

Hsiang Hsing and Hua Hsiang:
The Problem of ‘Symbolic’ Punishments in
Early China

Geoffrey MACCORMACK

(University of Aberdeen)

An intriguing puzzle arising from the early history of law in China is the proper understanding of the role of what are often called ‘symbolic punishments’, that is, punishments which consisted merely in the wearing of particular kinds of clothing or the painting of part of the body. Beginning in the fourth century BC, literary sources attribute to the ‘golden age’ of the (mythical) emperors Yao and Shun the use of punishments which did not impose death or mutilation. The underlying point is that the virtue of these sage rulers ensured that the people themselves behaved well. The only punishments necessary were the wearing of distinctive clothing or the painting of parts of the body. Although we might disregard the whole concept of a ‘golden age’ as a fantasy, certain interesting questions still arise from the tradition: why were punishments by way of clothing or painting of the body given such prominence in the construction of the ‘golden age’; what was their precise relationship to the physical, mutilating punishments; in what sense precisely can they be deemed to be ‘symbolic’; and what evidence is there that such punishments were ever actually used?

An attempt to suggest possible answers to these questions will be made in this paper. First, however, a preliminary issue has to be addressed. At some point in its development the tradition as to punishments by way of clothing or painting became contaminated with a different tradition concerned with the placing of tablets bea-

ring descriptions (whether written or pictorial) of the punishments on gates outside the ruler's palace. This contamination has led to a significant misinterpretation of phrases found in two of the most important sources for the 'golden age', the *Yao tien* (*Canon of Yao*) and the *Kao Yao mo* (*Counsels of Kao Yao*). These are documents contained in the *Shang shu* (*Book of History*), a classic which purports to collect the ancient documents relating to China's earliest history¹. The first section of the paper will examine the tradition on the existence of tablets containing descriptions of the punishments (*hsiang hsing* or 'representations of the punishments'), and the second will examine that on the use of clothing or painting of the body as punishments (*hua hsiang* or 'painted representations').

I. *Hsiang hsing*: Representations of the Punishments

We consider first the two passages from the *Shang shu*. In the *Yao tien* Shun is said to have *hsiang i tien hsing* (literally, 'represent by standard punishments')², while in the *Kao Yao mo* Shun's minister, Kao Yao, is praised for *hsiang hsing wei ming*, that is, his intelligent application of the represented punishments³. The exact sense of the word *tien* in the first phrase is difficult to determine. It has a range of meaning expressed by 'statute', 'standard text', 'code', 'rule', 'norm', 'regulation', 'direct', and 'regular'⁴. In some contexts it expresses 'rules for right behaviour', especially that behaviour prescribed by the rites⁵. Consequently, the phrase *tien hsing* might be construed as referring to two different kinds of rule: those generally prescribing the right way to behave, and those

¹ On this work see E. L. SHAUGHNESSY, *Shang shu*, in *Early Chinese Texts. A Bibliographical Guide*, edited by M. Loewe, Berkeley, 1993, pp. 376-89.

² The text and a translation are given in J. LEGGE, *The Chinese Classics*, Taipei, nd., 3, pp. 38-9; S. COUVREUR, *Chou King*, Taipei, 1971, p. 21; B. KARLGREN, *The Book of Documents*, in *The Museum of Far Eastern Antiquities Stockholm* 22 (1950), p. 5.

³ KARLGREN, *Book of Documents*, *op. cit.*, p.12 (para. 17); LEGGE, *Chinese Classics*, *op. cit.*, 3, p. 86; Couvreur, *Chou King*, *op. cit.*, p. 56.

⁴ B. KARLGREN, *Grammata Serica Recensa*, in *The Museum of Far Eastern Antiquities Stockholm* 29 (1957), p. 131, no 476a-c.

⁵ Cf. *Yao tien*, KARLGREN, *Book of Documents*, *op. cit.*, p. 4 (para. 13).

imposing punishments. However, the fact that *hsiang* ('represent') qualifies both *tien* and *hsing* suggests that *tien* should be taken in an adjectival sense qualifying *hsing*, so pointing to the fact that the punishments in question were the statutory, regular, or legal punishments. Use of the word *tien* may further imply that the punishments were expressed in a written form⁶.

The critical word in the phrases *hsiang i tien hsing* and *hsiang hsing wei ming* is *hsiang*. This word can be translated as 'represent' or 'representations', but the question we have to answer is, in what sense exactly are the punishments 'represented'? The explanation given by Chinese commentators or modern scholars has gone in one of two directions. *Hsiang* is taken as referring either to a description of the (normal) punishments or to the creation or application of 'symbolic' punishments by way of clothing or painting.

The earliest surviving interpretation is from the Han scholar Ma Jung (AD 79-166). He states that, when Kao Yao (Shun's minister) instituted the five kinds of punishment, there were in fact no persons who actually committed offences, merely the forms or representations (*hsiang*) of the punishments⁷. In part his meaning is that the people, under the guidance of Yao and Shun, were sufficiently virtuous not to commit offences; hence there was no need for them to be punished. But what did he mean by saying that there were merely the 'forms' or 'representations' (*hsiang*) of punishments? The most sensible understanding of Ma's thought is that he held that Kao Yao had defined the punishments and made descriptions of them, but had no need to apply them because the people did not commit offences. It is not obvious that Ma was thinking of punishments by way of special clothing or painting of the body. In-

⁶ Cf. H. G. CREEL, *The Origin of Statecraft in China Volume I: The Western Chou Empire*, Chicago and London, 1970, pp. 125, 165; but see also the remarks of L. SKOSEY, *The Legal System and Legal Tradition of the Western Chou (ca. 1045-771 B.C.E.)*, University of Chicago Dissertation, 1996, pp. 158-60.

⁷ Ma Jung's gloss is given in Sun Hsiung-yen's edition of the *Shang shu: Shang shu chin ku wen chu shu*, Taipei, 1970, p. 39. It is translated (and rejected) by B. KARLGREN, *Glosses on the Book of Documents*, in *The Museum of Far Eastern Antiquities Stockholm* 20 (1948), p. 88 (gl. 1267).

deed, the force of his contrast between the presence of ‘representations of the punishments’ and the absence of actual offenders is lost or at least considerably weakened, if we suppose he was referring to punishments which imposed humiliation, although not physical harm, on the offender.

However, other scholars from the same period did associate the ‘golden age’ of antiquity with the use of punishments by way of clothing or painting. Cheng Hsüan (AD 127-200), a pupil of Ma Jung⁸, in his commentary on the *Chou li* (*Rituals of Chou*)⁹ refers to the ancient system of *hsiang hsing* under which offenders had their heads covered with a black cloth¹⁰. Ying Shao (AD ca. 140-203) in his commentary on the *Han shu* (*The Official History of the Former Han*) notes that the two ancient rulers (*Yao and Shun*) only painted (*hua*) clothes and caps, differentiating clothing and ornaments, and yet the people did not dare to commit offences¹¹. The implication of Ying’s remark is that, although the punishments were extremely light, the people, influenced by the virtue of the ruler, still did not commit crimes. Commentaries which appear to have been composed in the Han dynasty (BC 206-AD 220), as well as earlier works, give a more detailed account of the changes of clothing or the painting of the body introduced as punishments by Yao and Shun. These accounts are examined in the next section.

Commentators from the Ch’ing dynasty (AD 1644-1911) on the *Shang shu* have cited together Ma Jung’s opinion and the commentaries which specifically treat the clothing and painting punishments as the creation of Yao and Shun. Such commentators appear to think that Ma Jung himself was referring to these pu-

⁸ Cf. SHAUGHNESSY, *Shang shu*, *op. cit.*, p. 386.

⁹ This work purports to be a description of the administrative structure of the Western Chou dynasty (ca. 1045-771 BC) but was itself probably composed in the late Warring States or early Han periods, that is, in the fourth or third century BC. See W. G. BOLTZ, *Chou li*, in *Early Chinese Texts...*, *op. cit.*, pp. 24-9.

¹⁰ *Chou li chu shu chi pu cheng*, Taipei, 1980, 36.14b (section on the *ssu huan* or ‘prison officials’); E. BIOT, *Le Tcheou-li ou Rites des Chou*, Taipei, 1975, II, p. 366 n1.

¹¹ Wang Hsien-ch’ien, *Han shu pu chu*, Beijing, 1983, I, 6.4b, p. 85; H. H. DUBS, *The History of the Former Han Dynasty by Pan Ku*, 1954, II, p. 124.

nishments¹². The great legal historian, Shen Chia-pen (1840-1913), also expresses the opinion that the phrase *hsiang hsing* designated punishments by way of clothing, handed down from antiquity, that is, the time of Yao and Shun¹³. Some modern scholars have the same interpretation¹⁴.

Other explanations of the references to *hsiang hsing* in the *Shang shu* are also to be found in the old commentaries. One is that the word *hsiang* is to be understood as *fa* ('law'). This is found in a commentary attributed to the Han scholar K'ung An-kuo, believed to have been forged in the fourth century AD¹⁵. This explanation, generally regarded as improbable¹⁶, removed the difficulty of explaining the nature of the 'images' postulated by Ma Jung by taking the passage from the *Yao tien* in the sense 'according to the law Shun used the regular punishments'¹⁷. Another, equally implausible explanation, is found in the Legal Treatise of the *Han shu*, compiled by Pan Ku (AD 32-92), at the point where the author is discussing Hsün tzu's¹⁸ account of the punishments by way of clothing or painting. Either Hsün tzu or Pan Ku, depending upon which punctuation of the text one accepts¹⁹, held that *hsiang* in the phrase *hsiang hsing* had the force of 'imitate', the

¹² See, for example, Sun Hsiung-yen, *Shang shu...*, *op. cit.*, pp. 39-40; Liu Feng-lu, *Shang shu chin ku wen chi chieh*, Taipei, 1977, I, p. 45.

¹³ Shen Chia-pen, *Li t'ai hsing fa k'ao* (*Investigations into the Penal Laws of Successive Dynasties*), Beijing, 1985, I, p. 6.

¹⁴ See, for example, E. CHAVANNES, *Les mémoires historiques de Se-ma Ts'ien*, Paris, 1897, II, p. 475 n1; M. NYLAN, *The Five "Confucian Classics"*, New Haven and London, 2001, p. 149; D. GAURIER, *L'influence de l'esprit commerçant sur la déritualisation du droit dans la Chine ancienne*, in *RIDA* 48 (2001), p. 140. Cf also the remarks of DUBS, *History of the Former Han...*, *op. cit.*, II, p. 123.

¹⁵ See SHAUGHNESSY, *Shang shu*, *op. cit.*, p. 385.

¹⁶ It has been adopted by some modern scholars. See, for example, Hsiao Yung-ching, *Chung kuo fa chih shih ch'ien pien* (*Concise Legal History of China*), Shansi, 1981, p. 321.

¹⁷ *Shang shu chu shu pu cheng*, Taipei, 1985, p. 15 of first section. See also LEGGE, *Chinese Classics*, *op. cit.*, 3, p. 38n; KARLGREN, *Glosses...*, *op. cit.*, p. 88 (gl. 1267).

¹⁸ On Hsün tzu see below.

¹⁹ Cf. *Han shu*, Beijing, p. 1111 with A. F. P. HULSEWÉ, *Remnants of Han Law*, Leiden, 1955, pp. 348, 415 n321.

idea being “that the punishments have been made in imitation of the way of Heaven”²⁰.

The most satisfactory explanation is that proposed by the Sung commentator Ts'ai Chen (AD 1167-1230)²¹. He understands the *Yao tien* passage in the sense: “Shun made a (delineation, representation =) full description of the legal punishments”²². Both Legge and Karlgren in their translations and commentaries have adopted this explanation, although perhaps they understand Chen's words in slightly different ways. Legge observes: “Ts'ae Chin says we are to understand it {the word *hsiang*} as in the phrase ‘Heaven hangs out its appearances to show (*shih*) to men’; which gives us the idea of pictorial representation”²³. The term used by Ts'ai Chen to give the sense of *hsiang* is *shih* (‘represent’, ‘exhibit’). Whereas Karlgren understands *shih* in the sense of ‘gives a full written description of the punishments’, Legge emphasises rather the idea of ‘represent by means of pictures’. Even though the text of the *Yao tien* may have contemplated a written description of the punishments, ‘pictorial representation’ is likely to have formed a part of the description. If we make the reasonable assumption that the idea was to communicate the nature of the punishments to the people and so deter them from wrongdoing²⁴, we can suppose that this idea was best realised through the exhibition of pictures of the punishments²⁵. This argument acquires greater force if we make the further assumption that the ability to read the written language was not widely disseminated among the population.

Ts'ai Chen's explanation not only possesses an inner plausibility, fitting the context in which the phrase *hsiang i tien hsing* oc-

²⁰ HULSEWÉ, *Remnants of Han Law*, *op. cit.*, p. 348.

²¹ On him see SHAUGHNESSY, *Shang shu*..., *op. cit.*, p. 386.

²² KARLGREN, *Glosses*..., *op. cit.*, p. 88 (gl. 1267).

²³ LEGGE, *Chinese Classics*, *op. cit.*, 3, p. 38n

²⁴ Cf. here Wu Yü, *Hsin i Shang shu tu pen*, Taipei, 1977, p. 18 n111.

²⁵ Cf the reference in an early legalist text to the practice of the early kings in ‘hanging up’ scales with the standard weights, presumably in order to display to their subjects what the correct weights and measures should be: J. J. L. DUYVENDAK, *The Book of Lord Shang*, London, 1963, p. 262.

curs in the *Yao tien*²⁶, but it also receives strong confirmation from the tradition which held that rulers during both Western (ca. 1045-771 BC) and Eastern Chou (771-221 BC) displayed descriptions of the laws on wooden tablets placed on a gate outside their palaces. The earliest references to such a practice are probably to be found in the *Chu shu chi nien* (*Bamboo Annals*). This work was discovered in a tomb in AD 281, but the original texts no longer survive. There are two versions of the *Bamboo Annals* present today, one, entitled the 'old text', being a reconstruction on the basis of quotations from the original preserved in books written prior to the Sung dynasty (AD 960-1279), the other, a fuller version known as the 'current text', generally believed until recently to be a fabrication concocted in Ming times (AD 1368-1644)²⁷. Modern American scholarship has, however, defended the genuineness of the 'current text' with arguments suggesting that the chronology it gives was compiled in the third century BC on the basis of earlier, reliable records²⁸. Hence, we may with caution use the material presented in the 'current text'²⁹. This text has two significant entries for the reigns of the early Western Chou kings. The first states that king Ch'eng in the twenty first year of his reign (1025/15 BC) "removed the representations (*hsiang*) of the penal laws (*chih*)"³⁰, and the second that king Chao in the first year of his reign (977/5

²⁶ Cf. KARLGREN, gloss cited note 22 above.

²⁷ On this position see CREEL, *Origin of Statecraft...*, *op. cit.*, pp. 483-5; D. N. KEIGHTLEY, *The Bamboo Annals and Shang-Chou Chronology*, in *Harvard Journal of Asiatic Studies* 38.2 (1978), pp. 423-4.

²⁸ See D. PANKENIER, *Astronomical Dates in Shang and Western Chou*, in *Early China* 7 (1981-2), pp. 3-4; D. S. NIVISON, *The Dates of Western Chou*, in *Harvard Journal of Asiatic Studies* 43.2 (1983), pp. 496-7, and *Chu shu chi nien*, in *Early Chinese Texts...*, *op. cit.*, pp. 39-47; E. L. SHAUGHNESSY, *On the Authenticity of the Bamboo Annals*, in *Harvard Journal of Asiatic Studies* 46.1 (1986), pp. 149-80 (reprinted in E. L. SHAUGHNESSY, *Before Confucius. Studies in the Creation of the Chinese Classics*, New York, 1997, chapter 3), and *The Current Bamboo Annals and the Date of the Zhou Conquest of China*, in *Early China* 10/11 (1985-7), pp. 33-4.

²⁹ Text and translation in LEGGE, *Chinese Classics*, *op. cit.*, 3, Prolegomena, pp. 108-76.

³⁰ LEGGE, *Chinese Classics*, *op. cit.*, 3, p. 147.

BC) “restored the practice of suspending the representations of the penal laws (*hsiang wei*)”³¹.

The phrase *hsiang wei* occurs several times in the *Chou li*. Various officers of the central government are said to be charged with the duty of suspending tablets containing details of the administrative regulations, moral instructions, and the penal laws on the palace or other appropriate gates³². The Han commentator, Cheng Ssunung (first century AD), explains *hsiang wei* as *ch'üeh* or ‘gate tower’, that is, as suspending the representations in a high place³³. The inscription of the *Hu ting* (a bronze vessel from the first part of the ninth century BC) may contain a reference to a board displayed outside the royal palace, containing regulations governing transactions of sale, but the text is too corrupt for one to be certain of its reading³⁴. We also have useful notices in the *Tso chuan* (*Annals of the Spring and Autumn*)³⁵. For the second year of duke Ting (508 BC) it is recorded that a fire destroyed one of the palace gates together with its two flanking towers³⁶. The Ch'ing scholar, Mao Ch'i-ling (1623-1716), commented that representations of the punishments were suspended on the towers for the information of the people³⁷. For the third year of duke Ai (494 BC) it is recorded that, on the occasion of a great fire in the palace, the ruler's carriage approached the gate where the regulations were fixed

³¹ LEGGE, *Chinese Classics*, *op. cit.*, 3, p. 149. Cf. DUBS, *History of the Former Han...*, *op. cit.*, II, p. 37 (n5.1), who takes *hsiang* here to refer to ‘symbolic punishments’.

³² *Chou li...*, *op. cit.*, 2.10a, 10.10b, 29.6a, 35.5a-b; BIOT, *Tcheou-li...*, *op. cit.*, I, pp. 34, 39; II, pp. 167, 314.

³³ *Chou li...*, *op. cit.*, 2.10a; BIOT, *Tcheou-li*, *op. cit.*, I, p. 34 n6. On the meaning of *hsiang wei* see also *Chung wen ta tz'u tien* (*The Encyclopaedic Dictionary of the Chinese Language*), Taipei, 1993, 8, 37215.187; *Grand dictionnaire Ricci de la langue chinoise*, Paris-Taipei, 2001, II, p. 1012 (No 4213).

³⁴ On this see SKOSEY, *Legal System...*, *op. cit.*, pp. 161, 353-4.

³⁵ This work, giving the history of the principal Chinese states from 722 – 481 BC, is generally believed to have been composed sometime in the fifth or fourth centuries BC, though some scholars place its compilation as late as the Han dynasty in the second or first century BC. See A Cheng, Ch'un ch'iu, Kung yang, Ku liang, and Tso chuan, in *Early Chinese Texts...*, *op. cit.*, pp. 67-71.

³⁶ S. COUVREUR, *La chronique de la principauté de Lou*, Paris, 1951, III, p. 492;

LEGGE, *Chinese Classics*, *op. cit.*, 5, p. 746.

³⁷ LEGGE, *Chinese Classics*, *op. cit.*, 5, p. 746.

(*hsiang wei*). An official superintending the extinction of the fire ordered the workers to ensure the safety of the *hsiang wei*, so that the old statutes might not be lost³⁸.

Finally, we have a number of references in the Legal Treatise of the *Chin shu* (*Official History of the Chin Dynasty*), compiled by Fang Hsüan-ling in AD 644, to the practice of suspending details of the laws on gate towers. A memorial submitted by Liu Sung in the time of emperor Hui of Western Chin (AD 290-307) states that, during the Hsia, Shang, and Chou dynasties³⁹, the statutes were written down and attached to a gate tower (*shu fa hsiang wei*)⁴⁰. A response to the memorial also noted that during the Chou (ca. 1045-221 BC) the statutes were suspended from a gate tower (*hsiang wei*)⁴¹. Another memorial submitted at the beginning of Eastern Chin (ca. AD 317) also refers to the Chou practice of suspending the statutes from a tower gate (*hsiang wei*)⁴².

The references in the *Yao tien* and *Kao Yao mo* to *hsiang hsing* should be understood as forming part of the well attested tradition which assigned to the Chou rulers the practice of recording details of the laws (probably both written and pictorial) on wooden tablets which were then displayed at a gate of the palace or town for the information of the people. The *Yao tien* and the *Kao Yao mo* were not themselves composed until the end of the Warring States period (480-221 BC)⁴³. Yet they ascribe the practice of displaying representations of the penal laws on tablets suspended from gate towers to a time that antedates even the traditional founding of the Hsia dynasty in 2205 BC. How reliable is this ascription? We touch here upon the fundamental dispute over the conclusions to be drawn

³⁸ COUVREUR, *Chronique...*, *op. cit.*, III, p. 615; LEGGE, *Chinese Classics*, *op. cit.*, 5, p. 802.

³⁹ These are, according to traditional history, the first three dynasties spanning the period from ca. 2205 – 221 BC.

⁴⁰ *Chin shu*, Beijing, 1974, p. 937; R. HEUSER, *Das Rechtskapitel im Jin-Shu. Ein Beitrag zur Kenntnis des Rechts im frühen chinesischen Kaiserreich*, München, 1987, p. 142.

⁴¹ *Chin shu*, p. 938; HEUSER, *Rechtskapitel...*, *op. cit.*, p. 147.

⁴² *Chin shu*, pp. 938-9; HEUSER, *Rechtskapitel...*, *op. cit.*, p. 149.

⁴³ See now NYLAN, *Five "Confucian Classics"*, *op. cit.*, pp. 125, 133-4.

from modern archaeology. Many archaeologists, in particular those from mainland China, have interpreted the uncovering of sophisticated late Neolithic cultures as a vindication of much of the traditional, written record of Chinese history. Others have been more sceptical and argued that the archaeological data must be interpreted strictly on its own without reference to assumptions drawn from a written record largely composed of fictions⁴⁴. This dispute need not concern us too much. Whether Shun is to be taken as a legendary or an historical figure, the archaeological evidence makes it clear that powerful 'states' centred on walled towns co-existed in the basin of the Yellow River and along the Yangtse from the latter part of the third millennium BC. In some of these towns the remains of large buildings, probably royal palaces, have been found. We do not know whether writing was invented at this time. Its use is not clearly evidenced before the middle or end of the second millennium BC⁴⁵. Yet it does not seem impossible that rulers of the powerful polities that flourished during the third millennium should have displayed outside their palaces pictorial, and perhaps also, written, representations of the punishments.

II. The Painted Punishments: *hua hsiang*

The tradition that in antiquity at the time of Yao and Shun punishments consisted in the painting of the body or the wearing of different coloured clothes was prevalent by the time of the Han, although there was confusion as to the precise role of such punishments, in particular, as to whether they alone existed in the 'golden age', whether the corporal punishments were also in existence but not used, or whether both punishments by way of painting or clothing and physical mutilation were applied. There are

⁴⁴ On this point there is useful material in *The Cambridge History of China. From the Origins of Civilization to 221 BC*, edited by M. Loewe and E. L. Shaughnessy, Cambridge, 1999.

⁴⁵ See W. G. BOLTZ, *The Origin and Early Development of the Chinese Writing System*, New Haven, Connecticut, 1994, pp. 31-44. D. N. KEIGHTLEY, *The Origin of Writing in China: Scripts and Cultural Contexts*, in *The Origins of Writing*, edited by W. M. SENNER, Lincoln and London, 1989, pp. 171-202, argues for an earlier date.

also differences in the sources as to the type of clothing or nature of the painting that 'corresponded' to each of the regular 'five punishments'. We first examine these differences and then come back to the other issues.

The sources represent two principal traditions with respect to the way in which offences punished by the wearing of particular kinds of clothing or the painting of parts of the body were classified. The first adopts a classification based upon the five physical punishments themselves, namely, tattooing or black branding, amputation of the nose, amputation of the legs or feet, castration, and death. The second adopts a more general classification based upon the seriousness of the offence, namely, grave, middle, or light offences.

The passages based upon the 'five punishments' are from the philosopher Shen Tao who flourished around the end of the fourth century BC⁴⁶, the philosopher Hsün Tzu (c. 335 –238 BC)⁴⁷, the *Ta chuan*, a commentary on the *Shang shu* attributed to Fu Sheng (third to second century BC) but perhaps written by his students in the second century BC⁴⁸, the *Po Hu t'ung* (*Comprehensive Discussions in the White Tiger Hall*) recording the results of a court discussion in AD 79 on the proper interpretation of the Confucian classics⁴⁹, and the Legal Treatise of the *Chin shu*. These passages present some difficulties of interpretation, as we shall see in the comparison of the accounts they give of the 'punishments by way of clothing' corresponding to the physical punishments. We take the latter punishments in ascending order of severity.

Black branding or tattooing (mo/ch'ing). Shen Tao says that corresponding (*tang*) to this punishment was *hua kuei*⁵⁰, a phrase

⁴⁶ On Shen Tao and his work, the *Shen tzu*, see P. M. THOMPSON, *Shen tzu*, in *Early Chinese Texts...*, *op. cit.*, pp. 399-400.

⁴⁷ On Hsün tzu and his writings see M. LOEWE, *Hsün tzu*, in *Early Chinese Texts*, pp. 178-80.

⁴⁸ See SHAUGHNESSY, *Shang shu*, *op. cit.*, pp. 381, 385.

⁴⁹ There is some doubt as to the date of compilation of this work. See M. LOEWE, *Pai hu t'ung*, in *Early Chinese Texts...*, *op. cit.*, pp. 347-50.

⁵⁰ The text can be found in P. M. THOMPSON, *The Shen Tzu Fragments*, Oxford, 1979, p. 292, fr. 108 (also cited in the commentary of the T'ang scholar Yang

translated by Knoblock as “the drawing of irregular designs on the face”⁵¹ and by Dubs as “used designs on the feet”⁵². Since the punishment of tattooing itself was inflicted on the face, Knoblock’s rendering is to be preferred. The extant text of the *Hsün tzu* is defective, containing merely the phrase *mo ch’ing* (black branding)⁵³. The emendation followed by Knoblock supposes that the text originally read *mo meng chin*: “black branding is covering (the head) with a cloth”. This would yield the sense that the offender had to have a black hood over his face⁵⁴ or wear a black turban⁵⁵. However, the Ch’ing scholar Hao I-hsing (1757-1825), perhaps following the explanation given in the *Shen tzu* passage, held that Hsün Tzu was referring to the drawing of black lines (without making an incision) on the face as a substitute for black branding⁵⁶. Hao’s interpretation is followed by Köster in his translation⁵⁷. The *Ta chuan* says that one who committed an offence entailing black branding (*mo*) was to wear a black cloth (*meng tsao chin*)⁵⁸. Both the *Po Hu t’ung* and the *Chin shu* speak of the wearing of a black head covering, the former using the phrase *meng chin* (‘covered with a cloth’)⁵⁹, the latter *tsao ch’ih chin* (‘wearing a black hat’)⁶⁰.

Liang (ninth century) to the works of Hsün Tzu: *Hsün tzu chi chieh*, Taipei, 1983, p. 218, and by Shen Chia-pen, *Li t’ai hsing fa k’ao*, op. cit., pp. 5-6).

⁵¹ J. KNOBLOCK, *Xunzi. A Translation and Study of the Complete Works*, Stanford, California, 1994, 3, p. 24.

⁵² *History of the Former Han...*, op. cit., II, p. 127.

⁵³ *Hsün tzu chi chieh*, op. cit., p. 218.

⁵⁴ KNOBLOCK, *Xunzi...*, op. cit., 3, p. 37.

⁵⁵ DUBS, *History of the Former Han...*, op. cit., II, p. 123; H. H. DUBS, *The Works of Hsuntze*, Taipei, 1973, p. 193.

⁵⁶ Cited by Liang Ch’i-hsiung, *Hsün tzu chien shih*, Beijing, 1956, p. 237;

KNOBLOCK, *Xunzi...*, op. cit., 3, p. 307 n.35.

⁵⁷ H. KÖSTER, *Hsün-tzu*, Kaldenkirchen, 1967, p. 228.

⁵⁸ The passage is cited in Wang Jang-pao’s commentary to the *Fa yen*: *Fa yen i shu*, Taipei, 1981, II, section 9 (*hsien chih*), 8a, p. 437. It is translated by T. T. SOM, *Po Hu T’ung. The Comprehensive Discussions in the White Tiger Hall*, Leiden, 1949, II, p. 604 n5 as “covered with a black cloth”, while KNOBLOCK, *Xunzi...*, op. cit., 3, p. 24 has “Branded offenders have to wear the clothing of menials”. Som’s rendering is closer to the Chinese text.

⁵⁹ The text is quoted by Wang Hsien-ch’ien, *Han shu pu chu*, op. cit., I, p. 85 and Shen Chia-pen, *Li t’ai hsing fa k’ao*, op. cit., I, p. 6. It is translated by DUBS, *History of the Former Han...*, op. cit., II, p. 125 and SOM, *Po Hu T’ung...*, op. cit., II, pp. 603-4.

⁶⁰ *Chin shu*, op. cit., p. 917; HEUSER, *Rechtskapitel...*, op. cit., p. 56.

These sources suggest the existence of two traditions defining a punishment that corresponded to black branding. One, possibly the earlier, defined it as the painting of the face with black lines, the other, which came to be dominant, defined it as the wearing of some kind of head covering, probably black.

Amputation of the nose (i): Again we can distinguish two traditions concerning the punishment that corresponded to removal of the nose. The earlier, evidenced in the *Shen tzu* and *Hsün tzu*, specifies that the offender was to wear bleached strings attached to his cap⁶¹. The *Shen tzu* has the phrase *ts'ao ying*⁶², translated by Knoblock as "wearing of bleached cap-strings"⁶³ and Dubs as "uses a grass cord"⁶⁴. The *Hsün tzu* has *sao ying*⁶⁵, translated by Knoblock as "wear bleached cap strings"⁶⁶, by Dubs as "wearing a grass cord around the neck"⁶⁷ or "wearing of straw fringes (on the cap used by adults)"⁶⁸, and by Köster as "the attaching of straw bands"⁶⁹. The later tradition, recorded in the *Ta chuan*, *Po Hu t'ung*, and *Chin shu*, holds that the offender wore red clothing. Both the *Ta chuan* and the *Po Hu t'ung* specify *che ch'i i*⁷⁰, that is, offenders were to dye their clothing with red ochre⁷¹, while the *Chin shu*⁷² has *tan ch'i fu*, that is, offenders wore red clothing⁷³.

⁶¹ Following the rendering of KNOBLOCK (below).

⁶² See note 50 above.

⁶³ *Xunzi*..., *op. cit.*, 3, p. 24.

⁶⁴ *History of the Former Han*..., *op. cit.*, II, p. 123.

⁶⁵ See note 53 above.

⁶⁶ *Xunzi*..., *op. cit.*, 3, p. 37.

⁶⁷ *History of the Former Han*..., *op. cit.*, II, p. 123.

⁶⁸ *Hsuntze*..., *op. cit.*, p. 193.

⁶⁹ *Hsün-tzu*, *op. cit.*, p. 228.

⁷⁰ See notes 58, 59 above.

⁷¹ *Xunzi*..., *op. cit.*, 3, p. 24; DUBS, *History of the Former Han*..., *op. cit.*, II, p. 125; SOM, *Po Hu T'ung*..., *op. cit.*, II, p. 605.

⁷² See note 60 above.

⁷³ HEUSER, *Rechtskapitel*..., *op. cit.*, p. 56.

Amputation of feet or legs (yu/pin): Again, we can discern two traditions. The earlier, evidenced in the *Shen tzu*⁷⁴ and the *Hsün tzu*⁷⁵ specifies that the offender is to wear hemp or straw sandals. The later, recorded in the *Ta chuan*⁷⁶, the *Po Hu t'ung*⁷⁷, and the *Chin shu*⁷⁸ states that the knee caps of the offender were to be painted black or to be covered with a black cloth⁷⁹.

Castration (kung): The *Shen tzu* and the *Hsün tzu* both use the phrase *ai pi* to describe the punishment of the offender. This phrase has been interpreted in different senses. Knoblock has "the cutting off of a piece of the apron"⁸⁰, Dubs offers both "(there was wearing) a grey apron"⁸¹ or "cutting off the apron"⁸² and "cutting off the leather knee pads"⁸³. Köster translates "cuts out the leather knee coverings"⁸⁴. Some Chinese commentators also prefer the interpretation which refers to cutting out knee coverings rather than the apron⁸⁵. Perhaps the difference is not great, since the apron was worn to protect the body from the waist to the knees⁸⁶. The later sources, *Po Hu t'ung*⁸⁷ and *Chin shu*⁸⁸ have a

⁷⁴ *li fei*: KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 24; DUBS, *History of the Former Han...*, *op. cit.*, II, p. 123.

⁷⁵ *tui chü*: KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 37; DUBS, *History of the Former Han...*, *op. cit.*, II, p. 123; DUBS, *Hsuntze...*, *op. cit.*, 193; KÖSTER, *Hsün-tzu*, *op. cit.*, p. 228.

⁷⁶ *i mo meng ch'i pin ch'u erh hua chih*, erroneously rendered by KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 24, as "offenders whose legs were cut off were to wear a black covering over their amputated leg stumps".

⁷⁷ *i mo meng ch'i pan ch'u erh hua chih*: DUBS, *History of the Former Han...*, *op. cit.*, II, p. 125; SOM, *Po Hu T'ung...*, *op. cit.*, II, p. 605.

⁷⁸ *mo ch'i t'i*: HEUSER, *Rechtskapitel...*, *op. cit.*, p. 56.

⁷⁹ The version in the *Chin shu* simply says that the body is to be blackened.

⁸⁰ *Xunzi...*, *op. cit.*, 3, p. 24.

⁸¹ Cf. also Wang Hsien-ch'ien, *Hsün tzu chi chieh*, *op. cit.*, p. 218.

⁸² *History of the Former Han...*, *op. cit.*, II, p. 123.

⁸³ *Hsuntze...*, *op. cit.*, p. 193.

⁸⁴ *Hsün-tzu*, *op. cit.*, p. 228.

⁸⁵ Liang Ch'i-hsiung, *Hsün tzu chien shih*, *op. cit.*, p. 238.

⁸⁶ KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 307 n38.

⁸⁷ *li tsu fei*: DUBS, *History of the Former Han...*, *op. cit.*, II, p. 125; SOM, *Po Hu T'ung...*, *op. cit.*, II, p. 605.

⁸⁸ *tsa ch'i chü*: HEUSER, *Rechtskapitel...*, *op. cit.*, p. 56.

completely different account, specifying that the punishment was the wearing of variegated straw sandals.

Death (ta p'i/sha): Here, surprisingly, all the sources agree that the offender was to wear clothing without a collar, the version in the *Hsün tzu* specifying that the clothing be dyed red⁸⁹.

The second principal tradition distinguishes offences punishable by clothing or painting not according to the corresponding specific corporal punishments but according to the degree of seriousness of the offence. The two sources do not accord in the accounts they give. These are a passage from the *Ta chuan* and a passage contained in the *Hsiao ching Wei Yüan-sheng*, a work on filial piety attributed to the end of the first century BC⁹⁰. For light offences, the *Ta chuan* specifies that black clothing (or a black head covering) is to be worn: *mo meng*⁹¹, while the *Hsiao ching Wei Yüan-sheng* specifies the wearing of many coloured sandals: *tsa chü*⁹². For middle offences, the *Ta chuan* has the punishment given by the *Hsiao ching Wei Yüan-sheng* for light offences, namely, the wearing of many coloured sandals, while the latter text stipulates the wearing of both clothing dyed with red ochre and many coloured sandals. For grave offences, the *Ta chuan* specifies the wearing of red clothes without a collar or border: *che i erh pu shun*⁹³, while the *Hsiao*

⁸⁹ *Shen tzu*: *pu i wu ling* (KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 24); *Hsün tzu*: *che i erh pu shun* (KNOBLOCK, p. 37; DUBS, *History of the Former Han...*, II, p. 123 and *Hsuntze...*, *op. cit.*, p. 193; KÖSTER, *Hsün-tzu*, *op. cit.*, p. 228); *Ta chuan*: *pu i wu ling* (KNOBLOCK, p. 24); *Po Hu t'ung*: *pu i wu ling* (DUBS, *History of the Former Han*, p. 125; SOM, *Po Hu T'ung...*, *op. cit.*, II, p. 605); *Chin shu*: *pu ch'i i chü erh wu ling yüan* (HEUSER, *Rechtskapitel...*, *op. cit.*, p. 56).

⁹⁰ See DUBS, *History of the Former Han...*, II, p. 124.

⁹¹ The text is quoted by Yang Liang in his commentary to the *Hsün tzu*: Wang Hsien-ch'ien, *Hsün tzu chi chieh*, *op. cit.*, p. 218. See also Shen Chia-pen, *Li t'ai hsing fa k'ao*, *op. cit.*, I, p. 5. It has been translated by KNOBLOCK, *Xunzi...*, *op. cit.*, 3, p. 24; DUBS, *History of the Former Han...*, *op. cit.*, II, p. 124; L. VANDERMEERSCH, *Wangdao ou la voie royale. Recherches sur l'esprit des institutions de la Chine archaïque*, Paris, 1980, II, p. 447.

⁹² For the text see Wang Hsien-ch'ien, *Han shu chu pu*, *op. cit.*, p. 85; Shen Chia-pen, *Li t'ai hsing fa k'ao*, p. 5. It is translated by DUBS, *History of the Former Han...*, *op. cit.*, II, p. 124; Biot, *Tcheou-li...*, *op. cit.*, II, p. 336 n11.

⁹³ VANDERMEERSCH, *Wangdao...*, *op. cit.*, II, p. 447 reads 'without silk' instead of 'without collar or border'.

ching Wei Yüan-sheng has the wearing of a black head covering, red clothes, and many coloured sandals: *mo meng che i tsa chü*⁹⁴.

One may suppose a rough correlation between the two sets of classifications. 'Light offences' might approximate to those punished by black branding, 'middle offences' to those punished by amputation (of nose or feet) or castration, and 'grave offences' to those punished by death. On this basis, one may also detect some correspondences in the type of clothing selected as punishment. Thus, the wearing of a black head covering for 'light offences' is paralleled by the same punishment for offences entailing black branding. The wearing of red clothing or hemp sandals for 'middle offences' is paralleled by the same punishments for offences entailing amputation or castration. The wearing of collarless (red) clothes for 'grave offences' is paralleled by the same punishment for offences entailing death.

We now turn to the question, generally ignored, of the precise way in which the punishments by way of clothing or painting can be aptly described as 'symbolic'. The context in which this expression is used suggests that the punishments under discussion 'stand for' or 'represent' certain other punishments, namely, those which physically harm the body: black branding, amputation, castration, and death. Clothing or painting, by contrast, affects or touches, but does not harm, the body. A necessary implication of this view is that the physical punishments were in existence at the same time as the punishments by way of clothing or painting, the point being that the former were not used, the latter appearing as substitutes. Certain passages which refer to punishments by clothing or painting are compatible with, or even support, this view. Others are inconsistent with it. Thus the *Shen tzu* states that the various types of clothing or painting 'corresponded to' or 'substituted for' (*tang*) the different physical punishments⁹⁵. Hsün Tzu's reference to 'popular opinion' (including the view of Shen Tao) contains an ambiguity. He says that in antiquity there were no 'corporal punishments', but merely *hsiang hsing*, the phrase often rendered as

⁹⁴ This follows the translation of BIOT rather than DUBS.

⁹⁵ Cited above at note 50.

'symbolic punishments'⁹⁶. Hsün Tzu may have meant that, although the corporal punishments were formally in existence, they were not applied, being replaced in practice by clothing and the painting of the body. On the other hand, he may have meant that in antiquity the corporal punishments had not yet been invented, there merely being *hsiang hsing*. There is some support for the former interpretation in the fact that the passage proceeds to equate the punishments by way of clothing or painting with each of the five physical punishments.

The two passages attributed to Fu Sheng's *Ta chuan* provide no very clear indication of the relationship between the physical and the non-physical punishments. That which utilises the classification of grave, middle, and light offences makes a distinction between the treatment of the Chinese and the (barbarian) Miao⁹⁷. The punishments by way of painting or clothing are applicable only to the Chinese, the Miao being subject to the full range of physical punishments. One might construe this passage in the sense that the non-physical punishments applied to the Chinese corresponded to and substituted for the physical punishments applied to the Miao. On the other hand, no particular relationship between the two kinds of punishment may be implied, one kind simply being applicable to the Chinese and the other to the Miao. The language of the second passage suggests that for each physical punishment there was a corresponding non-physical punishment which 'replaced' it⁹⁸. For example, the punishment of black branding or tattooing was replaced with the wearing of a black covering. However, even this conclusion is not certain. The commentator may be using elliptic language to state that offences *now* punished by black branding were in the past punished by the wearing of a black covering.

Several passages are directly opposed to the 'symbolic' interpretation of the punishments by way of clothing or painting, in that

⁹⁶ Cited above at note 53.

⁹⁷ Cited above at note 91.

⁹⁸ Cited above at note 58. KNOBLOCK's interpretation of the passage is different. He supposes that the punishments by way of clothing or painting were *added* to the corporal punishments (*Xunzi...*, *op. cit.*, 3, p. 24).

they presuppose an historical evolution in the development of punishments. The earliest appears to be that from the *Hsiao ching Wei Yüan-sheng*. It states that in the time of the three sovereigns (*huang*) there were no written texts, that in the time of the five emperors (*ti*) there were the *hua hsiang*, and that in the time of the three kings (*wang*) there were the corporal punishments⁹⁹. The *hua hsiang* are illustrated by reference to the classification of 'light', 'middle', and 'grave' offences¹⁰⁰. This a clear statement of a temporal sequence in the development of the *hua hsiang* and the corporal punishments. The former belong to a period prior to the introduction of the latter. Hence, they cannot be said to 'represent' or 'stand for' the punishments of black branding, amputation, castration, or death.

Yang Hsiung in his *Fa yen* (*Model Sayings*), compiled at the beginning of the first century AD¹⁰¹, quotes from the *Kao Yao mo* the phrase *hsiang hsing wei ming*. The commentator Li Kuei (early fourth century AD) explains the phrase *wei ming* as "to make known the laws and statutes (*fa tu chang*)"¹⁰². The way in which Yang Hsiung understood the phrase *hsiang hsing* is to be gathered from the succeeding statement in the text, according to which the Hsia dynasty created three thousand offences for which corporal punishments were imposed¹⁰³. The contrast of *hsiang hsing* and corporal punishments makes it clear that the former phrase is to be understood as 'punishments by way of clothing or painting'. The texts cited by Wang Jung-pao in his commentary, such as the two passages from the *Ta chuan*, confirm this interpretation.

⁹⁹ A similar sentiment is attributed to Confucius by Ho Hsiu (Ad 129-82) in his *Kung yang* commentary (duke Hsiang, 29th year), cited by Kao Ch'ao and Ma Chien-shih, *Chung kuo li t'ai hsing fa chih chu i* (*Translation (into modern Chinese) of the Legal Treatises Contained in the Standard Histories*), 1994, p. 58 n11.

¹⁰⁰ For the text see note 94 above.

¹⁰¹ See D. C. KNECHTGES, *Fa yen*, in *Early Chinese Texts...*, *op. cit.*, pp. 100-1.

¹⁰² *Fa yen shu i...*, *op. cit.*, II, 9.7b, p. 436. This explanation is contrary to the interpretation given by the main Western translators of the *Shang shu* who take the phrase in the sense: Kao Yao was enlightened in his application of the punishments. See note 3 above.

¹⁰³ Cf. the translation by E. VON SACH, *Yang Hsiung's Fa yen* (*Worte strenge Ermahnung*), San Francisco, 1978, p. 43.106.

The same point of view is represented in three imperial edicts from the former Han dynasty (206 BC - AD 25). The edict abolishing the mutilating punishments, promulgated by emperor Wen in 167 BC, states: "We have heard that in the time of the Yu-yü clan (= Shun), people regarded it as shameful if their clothes and hat were painted (*hua*) and if they were distinguished from others by dress which was marked. Yet the commoners did not violate the law"¹⁰⁴. Edicts of emperor Wu in 134 BC¹⁰⁵ and emperor Yuan in 42 BC¹⁰⁶ also recall the tradition assigning to Yao and Shun punishments by way of painting and clothing, a time when the people did not commit offences. The former edict uses the expression *hua hsiang* and the latter the expression *hsiang hsing*, both having an identical sense¹⁰⁷.

With one complication to be noted below, later sources also consistently portray the 'five emperors', including Yao and Shun, as employing punishments by way of clothing or painting and the 'three kings' as introducing the physical punishments. Thus, the *Po Hu t'ung* cites the *chuan* (tradition)¹⁰⁸ for the proposition that the five emperors had *hua hsiang* and the three kings corporal punishments¹⁰⁹. The Legal Treatise of the *Chin shu* also notes that, according to tradition (*chuan*), the three sovereigns (*huang*), legendary rulers antedating the five emperors, only used words but

¹⁰⁴ Quoted from Ssu-ma Chien. *The Grand Scribe's Records. Volume II. The Basic Annals of Han China*, edited by W. H. Nienhauser, Jr. Bloomington and Indianapolis, 2002, pp. 170-1. For the text see *Shih chi*, Beijing, 1972, p. 427 and *Han shu*, *op. cit.*, p. 1098. Other translations: B. WATSON, *Records of the Grand Historian of China*, New York and London, 1961, I, p. 387; CHAVANNES, *Mémoires historiques...*, *op. cit.*, II, p. 475; HULSEWÉ, *Remnants of Han Law*, *op. cit.*, p. 334, assuming without justification that the likenesses of the mutilating punishments were depicted.

¹⁰⁵ DUBS, *History of the Former Han...*, *op. cit.*, II, p. 36.

¹⁰⁶ DUBS, *History of the Former Han...*, *op. cit.*, II, p. 320.

¹⁰⁷ DUBS in both cases mistranslates the text by taking *hua hsiang* and *hsiang hsing* in the sense: "the former rulers merely portrayed the mutilating punishments by likenesses of those punishments in the criminal's clothing". There is no necessary reference to the mutilating punishments at all.

¹⁰⁸ SOM, *Po Hu T'ung...*, *op. cit.*, II, p. 603 n1 suggests that *chuan* in this context refers to the *Hsiao ching Wei Yüan-sheng*.

¹⁰⁹ See note 59 above.

the people did not violate them, while the five emperors used the *hua hsiang* but the people knew the prohibitions. It then cites from the *Yao tien* the phrase *hsiang i tien hsing*¹¹⁰ as a reference to the *hua hsiang*. There is here an implication, although nothing is said specifically, that the physical punishments were introduced by the three kings¹¹¹. The Legal Treatise of the *Sui shu* (*Official History of the Sui Dynasty 589-618 AD*), compiled in 656, states that the five emperors had the *hua hsiang* under which the clothing of offenders was marked in different ways, while the three kings had the corporal punishments under which incisions were made in the body¹¹². Finally, the preface to the T'ang code of 737 AD states that, in the time of Yao and Shun, the virtue of the rulers was such that offences were few. These rulers established the *hua hsiang*. It was the three kings who first used corporal punishments, since it was no longer possible to punish criminals merely through the wearing of ochre coloured garments¹¹³.

The complication to which reference has been made arises from the fact that both the *Po Hu t'ung* and the *Chin shu* appear to confuse the stage in which only non-physical punishments (by way of clothing and painting) were used with that in which the physical punishments were introduced. The *Po Hu t'ung*, after distinguishing the *hua hsiang* of the five emperors from the corporal punishments of the three kings, proceeds to describe the former as 'depictions' in clothing and painting of each of the five punishments¹¹⁴. The account in the *Chin shu* compounds the confusion. The explanation which it gives of the various punishments by way of clothing or painting suggests not only that the physical punishments were in existence at the same time, but, at least in the case of capital offences, that the physical was applied in conjunction with the non-physical punishment. When a person has committed an

¹¹⁰ See above at note 3.

¹¹¹ *Chin shu*, *op. cit.*, p. 917; HEUSER, *Rechtskapitel...*, *op. cit.*, p. 56.

¹¹² *Sui shu*, Beijing, 1973, p. 696; E. BALAZS, *Le traité juridique du "Souei-Chou"*, Leiden, 1954, pp. 29-30.

¹¹³ *T'ang li shu i*, Beijing, 1983, pp. 1,2; W. JOHNSON, *The T'ang Code. Volume I. General Principles*, Princeton, New Jersey, 1979, pp. 50-1, 52 (with a different interpretation of the phrase *hua hsiang*).

¹¹⁴ See note 59 above.

offence entailing death, he is to be dressed in clothing without a collar, taken to the market place, and there publicly beheaded¹¹⁵.

The sources thus yield no clear picture of the relationship between the non-physical and the physical punishments. On the one hand, there is the tradition that the former historically preceded the latter. The physical punishments replaced the non-physical at one point in the supposed succession of the Chinese dynasties. Hence, the punishments by way of clothing or painting can hardly be treated as 'symbolising' or 'representing' the five corporal punishments. On the other hand, we find statements which define the punishments by way of clothing or painting by reference to the corporal punishments. Wearing a black covering, for example, is the punishment imposed for an act that otherwise would be punished with black branding. The non-physical punishments thus presuppose the existence of the physical and appear as substitutes or replacements for the latter. It is only on this kind of supposition that one can understand the qualification of punishments by way of clothing or painting as 'symbolic'.

As we have seen, not all the ancient accounts of the relationship between the physical and the non-physical punishments warrant the description of the latter as 'symbolic'. Is there any evidence to suggest which element of these diverse traditions may be more accurate? From this point of view, we may consider the characteristics of some of the punishments by way of clothing or painting. One can detect a possible correlation between the kind of clothing or painting and the kind of physical punishment. For example, the painting of black lines on the face or the wearing of a black head covering aptly expresses the punishment of black branding, the wearing of straw sandals or the painting of knee caps suggests a reference to the punishment of amputation of the foot or leg, the wearing of red clothing might stand for the shedding of blood, and the wearing of a collarless jacket might express the fact of beheading.

¹¹⁵ See note 60 above.

The points of similarity between the non-physical and the physical punishments are an important indication of the relationship between the two kinds of punishment. They show that the tradition which presupposes the existence of the physical in its account of the non-physical punishments is more plausible than that which treats the latter as historically antedating the former. In other words, we have to treat the ascription of the punishments by way of clothing or painting to the period of the 'five emperors' as part of the attempt by scholars in the Warring States or Han to create a 'golden age' preceding the rise of the recognised dynasties, beginning with the Hsia. This conclusion still leaves open the question, what role, if any, did the punishments by way of clothing or painting play in Chinese legal history? It is instructive on this point to contrast the opinion of the third century BC philosopher Hsün Tzu with that of the late Ch'ing legal scholar Shen Chia-pen.

The question is: was there ever a time in antiquity at which the only punishments for offences, however serious, were the requirement to wear a certain kind of clothing or have a portion of one's body painted? To these questions Hsün Tzu, one of the earliest commentators on the subject, returned a qualified negative. The negative is qualified because Hsün Tzu linked effective punishment with good order. In the well ordered times of antiquity, he argued, offences must have been properly graded and serious offences have received severe punishment. Homicide, for example, must have been punished with death. Light or ineffective punishments arose in times of disorder or chaos. It is this point which explains the qualification of his negative. Hsün Tzu concluded that the punishments by way of clothing or painting are rather to be considered a product of the present age of chaos. Unfortunately, he does not further elucidate this elliptic statement which implies the existence of such punishments in the fourth and third centuries BC. It is perhaps possible that he meant that the idea of such punishments was imagined in the present age, even though they never existed¹¹⁶.

Hsün Tzu completes his account by offering his own explanation of the phrase *hsiang i tien hsing* from the *Yao tien*. The

¹¹⁶ See note 53 above.

phrase, he says, refers to the five corporal punishments but describes them as 'modelled on' or 'imitating' (*hsiang*) the Way of Heaven (*tao t'ien*)¹¹⁷. From this point of view, the physical punishments themselves are 'symbolic' not in the sense that they 'represent' the mutilating punishments but in the sense that they express the inexorable pattern of nature.

Hsün Tzu's arguments with respect to the 'well ordered age of antiquity' have a degree of plausibility. It is difficult to accept that in the pre-Chou period, for example, the only punishments imposed were those that consisted in the wearing of particular kinds of clothing or the painting of different parts of the body. Shen Chia-pen in his discussion of this matter has a different view. First, he rejects the view expressed by the T'ang scholar Tu Yu (AD 735-812) to the effect that Shun inherited the five punishments, initially abrogated them, and afterwards brought them back. Shen himself holds that Shun applied both the physical punishments and the punishments by way of clothing (*hsiang hsing*), the former to certain tribes of rebellious and refractory barbarians as well as to the incurably wicked Chinese, the latter to the mass of the ordinary people¹¹⁸.

Hsün Tzu's approach to the nature of punishments in antiquity is to be preferred to that of Shen Chia-pen. It is difficult to accept that in the remote past the 'virtue' of the rulers was such that the people (with few exceptions) behaved well, committing only offences that might appropriately be punished by a particular style of clothing or the painting of part of the body. At the same time, it is difficult to accept that the tradition of *hua hsing/hsiang* rests upon a complete fabrication. The belief that Yao and Shun invented and employed the punishments by way of clothing or painting, even if it crystallised in the Warring States period, must have been based

¹¹⁷ This section of the argument is preserved in the quotation from Hsün Tzu given by Pan Ku in his *Treatise on Punishments* (*Han shu*, *op. cit.*, p. 1111). See KNOBLOCK, *Xunzi...*, *op. cit.*, 3, pp. 38, 308 n46; HULSEWÉ, *Remnants of Han Law*, *op. cit.*, p. 415 n32. Pan Ku himself cites Hsün Tzu with approval, but still appears to follow the traditional view which attributed the creation of the mutilating punishments to Yu after the time of Yao and Shun (HULSEWÉ, p. 348).

¹¹⁸ *Li t'ai hsing fa k'ao*, *op. cit.*, I, pp. 6, 7-8.

upon some concrete data. We may here advert to a fact to which Shen Chia-pen himself drew attention¹¹⁹. This is the practice, verified for the Chin and Han, of requiring convicts to wear red clothing and the statement in the *Chou li* that a Chou punishment was barring the offender from wearing the ordinary cap and head ornaments.

Red clothing in Warring States, Ch'in (221-206 BC), and Han times was the appropriate garb both for persons sentenced to forced labour and those sentenced to death. The Ch'in statutes of the third century BC specifically provided that persons sentenced to the most serious grade of forced labour were "to be dressed in red clothes and wear red head cloths"¹²⁰. That this statute still applied in the time of the First Emperor (the founder of the Ch'in dynasty, who reigned 221-210 BC) can be seen from Tung Chung-shu's memorial on conditions under the Ch'in, submitted to Han emperor Wu around 100 BC: "Felons' costumes of red ochre spread over half the roadways"¹²¹. The late Han scholar Ying Shao (AD ca. 140-203) also notes that offenders under the Ch'in were sent by the First Emperor to build the Great Wall. They were ordered to have their heads shaved and to wear red clothing¹²².

The same practice continued under the Han. The Han penal code itself contained a provision enacting that prisoners or convicts who illicitly removed their iron collars, iron fetters, or their red garments were to have their punishments increased by one degree¹²³. After the arrest of the king of Chao, Chang An, in 198 BC,

¹¹⁹ *Li t'ai hsing fa k'ao*, *op. cit.*, I, p. 6.

¹²⁰ The text can be found in *Chung kuo chen hsi fa lü tien chi chi cheng* (*Rare Ancient Codes of Chinese Law*), Beijing, 1994, p. 122. It is translated by A. F. P. HULSEWÉ, *Remnants of Ch'in Law*, Leiden, 1985, p. 72 (A70). He suggests (n1) that the head cloth may have been a 'conical cap' (cf. DUBS, *History of the Former Han...*, *op. cit.*, II, p. 302 n1).

¹²¹ *Han shu*, *op. cit.*, p. 1137; N. L. SWAN, *Food and Money in Ancient China*, New York, 1974, p. 182.

¹²² *Feng su t'ung i*, Peking, 1943, p. 110; T'ung-tzu Ch'u, *Han Social Structure*, edited by J. L. DULL, Seattle and London, 1972, p. 336 (n49).

¹²³ This law is cited by the commentator Meng K'ang (ca. AD 180-260), *Han shu*, *op. cit.*, p. 3654 n1; see also YONGPING LIU, *Origins of Chinese Law*, Hong Kong, 1998, p. 315 n126.

several of his officials, dressed in red with shaved heads and wearing iron collars, followed him to the capital¹²⁴. To show that they had committed offences, the officials had dressed in the clothing of convicts. Ssu-ma Ch'ien in his letter to Jen Shao-ch'ing of 93 BC refers to the fate of the general Tou Ying who, despite his victories, was made to wear red clothing and bound in fetters¹²⁵. In fact, You Ying in 131 BC had been impeached, imprisoned, and sentenced to death on the charge of forging an imperial edict¹²⁶. This is an example of a person imprisoned on a capital charge wearing red clothing.

The *Chou li* in its discussion of the duties of the officers termed *ssu huan* (those in charge of the central prison) states that persons who harm (*hai*) others are not to wear the ordinary cap and head covering; they are to receive the punishment of 'public disgrace' (*ming hsing*)¹²⁷. More information is given in the section on the duties of the *ta ssu k'ou* (the great officer in charge of crime). This states that persons who harm (*hai*) others are to be detained in the central prison. There they are humiliated by means of the punishment of 'public disgrace' (*ming hsing*)¹²⁸. What is meant by this punishment and the nature of the offences which attract it are both explained by the Han commentator Cheng Hsüan. He states that those who harm others are depraved persons who have not deliberately broken the law but have committed wrongs through error (*kuo shih*). Hence, they are kept in prison for instruction so that they might repent and reform. The public humiliation to which they are exposed includes the writing of their offence on a tablet which is then tied to their back¹²⁹. Cheng further explains the pu-

¹²⁴ *Han shu*, *op. cit.*, p. 1982; Ch'u, *Han Social Structure*, *op. cit.*, pp. 335-6 (n49); C. M. WILBUR, *Slavery in China during the Former Han Dynasty (206 B.C. - A.D. 25)*, New York, 1967, p. 273 n5.

¹²⁵ *Han shu*, *op. cit.*, p. 2733; B. WATSON, *Ssu-ma Ch'ien Grand Historian of China*, New York, 1958, p. 64.

¹²⁶ *Shih chi*, *op. cit.*, p. 2853; WATSON, *Records...*, II, pp. 126-7.

¹²⁷ *Chou li...*, *op. cit.*, 36.14b; BIOT, *Tcheou-li...*, *op. cit.*, II, pp. 365-6.

¹²⁸ *Chou li...*, *op. cit.*, 34.4b; BIOT, *Tcheou-li...*, *op. cit.*, II, p. 310. Cf. also GAURIER, *L'influence de l'esprit...*, *op. cit.*, p. 141.

¹²⁹ *Chou li...*, *op. cit.*, 34. 4b; BIOT, *Tcheou-li...*, *op. cit.*, II, p. 310 n2 (not noting the distinction between the 'intentional' and the 'non-intentional' breaking of the law).

nishment of not wearing a cap and head ornaments by citing the punishment of *mo meng* which in antiquity constituted one of the *hsiang hsing*¹³⁰. He appears to mean that the offender wore a black head covering instead of the normal cap.

The evidentiary force of the statement in the *Chou li* together with Cheng Hsüan's explanation differs in two respects from that of the statements concerning the red clothing worn by convicts. In the first place, while the latter collectively can be taken as sufficient proof of the existence of the practice they describe, the former in itself cannot be assumed to be proof of an actual Chou practice. The *Chou li* describes a system of administration that was believed ideally to characterise the Chou kingdom, but it is not a work of entire fiction or invention. Many of the officials and institutions it describes had a basis in fact. Therefore, it is probable, although not certain, that the Warring States or even earlier period knew a punishment under which the offender was required to wear a particular kind of head covering. This punishment may have been imposed in conjunction with some kind of labour. The *Chou li* seems to associate the punishment of public humiliation with some sort of labour. In the second place, the requirement of wearing a special head covering, even if associated with labour, appears to have been a punishment in itself, the essence of which was to impose humiliation upon the offender. The wearing of red clothes, on the other hand, appears as a subsidiary part of the punishments of forced labour or death. It is essentially a sign of convict or condemned status. One can, of course, see in the wearing of red clothing an element of humiliation, an outward sign of inferior status. At the same time, the distinctive colour of the clothes worn by convicts may also have been a device to make escape more difficult or to facilitate recapture.

We may conclude that the attribution in Warring States times to Yao and Shun of the creation of the punishments by way of clothing or painting of the body was based upon the fact that types of clothing were in use at that time to mark in some way the commission of an offence. Propagandists of a 'golden age' at the start of

¹³⁰ *Chou li*..., *op. cit.*, 36.14b; BIOT, *Tcheou-li*..., *op. cit.*, II, p. 366 n1.

recorded history believed that the use of special clothing in punishments known to them was a relic of a far distant period in which the virtue of the rulers ensured that the people did not offend. It was sufficient that the punishments were 'represented' by types of clothing or the painting of the body. The latter may have been suggested by the fact that the punishment of tattooing required both the incising of the face and the application of ink to the wound¹³¹. One could infer that in the 'golden age' only the application of ink to the body had been used.

We are still left with important lacunae in our understand of the way in which punishments by way of painting or clothing were used during the Warring States or the Ch'in and Han dynasties. The only certainty is that prisoners and convicts were required to wear a special kind of red coloured clothing. But this is not a punishment in itself; it is the outward mark of persons sentenced to a physical punishment (death or forced labour). We do not know the extent to which the obligation to wear special clothing might have been a punishment in itself, its purpose to expose the offender to humiliation and ridicule. All we have is the inference to be drawn from the *Chou li* that punishments of this kind may have existed during the Warring States.

Conclusion

We may summarise the results of this discussion in three propositions:

1. The Warring States creators of the 'golden age', on the basis of contemporary practices for the punishment of offenders, ascribed to Yao and Shun the use of *hua hsiang/hsing* (punishment through the wearing of special clothing or the painting of the body).
2. The term *hua hsiang* became confused with the term *hsiang hsing* used to describe the laws which from the early Chou had been written on tablets and suspended on the gates of the ruler's

¹³¹ See C. E. REED, *Tattoo in Early China*, in *Journal of the American Oriental Society* 120.3 (2000), p. 366, entry 296.

palace. As a result, the phrases *hsiang i tien hsing* in the *Yao tien* and *hsiang hsing wei ming* in the *Kao Yao mo* came to be understood as referring in some way to the punishments by way of clothing or painting and not to the description (perhaps both written and pictorial) of the punishments and laws exhibited for the information and warning of the public.

3. Although there is evidence that offenders during the Warring States and under the Ch'in and Han dynasties were required to wear clothing of a particular colour, we cannot establish the extent to which punishments at this time might consist solely in the wearing of special clothing, that is, where the punishment was designed to inflict only humiliation and did not directly affect the body.