

# DEBATES ON MUTILATING CORPORAL PUNISHMENTS AND THEORIES OF PUNISHMENT IN TRADITIONAL CHINESE LEGAL THOUGHT

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## DEBATES ON MUTILATING CORPORAL PUNISHMENTS AND THEORIES OF PUNISHMENT IN TRADITIONAL CHINESE LEGAL THOUGHT

Norman P. HO

### *Abstract*

*One of the most enduring jurisprudential debates throughout Chinese legal history concerned mutilating corporal punishments (hereinafter referred to as “MCPs”; in Chinese, rouxing 肉刑). MCPs—which can trace their roots back to Chinese high antiquity—included tattooing on the face (mo 墨), amputation of the nose (yi 劓), amputation of the left foot, right foot, or both (yue 刖), and castration (gong 宫). MCPs were used by the states throughout the Warring States Period and into the Qin Dynasty. They were abolished by Emperor Wen of the Han Dynasty in 167 B.C. and replaced with punishments such as penal servitude, hard labor, and beating. However, for several centuries after their abolition, there continued to be calls by certain officials for the reinstatement of MCPs in the criminal law. This Article sets forth and explains the recorded key debates (i.e., debates and/or positions of which we have historical records of what was actually said/written by officials participating in the debates), starting from the Han Dynasty (i.e., Emperor Wen’s decision to abolish the MCPs), and proceeding into the later Han Dynasty, the Three Kingdoms and Wei-Jin periods, the Tang Dynasty, and the Song Dynasty. This Article also provides full translations of the debates that have never (to my best knowledge) been previously translated into English. This Article makes the following arguments: first, from the Han Dynasty to the Song Dynasty, the debates and the ideas presented therein did not really change (both in the anti-MCP reinstatement and pro-MCP reinstatement camps), which shows that there was a continuity of views regarding the purpose of punishment throughout premodern Chinese legal thought. The second argument connects the MCP debates with the literature on punishment theory more broadly. I argue that the MCP debates—as a window into understanding Chinese legal thought more generally—show that officials in premodern China justified punishment primarily on what we would describe as “consequentialist” bases, using the language of punishment theory scholarship. In the end, the MCP debates perhaps reveal what is unique about Chinese theories of punishment (as compared to Western theories of punishment)—that punishment was also justified based on appeals to the authority of history and antiquity.*

### I. INTRODUCTION

One of the best ways we can understand the legal thought and legal culture of any jurisdiction is to identify and examine its important jurisprudential debates, especially those that continued and persevered throughout various time periods. Doing so gives us a glimpse into how actors in the legal system thought about law and how such beliefs and assumptions about law changed (or remained static) in the development of that jurisdiction’s legal system.

To better understand the development of traditional Chinese law,<sup>1</sup> this Article identifies and focuses on one of the most enduring jurisprudential debates in traditional Chinese law – debates on mutilating corporal punishments (hereinafter referred to as “MCPs”) in Chinese law and specifically, whether they should be reinstated in the penal law. In these debates, MCPs generally referred to the punishments of tattooing (*mo* 墨), amputation of the nose (*yi* 劓), amputation of one (right or left) foot or both feet (*yue* 刖), and castration (*gong* 宫). The origins of such MCPs can be traced to the sage kings in Chinese prehistory, where they were widely used under the penal laws of the Zhou (1045 – 221 B.C.) and Qin (221 – 206 B.C.) dynasties.<sup>2</sup> They were officially abolished by Emperor Wen of the Han Dynasty (r. 180 – 157 B.C.) in 167 B.C. and replaced with other punishments.<sup>3</sup> However, after Emperor Wen’s abolition of MCPs, there were continued calls by various officials at the highest levels of the government bureaucracy from the Han Dynasty through the Song Dynasty for the reinstatement of MCPs in the penal law. They were debated by other high-ranking officials who believed that MCPs should remain abolished.

This Article sets forth and analyzes the content of such debates and positions expressed by officials therein that have been recorded in Chinese historical sources (i.e., the debates over MCPs and positions expressed therein of which we have sufficiently detailed historical records of what was actually said and/or written by officials participating in the debates and not just brief sentences in the historical record that simply record “official A was against reinstating MCPs”)<sup>4</sup> starting from the Han Dynasty in 167 B.C.

<sup>1</sup> By “traditional Chinese law” (or its various permutations, such as the “traditional Chinese legal system” or “traditional Chinese legal thought”), I refer to Chinese law in the period from Chinese antiquity up to 1911 (i.e., dynastic Chinese law).

<sup>2</sup> Geoffrey MacCormack, *Punishment: Chinese Law, Overview*, 5 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 24, 24-26 (Stanley N. Katz ed., 2009).

<sup>3</sup> KLAUS MÜHLHAHN, CRIMINAL JUSTICE IN CHINA: A HISTORY 30 (2009).

<sup>4</sup> Unfortunately, historical records do not always give us perfect, complete records of each side in a debate at a particular point in time, so we may only have the recorded position of only one particular side in some cases. This, however, does not prevent us from analyzing the various positions in the pro- and anti-MCP camps and how they have changed over time. This Article does not purport to provide an account of every single MCP debate from the Han to Song Dynasty. But, I have tried to identify what I consider to be the major contributions to this debate.

(Emperor Wen's abolition of MCPs), and proceeding into the later Han Dynasty, the Three Kingdoms & Jin dynasty, the Tang Dynasty, and the Song Dynasty.<sup>5</sup> This Article specifically identifies and covers the MCP debates at the following points in time as set forth in the table<sup>6</sup> below (for ease of reference):

Dynasty and Year	Official(s) and Positions
Han Dynasty, 167 B.C.	Emperor Wen of the Han Dynasty 汉文帝 (anti-MCP) <sup>7</sup>
Han Dynasty, ~111 A.D.	Ban Gu 班固 (32 – 92 A.D.) (more pro-MCP) <sup>8</sup>
Han Dynasty, ~208 A.D.	Kong Rong 孔融 (153 – 208 A.D.) (anti-MCP)
Jin Dynasty, ~289 A.D.	Liu Song 刘颂 (d. 300 A.D.) (pro-MCP)
Jin Dynasty, ~318 A.D.	Wei Zhan 卫展 (c. 4th century A.D.) (pro-MCP)  Wang Dao 王导 (276 – 339 A.D.), He Xun 贺循 (260 – 319 A.D.), Ji Zhan 纪瞻 (253 – 324 A.D.) et al. (pro-MCP)  Diao Xie 刁协 (d. 322 A.D.), Xue Jian 薛兼 (255 – 322 A.D.) et al. (lean toward pro-

<sup>5</sup> This Article stops at the Song Dynasty (inclusive) as most of the recorded (and most often studied) in the Chinese-language scholarly literature) pivotal debates on MCPs occurred from the Han to Song dynasties, especially in the Han-Tang transition. This is not to say that there were no debates over the restitution of MCPs in later dynasties, but they are outside the purview of this Article. To cover every single Chinese dynasty from the Han Dynasty to the end of the Qing Dynasty would likely require a book-length treatment.

<sup>6</sup> The table below is adapted from the table in Cai Liying (蔡丽影), *Xilun Wei Jin Shiqi Huifu Rouxing zhi Zheng* (析论魏晋时期恢复肉刑之争) [*An Analysis and Discussion of MCP Debates in the Wei-Jin Period*], 4 SHANGPIN YU ZHILIANG (商品与质量) [THE MERCHANDISE AND QUALITY] 158 (2012). I will not reproduce the Chinese characters or birth/death years for the officials in later sections of the Article. Note also that the text in brackets in this citation and all other citations to Chinese-language sources are English translations of the title of the Chinese-language article, book, and/or journal. The English translations of citation information are for reference only. Wherever possible I have tried to use the English translations actually used by the Chinese-language article, book, and/or journal (even if such translation has syntax or errors). Otherwise, the titles are translated by myself.

<sup>7</sup> In this Article, for the sake of convenience, I use the terms “anti-MCP” to refer to positions which opposed the reinstatement of MCPs. However, to save space, rather than write out “anti-reinstatement of MCPs” each time, I have decided to simply use “anti-MCP.”

<sup>8</sup> In this Article, for the sake of convenience, I use the terms “pro-MCP” to refer to positions which supported the reinstatement of MCPs. However, to save space, rather than write out “pro-reinstatement of MCPs” each time, I have decided to simply use “pro-MCP.”

	MCP but set forth a compromise)  Zhou Yi 周顗 (269 – 322 A.D.), Cao Yan 曹彦 (4th century A.D.) et al. (anti-MCP)  Wang Dun 王敦 (266 – 324 A.D.) (anti-MCP)
<b>Jin Dynasty, ~403 A.D.</b>	Cai Kuo 蔡廓 (379 – 425 A.D.) (expressed both anti-MCP and pro-MCP views)
<b>Tang Dynasty, ~806 A.D.</b>	Bai Juyi 白居易 (772 – 846 A.D.) (anti-MCP)
<b>Song Dynasty, 12th century A.D.</b>	Zhu Xi 朱熹 (1130 – 1200 A.D.) (pro-MCP)  Chen Liang 陈亮 (1143 – 1195 A.D.) (anti-MCP)

This Article also provides full English translations of many of these debates, the full text of which have never (to my best knowledge) been previously fully translated into any Western language. Furthermore, this Article (to my best knowledge) represents the first major, more comprehensive scholarly study of debates over the reinstatement of MCPs in any Western language.<sup>9</sup> In addition, while there is very important Chinese-language scholarship on these debates, most of the existing Chinese-language scholarship focus on debates over MCPs in one particular dynasty and/or the positions of one particular thinker, and therefore do not study the debates over a longer time frame; or, if they take a longer time view, they do not look deeply into the thoughts of specific officials and/or how the debates changed or stayed the same.<sup>10</sup>

<sup>9</sup> There is an English-language article published in a Chinese journal, but it is very short (1 page in length) and covers mostly reinstatement of MCP debates in the Jin Dynasty; see Wen Xiao, *Discussion on the Abolishment and Recovery of Corporal Punishment in Xingfa Zhi of JinShu*, 15 KEJI XINXI (科技信息) [SCIENCE AND TECHNOLOGY INFORMATION] 214 (2010).

<sup>10</sup> See, e.g., Cai, *supra* note 6 (focusing on MCP debates in the Wei-Jin period). See also Xu Chao (徐超), *Jinshu Xingfazhi zhong de Rouxing Feifu zhi Zheng* (《晋书：刑法志》中的肉刑废复之争) [Debates on the Reinstatement of MCPs in the Monograph of Criminal Law in the Book of Jin], 6 CANG SANG (沧桑) [VICISSITUDES] 38 (2014) (focusing on MCP debates in the Jin period); See also Li Zhiyun (李祉芸), *Wei Jin Shiqi Rouxing Cunfei zhi Zheng Tanxi: Jian Lun Zhongguo Gudai Rouxing Cunzai de Turang* (魏晋时期肉刑存废之争探析：兼论中国古代肉刑存在的土壤) [An Analysis of the Debates over Reinstatement of MCPs in the Wei-Jin Period: Supplemented with a Discussion of the Existence of MCPs in Ancient China], 12 FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND

Therefore, this Article hopes to be a more *comprehensive* study of the debates over MCPs in traditional Chinese law.

I make the following arguments in this Article. First, from the Han Dynasty to the Song Dynasty, the debates over the reinstatement of MCPs and the ideas and positions presented therein did not really change (both in the anti-MCP and pro-MCP reinstatement camps), which arguably shows a continuity of views regarding the purpose of punishment throughout traditional Chinese legal thought. The second argument aims to connect the debates over the reinstatement of MCPs with the legal theory scholarly literature on punishment theory more broadly. Specifically, I argue that the MCP debates—as a window into understanding Chinese legal thought more generally—show that officials in traditional China justified punishment primarily (but not exclusively) on what punishment theorists would describe as consequentialist bases (i.e., justifying certain punishment based on perceived beneficial consequences such punishment would bring or lead to). In the end, the MCP debates may reveal what is perhaps more unique about traditional Chinese theories of punishment (as compared to Western theories of punishment)—that punishment was also justified based on appeals to the authority of antiquity and practices in antiquity. In fact, as this Article will also show, one thing almost all the participating officials (both pro-MCP and anti-MCP)

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SOCIETY] 227 (2017) (focusing on MCP debates in the Wei-Jin period); *See also* Hu Kun (胡坤), *Shi Xi Wei Jin Shiqi Huihu Rouxing zhi Yi* (试析魏晋时期恢复肉刑之议) [*An Analysis of the Debates over Reinstatement of MCPs in the Wei-Jin Period*], 7 FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY] 370 (2009) (focusing on MCP debates in the Wei-Jin period); *See also* Li Wei (李伟), *Rou xing zai Liang Song Shiqi de Sixiang Lunzheng yu Zhidu Biaoda* (肉刑在两宋时期的思想论争与制度表达) [*System Expression and Ideological Debates of Corporal Punishment During the Two Song Dynasties*], 11(2) HENAN SIFA JINGGUAN ZHIYE XUEYUAN XUEBAO (河南司法警官职业学院学报) [J. HENAN JUDICIAL POLICE VOCATIONAL COLLEGE] 49 (2013) (focusing on MCP reinstatement debates in the Song Dynasty); *See also* Zhang Zhenying (张震英) & Shi Ling (石玲), *Wenming yu Yeman de Jiaoliang: Zhongguo Lidai Rouxing Xingfei Shulun* (文明与野蛮的较量：中国历代肉刑兴废述论) [*Dispute Between Civilization and Barbarism: The Expounding of Corporal Punishment in Ancient China*], 24(1) TONGHUA SHIFAN XUEYUAN XUEBAO (通化师范学院学报) [J. TONGHUA TEACHERS' COLLEGE] 58 (2003) (takes a longer time view and covers MCP debates across time but focuses primarily on arguing that MCPs are savage, primitive, and antithetical to civil and democratic society); *See also* Zhang Zhaokai (张兆凯), *Lun Gudai Rouxing Cunfei zhi Zheng* (论古代肉刑存废之争) [*Discussion of Abolishment and Existence of Ancient Corporal Punishment*], 27 XIANGTAN DAXUE SHEHUI KEXUE XUEBAO (湘潭大学社会科学学报) [SOC. SCI. J. XIANGTAN U.] 56 (2003) (covers a longer time frame but focuses primarily on the Wei-Jin period and on the question of why so many officials supported MCPs).

had in common is that they sought to justify their positions on history and antiquity.

This Article proceeds as follows: Part I provides an overview of MCPs, their history, and their significance in traditional Chinese law more generally. Part II covers the recorded positions in the MCP debates in the Han Dynasty, while Part III looks at the recorded positions in the MCP debates in the Jin Dynasty. Part IV covers a recorded position in the MCP debates in the Tang Dynasty, and Part V covers two important recorded positions in the MCP debate in the Song Dynasty. The Article then concludes in Part VI.

## II. OVERVIEW OF THE HISTORY, DEVELOPMENT, AND SIGNIFICANCE OF MCPs IN TRADITIONAL CHINESE LAW

MCPs were part of the so-called “Five Punishments” (*wuxing* 五刑), which was the generic term used in traditional China to describe the standard, main punishments in the penal legal system.<sup>11</sup> The specific punishments which comprised the Five Punishments changed over time.<sup>12</sup> Chinese historical sources claim that it was the Miao barbarian peoples who invented the Five Punishments, which ultimately led to their downfall due to their reckless overuse of the Five Punishments.<sup>13</sup> There is also archaeological evidence to suggest that MCPs—namely, the cutting off of limbs—were used in the Shang Dynasty (1750 – 1122 B.C.).<sup>14</sup> During the Zhou Dynasty (1045 – 221 B.C.), the Five Punishments were tattooing,<sup>15</sup> amputation of the nose, amputation of one or both legs, castration, and the death penalty.<sup>16</sup> Within the Five Punishments, the MCPs refer to the first four punishments—i.e., tattooing, amputation of the nose, amputation of one or both legs, and castration—as they involved physical, actual mutilation of the convict’s body but should not result in his death. Penal servitude (forced labor for convicts) was

<sup>11</sup> MÜHLHAHN, *supra* note 3, at 29.

<sup>12</sup> MacCormack, *supra* note 2, at 24.

<sup>13</sup> MÜHLHAHN, *supra* note 3, at 29.

<sup>14</sup> BRIAN E. MCKNIGHT, LAW AND ORDER IN SUNG CHINA 328 (1992).

<sup>15</sup> The punishment of tattooing entailed carving and then rubbing black ink into the convict’s face, cheekbones, or forehead. *See* ZHANG JINFAN, THE TRADITION AND MODERN TRANSITION OF CHINESE LAW 116 (Zhang Lixin et al. trans., 2014).

<sup>16</sup> MÜHLHAHN, *supra* note 3, at 29.

later introduced in the Spring and Autumn Period (771 – 476 B.C.), which probably reduced (but did not eliminate) the use of MCPs as legal punishment.<sup>17</sup> There is evidence to suggest that the Qin Dynasty (221 – 206 B.C.) increased the use of MCPs.<sup>18</sup> MCPs used under Qin criminal law included shaving of the beard or head, cutting off the nose, amputation of one or both feet, castration, and tattooing the forehead.<sup>19</sup> Hard labor was also used as a form of punishment, with sentences ranging from one to six years.<sup>20</sup>

After the fall of the Qin, it is traditionally believed that Liu Bang, founder of the Han Dynasty (206 B.C. – 220 A.D.), abolished the harsh, cruel Qin laws, replacing them with simple regulations, setting forth that murder was to be punished by death, and battery and robbery by an appropriate sentence.<sup>21</sup> However, the early Han Dynasty generally continued the Qin system of punishments, which included the death penalty (e.g., slicing in half at the waist or decapitation with exposure of the head), shaving of the beard or hair, tattooing of the face, cutting off the right or left foot, castration, and cutting off the nose.<sup>22</sup> Hard labor and exile, as in the Qin, was also used in the Han Dynasty penal system.<sup>23</sup> An important event in the history of the development of MCPs occurred when Emperor Wen (r. 180 – 157 B.C.) abolished MCPs as forms of legal punishment in 167 B.C., replacing them generally with beatings and hard labor, although castration was still occasionally used, and the death penalty was retained.<sup>24</sup> Indeed, beating became the most serious non-capital

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<sup>17</sup> *Id.* at 30; MCKNIGHT, *supra* note 14, at 330. It is important to note that “penal servitude” in the traditional Chinese law context was *not* imprisonment. Rather, penal servitude was a form of hard labor as criminal punishment; convicts often had their heads shaved and/or wore an iron collar, and were forced by the state to do a variety of labor, such as building roads, public buildings, and/or cultivating land. See Geoffrey MacCormack, *Penal Servitude in Chinese Law*, 4 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 292, 292-93 (Stanley N. Katz ed., 2009).

<sup>18</sup> MCKNIGHT, *supra* note 14, at 331.

<sup>19</sup> Robin D.S. Yates, *Chinese Law, History of: Eastern Zhou, Warring States (464-221 B.C.E.), and Qin State and Empire (c. 350-206 B.C.E.)*, 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 406, 408 (Stanley N. Katz ed., 2009).

<sup>20</sup> *Id.*

<sup>21</sup> Robin D.S. Yates, *Chinese Law, History of: Han Empire (206 B.C.E.-220 C.E.)*, 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 412, 412 (Stanley N. Katz ed., 2009).

<sup>22</sup> *Id.* at 417.

<sup>23</sup> *Id.*

<sup>24</sup> MacCormack, *supra* note 2, at 25. Some MCPs like castration and tattooing were still occasionally used in the Han even after 167 B.C., but they did not comprise the standard punishments under Han law. See MacCormack, *supra* note 2, at 25. For example, Emperor Wu (r. 141 – 87 BC), in



punishment that could be imposed.<sup>25</sup> More specifically, under Emperor Wen's important reforms, convicts who had been sentenced to the MCP of tattooing were instead punished by the wearing of a cangue, shaving of the head, or around 4 years of forced labor.<sup>26</sup> Those who had been sentenced to amputation of the nose were instead punished with beating—specifically, 300 blows of the bastinado.<sup>27</sup> Those who had been originally sentenced to amputation of the left foot were instead punished with 500 blows of the bastinado, while those who had originally been sentenced to amputation of the right foot were instead punished by death.<sup>28</sup> The next emperor, Emperor Jing (r. 157 – 141 B.C.), made further reforms, reducing the number of blows substantially (500 blows was ultimately reduced to 200 blows, and 300 blows was ultimately reduced to 100 blows) and also more strictly regulating the thickness and weight of the bastinado and mandating that only one person can administer the blows (i.e., it was not permitted to change the person administering the blows when the previous punisher got tired).<sup>29</sup> By 220 A.D., basically all MCPs (including castration) were completely abolished and replaced with exile, penal servitude, beating, and the death penalty.<sup>30</sup> The Five Punishments were later standardized in the Sui (581 – 618 A.D.) and Tang (618 – 907 A.D.) dynasties and consisted of beating with the light stick (*chi* 笞), beating with the

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punishing the famous historian Sima Qian (d. 86 BC), ordered him to either commit suicide or submit to castration; Sima Qian, in order to complete his epic historical work *Shiji* (Records of the Grand Historian), chose the latter.

<sup>25</sup> Geoffrey MacCormack, *Beating and Whipping in Chinese Law*, 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 283, 283 (Stanley N. Katz ed., 2009).

<sup>26</sup> Gao Xun (高珣) et al., *Zhongguo Fazhishi: Anli yu Tubiao* (中国法制史：案例与图表) [Chinese Legal History: With Case Examples and Illustrations] 98-99 (2010); Chen Jiawei (陈佳维), *Lielun Zhongguo Gudai de Wuxing Zhidu* (略论中国古代的五刑制度) [A Brief Discussion of the Five Punishments in Ancient China], 7 SHEHUI KEXUE LUNTAN (社会科学论坛) [TRIBUNE SOC. SCI.] 242, 244 (2014) and also Long Yi (隆奕), *Zhongguo Gudai Wuxing Zhidu de Lishi Kaocha* (中国古代五刑制度的历史考察) [A Historical Exploration into the Five Punishments System of Ancient China], 12 FAZHI YU JINGJI (法治与经济) [RULE OF LAW AND ECONOMY] 187, 187-88 (2011).

<sup>27</sup> Gao Xun et al., *supra* note 26, at 98-99.

<sup>28</sup> *Id.* This substitution caused a lot of controversy both during and after the Han Dynasty and will be discussed later in this Article.

<sup>29</sup> *Id.*

<sup>30</sup> MÜHLHAHN, *supra* note 3, at 30.

heavy stick (*zhang* 杖), penal servitude (*tu* 徒), exile (*liu* 流), and death (*si* 死) (by strangulation or decapitation in the Tang).<sup>31</sup>

Having briefly covered the history and development of MCPs in traditional Chinese law, what was the significance of MCPs? MCPs were so powerful in traditional China because it was believed that they had impact in both the physical and spiritual worlds. They were, as Brian McKnight has put it, the “most striking demonstrations of the power of the ruler, sending the loudest and clearest message to both men and spirits.”<sup>32</sup> They were a symbol of state power, a physical inscription of the ruler’s authority over the convict’s body.<sup>33</sup> Because the convict was (usually) still alive after the imposition of the MCP, the permanent injuries served as a constant reminder to him, made his life physically and emotionally difficult, and marked him with a scarlet letter—these all made it very challenging for him to properly function in society.<sup>34</sup> MCPs had even deeper spiritual significance as well. Traditional Confucian beliefs dictated that people inherited their bodies from their parents and their ancestors, and thus people had a duty at death to return their bodies in good form as an expression of respect and gratitude to their parents and ancestors.<sup>35</sup> The Confucian reverence and worship of ancestors only served to further reinforce these beliefs and duties.<sup>36</sup> The infliction of MCPs, however, made fulfilling this duty impossible, hence shaming those who had been punished with MCPs as “partial human beings.”<sup>37</sup> A mutilated body was also seen as a mutilated spirit.<sup>38</sup>

Having briefly set out the concept, history, development, and significance of MCPs in traditional China, we now proceed to our examination of the MCP debates in the Han Dynasty.

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<sup>31</sup> MacCormack, *supra* note 2, at 25.

<sup>32</sup> MCKNIGHT, *supra* note 14, at 330.

<sup>33</sup> Robin D.S. Yates, *Mutilation in Chinese Law*, 4 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 196, 196 (Stanley N. Katz ed., 2009).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> MCKNIGHT, *supra* note 14, at 330.

<sup>37</sup> Yates, *Mutilation*, *supra* note 33, at 196.

<sup>38</sup> MCKNIGHT, *supra* note 14, at 330.

### III. HAN DYNASTY MCP DEBATES

This section analyzes the recorded MCP debates in the Han Dynasty—specifically, the anti-MCP position of Emperor Wen (who abolished MCPs in 167 B.C.), the pro-MCP leaning positions of Han Dynasty historian Ban Gu (32 – 92 A.D.), and the anti-MCP positions of Han Dynasty official Kong Rong (153 – 208 A.D.).

The Han Dynasty adopted Confucianism as the state orthodoxy, rejecting the Legalist philosophies of the Qin. However, in terms of law, the Han relied heavily on the codification system and legal institutions from the Qin period.<sup>39</sup> As discussed in the preceding section, the early Han Dynasty generally continued to use the legal punishments from the Qin period, including MCPs such as shaving of the beard and hair, tattooing the face, amputation of the left or right foot, and castration, until the abolition of MCPs in 167 B.C. by Emperor Wen.<sup>40</sup>

#### *A. Emperor Wen of the Han Dynasty*

Emperor Wen was generally the first figure in traditional Chinese history who made specific arguments regarding MCPs and of which we have extant records of what he said. Emperor Wen was emotionally moved to abolish MCPs due to an event which occurred in the thirteenth year of his reign, when a young woman tried to plead for mercy for her father, an official entrusted with overseeing granaries who had committed a crime. Emperor Wen's edict ordered him to be arrested and jailed in the capital city, Chang'an, awaiting punishment (it appears the man was to be punished by an MCP, although the historical record does not make clear which particular MCP).<sup>41</sup> This man had five daughters, but no sons.<sup>42</sup> His youngest daughter, distraught and deeply saddened at her father's upcoming punishment, traveled to Chang'an and presented a letter to Emperor Wen which said, in part: "... those who have been mutilated cannot

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<sup>39</sup> ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (4th ed.) 16 (2011).

<sup>40</sup> Yates, *Chinese Law, History of: Han Empire*, *supra* note 21, at 413.

<sup>41</sup> A.F.P. HULSEWÉ, REMNANTS OF HAN LAW, VOLUME 1: INTRODUCTORY STUDIES AND AN ANNOTATED TRANSLATION OF CHAPTERS 22 AND 23 OF THE HISTORY OF THE FORMER HAN DYNASTY 334 (1995).

<sup>42</sup> *Id.* at 334.

again attach (the lost member). Although later they would have desired to correct their faults and to renew themselves, that road cannot be followed.”<sup>43</sup> She then offered to sacrifice herself into service as a government slave so that her father could escape punishment.<sup>44</sup>

Emperor Wen was extremely moved, and the *Book of Han* records his remarks against MCPs and justifying their abolition:

If the people nowadays commit transgressions, while teaching is not extended to them, the punishments are already applied to them. Maybe they desired to change their actions and become good, but to the road thereto there is no means of access. We greatly pity this. When the mutilating punishments are applied, members are cut off and the skin is carved, (so that) to the end of one’s life they will not grow (again). How painful are these punishments and how unvirtuous (am I). How could this ever correspond to the idea of “being the father and the mother of the people”? Let the mutilating be abolished, and let there be (something) to replace them . . .<sup>45</sup>

Above, Emperor Wen made a couple of arguments against MCPs. First, he believed MCPs were cruel—they were “painful” and also resulted in the permanent removal of limbs. Second, he believed the permanence of and everlasting shame inflicted by MCPs did not provide adequate opportunity for the offender to be rehabilitated or to reform himself—the “road” that the offender could take toward the good would be cut off by the MCPs. Third, he seemed to be against MCPs also because he was concerned they would taint his current and also historical reputation, casting him as a violent leader who did not care for his people. Thus, in sum, he made certain consequentialist arguments—e.g., that MCPs stand in the way of reformation and education of criminals, which would not be ideal—and also took issue with the very morality of MCPs, pointing out their violent and cruel nature.

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<sup>43</sup> Quoted and translated by Hulsewé in *id.*

<sup>44</sup> *Id.* at 334.

<sup>45</sup> Quoted and translated by Hulsewé in *id.* at 334-35.

*B. Ban Gu*

Ban Gu was a historian in the Han Dynasty who is best known today as the author of the *Book of Han* (*Hanshu* 汉书), the official dynastic history of the Han Dynasty. In the *Book of Han*, Ban Gu also set forth his own views on MCPs, evaluating Emperor Wen's decision to abolish MCPs in 167 B.C. and to replace them with punishments such as beating and forced labor (which included shaving of the head and/or wearing of the cangue). His recorded views point out the negative effects of Emperor Wen's abolition of MCPs:

Moreover, the abolition of the mutilating punishments is fundamentally the desire to keep people intact thereby. Now moving away one degree from (the punishment of) shaving (the head) and (wearing) an iron collar, one enters unexpectedly into (the category of) the supreme penalty, (but) catching people by means of the death (penalty) is missing the original intention (of preserving them). That therefore those who are made to die are to be counted by tens of thousands annually is brought about by the severity of the punishments. (On the other hand), if we turn to evils like theft by breaking and climbing in, or wounding people in a fit of anger, or men and women abandoning themselves to lechery, or officials committing villainous graft, the punishment of "shaving (the head) and (wearing) an iron collar" is far from sufficient to repress them. Therefore, those who are punished are to be counted annually by hundreds of thousands. That the people do not stand in awe and have even less sense of shame, is brought about by the lightness of the punishments.<sup>46</sup>

Above, Ban Gu expressed some disquiet with Emperor Wen's abolition of the MCPs. He pointed out that abolishing MCPs actually *increased* the severity of the penalty for those who had originally been sentenced with MCPs. Recall, after all, that Emperor Wen had replaced the MCP of amputation of the right foot with the death penalty. Therefore, many offenders who would have had their right foot amputated but their lives still preserved would now be sentenced

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<sup>46</sup> Quoted and translated by Hulsewé in *id.* at 348-49.

to the harsher penalty of execution. Ban Gu pointed out that this result went against Emperor Wen's "original intention" to "preserve" and protect the lives of offenders. This can be understood as a consequentialist argument—Ban Gu was arguing here that, for some offenders, abolition of MCPs leads to undesirable (and absurd) consequences which go against the spirit of Emperor Wen's reforms.

Ban Gu also pointed out that the replacement of some MCPs with punishments of shaving the head or wearing an iron cangue would not be severe *enough* to deal with serious crimes such as lechery and official corruption, crimes which deserve harsher penalties. He advanced another consequentialist argument against Emperor Wen's abolition of MCPs—in his view, abolition of some MCPs would lead to a reduced deterrent effect to repress certain serious crimes, which in turn would lead people to disrespect the law and to have "less sense of shame." This argument can also be understood as retributivist—Ban Gu did not believe that the abolition of MCPs brought about proper retribution for certain crimes by under-punishing them (i.e., the criminal did not get what he truly deserved due to Emperor Wen's abolition of MCPs).

### C. Kong Rong

Kong Rong was a prominent writer and also an official in the later Han Dynasty who served under the warlord Cao Cao (c. 155 – 220 A.D.) (posthumously known as King Wu of the Wei, who established the foundations of the Wei Dynasty in the Three Kingdoms period). The time in which Kong Rong lived was characterized by chaos and law-breaking, and the existing criminal law and punishments were not seen as sufficient to solve these problems.<sup>47</sup> One prominent official who also served as an adviser to

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<sup>47</sup> Fang Xuanling (房玄龄) et al., *Jinshu* (晋书) [Book of Jin] 30.921 (Taipei TingWen Publishing Co. ed., 1980) [hereinafter in the citations, "Book of Jin"]. All citations to the *Book of Jin* will be in the format of "chapter.page number", which is the standard way of citation to such sources in the field of sinology. Note that this source is available for free online at the Academia ScriptaSinica database at <http://hanchi.ihp.sinica.edu.tw/ihp/hanji.htm>. According to the Academia Sinica, the ScriptaSinica, which was started in 1984 in an effort to digitize all key documents for traditional sinological studies, is the largest Chinese full-text data base of its scale. I should note that a popular edition for sinologists is the Zhonghua Book Company (Beijing) editions in hard copy, but in this Article, I have chosen to use the TingWen Publishing Company edition (i.e., the edition on the ScriptaSinica database) because it is freely available online, far more accessible to scholars, and equally authoritative. The *Book of Jin* is one of the 24 standard histories (*zhengshi*) and was written by a group of scholars led by Fang Xuanling

Cao Cao, Xun Yu (163 – 212 A.D.), urged Cao Cao to reinstate MCPs to bring order to society.<sup>48</sup> Kong Rong, however, memorialized against Xun Yu's proposal, arguing that MCPs were no longer appropriate for or fitting of the current times and that reinstatement would lead to a host of bad consequences. I provide my full translation of Kong Rong's memorial below, followed by my analysis:

In antiquity, society was simple and pure, and good and evil were clearly distinguished. Officials were upright, law and punishments were clear, affairs of state were simple, and governance was carried out without error. Thus, when the people committed crimes, they were willingly submitted to punishment. But in later dynasties, the political situation declined, the atmosphere became corrupt, decrees undermined the people's customs, and laws harmed education. Therefore, the *Analects* said: "The rulers have failed in their duties, and the people consequently have been disorganized, for a long time."<sup>49</sup> Now you desire to use mutilating corporal punishments to restrain the people, to use brutal punishments of cutting of limbs to abuse them—this does not accord with the common, natural principle of developing and changing in accordance with the needs of changing times. King Zhou of the Shang<sup>50</sup> cut off the legs of those who forded rivers in the winter mornings. All those under Heaven thought he was cruel and unprincipled. If across the Nine Provinces there were 1800 rulers who each had one of their subject's feet cut off, then there would be 1800 King Zhou's. Acting like this and yet desiring for society to be peaceful would be impossible. Furthermore, those who suffer mutilating corporal punishments

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(578-648). Compiled in 646 A.D., it consists of 130 chapters (*juan*) and covers the period from 265 to 420 A.D. See ENDYMION WILKINSON, CHINESE HISTORY: A NEW MANUAL 626, 635 (4th ed. 2015).

<sup>48</sup> Book of Jin, *supra* note 47, at 30.921.

<sup>49</sup> This is a quote from *Analects* (Lunyu 论语) 19.19. The full passage in *Analects* 19.19 reads: "When the Meng Family appointed Yang Fu to be their Captain of the Guard, he went to ask Master Zeng for advice. Master Zeng said, "It has been a long time since those above lost the Way, and so the people lack guidance. When you uncover the truth in a criminal case, proceed with sorrow and compassion. Do not be pleased with yourself." CONFUCIUS ANALECTS WITH SELECTIONS FROM TRADITIONAL COMMENTARIES 226 (Edward Slingerland trans., Hackett, 2003).

<sup>50</sup> King Zhou was the last ruler of the Shang Dynasty; he is considered by traditional Chinese historiography to have been a very cruel emperor and responsible for the downfall of the Shang.

will not have the will in the heir hearts to live. Once they are aware of this lack of will to live, many of them will engage in evil, and none will be willing to turn away from their evil ways toward good. Feng Sha rebelled in the state of Qi, Yin Lei brought disaster in the state of Song, Zhao Gao during the Qin, Yin Bu in the Han—all of them caused great disasters in society. Therefore, it can be seen that mutilating corporation punishments do not stop people from committing crimes. Even if one is as loyal as Yu Quan, as trustworthy as Bian He, as intelligent as Sun Bing, as treated unjustly as Xiang Bo, as talented as Sima Qian, as learned as Liu Xiang, if one day he receives brutal punishments under the knife, he shall be looked down upon by others for his entire life. If this really happens, then these historical events would not have happened: Tai Jia after his exile felt regret, Duke Mu of Qin trusted Meng Ming to help him establish himself as a hegemon, Chen Tang after his release killed Shan Yu by decapitation at Dulai, and Wei Shang after his pardon went to guard the border. Emperor Wen's abolishment of mutilating corporal punishments opened the road to turning away from evil and following the good, in order to reach the goals enumerated above. Therefore, it is said, rulers who understand principles and cultivate virtue are all able to formulate long-term plans and have deep consideration, to get rid of the harmful and promote the beneficial, and so they will not arbitrarily change their regulations, decrees, and laws.<sup>51</sup>

Above, Kong Rong began his anti-MCP memorial by arguing that MCPs were obsolete and not suited for the current, more complex times. In antiquity, people and society were simpler, and rulers were better, and so the imposition of MCPs worked better. The bulk of his memorial, however, is focused on more consequentialist arguments—i.e., that reinstatement of MCPs would bring about bad consequences in society. Using a variety of historical figures and historical events to prove his point, he continues Emperor Wen's argument that MCPs deny offenders the opportunity to reform themselves and become better. In Kong Rong's view, the cruelty and

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<sup>51</sup> Book of Jin, *supra* note 47, at 30.921. Unless otherwise indicated in the Article and/or in the footnotes, all translations of these primary source passages in this Article are mine.



permanence of MCPs would remove the will of the punished to live (given the shame and pain), which would lead them to evil. Kong Rong also argued that MCPs do not serve as effective deterrents to prevent crime. To support this point, Kong Rong cited examples of historical figures in Chinese antiquity who had suffered MCPs (castration, tattooing) and who still caused great disorder in society. He also brought up a number of positive figures in Chinese history (e.g., Tai Jia and Chen Tang) to argue that if Cao Cao reinstated MCPs, such figures and their positive contributions would no longer be nurtured. He ended his memorial by arguing that the abolition of MCPs was beneficial to society because it led people down the road of good. Furthermore, preserving Emperor Wen's abolition also, in Kong Rong's view, promotes the stability and constancy of a state's regulations and decrees, which should not be "arbitrarily" changed. In the end, the imperial court agreed with Kong Rong, and it did not reinstate MCPs.<sup>52</sup>

#### IV. JIN DYNASTY MCP DEBATES

The debates over reinstatement of MCPs or preserving their abolition grew more intense in the Jin Dynasty (which is comprised of both the Western Jin (265 – 316, A.D.), and the Eastern Jin (317 – 420, A.D.). The Jin penal code is no longer extant, but we know that it was lauded by the code of the Sui Dynasty (581 – 618, A.D.) for its equity of treatment, simplicity, and easy-to-apply provisions.<sup>53</sup> Punishments in the Jin Dynasty included the death penalty, penal servitude, beating with a light stick, and also redemption (using assets or money to pay for crimes committed).<sup>54</sup> Luckily, historical records have preserved many memorials prepared by various officials on both sides of the debate. This section will provide full translations and analyses of the surviving memorials and/or remarks of three MCPs debates that occurred in the years 289, 318, and 403, respectively. Specifically, the views of Jin Dynasty officials Liu

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<sup>52</sup> *Id.*

<sup>53</sup> Benjamin E. Wallacker, *Chinese Law, History of: Three Kingdoms, Qin, and Southern Dynasties (220-589 C.E.)*, 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 418, 419 (Stanley N. Katz ed., 2009).

<sup>54</sup> ZHANG, *supra* note 15, at 117.

Song (pro-MCP), Wei Zhan (pro-MCP), Wang Dao et al. (pro-MCP), Diao Xie et al. (pro-MCP leaning but setting forth a compromise), Zhou Yi et al. (anti-MCP), Wang Dun (anti-MCP), and Cai Kuo (expressed both pro-MCP and anti-MCP views) will be considered. Despite the greater frequency, intensity, and number of participants involved in the debates, I hope to show that both sides—similar to Emperor Wen, Ban Gu, and Kong Rong in the Han Dynasty—justified their positions largely on consequentialist grounds. They also relied heavily on arguments made in the Han Dynasty.

*A. Liu Song (289 A.D.)*

Liu Song was a prominent legal official in the Jin Dynasty, serving most notably as Chamberlain for Law Enforcement (*ting wei* 廷尉).<sup>55</sup> After he was appointed Chamberlain, Liu Song sent memorials on several occasions to the emperor advocating for the reinstatement of MCPs, but they were ignored by the throne.<sup>56</sup> He was, however, persistent, sending up a lengthy and detailed memorial again. I provide a full, uninterrupted translation of the memorial below, followed by my analysis:

In the past, I have presented memorials advocating for reinstating mutilating corporal punishments. Many years have passed, and my memorials have been placed aside and not discussed. I humbly believe that those who do not agree with my views] are wrongly clinging to Han Dynasty Emperor Wen's overrated interpretations of benevolence and are also neglecting and indeed violating the laws and legal punishments of the ancient sage kings. Nothing is graver than the failure to discuss [the question of reinstating mutilating corporal punishments. These days, capital punishment is excessive, and so many people have lost their lives. At the same time, other punishments are overly lax, and so even sentencing and punishing] offenders cannot stop evil breaking of laws. All of

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<sup>55</sup> I use Charles Hucker's translation for this official title. See CHARLES HUCKER, A DICTIONARY OF OFFICIAL TITLES IN IMPERIAL CHINA 512 (1985). For an overview of Liu Song's legal thought and life, see Norman P. Ho, *Chinese Legal Thought in the Han-Tang Transition: Liu Song's (d. 300) Theory of Adjudication*, 35 UCLA PAC. BASIN L. J. 155 (2018).

<sup>56</sup> Book of Jin, *supra* note 47, at 30.931.

these phenomena are due to the non-use of mutilating corporal punishments.<sup>57</sup>

The criminals who have been sentenced to imprisonment are generally types of people with evil and lawless dispositions. They left their hometowns and labored under difficult conditions in the mountains and valleys, suffering from hunger and cold. They became determined in their thinking not to live like this anymore. Even if there are honorable, law-abiding, and upright individuals, if they are confronted with death and yet are unwilling to die, they will all become thieves. How much more so with these persons with evil and lawless dispositions! Moreover, there is the phenomenon today of rich criminals who have been sentenced to penal servitude sending up their assets [to the state]. Once their assets are collected, these criminals are let go and can return to their homes. They are just like those who have never been sentenced. Poor people who become thieves and criminals are also enemies who are hard to control. Without punishments, criminal behavior cannot be stopped. Without rule by law, many lawless and evil people will brazenly do what they want. Designing and implementing law like this is weak and leaves holes. Therefore, we have constant escapes by prisoners, and cases of violent robbery and theft increase every day. There are many cases of prisoner escape daily—almost 10 cases. After the escapees are caught, their punishments must be increased; for each day they are on the run, one additional year should be added to their sentence—this is indeed equivalent to a life sentence. It is not realizable for prisoners to commit to turn away from evil and better themselves. However, their desires to escape and commit thievery are unstoppable. It is the current situation and state of affairs that has forced them to be like this!<sup>58</sup>

In ancient times, punishments were applied ultimately for the purpose and hope that one day, punishments would not be needed. It is the exact opposite these days. For those convicts who escape, if their hair grows in length over three inches, then

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 30.932.

they will again be subject to the punishment of cutting their hair. This is an example where previous punishments give rise to new, additional punishments. Adding one more year of forced labor is also a case where a previous penal sentence gives rise to a new, longer penal sentence. Those who have escaped and are on the run grow in number, and more and more criminals are also being detained and jailed. There are those who say that it is not possible to not pardon prisoners with amnesties. If we indeed pardon them, this is an example where punishments are unable to stop criminal activity and where criminal law cannot deal with evil and malice. It then follows that the populace will know that law is unable to control treachery and evil, and then they will get together to conspire to commit malicious deeds. Every month and every year there are different [such cases]. Therefore, in recent years, evil, violent, and bullying acts have inundated every corner of the realm. Those who have memorialized in opposition to mutilating corporal punishments have not considered the reason for such a phenomenon, and they continue to say mutilating corporal punishments have a bad reputation and do not sound good. It must be asked—mutilating corporal punishments have a bad reputation and do not sound good vs. thievery cannot be stopped—which is more serious?<sup>59</sup>

The sage kings had profound reasons for establishing mutilating corporal punishments. Such reasons and matters can be known and explained. The rationale [for mutilating corporal punishments] is not just that the evil and lawless will stop their evil conduct because they fear the pain of losing one of their limbs. Mutilating corporal punishments remove their tools for criminal and evil acts. Those who are evil and treacherous will, because of mutilating corporal punishments, be unable to do whatever they want. Evil and treachery are stopped at the root—this is indeed the wisest rationale and reason. Amputate the feet of those who prison break, and they are unable to escape in the future. Amputate the pair of hands of those who steal, and it is impossible for them to steal again. Amputating the reproductive organs of those who commit illicit sexual crimes follows the same logic. There is no better way to get rid

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<sup>59</sup> *Id.*

of evil and close the door to catastrophes. Taking such an approach is not futile. After the criminals have been punished with mutilating corporal punishments, they will each go home, and their parents, wives, and children will look after them and take care of them. They will no longer be wandering about destitute. There will of course be difficulties at first, but once their wounds have healed, they can still perform labor services. This is in accordance with the system in antiquity. They can also be assigned different work to do in accordance with the current times and situation. Even though they have become handicapped due to the mutilating corporal punishments, they have not been abandoned. Rather, what they have worried about [i.e., doing bad and committing harm] have been eliminated. And, furthermore, the important principle of human relations of giving birth to sons and daughters, reproducing, and growing have not been harmed.<sup>60</sup>

At present, we should reduce the scope of capital punishment; [rather than use capital punishment for the crimes of] jailbreaking multiple times, rape, and stealing, mutilating corporal punishments should replace the use of capital punishments. Those serving penal sentences of fewer than 3 years should be required to beat themselves with the heavy stick, and the number of blows should be regulated clearly so there is a clear, regular limit; however, the number of blows shall not arbitrarily be reduced. For those who should suffer a heavier penalty [of the blows], the official [in charge] should decide [how many more blows to administer]. Those serving sentences of 4-5 years should all suffer the punishment of shaving the head and beating with the light stick. There should be up to 100 blows of the light stick, to be gradually administered, with each blow to be different. They should all not be punished with forced labor. After receiving the punishments, additional punishments should not be imposed, and those who were sentenced to penal servitude should not have their sentences increased. Those limbs that were lost and destroyed will, for [the offender's] entire life, serve as a warning and lesson. When people see the pain of those offenders who received mutilating corporal punishments,

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<sup>60</sup> *Id.*

feelings of fear will arise, and they will not dare to commit crimes. This [situation] is definitely many times better than the current situation. And those who committed evil received their due and deserved punishments after their crimes were exposed, and the methods and tools they used to commit crimes have been cut off. This will transform those who have received punishments into good citizens. How could this recommended approach possibly be equated with preserving the evil-doing hands and feet of criminals and then kicking them into a situation of hopelessness and definitive death? But yet there are still those who say that mutilating corporal punishments may not be used. I personally believe [these views] show ignorance of our current times.<sup>61</sup>

I have been at your Majesty's side, and [during this time] I have heard many of your Majesty's enlightened edicts. I believe that mutilating corporal punishments should be used. It will be beneficial to governance. I hope that your Majesty trusts in your own unique opinions and judgment and that your Majesty will allow the virtuous and is able to carry out your sagacious policies, and that we can carry out [mutilating corporal punishments immediately. Before I die, I hope to see peace in the world. The *Rites of Zhou* recorded the regulation of "san she san you" ("The Three Pardons and Three Mercies") which were applied to [offenders] who were old, of minor age, and other persons who should not be arrested. The *san she san you* principle was not carried out for the purpose of being merciful to those who commit evil, so the *san she san you* principle exempted them from the [ordinary] punishments and treated them with mercy. If one is not part of the covered groups [under *san she san you*] and commits a crime, then one must be punished and not given an amnesty. This is a fundamental principle of carrying out and implementing laws. In later times [after the Zhou Dynasty], the world became more evil and disasters grew in number. Amnesties were used to placate the masses' dissatisfaction and for the time being were flexibly used. They were not used to be merciful toward criminals. Today, amnesties are used to release criminals because there are too many crimes and too many cases.

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<sup>61</sup> *Id.* at 30.933.

Therefore, there are more and more amnesties, and the jails get more crowded. If this continues, the situation will be untenable. If we ask what the cause is [for these problems], it is because mutilating corporal punishments are not being used. If we use mutilating corporal punishments now, not only will the jails and prisons not be overcrowded, then the evil crimes of criminals will naturally stop, because they will lack the physical tools they need to commit those crimes. If we deal with these problems by removing the two causes (i.e., removing the tools of the criminals and reducing the crime), then the number of cases will not be that high, and therefore amnesties will not have to be repeatedly given. This is of great benefit to perfecting and unifying the kingdom's laws and regulations.<sup>62</sup>

Above, how did Liu Song justify his proposed reinstatement of MCPs? His rather histrionic and self-righteous tone notwithstanding, Liu Song first relied on a variety of consequentialist and utilitarian arguments. First, Liu Song argued that MCPs were an effective deterrent on the offender and the public at large, confidently positing that the “. . . evil and lawless will stop their evil conduct because they fear the pain of losing one of their limbs.”<sup>63</sup> As for the public, Liu Song argued that “[w]hen people see the pain of those offenders who received mutilating corporal punishments, feelings of fear will arise, and they will not dare to commit crimes.”<sup>64</sup> Second, Liu Song also advanced an incapacitation justification, arguing that MCPs would remove the offenders’ “tools for criminal and evil acts,” stamping out evil and treachery “at the root.”<sup>65</sup> He gave a variety of specific examples of incapacitation—for those who escaped from penal servitude, amputating their feet would prevent any possibility of future escape, for those who committed illegal sexual crimes, amputating their reproductive organs (i.e., castration) would guarantee they could not offend again.<sup>66</sup> Third, Liu Song pointed out the rehabilitative aspects of MCPs. His logic is as follows: by

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 30.932.

<sup>64</sup> *Id.* at 30.933.

<sup>65</sup> *Id.* at 30.932.

<sup>66</sup> *Id.*

removing the physical appendages needed by criminals to commit their crimes, the criminals will no longer be able to commit their crimes. Their inability to commit crimes will also remove their desire to commit crimes. They will then proceed home to be cared for by their families, and although their wounds will create difficulties in daily life, they can be “assigned different work to do in accordance with the current times and situation”<sup>67</sup> and will literally re-join the community.<sup>68</sup>

Fourth, Liu Song made a variety of utilitarian arguments which attempted to show that the reinstatement of MCPs would bring about tangible benefits to society as a whole. Besides the deterrence, incapacitation, and rehabilitation effects of MCPs on the offender, Liu Song argued that reinstating MCPs would in fact save more human lives, which in turn, would raise the population. In the beginning of his memorial, Liu Song pointed out that capital punishment had become “excessive” and that many people had died as a result of the abolition of MCPs.<sup>69</sup> More specifically, Liu Song pointed out that certain crimes were being over-punished (by the imposition of capital punishment)—crimes such as jailbreaking, rape, and stealing—that would be more appropriately punished by MCPs. On the other hand, Liu Song lamented that the abolition of MCPs also resulted in “overly lax” punishments for certain crimes.<sup>70</sup> It should be noted that Liu Song’s arguments here are not really new—the concern with over-punishment and overly lax punishment as a result of the abolition of MCPs was already previously raised by Ban Gu in the Han Dynasty. In Liu Song’s view, saving lives by reinstating MCPs would also preserve family bonds and the natural human cycle of reproduction and growing, which were all beneficial to society.<sup>71</sup>

Liu Song also justified the reinstatement of MCPs based on the benefits it could bring to the legal system and state administration. In

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<sup>67</sup> *Id.*

<sup>68</sup> Of course, Liu Song’s logic here makes various assumptions, one or all of which may be proven false. His logic assumes that offenders have surviving family members in the first place, that the family has sufficient means and ability to care for them, and that there is an adequate labor market to absorb these offenders.

<sup>69</sup> Book of Jin, *supra* note 47, at 30.931.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 30.932.



his memorial above, Liu Song noted that one of the problems in his time was that because there were too many crimes and too many cases, amnesties were being used to reduce the burden on the legal system; overcrowding in jails was also a problem.<sup>72</sup> MCPs, in his view, would help solve the overcrowding of jails because certain offenders would not have to be sentenced to penal servitude or kept in detention, but would simply suffer an MCP and be on their way. And, in turn, with the reduction of cases and amnesties, the legal system as a whole would be perfected and unified more strongly.

Thus, as we can see, Liu Song's justifications leaned heavily on consequentialist arguments, akin to methodology employed by Emperor Wen, Ban Gu, and Kong Rong. And, Liu Song continued many threads and points raised by Ban Gu, namely, concerns over the inappropriateness of punishments and excessive use of capital punishment post-abolition of MCPs.

However, Liu Song also justified the reinstatement of MCPs by appealing to the authority and practices of antiquity, which, I point out in this Article, is perhaps a more unique feature of punishment theory in traditional Chinese law. For example, in his memorial, Liu Song pointed out that in Chinese antiquity, punishments were applied but "ultimately for the purpose and hope that one day, punishments would not be needed."<sup>73</sup> The reinstatement of MCPs was important because it could bring society back to this ancient ideal. Abolition of MCPs, on the other hand, often lead to the imposition of more and more punishments on an offender—for example, Liu Song gives the example of an offender who, instead of receiving an MCP, gets sentenced to penal servitude and the shaving of the hair. If he escapes and is recaptured, he will be shaved again or be given a longer sentence—in other words, more punishments are added.<sup>74</sup> MCPs would permanently remove his ability to escape (e.g., amputation of the feet), and no further punishment would be needed. Liu Song also believed MCPs were a good idea because the "sage kings had profound reasons" for establishing them.<sup>75</sup> Finally, it

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<sup>72</sup> *Id.* at 30.933.

<sup>73</sup> *Id.* at 30.932.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* The sage kings are credited with establishing the foundation of Chinese civilization. The Chinese believed that during the dawn of Chinese civilization, the sage kings created basic inventions

should be noted that Liu Song cited to a classical Chinese text, the *Rites of Zhou*,<sup>76</sup> which stated that one who committed a crime and was not within the “Three Pardons and Three Mercies” must be punished and not given an amnesty.<sup>77</sup> Liu Song lamented that amnesties were now being granted excessively to deal with problems such as an unsustainable case load and overcrowding in jails, problems which he believed were caused by the abolition of MCPs. Thus, Liu Song believed that the abolition of MCPs created a situation that caused the state to go against the principles enumerated in the *Rites of Zhou*.

In the end, similar to what happened with Ban Gu’s memorial, Liu Song’s memorial was not considered by the emperor.<sup>78</sup>

### *B. The Debate of ~318 A.D.*

Approximately a few decades after Liu Song’s memorial, during the reign of Emperor Yuan of the Jin Dynasty (r. 318 – 323 A.D.), another major debate over the reinstatement of MCPs occurred in court. The ~318 A.D. debate is particularly instructive, because the historical records preserved the viewpoints of officials on both sides at one particular point in time. After Emperor Yuan ascended to the throne, Wei Zhan, who had become Chamberlain of Law Enforcement (Liu Song’s old position), sent up a memorial advocating for the reinstatement of MCPs, which I translate below:

In ancient times, mutilating corporal punishments were used. It was applied by the sage rulers of antiquity. Emperor Wen of the Han Dynasty abolished them, but the number of crimes punishable by death actually increased. Today, our population is low and is not even 1% [of what it was]. If our criminal law and punishments are harsh and severe, this is not in accordance with the reproductive spirit that King Gou Jian

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and technology for the people (such as teaching people how to farm) and also set up the political and social architecture. In later dynasties, the sage kings were often looked to as models of excellent leaders.

<sup>76</sup> The *Rites of Zhou* (*Zhou li* 周礼) is often dated back to about the third century B.C. It is an important primary source text that provides information on the political and administrative system of the Zhou Dynasty. The text discusses various officials in Zhou government and details their responsibilities and how they should perform their duties.

<sup>77</sup> Book of Jin, *supra* note 47, at 30.933.

<sup>78</sup> *Id.*

of Yue (496 BC – 465 BC) previously encouraged. I believe that we should reinstate mutilating corporal punishments to make the civilization of our peaceful society even brighter.<sup>79</sup>

Wei Zhan above, in his defense of MCPs, also relied on consequentialist arguments which were basically the same as those advanced by Ban Gu and Liu Song. Wei Zhan, for example, pointed out that the abolition of MCPs had led to a heightened use of capital punishment, which was bad for society because it would further decrease the already too-low population level (although Wei Zhan's population statistic should probably be taken with a grain of salt). He, like Liu Song and Ban Gu, was concerned about saving more lives who would otherwise be entrapped by capital punishment.

Emperor Yuan then convened a discussion on Wei Zhan's proposal. A group of officials—Wang Dao (an important Jin Dynasty official and minister), He Xun (a leading Confucian official who rose to become chamberlain of state sacrifices<sup>80</sup>), Ji Zhan (a leading official known for his eloquent memorials<sup>81</sup> who served as vice president of the Department of State Affairs under Emperor Yuan), and others—defended Wei Zhan's proposal, advocating for the reinstatement of MCPs. I translate their memorial in full below:

The origins of mutilating corporal punishments are from long ago. From their beginnings in antiquity, through the Xia, Shang, and Zhou dynasties, the enlightened rulers [from those periods] have never changed them. How could it be that such an ordinary emperor like Emperor Wen of Han could change them? At the time, Xiao He and Cao Can had already died. People like Zhou Lue and Guan Ying could not help Emperor Wen to understand why mutilating corporal punishments should still be maintained. It was not until the Eastern Han Dynasty when Ban Gu deeply evaluated Emperor Wen's decision to abolish mutilating corporal punishments. Ban Gu believed that although on the surface it appeared that such a decision reduced the number of punishments, in actuality that

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<sup>79</sup> *Id.* at 30.940.

<sup>80</sup> VICTOR C. XIONG, *A HISTORICAL DICTIONARY OF MEDIEVAL CHINA* 239 (Scarecrow Press, eds., 2d ed. 2017).

<sup>81</sup> *Id.* at 277.

decision killed many people. Capital punishment was used too severely, and on the other hand, using the light stick and penal servitude to punish was overly lenient. Those above used the light stick and penal servitude punishments to indulge criminals, while below, ruthless officials abused the application of the death penalty leading to injustice among the people. The harshness or leniency of punishments was applied inappropriately, and thus criminal laws and regulations could not be moderate or fair. Furthermore, in establishing mutilating corporal punishments, the ancient kings were not acting on a sudden rash impulse of anger. They were not acting in order to harm the people, but rather to stop evil conduct and to punish crime. Now, for all those thieves who steal others' property, lechers who covet women, convicts who have hid/escaped from their *corvée* obligations—their crimes do not involve murder, and so mutilating corporal punishments should not be imposed on them. Applying mutilating corporal punishments can stop their crimes. If we use capital punishment by decapitation, that punishment exceeds the severity of their crimes. Once someone has died, he cannot be brought back to life. Every year, there is a huge number to be counted of people who have been wantonly and violently executed like this. A leader with the virtues of benevolence and righteousness cannot bear to hear of such things, and so how can such policies be undertaken in government? If anyone is seduced by the philosophical notion of abolishing mutilating corporal punishments and does not investigate its nature in the practical real world, then [such person] is hating mutilating corporal punishments which allow the offender to live and instead causing them to be subject to the death penalty and be slaughtered. This is analogous to abandoning boats because one is afraid of drowning, or because one is afraid of falling into a pit, one jumps into a well. Even idiots do not do these things, so why should such reasoning be used in matters of governance? At present our Jin Dynasty is prosperous and accomplished. We should follow ancient systems and carry forth and use the ancient regulations and rules, and bring back those ancient norms that have been abolished, all in order to save the people who have constantly been victimized. Reviving the abandoned institutions of the sage kings, allowing those among the populace who are almost on the brink of death to live—even though mutilating corporal punishments (which

fully correspond to morality and justice) were most prevalent in the Xia, Shang, and Zhou dynasties, it is nevertheless a tradition which is able to be passed down through centuries to the present day, allowing flesh to grow on skeletons and spreading great virtue throughout earth—how can this not be desirable? Those who have been seduced by anti-mutilating corporal punishment talk] argue that even capital punishment cannot stop evil, and so therefore what could mutilating corporal punishments do? But *min* (ordinary people) are *min* (stupid)—in other words, they are stubbornly thickheaded and their stupidity reaches immense heights. So even if you execute them under severe capital punishment, their bodies will very quickly turn to dust. As the days pass after the execution, the evil desires of the living still persevere daily. They will not because of the executions change or repent. If the court uses mutilating corporal punishments in the streets to publicly punish criminals, it will cause people to all day and all night remember it as a lesson. Those who have been punished will sigh and lament the everlasting pain brought by their committing crimes. Those who do evil will personally see the permanent wounds caused by the amputation of limbs, and they will feel extremely afraid. Now, having gone through all the above, we can understand that the ancient kings, in applying less severe punishments [than capital punishment] was to manage the people and to give them warnings and to control their stupidity. The principles within this are indeed very profound and deep.<sup>82</sup>

Wang Dao et al.'s arguments above cited specifically to Ban Gu and basically repeated many of the consequentialist arguments he and Liu Song made. Wang Dao et al. lamented the overuse of capital punishment in over-punishing certain crimes (e.g., escaping from labor obligations, property theft), which also lead to “a huge number . . . of people who have been wantonly and violently executed . . .”<sup>83</sup> These arguments had also been made by Ban Gu and Liu Song, who were concerned with the appropriateness of punishments. Wang Dao et al. continued the concern that the

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<sup>82</sup> Book of Jin, *supra* note 47, at 30.940-941.

<sup>83</sup> *Id.* at 30.940.

abolition of MCPs did not lead to appropriate retribution for certain crimes. Like Liu Song, Wang Dao et al. also pointed out the deterrent effects of MCPs on both the offender and society at large, arguing that “people all day and all night [will] remember [MCPs] as a lesson” and that “[t]hose who have been punished will sigh and lament the everlasting pain brought by their committing crimes.”<sup>84</sup> The failure to reinstate MCPs, in Wang Dao et al.’s view, would lead to continuing evil and injustice in society, as well as loss of social control.

Wang Dao et al., like Liu Song, also advanced a justification based on the authority of Chinese antiquity. They called Emperor Wen a mere “ordinary emperor” and questioned how he could reverse what had been done by the “enlightened rulers” of antiquity.<sup>85</sup> Indeed, they ended their memorial by praising the ancient sage kings as “profound and deep” and urging Emperor Yuan to follow their examples.<sup>86</sup> Indeed, it should be noted they used a similar adjective that fellow pro-MCP official Liu Song used—“profound”—to describe the rationale of the sage kings.

The next group of officials to set forth its views was Diao Xie (official who served as president of the Department of State Affairs under Emperor Yuan<sup>87</sup>) and Xue Jian (a Jin Dynasty official), who arguably leaned more toward a pro-MCP view but nevertheless tried to reach a balance by allowing the offender to choose between receiving an MCP or execution:

Your Majesty feels sorry for those people who have suffered previously and have been crushed, and feels bad due to the large numbers of criminals who have been sentenced to death. Thus, your Majesty desires to use methods such as amputating feet to replace capital punishment, giving those who committed death penalty offenses to live. Doing such things will cause all the people in the kingdom to enjoy grace, and they will feel grateful for such grace and go back to reform themselves. Currently the court is prosperous and the fortunes

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<sup>84</sup> *Id.* at 30.941.

<sup>85</sup> *Id.* at 30.940.

<sup>86</sup> *Id.* at 30.941.

<sup>87</sup> XIONG, *supra* note 80, at 135.

of our kingdom are excellent; we have been entrusted by Heaven to govern anew. Indeed, we sincerely should establish more lenient laws in order to cultivate the people. But what we worry about is so many people are ignorant and narrow-minded. They are used to seeing executions often. [If mutilating corporal punishments are reinstated suddenly,] they will not understand the true meaning of mutilating corporal punishments and perhaps will not be completely convinced. We believe that when instituting and applying punishments, the laws and regulations must first be clearly announced. Those who are happy to receive mutilating corporal punishments can then have their limbs amputated, and those who are happy to be put to death can be executed. This way, the people will definitely be satisfied and convinced. The systems in antiquity mandated that “punishments do not reach the nobles”. Today, if there are nobles who commit crimes, they should be dealt with according to the old regulations; they should not receive punishments under the criminal law. Then in all circumstances can fairness and equity be achieved.<sup>88</sup>

Above, Diao and Xue tried to set forth a unique compromise. They began their memorial by clearly expressing more pro-MCP views, reiterating similar arguments as Ban Gu, Liu Song, and Wang Dao—i.e., that reinstating MCPs would be more merciful and lenient, saving lives, and thus benefitting the kingdom as a whole. However, they expressed concerns with the administration of such an immediate reinstatement policy, arguing that immediate reinstatement would be a jolt to the legal system and would not win popular support. Therefore, they came up with a unique proposal to allow offenders who were sentenced to death but who would have been sentenced to an MCP had Emperor Wen not abolished MCPs to choose between the two punishments.<sup>89</sup>

A group of officials, including Zhou Yi (who served as, *inter alia*, a junior mentor to the heir apparent and as an official in the Imperial

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<sup>88</sup> *Id.* at 30.941.

<sup>89</sup> As discussed in Part I of this Article, some offenders may have preferred death given Confucian beliefs that a mutilated body is equivalent to a mutilated spirit and would also violate norms on filial piety.

Secretariat under Emperor Yuan<sup>90</sup>) and Jin official Cao Yan, were the next to elucidate their views. Zhou's group argued against the reinstatement of MCPs. Many arguments they raised were essentially the same as those of the anti-MCP Kong Rong. Zhou's group memorial stated:

Reinstating mutilating corporal punishments to replace the death penalty indeed does reveal and make manifest the high virtues of the sage rulers, as well as the great grace of caring for and having sympathy for the people. However, we believe that the severity or leniency of punishments should be decided in accordance with the needs of, and at the time of, the particular situation. If at one time there was not much crime committed by the people and they easily succumbed to great authority, punishments could be lenient and applied mercifully. But if at another time the people committed many crimes and were not easily controlled by authority, then it would be appropriate to use capital punishment as a means to stop crime. Mutilating corporal punishments should be used as punishments during times of peace and order. They should not be used to save times of corruption. Currently we have just begun the process of educating and civilizing the populace. There is much evil thoughts and desires among the people, and among them, people who are accustomed to committing crimes continue to do bad things. Using the death penalties of decapitation and strangulation have not been able to stop them, so how could changing the punishments to amputation of legs or nose have any effect? Reducing the severity of punishments leads criminals to commit lesser crimes and be punished mercifully and then the number of criminals will increase in number. This is essentially using the act of making punishments more lenient to tempt the people to commit crimes and harming the bodies of criminals and causing them great pain. Those offenders who previously were very afraid of the death penalty and changed their ways today are unafraid to commit smaller crimes and face mutilating corporal punishments. For ordinary [law-abiding] people who are afraid

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<sup>90</sup> Ulrich Theobald, *Zhouyi*, CHINA KNOWLEDGE.DE—AN ENCYCLOPEDIA ON CHINESE HISTORY, LITERATURE, AND ART (June 30, 2018), at <http://www.chinaknowledge.de/History/Division/persons/zhouyi.html>.



of any heavy punishment, if they commit a small crime they will be entrapped in great difficulty and pain. If we take this kind of approach, how is this any different from thinking we are promoting grace and benevolence by cutting the noses and feet off ordinary, law-abiding people who have not committed any crimes?! There will be more and more people who are faced with mutilating corporal punishments, but those law-breaking and crimes will increase daily. The shoes of those who have their feet amputated are more expensive than ordinary shoes, and because those who have their noses cut off will number in the minority, they will feel that they are ugly and hideous. Being lenient in punishments sounds good in theory, but in practice it opens the door to long-lasting evil. Thus, [using mutilating corporal punishments] is not as good as executing to stop killing/murders and using heavy punishments to stop the commission of lesser crimes. We should therefore temporarily stop the reinstatement of mutilating corporal punishments and gradually implement it only after the efforts of our civilizing and educating on the people have produced results and when most of the people are easily deterred.<sup>91</sup>

Above, Zhou's group essentially used the same arguments advanced by late Han Dynasty scholar Kong Rong—first, in their view, reinstatement of MCPs would not be appropriate because times have changed. They argued that MCPs were appropriate in antiquity when MCPs were first introduced because there was peace and order then, but in the current Jin Dynasty, it was a time of corruption and thus MCPs would not be as effective. Second, as Kong Rong also pointed out, MCPs would not necessarily be effective deterrents against crime. Zhou's group set forth very clearly their belief that MCPs are not as effective as “executing to stop killing/murders and using heavy punishments to stop the commission of lesser crimes.”<sup>92</sup> In other words, they adopted a rather Legalist position, advocating for heavier penalties for lesser crimes.

The final recorded position we have in the ~318 A.D. debate is by General Wang Dun (a powerful, dominating official during the reign

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<sup>91</sup> Book of Jin, *supra* note 47, at 30.941.

<sup>92</sup> *Id.*

of Emperor Yuan<sup>93</sup>), who was also against the reinstatement of MCPs. He argued:

The customs and beliefs of the people have been molded and set for a long time. If mutilating corporal punishments are suddenly reinstated, people from across the realm will be shocked. Furthermore, we have not fully exterminated rebels and bandits in the kingdom, and so we should not be broadcasting across the realm brutal punishments.<sup>94</sup>

Wang Dun's arguments were not entirely novel; he basically continued Kong Rong and the Zhou group's points that reinstating MCPs would not be appropriate given the different times now. Interestingly though, and importantly, despite his fundamental disagreements with the pro-MCP camp (e.g., Liu Song and Wang Dao et al.), Wang Dun used a similar justification (but to reach a different conclusion)—Wang also appeals to the authority of history, arguing not that the sage kings who implemented MCPs should be followed (as the pro-MCP camp did), but rather than because historically speaking, MCPs had been abolished for such a long time, that historical practice should be honored and respected.

In the end, the historical records tell us that “Emperor Yuan abandoned any notion of reinstating MCPs.”<sup>95</sup> The abolition of MCPs continued in force.

*C. The MCP Debate of ~403 A.D. and Cai Kuo's Positions*

The next debate in the Jin (of which we have the text of the positions of participants still extant) occurred a little under a century later during the reign of Emperor An of the Jin Dynasty (r. 397 – 419 A.D.). Emperor An set forth a proposal to amputate a criminal's left and right foot to reduce capital punishments, and he issued an imperial order for his officials to discuss the matter at court.<sup>96</sup> The historical records preserve Jin official Cai Kuo's views, which

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<sup>93</sup> XIONG, *supra* note 80, at 626.

<sup>94</sup> Book of Jin, *supra* note 47, at 30.942.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

ultimately supported the emperor's proposal but which also expressed much disquiet with the practice of MCPs as a whole:

Establishing a country and its laws, as well as educating and civilizing the populace, requires creating policies based on the needs of the current situation and to rule with both virtue and also punishments. Strengthening people's innate, unadulterated character is directed toward preventing evil acts. Promoting education and civilization and issuing restrictive regulations are directed toward stamping out hearts which disrespect laws. This is like letting out more sweet dew to allow the people to enjoy grace while also sending down cold frost to make the laws and commands authoritative and serious. Even though virtue and punishments may have been used in the past in different turns, but the principle of governing with both virtue and punishments has never changed. Mutilating corporal punishments were started by the sage rulers in high antiquity. Because society back then was simple and honest, the majority of people were generous, humble and careful. Drawing a picture in order to show punishments would result in fraudulent and dishonest thoughts to be immediately taken back. When punished criminals were walking on the streets, unruly individuals upon seeing them would be willing to change their ways. Therefore, mutilating corporal punishments back then could stop violence, murder, and allow education to flourish. Without expending much effort, all under Heaven could be governed well. However, in later dynasties, customs and thoughts became dishonest and corrupt, and so the nets of laws became more dense and thicker, and hearts of trickery and self-interest also grew on a daily basis. Shame and awe became rare. Having someone go and perform forced labor [in penal servitude] for his entire life still cannot stop evil conduct; how can it be that tattooing and amputation of the nose could bring [the criminal] back to goodness? They [(mutilating corporal punishments)] can only create a bad reputation for punishments as cruel and vicious, and they do not have the benefit of saving our current customs. With respect to statutes and crimes punishable by public executions in the marketplace, even if the crime is one that is eligible for amnesty, and even if in reality it does not involve direct murder, according to law such crimes are also to be punished by death—but if both serious crimes and lesser crimes are to be punished this way, the road to

mercy and lesser punishments will be locked. Zhong Xi and Chen Qun previously protested [these laws], and Emperor Yuan also felt great sympathy for the pain of the punished. Now, able and wise officials are assisting with governance, and we are surpassing the way of Yi Yin and the Duke of Zhou. We should revise the laws, cautiously use punishments, and more deeply and broadly love, care, nurture, and educate the people. To make manifest compassion in order to reform and abolish the misuse of cruel punishments and to change capital punishment to the amputation of the left and right feet will result in the protection of the most sacred human life. And in the future, our population can flourish.<sup>97</sup>

Cai's memorial is a bit different from those we have previously analyzed in that it is harder to clearly characterize as just pro-MCP or anti-MCP. He expressed concerns with MCPs, employing many of the same arguments that had been used by the anti-MCP side. For example, he believed that MCPs "do not have the benefit of saving our current customs"<sup>98</sup> because the situation was no longer the same as the time of the sage kings. Cai pointed out that society was far simpler and more honest back then, and so MCPs were more effective since people were far more willing to change their bad ways. He considered the current society as corrupt and dishonest, and hence it was not appropriate to blindly apply MCPs in the present day. These arguments on the need to consider the times and circumstances were also previously advanced by Kong Rong, Zhou Yi, and Wang Dun. He did, however, ultimately propose that capital punishment should be changed to "amputation of the left and right feet" which would protect "sacred human life" and increase the population.<sup>99</sup> These more pro-MCP arguments were the same as those advanced by Ban Gu, Liu Song, Wei Zhan, Wang Dao et al., and Diao Xie & Xue Jian. Thus, we see continuity again in the types of arguments used from the Han through the Jin Dynasty. Ultimately, Cai's proposal was not adopted by the court.<sup>100</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

To summarize the above section on the Jin Dynasty debates regarding MCPs, we see that many of the arguments employed by both sides drew on Han Dynasty positions. All relied heavily on consequentialist arguments, regardless of their positions. The pro-MCP camp pointed out the strong deterrence effects of MCPs on both potential offenders and the public at large, as well as MCPs reducing the use of the death penalty and hence preserving lives and increasing population. Like Ban Gu, they also expressed concerns with the overuse of the death penalty and resulting injustices, arguing that some crimes were being over-punished by the death penalty (improper and disproportional retribution). The anti-MCP camp, like Kong Rong, expressed concerns with the suitability of MCPs given that the times had changed. They also employed a variety of consequentialist arguments, arguing that (similar to Emperor Wen) MCPs were cruel, and also that they did not serve as a strong deterrent. Officials who straddled between the anti-MCP and pro-MCP camps, such as Cai Kuo, used existing arguments from both sides, such as a desire to preserve more human life to raise the population (a pro-MCP argument) and that times had changed since antiquity and so reinstatement of all MCPs was not ideal (an anti-MCP argument). In short, we see continuity in the type of arguments and specific justifications put forward from the Han Dynasty through the Jin.

In the Jin, however, we do see more clearly enunciated a more unique type of justification that was employed by both the anti-MCP and pro-MCP camps. Both sides justified their views of punishment by appealing to the authority and history of antiquity. Officials like Liu Song and Wang Dao et al. praised the ancient sages who had implemented MCPs, arguing that the current Jin court should seek to emulate them. Others, like Wang Dun, believed that the historical practice of honoring Emperor Wen's original 167 B.C. abolition of MCPs should be respected.

V. TANG DYNASTY MCP DEBATES: BAI JUYI'S FAMOUS ESSAY  
AGAINST THE REINSTATEMENT OF MCPs

The Tang Dynasty is often considered by scholars as the era when the so-called “Confucianization of the law” reached its completion, its penal law representing “a climax in the development of law and legal scholarship in traditional China.”<sup>101</sup> As discussed in Section I of the Article, by the Tang, legal punishments (i.e., the Five Punishments) had been standardized and consisted of beating with the light stick, beating with the heavy stick, penal servitude, exile, and death by strangulation or decapitation.<sup>102</sup> These punishments were standardized and set forth in the Tang Code of 653 A.D. Yet, there were still calls to reinstate MCPs. One of the most famous essays in the Tang Dynasty dealing with the question of whether to reinstate MCPs was written by the famous Tang poet and official, Bai Juyi. Dating to approximately 806 A.D., the essay was part of Bai's *Forest of Theses*, a collection of 75 practice essays which Bai wrote in preparation for the civil service examinations. It covered a variety of topics such as governance, the emperor's responsibilities, law, and military policy.<sup>103</sup> It is, to my knowledge, one of the only full-length pieces where a prominent Tang official set forth his views on the reinstatement of MCPs. Bai began his essay on MCPs with the hypothetical examination question which he drafted:

Question: Mutilating Corporal Punishments appeared in high antiquity. It has also been abolished for a long time. Many wise people had diverse evaluations on them. There were both praise and criticism [and views were thus not unified]. If we now abolish mutilating corporal punishments and do not use them, perhaps this would be against the principle of conducting affairs and passing down the ancient system. But if we advocate a reinstatement of the use of mutilating corporal punishments, this perhaps may be against the principle of conducting affairs in accordance with the needs of the specific

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<sup>101</sup> CHEN, *supra* note 39, at 17.

<sup>102</sup> MacCormack, *supra* note 2, at 25.

<sup>103</sup> ANTHONY DEBLASI, REFORM IN THE BALANCE: THE DEFENSE OF LITERARY CULTURE IN MID-TANG CHINA 78-79 (2002).

times. Thus, between reinstating or abolishing mutilating corporal punishments, what should we choose?<sup>104</sup>

In the question above posed by Bai, we can see that he repeated the anti-MCP argument that times had changed as well as the pro-MCP argument that following the sage kings' use of MCPs was paramount. Below, I provide a full translation of Bai's practice essay, which ultimately reflected an anti-MCP position:

I think that, from the abolition of mutilating corporal punishments in the Western Han Dynasty to today, it has been over a thousand years. From then until now, many widely learned and virtuous scholar-officials have discussed the positives and negatives of mutilating corporal punishments. Those who resolved to abolish mutilating corporal punishments believe: tattooing destroys a man's face, amputating limbs removes a person's limbs, leading him to be handicapped in his life. A ruler who tolerates these punishments and utilizes them is at odds with having heart of generosity, compassion, and mercy. It is as what Ti Ying said: "After a person dies, he cannot be re-born; once a person becomes handicapped, he cannot be back to normal. Even if he wants to reform himself and start anew, there is no road for him to seek." Those in favor of restoring mutilating corporal punishments argue: irrespective of whether it was beating with the heavy stick or whipping with the light stick, if the official uses these punishments abusively, then malpractices of arbitrary killing [executions] will still exist. This is what Ban Gu pointed out when he mentioned that although penal servitude in theory is a light punishment, but in reality it is deliberate harming someone to death and also lacks the fundamental notion of a ruler's lenient and merciful treatment of his people. I believe that when discussing issues we must take reality as our evidence. Therefore, when using punishments, one must consider the specific actual situation. If we discuss the matter from a realistic point of view, mutilating corporal punishments can only be abolished and cannot be reinstated. Why is this so? What is meant by "mutilating

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<sup>104</sup> Bai Juyi (白居易), Bai Juyi Ji (白居易集) [The Collected Writings of Bai Juyi] 64.1351 (Zhonghua Book Co. ed., 1999). This essay is NO.53 in the *Forest of Theses* (策林).

corporal punishments” are punishments such as cutting off the nose, breaking of bones and tendons, carving the face and hacking feet. The *Book of Documents* (*Shangshu* 尚书) records five brutal punishments. In antiquity, the Miao people started to abuse them; because of this, Heaven brought down suffering [on them] to punish them. The Qin Dynasty also violently and brutally used them, and in the end, the people’s heart went astray and the Qin fell. If mutilating corporal punishments are used, how could many innocents not be killed? Only after Emperor Wen first abolished corporal punishments did punishments become fair and just. Emperor Taizong of the Tang Dynasty continued the Han and abrogated cutting of feet, and judicial officials did not use that punishment again. As a result, how can there be any more deliberate harming people to death? This is what I mean by taking reality and as our evidence. I have also heard that sages’ principles for using punishment were: in accordance with the need of changing times, choose the proper light or heavy punishment, and also in accordance with the particular person’s disposition, to decide upon whether to punish or not. Therefore, it is completely unnecessary to divorce ourselves from today’s practical situation and to revive the old, obsolete mutilating corporal punishments. Moreover, mutilating corporal punishments have been abolished for a very long time. People have even forgotten about them a long time ago. If they are suddenly reinstated again today, some will have their tendons and muscles cut off, some will have their bones broken, and others will have their faces carved. On the sight of this, people would definitely feel sadness and bitterness; hearing this, their fear will not cease. This is not in accordance with the principles advocated by the sages about changing with the times and [handling affairs] in accordance with a person’s dispositions. Taking into account the practical analysis and considering people’s dispositions discussed above, as to the question of whether mutilating corporal punishments should be reinstated, is the answer not clear? The *Zuo zhuan* states that: “when governing, a ruler should place an emphasis on historical systems and not change them on a whim.” The text also says, “Never change the existing laws if there aren’t 100



benefits for society today.” Thus, I believe that reinstating mutilating corporal punishments brings only harm and no benefit, so the [historical] decision of abolishing corporal punishments should not be changed.<sup>105</sup>

Above, Bai utilized many arguments we have already seen from officials in the Han and Jin dynasties. First, he followed Emperor Wen’s concerns that MCPs were cruel and violent per se, arguing that a ruler who imposed MCPs lacked compassion and mercy. A key part of his essay also stressed the importance of keeping up with the times, arguing that MCPs had become obsolete and that “it is completely unnecessary to divorce ourselves from today’s practical situation and to retreat and reinstate the old, obsolete mutilating corporal punishments.”<sup>106</sup> We have seen this argument set forth by various anti-MCP officials, including Kong Rong, Zhou Yi, Wang Dun, and Cao Kuo throughout the Han and Jin dynasties. As with the previous officials we have studied, Bai justified his positions largely on the grounds of consequentialist arguments, pointing out the disasters that would befall society if MCPs were reinstated (for example, he cited the fall of the Miao people and the Qin Dynasty, which he ascribes to the use of MCPs). But like many of the officials on both sides of the debate, Bai also defended his position with an appeal to the authority of history, trying to show that history and principles of antiquity were on his side. Just as Liu Song quoted a Confucian classic text (*Rites of Zhou*) to justify his pro-MCP views, Bai cited another important Confucian classic text, the *Zuo zhuan*,<sup>107</sup> to prove his views. He also argued that reinstating MCPs would in

<sup>105</sup> *Id.* at 64.1351-1352.

<sup>106</sup> *Id.* at 64.1352.

<sup>107</sup> The *Zuo zhuan* (左传) is a commentary on the *Spring and Autumn Annals* (*Chunqiu* 春秋), which is essentially a history of the twelve dukes of the ancient Chinese state of Lu from roughly 722 to 481 B.C. The structure of the *Spring and Autumn Annals* is akin to that of a historical outline or timeline, reporting facts in a chronological, pithy order. Authorship was traditionally attributed to Confucius. Because of the terse nature of the *Spring and Autumn Annals*, some authors wrote commentaries to expound and explain certain events and personages in the *Spring and Autumn Annals*. The *Zuo zhuan* is one such commentary and is regarded as the earliest work of narrative history in China. Its authorship has been traditionally attributed to Zuo Qiuming, a writer that lived in the fifth century B.C. in Lu. It runs chronologically parallel with the *Spring and Autumn Annals*, expounds on numerous events, and is filled with rich accounts and stories. Some scholars in China now believe the *Zuo zhuan* should be understood not as a commentary to the *Spring and Autumn Annals*, but rather as a free-standing work that was later inserted into the *Spring and Autumn Annals*. The *Zuo zhuan* is thought to date to the late fourth-century B.C.; it is considered one of the most important primary sources for the period as it augments the basic information provided in the *Spring and Autumn Annals*.

fact go against the lessons of the ancient sages—who, in Bai's view, had set forth the principle of "changing with the times and [handling affairs] in accordance with a person's disposition."<sup>108</sup> Thus, we continue to see continuity in the arguments used in the MCP debates from the Han all the way through the Tang Dynasty.

## VI. SONG DYNASTY MCP DEBATES

The next major MCP debates for which we have historical evidence occurred in the Song Dynasty, when the question of whether MCPs should be reinstated was again considered by the throne. The Song penal law retained the same five, standardized punishments under the Tang Code—i.e., beating with the light stick, beating with the heavy stick, penal servitude, exile, and death.<sup>109</sup> Just like in the Tang, there were also calls to reinstate MCPs. While various officials participated in this debate, arguably the two most prominent figures were the Neo-Confucian philosopher Zhu Xi and the utilitarian-minded scholar Chen Liang.<sup>110</sup>

Zhu Xi supported the reinstatement of MCPs.<sup>111</sup> He made four major arguments in his essay on MCPs: first, reinstatement was justified as it followed the models and intent of the sage kings; second, the legal punishments (such as penal servitude and exile) were no longer effective deterrents; third, MCPs could reduce the use of the death penalty and save lives; and fourth, MCPs would be effective deterrents and could incapacitate criminals by removing the physical tools they need to commit crimes, which would eliminate their desires to commit evil. The relevant passages are translated below:

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<sup>108</sup> Bai Juyi, *supra* note 104, at 64.1352.

<sup>109</sup> Brian E. McKnight, *Chinese Law, History of: Five Dynasties and Song Dynasty (907-1279 C.E.)*, 1 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 425, 426 (Stanley N. Katz ed., 2009).

<sup>110</sup> Chen Liang is frequently described and labeled by sinologists as a "utilitarian" philosopher. For an excellent study of Chen Liang's life and thought, see HOYT TILLMAN, *UTILITARIAN CONFUCIANISM: CH'EN LIANG'S CHALLENGE TO CHU HSI* (1982).

<sup>111</sup> I discuss Zhu Xi's views on MCPs, and law and punishments more broadly, in Norman P. Ho, *The Legal Philosophy of Zhu Xi (1130-1200) and Neo-Confucianism's Possible Contributions to Modern Chinese Legal Reform*, 3 TSINGHUA CHINA L. REV. 167 (2011). In this same article, I also try to reconcile his views on MCPs and his Neo-Confucian philosophical positions.

The ancient sage kings injured human bodies [through punishment] in order to punish evil. They [did not decide on this course of action lightly but rather] had exhausted their mind-and-heart; therefore, they enacted and continued to use corporal punishments because they could not bear to see government go off to the extreme [of tolerating evil and crime, helping only criminals]. Today, the punitive laws of penal servitude and exile are unfortunately no longer sufficient in order to stop and prevent the treachery of the crimes of theft and debauchery. Furthermore, some of the punishments adopted today are far too excessive: those that should not have been executed are being executed, such as individuals that have committed crimes like violent robbery . . . a more fitting punishment for these individuals would be to castrate them or cut off their legs; although this would do harm to their limbs, [these punishments] would nevertheless preserve their lives and destroy the root of their desires to commit evil, as well as [physically] preventing them from having the means to engage in those crimes again. Would this not preserve the intentions of the ancient sage kings as well as appropriately [dealing with the problems] of our age? Moreover, for the ruler to accomplish his ambitions and be successful in his actions, he must have the tools of cultivation and the techniques of education.<sup>112</sup>

As one can see, Zhu Xi's arguments are not new. They are the same as arguments advanced by earlier pro-MCP officials, such as Ban Gu (concerns with underpunishing and overpunishing due to abolition of MCPs), Liu Song (incapacitation, saving lives by reducing capital punishments, helping to reform people), Wei Zhan, Wang Dao et al. and Diao Xie (reduce capital punishments). He also justified and strengthened his position by appealing to the authority of history and antiquity (i.e., the ancient sage kings).

Chen Liang wrote an essay attacking Zhu Xi's position; we know that he sent this essay to Zhu Xi, but Zhu Xi's response did not

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<sup>112</sup> Zhu Xi (朱熹), *Zhuzi Wenji* (朱子文集) [The Collected Writings of Zhu Xi] 37.198-99.

comment directly on this piece.<sup>113</sup> My translation of this essay follows:<sup>114</sup>

As for the origins of mutilating corporal punishments, those discussants [who support its reinstatement] believe that they first appeared under the Miao people, and then Emperor Yao considered adopting it and [ended up] using them. Using severe punishments in order to deal with violent and bad behavior is aimed at guarding against petty people; they are not the original ideas of the sages. Therefore, Emperor Shun instituted many ways for people to have their punishments reduced or forgiven; he only punished those who in the end would refuse to change their ways. King Mu (of the Zhou Dynasty)'s exhortations to use punishments sparingly/lightly are even more detailed. Therefore, even [including] the sages, the desire to abolish mutilating corporal punishments has existed for a long time. How can it be said that the abolition of mutilating corporal punishments is just the unprincipled generous benevolence of Emperor Wen of the Han Dynasty? [...]<sup>115</sup>

The ancient sages distinguished [and removed] human beings from the birds and beasts and got rid of humanity's [early] catastrophe of fighting, stealing, and murdering. It is necessary to control the power of life and death, and only then can this be called punishments and laws. Thus, mutilating corporal punishments already existed; it was just that they were not formally set forth in laws. The Miao people created various brutal and vicious implements and used them with abandon. Yao was afraid that they would become laws passed down through the generations, so he listed them out in sequence and categorized them by rank and type all in accordance with their lightness or seriousness, and he limited their use. People would have had to be [as bad as] the Miao people before they could suffer such punishments. Thus, it can be said that serious punishments are used to deal with abusive and violent

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<sup>113</sup> HOYT C. TILLMAN, CH'EN LIANG ON PUBLIC INTEREST AND THE LAW 48 (1994).

<sup>114</sup> Very short excerpts of this essay have been translated in *id.* at 47-48 and MCKNIGHT, *supra* note 14, at 332-33, but to my knowledge, this Article is the first to provide a much fuller translation.

<sup>115</sup> Chen Liang (陈亮), Chen Liang Ji (陈亮集) [The Collected Works of Chen Liang] 4.42-43 (Zhonghua Book Co. ed., 1987).

behavior. Yao also established several ways for the people to reduce, or to be exempted from, their punishments. Indeed, the regulations on using property for redemption to lessen or exempt punishment were even more detailed. The rulers of the Shang Dynasty controlled punishments in order to keep tabs on treachery and they harmed human flesh in order to punish crime and evil. Only those who deserved severe punishments were treated with severity. Since many ways have been established for the people to have reduced or forgiven their punishments, if those who deserve harsh punishments are not dealt with severely, it would be equivalent to teaching people to take the breaking of laws lightly. How could this have been the original principles of punishment of the sage kings? King Wen of Zhou and King Wu of Zhou were extremely circumspect with respect to the various kinds of punishments, and King Cheng of Zhou and King Kang of Zhou put [mutilating corporal punishments] aside and did not use them for over 40 years. King Mu of Zhou was advanced in age and had an absent-minded spirit, but he [still] warned that punishments should be used lightly in order to stamp out unlawful activity in all-under-Heaven. From all of this we can understand that punishments were tools the sages used to love the people instead of tools for injuring them in a cruel manner. After its establishment, the Han Dynasty continued the system passed down by the Qin Dynasty. The legal system of the ancient emperors had been abolished, except that mutilating corporal punishments were preserved. Emperor Han came to his senses after hearing the words of a girl, and with emotion, abolished mutilating corporal punishments, and thus with him we can clearly understand the principle of conforming to and accommodating [the needs] of the current situation and times.<sup>116</sup>

From the times of the Yellow Emperor, the well-field system and the enfeoffment system passed through the thorough consideration and analysis of ten sages. Thus, these [systems] were maintained and put into practice; there was fear that one thing might not be complete or one regulation might not be detailed enough [in implementing them]. As for

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<sup>116</sup> *Id.* at 4.43

mutilating corporal punishments, however, [the sages] set up multiple different avenues for the people to be exempt from such punishments, which [shows] a fear that they would even be used. Thus, could the well-field & enfeoffment systems and mutilating corporal punishments be talked about together [as if they were the same thing]? Today we have abolished and have not put into practice the affairs which the sages feared would not be complete enough or the regulations would not be detailed enough [i.e., the well-field system & enfeoffment system], but some are enthusiastic about and now say it is only acceptable to use and carry out that which the sage kings feared would be put into use [i.e., the mutilating corporal punishments]. Does this not turn over the proper order and sequence [of logic]? The laws of today are sufficient to make the people feel shame [for their misdeeds]. If the people have nothing to depend on to live, then even if we use mutilating corporal punishments every day, they will still flout and disregard the law. If ritual propriety and etiquette are used to shape people's thoughts, if music is used to make the people's voices harmonious, if regulations are used to govern, if punishments are used to prevent evil, and if these are all implemented and not in conflict, then the kingly way will succeed. This is what I have heard about mutilating corporal punishments from the sage kings.<sup>117</sup>

The main components of Chen's arguments are that: first, reinstatement of MCPs was wrong because it went against the wishes and intention of the sage kings, who set up "multiple different avenues for the people to be exempt from such punishments, which [shows] a fear that they would even be used."<sup>118</sup> Chen cited various historical rulers from antiquity, such as King Mu of the Zhou, who had urged for the careful use of punishments. Chen took issue with those who, in his view, blindly intended to follow the sage kings' practice without further or deeper examination in the sage kings' motives. Second, Chen (like many anti-MCP officials before him) emphasized that reinstatement was not a good proposition because times had changed—he praised Emperor Wen, for example, for his

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

clear understanding of “the principle of conforming and accommodating [the needs] of the current situation and times.”<sup>119</sup> Third, he doubted whether MCPs would be an effective deterrent today, because existing laws were sufficient to deal with crime and to “make the people feel shame . . . .”<sup>120</sup> Thus, we can see continuity in Chen’s anti-MCP arguments with anti-MCP officials in the Han, Jin, and Tang dynasties.

## VII. CONCLUSION

This Article has attempted to show that the debates over reinstatement of MCPs and the specific articulated positions in both the anti-MCP and pro-MCP camps did not really change for over 1,000 years from the Han Dynasty to the Song Dynasty, showing a continuity of views regarding the purpose of punishment within traditional Chinese legal thought. As a window to understanding traditional Chinese punishment theory, the MCP reinstatement debates show that punishment in traditional China was justified on a variety of grounds<sup>121</sup>—retributivist and consequentialist (e.g., deterrence, incapacitation, reformation, effects on society)—although most arguments were consequentialist in nature. Officials who espoused pro-MCP beliefs from the Han to the Song dynasty that have been examined in this Article—Ban Gu, Liu Song, Wei Zhan, Wang Dao, Diao Xie & Xue Jian, Cai Kuo, and Zhu Xi—believed that reinstatement of MCPs could: reduce capital punishment and save lives, hence increasing the population; punish more appropriately, rather than over-punish certain crimes with capital punishment; avoid overly-light punishment for certain crimes; effectively deter crimes by scaring the public with displays of mutilation as well as permanent scarring of the offender; incapacitating the offender by removing his physical ability to commit certain crimes; help to rehabilitate the criminal and integrate him back into society by removing his physical ability and desire to commit crimes; and reduce caseloads and overcrowding in jails.

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Klaus Mühlhahn has also similarly argued, on a general philosophical level, that “Chinese theories of legal punishment thus show a mixture of goals.” See MÜHLHAHN, *supra* note 3, at 28.

Officials who espoused anti-MCP beliefs from the Han to the Song Dynasty who have been examined in this Article—Emperor Wen, Kong Rong, Diao Xue & Xue Jian, Zhou Yi & Cao Yan, Wang Dun, Cai Kuo, Bai Juyi, and Chen Liang—believed that MCPs were: obsolete as times have changed and thus they should not be blindly applied to the current situation to avoid a jolt to and instability of the legal system; cruel, merciless, bad punishments; and ineffective deterrents.

Despite the diversified specific arguments made by each side, both sides did something very similar—they both took great pains to show themselves and their positions as truly honoring antiquity. Pro-MCP officials like Liu Song and Zhu Xi argued that reinstatement of MCPs would honor the profound wisdom of the sage kings who had used MCPs, whereas anti-MCP officials like Bai Juyi, Chen Liang, and Wang Dun, argued that ancient texts and ancient sages emphasized the principle of changing with the times, that the long-standing abolition of MCPs should be honored as historical precedent, and that the sage kings did not really have a high opinion of MCPs. In other words, both sides used the importance and authority of antiquity as a justificatory theory of punishment—both making arguments akin to “we should punish this way, because this is how it was done in antiquity by the sage kings.”

I have made the point in this Article that such appeals to the authority of history may be what is perhaps “more unique” about traditional Chinese theories of punishment. This is a controversial point that perhaps should be more deeply explored in another paper, but it seems to me that Western theories of punishment have primarily focused on retributive, consequentialist, and threat-based justifications.<sup>122</sup> Western theorists of punishment do not seem to have justified certain modes or approaches of punishment based on appeals to ancient history as much as traditional Chinese thinkers have. Thus, this is perhaps one area where traditional Chinese legal thought can contribute to the field of theories of punishment more generally.

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<sup>122</sup> Larry Alexander, *Philosophy of Criminal Law*, in OXFORD HANDBOOK OF JURISPRUDENCE 815, 816 (Jules Coleman & Scott Shapiro eds., 2002).