, what is there to fear.” 157 These
Confucian self-control principles derives from the larger principle that that cultured person is
expected to be always in pursuit of in self-cultivation and perfection. 158

A cultured person in self-control was expected to accept personal responsibility and
punishment for his wrongdoing. 159 More specifically, he was expected to realize his mistake
and accept its consequences with dignity, honor, and grace, i.e., with remorse, repentance, and
reform. 160 Contrarily a cultured person was expected not to conceal his wrongdoing and to
deny his responsibility. Most certainly, a cultured person was not supposed to resent the
imposition of a legitimate sentence. Thus it was said: “Can men refuse to assent to the words of
strict admonition. But it is reforming the conduct because of them which is valuable ... If a man ...
assents to those, but does not reform his conduct, I can really do nothing with him.” For example,
in Case 26161 Wang Xun (WX) had delivered two “vulgar and philistine” (“offensive”) written
notes to the Yanshan county magistrate Chen Hongshu (CHS). Magistrate CHS, while denying
ever hearing of WX, nevertheless was willing to assume ultimate responsibility for his dereliction
of duty. Thus, CHS agreed with the emperor that he had been acting less than diligent in his
office.

155 Analects. Book XIII. Chapter 13. The statement was made with reference to a minister but it
equally applied to a cultured person.
156 Sources of Chinese Tradition, p. 114.
157 Analects. Book VII, Chapter 4:3.
159 Erving Goffman’s suggested that when expectations and norms were broken in the public
place the rule breaker and victim was forced to confront each other in a series of negotiation over
how to fix the problem for the purpose of reestablishing social control or relationship between the
offender and victim, a process Goffman called “Remedial Exchanges” Such a “remedial” process
is very predictable and follows articulable rules. See Relations in Public, Ch. 4, pp. 95-187.
There are two parts to a remedial exchange: giving an account of what happened and take
responsibility for ones action, pp. 108-118 (“Two principal forms of remedial work have been
considered: accounts and apologies.”).
160 Prompt and whole hearted acceptance of responsibility “shows that what he seeks is not a
change in his apportionment of rights but rather a single exception to restrictions and standards he
is ready continue to accept…” Goffman, Relations in Public, p. 165.
161 2.91.1 to 2.109.1
“All local heretical and evil teachings should be investigated and seriously dealt with. This is particularly so with WX who dared to utter eccentric, strange, absurd, and preposterous writings. If I have seen them, how could I not be in extreme anger and hold him accountable? How could I have returned the book so lightly?” Inasmuch as I have failed to detect such an and absurd persons, it was my fault for being muddled (“hutu”162), I willingly submit to punishment.”163

This case shows that CHS knew right from wrong (“evil teachings should be investigated and seriously dealt with ...”), able to objectively judge himself in that light (“How could I have returned the book lightly?”), and ready to accept personal responsibility (“I willingly submit to punishment.”).

Ultimately, taking personal responsible meana that the cultured person has to assure the emperor that he has regained self-control again by openly confronting his past mistakes.164 For example, in 17,165 Hua Ting county juren Nai Xian (NX) surrendered his suspected “offensive” work: Xian Yu Xian Xian Records to the Song Jiang fu (Pine Lake prefecture), zhifu. The Liang Jiang governor-general absolved all of NX’s students for not knowing anything about NX’s publications.166 The emperor rejected Liang Jiang governor-general’s finding and called for a further investigation.167 The Liang Jiang governor immediately submitted a memorial to the emperor and quickly accepted responsibility and asked for punishment.168 He conceded that, as the governor in charge, he was remised in not discovering the “offensive” writings before it was

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162 Wutu mans having no clear presence on mind. This goes against being a good official who is supposed to be alert and wise at all time. See Ci Yuan 1298.

163 2.102.2 - 4.

164 The Chinese then as now believe that the acknowledgement of guilt is the first step to successful reform. Every step was taken to make the offender realize his own mistake. Bao Ruowang & Rudolph Chelminski, Prisoner of Mao (N.Y.: Coward, McCann & Geoghean, Inc., New York, 1973) The Chinese approach is supported by modern day scientific-psychological theory. Effective personal reform starts with self-acknowledging of ones problem. Such is the approach taken by the AA self-help program.

165 1.369.2 to 1.375.11

166 1.381.14

167 “Nai Xiang Xiang an ge fan ying an lu yanzhi bude guxi yu” (Emperor’s decree regarding Nai Xian Xian and others should be seriously dealt with by law.) 1.381.14 to 1.383.9 (The emperor observed that the said governor has bungled the case in the following regards: (1) He has failed to interpret NX’s writings correctly, making them sounded more serious than they actually were. (2) He has entrusted his interpretation to his subordinate when he should be doing it himself. (3) He has been indulging other parties who were implicated in the case.)

168 “Gao Jin deng zou qing jiao bu yichu zhe” (Memorial requesting to have Gao Jin and others to be turned over to the board to be dealt with) 1.383.11 to 1.384.9
revealed. He further confessed that he had failed to detect all the “equivocate terms” (“yinyue qici”) in the “offensive” book because had not been using all his effort. Lastly, he acknowledged that he had failed to punish the various disciples of NX who were implicated in various ways with the book’s publication with appropriate punishment. In so doing, he admitted that he was stupid, incompetent, and extremely wrong. He felt most ashamed and fearful. His blameworthiness could not be excused. He asked for an opportunity to redeem himself by correcting the problems noted by the emperor, i.e., allowed to revisit the “offensive” materials and be seriously punished for his dereliction of duty as an example for other officials.

The above case shows that NX was trying to convince the emperor that in spite of his error in judgement, the incident did not amount to a personal failing, and certainly not a true reflection of his character. More important, he was trying to impress upon the emperor that he has taken corrective measures to regained control, i.e., that similar things would not happen in the future because he could be trusted to police himself still. He attempted to earn the emperor’s trust by: agreeing upon the assessment of facts and appropriateness of the rules, i.e., by admitting that the books were “offensive” and should have been seized, by confessing guilt, e.g., by admitting that he was remised and making amends, e.g., by admitting he was ashamed, by showing remorse, e.g., he was stupid and wrong, and asking for redemption, e.g., he asking for an opportunity to correct the problem, and by requesting for punishment, i.e., retribution and deterrence.

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169 1.384.3  
170 1.384.4  
171 1.384.5  
172 1.384.5  
173 1.384.6  
174 1.384.6-7.  
175 1.384.7  
176 Erving Goffman has perceptive noted that: “He who fails to sustain his obligation is responsible for trying to make amends for his offense and for showing proper regard for the process of correction. They whose expectations are not sustained must show that they are not to be delineated by what the offenses express about them and at whatever cost to themselves they have a proper relation to the sanctioning system, for their failure to commit themselves to this social mechanism can reflect more harshly on them than does the original offense.” *Relations in Public*, p. 100.
An official was given ample opportunities to show self-control. For example, in Case 4177 the governor of Jiangsu, Zhan Yougong (ZYG) was suspected by the emperor to have failed to report and surrender “offensive” books submitted to him while he was an education official.178 The emperor first called upon ZYG for a self-investigation. ZYG at first denied any knowledge. 179 The emperor responded with this memorial endorsement “This memorial is playing games...Should not risk losing everything.”180 Whereupon, ZYG admitted to not being able to locate the “offensive” books and asked the emperor to refer him to the board for sanctions.181

“There were words of high treason within and (I have) failed to uncover them so that it could be dealt with immediately by the law. This resulted in the escape of the prisoner. After five years ... the books were misplaced. This official has enjoyed the benevolence of the emperor and yet tolerated such rebellious and evil acts. Even this official deemed it to be beyond reason and facts. Now (I) beg for the emperor’s compassion to refer this official to the board (of punishment) for serious punishment.”182

This is a classical case to show the application of a liberal self control rule, especially with senior officials. The emperor gave ZYG every opportunity to examine his own conduct and correct his own mistakes, before the emperor decided to interven. ZYG as a cultured person and senior-official, was expected to be forthcoming about his own mistakes and in providing for corrective measures, as ZYG finally did. The main points to note here are: (1) ZYG was given an opportunity to investigate himself.183 This means that he was expected to examine his own conduct and ratify his own wrong doings. (2) When ZYG denied any responsibility, in spite of being instructed by the emperor,184 he was given yet another chance to correct himself;185 this

177 1.207.1 to 1. 236. 14
178 1.222.13
180 1.225.4.
181 “Zhuang You Gong zou qing jiao bu zhizui zhe.” (Memorial of Zhuang You Gong asking to be turned over to Ministry for punishment.) 1.230.11 to 1.231.11.
182 1.231.7-9.
183 1.222.14.
184 1.222.14.
time with a hint of punitive measure. This suggests that the emperor’s involvement in the
discipline of officials was to be progressive - depending on the conscientiousness of the officials
involved and the seriousness of the matter under consideration. (3) Finally, ZYG admitted to his
wrongdoing and asked for a most severe punishment.

The critical point in all these is that the emperor gave ZYG repeated and ample
opportunities to conduct an investigation of himself. This was so even after the emperor
suspected that ZYG would not cooperate in surrendering the “offensive” materials in question.

More specifically, a cultured person who has regained self-control is expected to show
that he was amenable to law, discipline, and control in the future. For example, in Case 33 the
speech offender Long Feng Xiang (LFX) was a Wen Zai county juren who was banished to
Guizhou for embezzlement. LFX was found in possession of two musk and mountain chops. The
chops have words and phrases on them that were considered “absurd, and un-authodox.” LXF
was quick to assure the emperor that in spite of his past criminal act he was still very much
amenable to the legal process:

“He was really poor and stupid and used the old chops to made printed stamp books. He also carved a few tens of stamps and printed into first and second
books. He used those stamped sentences and phrases to make up a preface to
give them to others for profit ... Long Feng Xian as a convicted official in exile
should have observed the law, yet he was stupid and ignorant and circulated
carved unruly stamps for small profits. This was indeed shallow and shameless
and deserved to be punished.” 186

This case shows that the first and most fundamental step to reclaim self control was for
LFX to persuade the emperor that he was still amenable to the government social control process.
This means that he has to openly and unequivocally accept the legitimacy and authority of the
emperor to control him. This can be done by accepting the law or/renounce his illegality.

PART FOUR
CONCLUSION

185 The emperor made clear in his initial instruction appended to ZYG’s first investigative
memorial (1.225.4) that he did not believe that ZYG could be trusted to carry out an objective and
impartial investigation of his own self in turning over the “offensive” book, nevertheless ZYG
was allowed to conduct his own search for the book.
186 2.220.9-13.
“Li is not applicable to the common people, punishment is not applicable to the ta-fu (officials).”

What is the implications and effects of the Confucianization of the law on the prosecution of the cultured speech offenders? It is apparent that the Confucian ethical principles and normative system was a much more restrictive form of social control than the Qing legal rule. Confucian ethics as a behavioral social control system was more restrictive in two ways. (1) It sets forth a high standard on what conduct is to be expected. (2) It sets forth a high standard on how to achieve perfect conduct.

Confucianization of the law set forth a restrively normative system for the cultured to follow in the following ways:

First, Confucian ethics has an all encompassing coverage; it touched upon everything the cultured person did - thinking, acting, speaking, as it attached to all matters he came to be associated with - ideas, people, transactions, things. It reached a person’s character, disposition, thought, and action. It was concerned with his present, as with his past and his future. Thus it was said: “1. How great is the path proper to the Sage! 2. Like overflowing water, it sends forth and nourishes all things, and raises up to the height of heaven. 3. All-complete is its greatness! It embraces the three hundred rules of ceremony, and the three thousand rules of demeanor.” Conversely, nothing escaped the watchful eyes of the Confucian ethics. “The way which the superior man pursues, reaches wide and far, and yet is secret.”

Second, Confucian ethics was distinguished by its open-endness. This meant that unethical conduct were not pre-defined.

Third, Confucian ethics was ever-evolving towards perfection. Perfection as a normative ideal was less a stationary goal to be achieved as it was a moving target to aim at. “Perfect virtue

187 See Legge, Texts of Confucianism, III, 90. For a discussion of the doctrine, see Zhongguo gudai falushi zhishi , 43-45. This Confucian doctrine was manifested in the following ways: (1) The “dafu” were not amenable to regular judicial process, though they were not exempted from punishment. (2) Western Zhou bronze relic showed that punishment could be redeemed with money (“shu”) and only the “dafu” could afford to be redeemed. (3) The “dafu” could be banished to the frontier instead of being put to dead. (4) The “dafu” could be allowed commit suicide instead of capital punishment. (5) The execution of the “dafu” was often executed in out of sight places to preserve the dignity of the “dafu.”

188 The Doctrine of the Mean, Chapter XVII.

189 The Doctrine of the Mean, Chapter XII.
is the burden which he considers it is his to sustain; is it not heavy? Only with death does his course stop - is it not long?" 190

Fourth, Confucian ethics was demanding. It required maximum effort, not minimum conduct as required by the legal rule. It was said: “Therefore, the superior man in everything uses his utmost endeavors.” 191 Furthermore, it required constant and unrelenting effort, “Hold faithfulness and sincerity as first principles, and be moving continually to what is right - this is the way to exalt one’s virtue.” 192 Practically, instead of asking the question of what a person has done to deserve legal punishment, it asked what could still be done to avoid moral sanction for falling short of ethical perfection.

The all-encompassing, open-ended, ever-evolving, and demanding nature of the Confucian ethics as applied to the non-cultured in Qing China was best captured by the following Confucian teaching:

“Therefore, the superior man honors his virtuous nature, and maintains constant inquiry and study, seeking to carry it out to its breath and greatness, so as not to omit any of the more exquisite and minute points which it embraces, and to raise it to its greatest height and brilliancy, so as to pursue the course of the Mean. He cherishes his old knowledge, and is continually acquiring new. He exerts honest, generous earnest, in the esteem and practice of all propriety.” 193

To say that the superior man must seek “constant inquiry and study” and “cherishes his old knowledge, and is continually acquiring new (ideas on virtue)” is to expect him to use continued and unrelenting effort to seek to perfect himself. To say that the superior man must seek to “carry it out to its breath and greatness, so as not to omit none of the more exquisite and minute points which it embraces, and to raise it to its greatest height and brilliancy” is to hint at the expansive scope, mercurial presence, and open-endedness of the Confucian ethical principles imposing upon the cultured person - from birth to death and on all matters large and small. To say that the superior man must “exert honest, generous earnest, in the esteem and practice of all propriety” is to affirm the demanding nature of Confucian ethics on the cultured person in exactitude. The Confucian ethics were unrelenting in its quest for perfection. “Perfect virtue is the

191 *The Great Learning*, Chapter II:3.
192 *The Analects*, Book XII, Chapter 10.
193 *The Doctrine of the Man*” Chapter XXVII: 6.
burden which he considers it is his to sustain; is it not heavy? Only with death does his course stop - is it not long?" 194

Table I: Characteristics of Confucian ethics vs. legal rule as social control

<table>
<thead>
<tr>
<th></th>
<th>Confucian ethics</th>
<th>Legal Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Scope</strong></td>
<td>Comprehensive</td>
<td>Limited</td>
</tr>
<tr>
<td><strong>Subject</strong></td>
<td>Person</td>
<td>Actions</td>
</tr>
<tr>
<td><strong>Purpose</strong></td>
<td>Perfection</td>
<td>Correction</td>
</tr>
<tr>
<td><strong>Nature</strong></td>
<td>Open-ended</td>
<td>Close-ended</td>
</tr>
<tr>
<td></td>
<td>Ever-evolving</td>
<td>Fixed</td>
</tr>
<tr>
<td><strong>Focus</strong></td>
<td>Internal process</td>
<td>External behavior</td>
</tr>
<tr>
<td><strong>Standard</strong></td>
<td>Maximum effort</td>
<td>Minimum</td>
</tr>
<tr>
<td></td>
<td>Constant effort</td>
<td></td>
</tr>
<tr>
<td><strong>Regulatory agent</strong></td>
<td>Self</td>
<td>Others</td>
</tr>
<tr>
<td><strong>Assessment</strong></td>
<td>Holistic</td>
<td>Decree act</td>
</tr>
<tr>
<td><strong>Sanction</strong></td>
<td>Psychological</td>
<td>Physical</td>
</tr>
</tbody>
</table>

As discussed earlier, Confucian ethics required the cultured to engage in self-cultivation as a mean to achieve perfection. In practical terms this meant self-control, not legal control, in enforcing Confucian ethics or state law. Self-control as an extension of state (legal) control is more onerous for the following reasons:
(1) The jurisdiction of (Qing) law was delimited. The jurisdiction of (Confucius) self-control was unlimited. Whereas legal control covered limited time, places, acts, and matters, self control covered all time, all places, all acts, and dealt with all matters pertaining the person.195
(2) Legal control (enforcement) was externally imposed. Self control (policing) was seen as internally directed.

195 The use of legal control to enforce Confucian ethics would have reduced the observed the jurisdictional differences between legal control and self-control. The close ended legal control scheme was being plied open by the open-ended ethical rules. However, legal control because of its inherent properties, i.e. limitations posed by language, tradition, and convention, could not be made to police things not properly delineated, classified, or enumerated. Self-policing has no such “artificial” limitation.
(3) Legal control (enforcement) was selective. Self-control (policing) was non-discriminate. Whereas law enforcement was strategically deployed to maximize its intended effect, self policing was naturally in place to monitor all of our ideas and conducts.

(4) Legal control (enforcement) was focused on the form, self-control (policing) was concerned with the substance. Whereas law enforcement looked for the manifestation of crime, self-policing looked for (the origin and root of the) crime itself.

(5) Legal control (enforcement) reached a person’s conduct, self-control (policing) reached a person’s mind.

(6) Legal control was sanctioned with physical (freedom) or material (money) deprivation (money, freedom). Self-control was sanctioned with psychological deprivation (shame).

(7) Legal control (enforcement) was exposed to mistakes. Self-control (policing) was susceptible to no errors.

(8) Legal control (enforcement) was effective some of the times. Self-control (policing) was effective all the time.

**Table II: Legal control vs. self-control**

<table>
<thead>
<tr>
<th></th>
<th>Legal-control</th>
<th>Self-control</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction</td>
<td>Limited</td>
<td>Unlimited</td>
</tr>
<tr>
<td>Enforcement target</td>
<td>Selective</td>
<td>Non-discriminate</td>
</tr>
<tr>
<td>Enforcement mode</td>
<td>External</td>
<td>Internal</td>
</tr>
<tr>
<td>Enforcement focus</td>
<td>Form</td>
<td>Substance</td>
</tr>
<tr>
<td>Enforcement reach</td>
<td>Conduct</td>
<td>Thought (motive, intent, state of mind)</td>
</tr>
<tr>
<td>Sanction</td>
<td>Physical or material</td>
<td>Psychological</td>
</tr>
<tr>
<td>Error</td>
<td>Some</td>
<td>None</td>
</tr>
<tr>
<td>Effectiveness</td>
<td>Sometimes</td>
<td>All the time</td>
</tr>
</tbody>
</table>

The cultured person who was expected to be self-controlled had to labor under a total control system which was unlimited in scope, policed internally, enforced punctiliously, sanctioned psychologically, seeking for the truth, probing of the mind, and never subject to a mistake. Self-control was thus a much more demanding and exacting form of social control than legal control.

An effloresce ethical code enforced by an ever present self-control scheme was possibly the most restrictive form of social control ever invented by man. The cultured people in China
was exposed to just such an all embracing system of control as a result of the Confucianization of the law.

To conclude, the analysis and discussion of relevant cases in this paper leaves very little doubt that the cultured people in the Qing courts were subjected to more restrictive\textsuperscript{196} - expansive, restrictive, demanding -judicial making norms and more protective as well as being afforded more protective judicial procedure rules. This resulted from the “Confucianization of the law.” This finding is contrary to the common belief that the cultured people in imperial China were universally treated favorably under the law.

\textsuperscript{196} See note 13, supra.