Introduction

During the last month of the twenty-seventh year of the Guangxu reign (1901), Guo Lizhang, the proprietor of a varnishing shop in Beijing, summoned to his store a former apprentice, Wu Zhiming (XS: Fujian 10660). Though the two men had been on good terms for years, living and working together, recently Wu had ended his apprenticeship and opened his own varnishing establishment, which was now competing for business with that of his former mentor. Guo was livid at this turn of events, so when Wu arrived Guo berated him for stealing his customers. Impenitent, Wu refused to offer any apologies, and an incensed Guo seized a wooden stick and struck him upside the head. Thereafter Guo went after Wu with an iron spike, striking him in the face. Wu, still conscious, spat curses at his attacker, who then unleashed all his rage, bashing Wu on the head with a brick and stabbing him numerous times, ultimately killing him. In an effort to destroy the evidence of his crime, Guo enlisted the help of his current apprentices to dump the body over his wall and into the courtyard of a neighbor. It was not long before the neighbor discovered Wu's corpse and alerted local authorities. Soon thereafter, Guo was arrested and put on trial.

How did the court, in this instance the central government's Board of Punishments (Xingbu 刑部), arrive at a verdict in this case?[1] Guo's crime possessed earmarks of three of the six main categories of homicide in Qing (1644–1912) law. Guo had nursed resentment of Wu Zhiming for some time, and, as it was later revealed, had summoned Wu to his home under false pretenses, making it possible that this was a case of premeditated homicide (*mousha* 謀殺). On the other hand, though Guo and Wu had been on bad terms, Guo had not attacked Wu right away, rather first confronting Wu and demanding an apology for poaching his business. Though Guo eventually attacked Wu, this could have been a spur-of-the-moment impulse, a case of sudden-intent homicide (*gusha* 故殺). Finally, both killer and victim had exchanged angry words during the course of the incident. It was not inconceivable that Guo had been incited to anger during the course of an argument, but had not really intended to kill his victim. Under such conditions the case would be one of killing in an affray (*dou'ousha* 鬬毆殺).

The court ultimately chose the second option, sentencing Guo Lizhang according to the laws on sudden-intent homicide. This was not a decision arrived at lightly, however. Homicide was among the most serious of crimes. In

1 On the organization of the Qing judiciary, see Bodde and Morris (1967: 113–131). On the handling of legal matters at the local level, see Ch'ü (1962: 116–129).

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the Qing, all homicide cases involved the taking of one if not more lives—the life of the victim, of course, but often also the life of the offender. These cases required particular care when issuing a judgment, and would be reviewed numerous times before a sentence was carried out. Accuracy and clarity were of the utmost importance, and the Qing code addressed this need with a series of finely graded categories of homicide, defined and differentiated by the degree of intent with which they were carried out. This carefully constructed continuum of mental culpability ranged from non-intentional, accidental homicides on the low end to homicides of premeditation and malice aforethought on the high end.

Forty years after the killing of Wu Zhiming, on a midsummer night in 1941, two members of the Guogong Village self-defense militia—Zhang Shoucai and Wang Weizong—were patrolling their neighborhood, located in the southern suburbs of Beijing (BMA: J65.4.313–315). Around 2 a.m., the men came upon a person crouching in the corner of a courtyard. Unable to see clearly in the dark, and thinking that nobody ought to be out and about at that hour, the men were concerned and called out for the person to identify himself. No response was forthcoming. Fearing that they had stumbled upon someone with nefarious intentions, and recalling another recent incident when bandits had shot at local militia members with no provocation, Zhang fired a warning shot from about thirty feet away. That shot, and a subsequent shot that Zhang insisted was the result of a misfire of the gun, struck and killed the unidentified stranger. Once the men reached the body they discovered that it was not a stranger at all, but rather Li Zhao Shi,[2] a local woman who had gone outside in the middle of the night to relieve herself. Zhang and Wang immediately sought help, and Zhang turned himself in to the police.

Zhang's Shoucai's lawyer, Zhang Yintang (of no apparent relation), claimed that his client had committed no crime: he had not intended to shoot Li Zhao Shi and was simply "carrying out his duties" (*zhixing zhiwu* 執行職務) as a member of the militia, defending a village that felt under siege.[3] Zhang Yintang supported this claim with a quote from the current criminal code: "an act is not punishable unless committed intentionally or negligently" (*xingwei fei chuyu*

2 Married women will be referred to following the pattern used in court documents: first their husband's surname, then their natal surname, and finally the term *shi* (氏), which means "family name" or "surname."

3 On this note Zhang Yintang was not exaggerating. Not only was much of northern China occupied by Japanese forces at this time, but bandit activity was apparently high in this area, so much so that during the trial the local militia applied to the court to return the gun held in evidence, as it was needed for use on patrols.

guyi huo guoshi zhe bu fa 行為非出於故意或過失者不罰) (*Criminal Code of the Republic of China, Bilingual Edition* 1960: A. 12). Unfortunately for both lawyer and defendant, those arguments were dismissed and the court focused on identifying the crime at hand. While in the Qing dynasty there would have been multiple options open to the courts—was this a case of premeditation (*mousha*), a case of sudden-intent killing (*gusha*), a case of mistaken killing (*wusha* 誤殺), or a case of accidental-negligent killing (*guoshisha* 過失殺)?—in the Republican era (1912–1949) only two options were available, the crimes of intentional homicide (*gusha*) and negligent homicide (*guoshisha*), redefined, repackaged, and now different in scope than their Qing-era namesakes.[4]

The local police initially approached the crime from a broad perspective, using terms of analysis that would have resonated with a Qing legal audience. Thus, an early police report labeled Zhang Shoucai's actions as "mistaken" (*wu* 誤), a descriptive that immediately evokes the Qing category of mistaken killing (*wusha*), where a person acted with some degree of intent but killed the wrong person. Subsequent police reports and official court documents hewed more closely to the new Republican-era script, describing the crime as one of either negligent or intentional homicide. The local Beijing court eventually settled on a verdict of guilt for the latter, a judgment that was upheld upon appeal to the Hebei Superior Court and the Supreme Court.[5]

When it came time to issuing that sentence, however, a variety of circumstances came into play, including testimony from the victim's widower, analysis of Zhang Jiacai's conduct after the shooting, and discussion of safety in Guogong Village. While the courts were in agreement about the *crime*, identifying the appropriate *punishment* proved to be more contentious. The Beijing court sentenced Zhang to five years in prison, half of the statutory minimum.[6] The Hebei Superior Court considered that punishment "a bit heavy" (*shao zhong* 稍重) and reduced it even further, to three years in prison. Be it a five-year or a three-year sentence, either punishment accorded more closely with those prescribed for a crime of negligence rather than a crime of intention. The result was a de facto sentence of negligent killing despite an official ruling of intentional killing.

The changes to China's legal system in the first four decades of the twentieth century were profound. They involved writing new legal codes, establishing

4 See Appendix 1 for charts of the main Qing-era homicide categories and their punishments, as well as those for their Republican-era counterparts.

5 On the organization of the court system during the Republican era, see X. Xu (2008: 40–45) and P. Huang (2001: 40–43).

6 See Chapter 5 for a discussion of judicial discretion in Republican China.

a new court system, introducing a new legal profession, and reforming the punishment and prison systems. In all of these areas, China looked abroad for inspiration. But the Republican-era legal system that resulted was not simply a wholesale adoption of foreign practices and complete abandonment of the judicial culture and social ideals that served as the underpinning for Qing, and late imperial, justice. Instead, those four decades bore witness to a complex process of adoption, adaptation, and resistance.

Tradition and Modernity in Scholarship and Law

Chinese law, past and present, has been subject to a series of critiques from the West. For law of the imperial period, that meant criticizing Chinese law for issues ranging from its lack of judicial independence to its punishment system. Other critiques have been of a more philosophical nature and long-lasting in their influence. For example, the sociologist Max Weber identified several qualities present in a modern, or "rational," legal system, key among them three factors: freedom from interference by a ruler; standardized, routinized, non-arbitrary legal procedures and guidelines; and a body of laws representing abstract concepts, legal norms to which the individual circumstances of each legal case could be matched (Weber 1978: 652–666, 809–815). In Weber's eyes, late imperial law failed on all counts.

Numerous works on Chinese law have revealed the flaws in Weber's interpretation of China, some more explicitly than others. Ch'ü T'ung-tsu's *Local Government in China Under the Ch'ing* (1962) cast an early, if indirect, blow. By framing much of local governance and judicial action as a dichotomy between formal and informal power (both within and outside the *yamen* [衙門]), his study provides an overwhelming impression of a government system, and a legal system therein, that was highly regulated and highly routinized. Bradly Reed's *Talons and Teeth: County Clerks and Runners in the Qing Dynasty* (2000) shows that clerks and runners in the local *yamen* operated in an interstitial space between state and society, maximizing both formal and informal avenues at their disposal in the operation of local administration. This high degree of clerk and runner autonomy was not indicative of the failures of the Qing state to achieve an appropriate level of rationality, but rather a process that allowed the smooth functioning of local government. Like Reed's work on local government, Philip C.C. Huang's studies of Chinese civil law (1996, 2001, 2010) also challenge and dismantle Weberian categories. Huang describes the civil justice system as one of "practical moralism," knowingly embracing the utility of both formal *and* informal avenues of justice, complementary arenas

that played to the strengths of a late imperial Chinese bureaucracy that was thinly populated. It allowed for a legal code that was detailed, standardized, and uniformly used while also being imbued with Confucian morality. Huang finds evidence of this practical moralism in Qing, Republican, and post-1949 China, though the morality that informed each of those systems was different, and at times evolving. These works all reveal a standardized, routinized local-level bureaucracy and judiciary, firmly refuting any notion that justice in the Qing was arbitrary.[7]

Where Weber's assessment of Chinese law has stood largely unchallenged lies in the last of his main criteria for modern, rational law: the need for abstract legal categories to which the "fact-situations" of each individual crime could be matched. Weber held that an absolutist state was incompatible with not just an independently functioning judiciary, but also with a legal process wherein judicial officers exercised objective, rational reasoning to evaluate individual circumstances and identify the general principles to which they most closely conformed (Weber 1978: 811–813). Many scholars of late imperial law, including some who have challenged other of Weber's assertions, have tacitly accepted Weber's arguments regarding the absence of abstract legal conceptualization in Chinese law. Ch'ü T'ung-tsu's second foundational work, *Law and Society in Traditional China* ([1961] 1980), focused on family-based specificity in Chinese law, emphasizing the specificity of late imperial law as well as the variance of punishment based on one's relative position within the Chinese family system: superiors received lesser punishments for crimes against subordinates, while subordinates received more severe punishments for crimes against their superiors. Derk Bodde and Clarence Morris, in *Law in Imperial China* (1967), emphasized the situation-specific nature of criminal offenses under Chinese law, the "particularism" of the late imperial codes as seen in the "proliferation" of substatutes in Qing law (Bodde and Morris 1967: 29–38, 63–68). Geoffrey MacCormack (1988, 1996) presents arguments similar to those of Ch'ü and Bodde and Morris. He goes further than they do, however, to explicitly argue for a limited presence of abstraction or even generalization in the late imperial legal codes (1988: 35–36). Only Philip Huang (2010), through his exploration of the complex relationship between principle and circumstance in Chinese civil law, has challenged the idea that Qing law was bereft of such conceptualization.

7 This impression is confirmed by English- and Chinese-language studies of the judiciary at the central level, studies that also highlight a general lack of interference in the judicial system from on high. See Bodde and Morris (1967), MacCormack (1996: 146–149), and Zheng Qin (1988, 1995).

Late imperial China—a monarchy wherein the emperor was invested with the "mandate of heaven" to rule over China and its peoples—certainly fit the image of Weber's absolutist state.[8] But as this book will show, that absolutist, or monarchical, rule did not prevent late imperial Chinese law from attaining a high degree of abstraction and a high degree of conceptual sophistication. In fact, the very dichotomy between abstract categories of law and situation-based categories of law is done away with by a close examination of Qing criminal law. While it is true that late imperial law was highly situation-specific, it used concrete fact-situations to illuminate rather than obfuscate categories of intent. And it was the very attention to circumstance and situation that allowed for the finely graded categories of intent in the late imperial codes.

Thus, while Western scholars of late imperial criminal law may have focused on its particularism, the focus of Qing jurists was on something more complicated and nuanced. In commentaries to the code and guidelines provided in magistrates' handbooks,[9] six categories of homicide were identified as the major homicide offenses (*liusha* 六殺): premeditated murder (*mousha*), sudden-intent killing (*gusha*), killing in an affray (*dou'ousha*), mistaken killing (*wusha*), killing at play (*xisha* 戲殺), and accidental-negligent killing (*guoshisha*).[10] Five of these categories marked their own degree of intent.[11] Intent was conceived along a finely graded continuum of severity beginning at the high end with malice aforethought and continuing through a diminishing scale based on when the intent was formulated. For premeditated murder, the intent to kill arose before the crime was carried out, whereas for sudden-intent killing the intent to kill arose only at the moment of the killing. Killing in an affray covered homicides where the perpetrator intended to harm his or her victim, but not to kill. Killing at play covered the only slightly less serious category of reckless killing during the course of roughhousing or through trickery. The final category, *guoshi* killing, covered both homicides committed by low-level negligence as well as those committed by accident. For cases of accidental-*guoshi* killing, the homicide involved no intent or criminal state of mind at all.

8 Though, it would be more accurate to describe the actual functioning of this system as either a "patrimonial bureaucracy" (per Weber [1978: 1047–1051] and P. Huang [1996: 229–234]) or a "bureaucratic monarchy" (per Kuhn [1990: 187–222]).

9 Magistrates, in charge of the local government, served multiples roles, including those of chief investigator and judge, for cases that arose in their jurisdictions. On their duties and the help provided them by legal secretaries, see Ch'ü (1962: 93–101, 116–129).

10 Xue Yunsheng, in his analysis of the Qing code, describes these six categories as the major homicide offenses (DLCY: A. 292.04, A. 292.11).

11 *Wusha* was the exception, as it mapped onto other categories of intent. See Chapter 3.

In addition to the statutes dealing with the six main categories of homicide offense, there were a host of other statutes on additional crimes involving the taking of human life, such as killing with a cart or horse, killing with a bow and arrow, or losing control of a fire and causing death.[12] Though defined in part based on the circumstances surrounding the crime, these statutes too gave great weight to the mental element behind the crime and required keen analysis of the state of mind of the offender. These crimes, along with the major homicide categories, therefore serve to illustrate the relationship between situation and intent in Qing law, where intent was conceptualized in tandem with concrete situations, allowing detailed differentiation of intent and a detailed scale of homicide offenses even beyond the six major categories.

The scale of homicide offenses in late imperial China was much more complex than the simple negligence-intent dyad that characterized law codes throughout much of European history.[13] Where and how the concept of criminal negligence even developed in European law is the subject of debate. George Fletcher (1971: 415) writes that criminal negligence was present in continental legal codes no later than the sixteenth century, and possibly as early as the "late Roman empire." Ray Moreland (1952: 5–6) and Francis Sayre (1932: 977) argue that the common law tradition only first paid attention to the mental element in crimes in the twelfth century. According to Sayre (1983: 979–981), it was around this time that criminally negligent acts began to be addressed in legal codes, if not under the label of "negligence." Moreland (1952: 101–104) dates the development of the *concept* of criminal negligence in the common law tradition to the seventeenth century.

The Chinese scale of homicide offenses, however, ran the gamut from finely differentiated degrees of nonnegligent culpability and low-level negligence through recklessness, the intent to harm, and the intent to kill. The complex treatment of the mental element in late imperial Chinese law, more complex than Western law both early and recent, suggests that we must rethink not

12 For the first two of these offenses, here and below I largely follow the article titles provided in *The Great Qing Code* (1994: 280–281).

13 As discussed in *The Statutory Criminal Law of Germany* (1946: Ch. 16), the German code of 1871 did include three categories of mental culpability—premeditation, sudden intent, and negligence—but in 1941 the category of premeditation was eliminated. Thereafter it became just one of several aggravating circumstances that could make the basic category of intent more serious. The criminal codes of Italy, Switzerland, Yugoslavia, and Romania also followed this sort of "aggravating circumstances" model, as did some of the countries in South America (EXZ: A. 280). Some other European criminal codes, such as those of Poland and Russia, did not even discuss the issue of premeditation (*Statutory Criminal Law of Germany* 1946: 125).

only how we categorize the Chinese legal system, but also how we define the very categories of modern and premodern law. An examination of criminal intent and homicide law in the Qing finds the third major pillar on which Weber based his evaluation of Chinese law, and his very definition of legal modernity, collapsing. That collapse becomes complete when we turn to examine Chinese criminal law of the Republican era.

Breaks...

During the first years of the twentieth century, to end the onus of extraterritoriality and also as part of a general drive to modernize, the Qing central government sounded the official call for legal reform in accordance with current "modern" Western juridical theory. The complicated process of revising the Qing code and drafting new codes extended from the early 1900s to 1935. These endeavors began under the watchful eye of the scholars Shen Jiaben and Wu Tingfang, who served as Co-Commissioners for the Revision of Laws (*Xiuding falü dachen* 修訂法律大臣) in the late Qing (Meijer 1967: 17–18).[14]

The bureau headed by Shen and Wu, the Bureau for the Revision of Laws (*Xiuding falü guan* 修訂法律館), compiled two criminal codes. One was a revised version of the Qing dynasty code, the *Da Qing xianxing xinglü* (大清現行刑律). The other was a code based on recent Western and Japanese criminal codes, the *Xin xinglü* (新刑律).[15] A draft of the latter was memorialized by Shen Jiaben in 1907, but met with such vociferous opposition that the reformers turned to work on the revised Qing code instead. The committee memorialized that code in October 1909; it was approved by imperial edict on May 15, 1910 (J. Cheng 1977: 235). The 1910 revised Qing Code included few changes that affected the basic structure and process of criminal law (Y. Huang 2002: 38–42). The main change was that the codified punishment system was overhauled, eliminating all variants on the death penalty aside from strangulation

14 Shen Jiaben (1840–1913) was a *jinshi* (進士) degree holder, senior official in the Board of Punishments, and eventually an early president of the Supreme Court. Shen was also a prolific scholar who wrote extensively and authoritatively on many aspects of Chinese legal history. Wu Tingfang (1842–1922) was a lawyer, trained in England, who served on the Legislative Council of Hong Kong before working as an advisor to Li Hongzhang and as a Chinese minister abroad. For detailed biographies of these two figures, see J. Cheng (1977: 75–85), Meijer (1967: 17–18), and Y. Huang (1991: 262).

15 The foreign codes used as models were translated into Chinese beginning in 1903 (Meijer 1967: 47). Japanese criminal law had undergone a similar process of reform from the 1870s to 1907. See Takayanagi (1963: 15–23).

(*jiao* 絞) and eliminating corporal punishments in favor of fines (*Qinding da Qing xianxing xinglü anyu* 1910: A. 1).[16] The reformers also eliminated six hundred substatutes from the previous edition of the Qing code (Meijer 1967: 56). The 1910 code was not in use for long, however, as the contested criminal code based on foreign models went into effect less than two years later, on March 10, 1912 (*Provisional Criminal Code of the Republic of China* 1923: 1).[17] This 1912 code, the Provisional Criminal Code (*Zhanxing xin xinglü* 暫行新刑律), remained in effect until the promulgation in 1928 of the Criminal Code of the Republic of China (*Zhonghua minguo xingfa* 中華民國刑法), a revised version of which appeared in 1935.

Upon first examination, the Provisional Criminal Code of 1912, the first of the Republican-era codes, appears to be a direct adoption of Japanese and German models and a wholesale rejection of Qing law. Both Marinus Meijer (1967) and Joseph Cheng (1977), in their examinations of the complicated legal revision process undertaken during the last decade of the Qing dynasty, have focused their discussions along those lines, emphasizing sharp breaks between Republican law and the Qing legal tradition such as the elimination of collective responsibility for certain heinous crimes, the consolidation of death penalties, and an end to differentiation of punishments based on the relationship between offender and victim.

Homicide law, too, underwent major changes in the Qing-Republican transition. These changes were also adopted from contemporary European and Japanese models, where trends in what Weber would call legal formal-rationalism had led to the creation of law codes that embodied the Weberian ideal and were composed solely of principle-based statutes intended to cover all possible crime situations. Now Chinese homicide offenses were distilled into two main categories: intentional and negligent. This change may have accorded with the blueprint for "modern" law as outlined in continental European and Japanese codes, but the reality was that Qing law already possessed intent-based categories of differentiation. Indeed, it possessed five major categories of intent rather than two.

This narrowing of the categories of intent had repercussions. Since the only acts now considered crimes would be those committed intentionally or through negligence, the fine gradations of intent found in Qing law, the differentiation between premeditated and sudden intent, the numerous shades of

16 These changes had already been enacted between 1903 and 1907 (Meijer 1967: 24–25; P. Huang 2001: 17).

17 The 1910 code continued to be used for civil matters until the late 1920s. See Bernhardt (1999: 74–76) and P. Huang (2001: 18–20).

negligent and reckless acts, would all be condensed into two criminally culpable states of mind. Under Qing law a detailed examination of the state of mind of the offender was of paramount importance in identifying the exact degree of intent, and thereby the exact offense. This no longer held true under Republican law. Now finding the appropriate statute required no such differentiation: homicides committed with sudden intent and premeditated intent would fall under the same article, the general intentional-homicide provision. Although under Qing law premeditated killing was its own category of homicide, the most serious of all homicide offenses, under Republican law premeditation would serve merely as one of many factors given consideration at sentencing, a factor considered no more important than the character of the offender and the attitude of the victim.

Previous studies have operated under the mistaken impression that late imperial law was exclusively circumstance-based and largely bereft of abstract conceptualization. Indeed, conventional wisdom holds that situation-based crime categories and concept-based crime categories are mutually exclusive, with the latter serving as the preferred and more advanced model. As a result, the streamlining of homicide offenses during the Qing-Republican transition has heretofore been taken as a sign of progress—moving Chinese law from the particular to the general, and coming closer to Weber's ideal of a modern, rational law code. However, once we understand the true sophistication with which Qing law dealt with abstract concepts, we realize that transition was actually a limiting one. Chinese law's nuanced approach to mental culpability—an approach that intertwined both the abstract and the concrete—was now constrained. As we will see, the problems Republican-era courts experienced using the new, abstract, but limited categories of criminal intent put the true complexity of the Qing approach to abstract concepts in sharp relief. That, in turn, deals the final death-blow to the third pillar of Weber's assertions regarding Chinese law: that the autocratic state and conceptual sophistication in lawmaking were incompatible.

... And Continuities

The 1911 Xinhai Revolution brought an end to the Qing dynasty, and with it the late imperial era. The Republic of China was declared in 1912, but within years the fledgling Republic had fractured, giving way to an era of destructive warlordism that lasted until the late 1920s. Thereafter the Guomindang (the Nationalist Party) took the helm of political power, though its hold was tenuous and it was at near-constant war with Communist rivals and Japanese

invaders. Once Japan was defeated in 1945, China descended into civil war, with the Communists declaring both victory and the People's Republic in 1949.

Though the years 1911 and 1949 have long been the traditional breaking points in the study of (and teaching of) Chinese history, scholars have shown them to be lines scratched in the sand rather than inscribed in stone. Scholarship surrounding the 1911 Xinhai Revolution—even politically, much more whimper than bang—has demonstrated that regime change and the end to the dynastic era did not automatically mean change to society and culture. The events of 1911 may have been a starting point for revolutionary action, but an endpoint to that revolutionary action came decades later, if at all (see Mitter 2011).

In more recent years, the same sort of critical lens has been turned on the year 1949. Philip C.C. Huang (1995) proposed an alternate periodization for the Chinese communist revolution, dismissing the year 1949 altogether and offering the years 1946–1976 instead. Using those dates to frame the revolution allows for consideration of not just political regime change, but "large scale structural change" as well (1995: 106). Paul Cohen, too, has written of the need to "break through the '1949' barrier" (1988: 519; 2003: 131–147), seeing continuities in the goals, if not always the mechanisms, of reform and self-strengthening efforts from as early as the mid-nineteenth century to the more recent Deng Xiaoping era. As Cohen shows, in some ways "1949" is more a matter of liberation rhetoric (on the mainland) and Cold War politics (in the West) than a truly significant break with the past.

While the 1911 and 1949 barriers have largely fallen in the realms of politics, economics, gender, and cultural studies, they held a tenacious grip on studies of Chinese law until the 1990s, and for certain aspects of law those barriers still stand. That hold can largely be explained by the available source materials. The first generations of scholars working on Chinese law had to rely on memorials, published case collections, draft codes and their critiques, and collected writings of the legal reformers. With the exception of one local case collection in Taiwan that gave rise to two publications—Buxbaum (1971) and Allee (1994)—it was not until scholars began to access mainland Chinese archives that they were able to push beyond the official representation of the Chinese legal system to explore the true workings of the law in practice. Works such as Bernhardt and Huang (1994), Bernhardt (1999), and P. Huang (2001) have used a comparative lens to investigate not just change but also continuities between the civil justice systems of the Qing and the Republic. More recently, that comparative lens has been expanded to include the People's Republic (P. Huang 2010; Cong 2013; Cong 2014; Tran 2015).

Previous works on Chinese criminal law, however, have not delved as deeply. Neither Meijer (1967) nor Cheng (1977) use legal case records, and neither pushes his discussion past 1912, when the first Republican code was promulgated. As a result of these limitations in both source material and time period, their portrait of the legal reform process draws an overly stark image of the changes to criminal law. To be sure, many aspects of the Chinese justice system underwent profound changes during the first decades of the twentieth century. Indeed, this book highlights how Chinese law's approach to abstract conceptualization changed between late imperial and Republican times. Despite these differences, however, by examining criminal legal codes and cases from the entire Republican period and viewing them in comparison to their Qing counterparts, this book will argue that in some ways the continuities between Qing and Republican law outweighed the changes.

Several of these continuities are revealed through an examination of the later Republican-era legal codes: changes present in the 1912 Provisional Criminal Code were sometimes reversed in later versions of the Republican code, in at least one instance recreating the letter of Qing law. Thus, the premeditated homicide statute that was eliminated in the 1912 code was reintroduced in the 1928 criminal code (see Chapter 4). Other continuities become apparent through an investigation of Republican law in action, through examination of local, superior, and Supreme Court case records, where we find that breaks with Qing law were sometimes nullified in practice as Republican judges created sentences that mirrored those that would have been issued in the Qing (see Chapter 5). In addition, in courtrooms the Republican-era criminal statute on injury to the point of death (*shanghai zhi si* 傷害致死) evolved to mirror the category of killing in an affray from the Qing (see Chapter 2). These turns toward Qing models—this resurrection of the Qing in Republican times—did not mean a turn away from "the modern." Rather, they show China forging its own path of modernity, one that reflected its early twentieth-century cultural and social norms and one that acknowledged the advantages of several of the major changes introduced from abroad, but one that also acknowledged the advantages of the conceptual framework that had preceded China's embrace of Western and Weberian models.

The Meaning of Justice, in Theory and Practice

The late imperial criminal justice system was multifaceted, by turns punitive and pedagogical, while also concerned with exacting and bringing about justice. Meting out punishments was meant to help right wrongs. Crimes created imbalances in the human and natural worlds, and punishing offenders helped

to restore balance to those worlds. While the first priority of the legal system was ensuring the safety of the realm, there were lessons to be learned from this system as well. Offenders would serve as examples to others of what ought not to be done. And the judicial system as a whole would remind all those who came in contact with it—victim, offender, witness, and bystander—of their Confucian obligations, their duties to family and state, and their responsibility to help ensure an ordered society and an ordered world (Ch'ü [1961] 1980; Bodde and Morris 1967).

Scholars such as Michael Dutton (1992), Frank Dikötter (2002), and Jan Kiely (2014) have explored the changing priorities of the Chinese justice system, seeking to understand, and to explain, the logics of punishment, incarceration, and detention as they developed over the course of the last hundred-odd years, from the late Qing to the post-Mao era. In addition to carefully exploring penal theory, their works examine the place of the prisoner in the justice system and his or her treatment before, during, and after trial. They also address the process and priorities by which the state exacts justice from those it finds guilty of a crime.

Studies of Chinese civil law have looked at the reverse: the means by which actors, in some cases victims, seek justice from the state. From families seeking legal help to ensure proper household division or enforcement of contracts (P. Huang 1996) and widows and daughters asserting their inheritance rights (Bernhardt 1999) in late imperial times, to wives pursuing divorces (Kuo 2012) and concubines pursuing their rights to maintenance and support (Tran 2015) in the Republican era, scholars have explored the ways individuals sought state assistance to ensure what was right, fair, and proper according to the laws, and in some cases the social norms, of the time.

The field of late imperial Chinese criminal law has sidestepped this arena of the law. After all, conventional wisdom held that the legal code was entirely penal in nature. Even after the emergence of the field of Chinese civil law effectively debunked that notion, there was a general acceptance of the idea that *criminal* law, at least, was still a fully penal system. But as this book will show (see Chapter 6), even within the criminal justice system there were elements of civil-type compensation in play. The difference between that compensation and the compensation found in late imperial civil law and the Republican-era justice system to come was that in late imperial times the state was the actor pursuing compensation on behalf of the victim. The victim did not request compensation; the state provided it automatically.

How was this possible? Part of the explanation lies in the organization of late imperial law. Unlike in the contemporary West, in late imperial criminal trials there was no separate sentencing phase. Instead, once a crime was identified, the specific punishment was identified as well (see Chapter 5). Thus, when

victim compensation was called for in addition to a penal sanction, the kind and amount of compensation was written into the very language of the law. It was predetermined and standardized, tailored to fit the crime.

Turning to the Republican era, not only were the civil and criminal justice systems separated for the first time, but naming a crime and determining a punishment for that crime became distinct processes. This meant that the notion of automatic victim compensation ended. It would not come attendant with the declaration of crime, but would have to be pursued in a separate legal arena. And it would have to be *pursued*. No longer would the state seek compensatory justice on behalf of the individual. Now the individual would pursue that justice on his or her own.

This disjunction between late imperial and Republican law provides a window onto changing meanings of justice, changing processes for obtaining justice, and changing experiences of justice in China. Both in the late imperial era and in the Republican period, the law was the official instrument by which one obtained justice: that which is fair and just and, especially in the Confucian context, righteous (*zhengyi* 正義). When a person was wronged, he or she could seek judicial intervention—intervention by the state—to right that wrong. But what was the quality of that justice? What was its nature?

In early Chinese history, official justice was linked to the concepts of *tianli* (天理) or *tiandao* (天道)—heavenly law or heavenly justice.[18] The emperor was the lynchpin of heaven, earth, and man (Feng 1953: 46–47). Heaven granted him the mandate to rule, and therefore his actions and judgments embodied the will of heaven. While in practice notions of divine will receded over the course of the imperial era, they still left their mark on the language of the legal code and the image of the legal system. For instance, a number of crimes involving homicide were punished with death sentences that were automatically redeemable once a monetary fine was paid. The initial sentence of death, however, allowed the legal code to, at least nominally, require a life to be given when a life was taken, thereby redressing any cosmic imbalances that might otherwise result.

Complementing the notions of *tianli* and *tiandao* is the concept of *bao* (報), a term that can be translated as "retribution," "recompense," or "revenge," but which contains the additional meaning of "judgment" in the sense of an

18 In English, the term "justice" has multiple, complementary meanings. Its primary definition, according to the *Oxford English Dictionary*, 2nd ed., is "maintenance of what is just or right by the exercise of authority or power," but it is also used to refer to the judicial process itself, as well as the act of punishing an offender, the place of punishing an offender, and an individual (i.e., a judicial official). On *tianli and tiandao* as "heavenly principle" and "heavenly way," and on their role in the Ming legal system, see Jiang (2011).

appropriately weighed judicial sentence ("according to the severity or lightness of a criminal's offence, sentence to an appropriate punishment in accordance with the law" [*Hanyu da cidian* 2010]).[19] While *bao* can have religious (Buddhist) overtones, unlike *tianli* and *tiandao,* which by definition are heaven-sent or heaven-mediated, *bao* is something that can be sought from below. Though the government preferred that *bao* be the sole purview of the state, it was accessible to the general populace, and it could be obtained, if need be, through their actions alone.

The notion of *bao* as justice is pervasive in Chinese popular consciousness, past and present. In part this is due to the heavy presence of *bao* plotlines in Chinese fiction, from Ming dynasty vernacular novels such as *Jinping mei* (金瓶梅), to the short stories in Pu Songling's *Liaozhai zhiyi* (聊齋誌異), to the robust body of Chinese detective novels that were written over the course of the late Ming and Qing dynasties, to the contemporary *wuxia* (武俠) films that the latter inspired (Kao 1989; Lean 2007: 36).[20] It is also due in part to the concept's important role in popular religion. As Paul Katz (2009) has shown in his exploration of the "judicial continuum," popular Buddhist and Daoist traditions included a robust arena where wronged spirits could file plaints with underworld officials and exact punishments on those who had escaped earthly judgments and thus earthly justice, allowing *bao* to be attained in the afterlife if not in this world.

Though the notion of heavenly or divine intervention in the formal legal realm may have fallen into desuetude by the Qing dynasty, and notions of strict judicial retribution were less prevalent in the legal codes than in early eras, the idea that official justice was something *granted* by or *provided* by an authority, be it from above or be it from the beyond, still held. For our purposes, the "above" in question was the state, specifically the legal system and its officialdom. When a criminal case came to the attention of the authorities, those authorities carried out investigations, arrests, and trials. They identified the crime, and the legal code specified the necessary justice.

In some homicide cases that justice was solely penal in nature: a sanction that could range from beating with the bamboo or penal servitude all the way

19 The idea of negative retribution for an injustice can be contrasted with more positive aspects of *bao* as seen in Confucian reciprocity, especially vis-à-vis the five relationships (ruler-subject, father-son, husband-wife, older brother-younger brother, and friend-friend). On these aspects of *bao,* as well as the origin of *bao* in the Chinese classics, see L.S. Yang (1957).

20 *Bao* itself was not always straightforward. On the complexities and contradictions of *bao* in late imperial fiction, see Youd (2007).

to death. In other cases the penal sanction was lower, but was supplemented by direct compensation to the victim or the victim's family. The late imperial legal system took a holistic approach to justice. It favored what we might term "pan-societal justice": a justice that would punish (an offender), warn (others not to do the same), and educate (the populace about right and wrong). Nonetheless, it acknowledged the need for compensatory justice to be provided to individuals for some categories of crimes, crimes where societal justice might be less pressing, but individual loss could still be great. The state strictly defined the bounds of that justice, but so long as a conviction was obtained in the criminal realm, compensatory justice in those cases was *guaranteed*.

With the advent of the Republican era, along with the separation of the court system into civil and criminal realms, and the separation of guilt and sentencing processes in a trial, came a new way for framing legal interactions. In contemporary China, criminal law is intended to be an arena for citizen-state interactions, while civil law is intended to be an arena for citizen-citizen interactions, with the state playing the role of a third party, mediating justice between the two main actors (P. Huang 2010: 255–256). In the Republican era, civil court judges were cast in a much more active role. Unlike their Qing counterparts, who (as representation would have it) were rarely used mediators bereft of codified guidelines, Republican-era judges were presented as the ultimate authority for civil disputes, issuing judgments based on Daliyuan 大理院 (Supreme Court) rulings and eventually, in the 1930s, new legal codes written expressly to cover civil matters.[21] Though civil cases were filed between citizens, the "new" and significant presence of official, formal judicial authority in the civil arena—the presence of the state—was emphasized and lauded, touted as a sign of the modernity of the new system. This emphasis on the state and its state-making agenda was not unique to the legal system—it was undertaken by multiple elements of Republican-era regimes both early and late, one of the most visible markers of the newer, "modern" Republican government(s).[22]

Although any differences in the level of active engagement in formal legal processes undertaken by Qing and Republican-era judges are debatable, the

21 As Philip Huang (1996) has shown, this characterization of Qing-era judges is erroneous—Qing judges actively adjudicated civil cases, utilizing specific provisions in the Qing legal code. The characterization, however, was a useful one for those seeking to label late imperial law as fundamentally premodern and post-imperial law as modern.

22 On the intersection of legal reform and state-making in Republican China, see X. Xu (2008: Chs. 2–3); on the intersection of state-making and institution-building in the Republican era, see Strauss (1998); on the role and agenda of the state in the development of professional organizations during the Republican era, see X. Xu (2001, esp. 13–19).

issue of citizen involvement is not: Republican-era civil law required more action on the part of citizens than did Qing law. As we will see in Chapter 6, for cases that occupied the low end of the homicide continuum during the Qing, the Republican-era courts put a greater burden of action on the shoulders of citizens. Under Republican-era law, low-level homicide offences straddled the criminal and civil justice systems. A penal sanction could be issued in the criminal realm, but if victims sought compensation they most often ended up in civil court, meaning a second trial. Unlike the Qing dynasty, where the government automatically pursued civil-type justice on the victim's behalf, in Republican times it was up to the initiative of the individual citizen to articulate and pursue his or her cause and his or her justice. The state would eventually issue a judgment, but it would not take action on an individual's behalf nor would it guarantee justice beyond what could be proven in the courtroom. In homicide cases, litigants in search of civil justice faced more costly and longer legal journeys. As a result, those on the low end of the socioeconomic scale could face greater barriers to obtaining justice than they had faced in the Qing. This was certainly not the scenario that lawmakers had envisioned or that modernity theory had posited.

Scholars of Republican-era civil law have called attention to the increased agency of individual citizens as they pursued their rights in the newly separated arena of civil law. From the perspective of those involved in cases on the borderline between civil and criminal law, that individual agency might be recast as an individual burden. Agency or burden, it nonetheless opened up a new arena for individual expression. In the course of articulating and *proving* pain, suffering, and loss, victims were able to give voice to and, for the successful, lay claim to an individualized vision of justice, or *bao*, that the legal system of the Qing had not afforded.[23] *Bao*, in this context, was not something to be granted from above but claimed from below.[24]

In the early twentieth century, the international community paid a great deal of attention to the priorities of the Chinese justice system, part and parcel of the constant assessments, evaluations, and criticisms of Chinese law that accompanied the system of extraterritoriality. In the late twentieth century, the international community once again scrutinized Chinese justice, as the post-Mao legal system came into form alongside debates over the possible meanings and possible realities for "rule of law" in contemporary China.

23 Though late imperial literature had—see Kao (1989).

24 As Eugenia Lean discusses in her examination of the trial and eventual pardon of the assassin Shi Jianqiao, Shi's actions present an example of an individual using not just the trial, but also the crime itself, to claim and seek *bao* (Lean 2007: Ch. 2).

In the chapters that follow I do not argue that Qing law was superior to Republican law, nor do I argue the reverse. By engaging in a careful examination of the legal codes and especially the legal practices of both eras, we will see that the Qing system had its advantages, as did the Republican system. Some of the continuities between Qing and Republican law came from Republican-era lawmakers, in practice, reintroducing elements of the Qing system that were better suited to the social and cultural conditions of China at the time. At the same time, some of the breaks between Qing and Republican law reflected changing priorities of both law and society.

The Chapters

Chapter 1 examines the low end of the Qing homicide continuum. This chapter explores both the category of *guoshi* (過失) killing, which encompassed accidental and low-level negligent homicides, as well as a collection of individual crimes that were found to contain a degree of culpability more serious than *guoshi* crimes but less serious than those of intentional harm—in essence, a finely differentiated range of negligent and reckless acts. In 1912, with the introduction of the first criminal code based on modern European models, this low end of the homicide continuum underwent a dramatic shift as the category of *guoshi* killing was simultaneously both contracted and expanded. First, according to the new code only acts committed with intent (*guyi* 故意) or through negligence (*guoshi*) were to be considered crimes. As a result, accidental killings (previously falling under the scope of *guoshi*) were no longer to be prosecuted, meaning a narrower range of punishable acts under Republican law than under Qing law. Second, the term *guoshi* now covered all crimes committed through negligence, meaning that the multiple acts covering the earlier *guoshi* spectrum, each of which had previously had its own statute, would now be condensed into one general category. In addition, the individual crimes that were more serious than negligent acts but less serious than intentional acts seemed no longer to have a home in the code. As my examination of court records shows, these changes led to a great deal of confusion among jurists as they sought to negotiate new meanings given to old terms and broad statutes that were ambiguously defined.

Among the main types of homicide in late imperial China, those committed with intention were adjudged the most harshly. These homicides were committed in conscious violation of the law and inflicted purposeful harm on their victims, and as such they merited severe punishment. Chapter 2 examines the category of killing in an affray (*dou'ousha*) and the intent to harm involved in

such crimes. It unpacks the muddy middle of the Qing homicide continuum, where intent was defined in tandem with concrete situations but where intent was also keenly analyzed to differentiate intent to harm from intent to kill. Republican-era lawmakers attempted to eliminate the connection between intent and circumstance, eliminating the category of killing in an affray and the attention Qing law gave to the intent to harm, crafting instead a new category simply titled "injury to the point of death." As we will see with other categories of homicide and other aspects of criminal law, that statute proved unwieldy in the courtrooms, and the nuanced focus on intent, and preference for marrying intent and circumstance, in Qing law worked their way back into Republican law in practice and on the books.

Chapter 3 moves past the portion of the homicide continuum covering the intent to harm and into the highest end of that continuum, examining sudden-intent killing (*gusha*) and premeditated killing (*mousha*) in late imperial law. As codes and cases will show, Qing law placed primary importance on the state of mind of the offender, with a highly detailed differentiation of the *mens rea* involved. Premeditated homicide offenses, for example, were further formally differentiated in the legal codes based upon the motive of the offender. Chapter 4 explores the legacy of these homicide crimes under Republican law, as the first Republican-era code condensed these finely differentiated categories of homicide into one standard homicide statute meant to cover all intentional-homicide offenses regardless of the quality of that intention and regardless of the motive involved. Under Qing law, premeditated homicide stood at the pinnacle of the homicide continuum. Under Republican law, however, premeditation was demoted to the status of "circumstance," serving as only one of the numerous factors to be taken into account when determining the sentence for a crime. Frustrated lawmakers successfully sought the reintroduction of the premeditated homicide statute in the 1928 edition of the Republican criminal code, providing further evidence of the impulse to return to the Qing models that had functioned so smoothly for centuries.

Chapter 5 examines changes in the realm of judicial authority and the scope of the criminal justice system in the Republican period. Under Qing law the naming of a crime had meant the automatic naming of the punishment for that crime; each provision in the legal code contained a precise punishment tailored to the crime in question. This principle was eliminated in the Republican codes, and the naming of a crime and the naming of its punishment were for the first time separated. Concomitant with this separation, the discretionary powers granted to judges for sentencing were greatly enhanced. As a result of these changes, when new laws (particularly those pertaining to adultery-homicide and homicides within one's family) contradicted traditional notions

of justice carried over from late imperial society, there were unforeseen consequences. Republican jurists were able to use their newly expanded powers at sentencing to replicate Qing rulings and thereby bring Republican-era justice closer to judicial and social norms of the late imperial period.

Chapter 6 returns to a discussion of *guoshi* homicide but shifts to an examination of torts and the intersection between criminal and civil justice. The separation of the civil and criminal justice systems in the Republican era has often been heralded as one of the main advancements that brought Chinese justice into the modern era. This chapter shows that the differences so often highlighted between Qing and Republican law are not nearly as stark as they may initially seem. To be sure, under the Republican-era justice system individuals could file suits in the new civil courts seeking monetary compensation for wrongs done to them, be they physical or emotional, short-term or long. In the late imperial period there was only one legal system, but the law still ensured many of the same kinds of "civil" compensation for crimes as were to be found in the Republican era. For *guoshi* homicide this meant that the Qing state issued a penal sanction to address symbolic cosmic imbalances but also required that the offender pay compensation directly to the family of the victim. Qing criminal and civil justice were symbiotic in nature. Looking at Republican-era wrongful death and injury cases, we find the Republican legal system in action creating a similar kind of symbiosis: criminal verdicts in *guoshi* homicides influenced the outcome of civil wrongful death trials, and, significantly, civil wrongful death verdicts could influence the outcome of criminal trials.

Source Materials

The primary source materials used in this project are of three main varieties: the writings of Qing and Republican-era legal specialists, legal codes and commentaries, and legal cases from the local, provincial, and central levels. For the first type of source, the writings of legal specialists, I have relied mainly on the collected essays of Shen Jiaben and the *Mulingshu* (牧令書), a compendium of essays on the magisterial process culled from the works of eminent Qing jurists.

For each of the late imperial dynasties, with the exception of the Yuan dynasty (1279–1368), I have used at least one edition of the dynasty's law code. The Tang dynasty (618–907) code, the foundation for the later imperial codes, was, with very few changes, the basis of Song dynasty (960–1279) criminal law. Similarly, the statutes of the Qing code are a virtual copy of the Ming dynasty

(1368–1644) code, interlinear commentary aside, with the main differences in the substatutes, added and removed throughout the Qing dynasty. Moving into the twentieth century, my discussion of the late Qing legal reforms and Republican-era law uses the Revised Qing Code (*Da Qing xianxing xinglü*) of 1910, a 1911 draft of the General Principles section (*zongze* 總則) of the new "modern" criminal code (*Da Qing xin xinglü*) with commentary by Shen Jiaben, the Provisional Criminal Code of 1912 (*Zhanxing xin xinglü*), the Criminal Code of the Republic of China of 1928 and its 1935 revision, the Civil Code of the Republic of China, as well as a series of draft criminal codes written, but never promulgated, during the 1910s.

The legal case materials used in this project come from a wide variety of sources, both archival and published. The published cases from the Qing dynasty, all from the central level, are drawn from the *Xing'an huilan* (刑案匯覽) and its appendixes, cases that often focused on legal dilemmas. Those of the Republican era are drawn from the *Daliyuan xingshi panjue quanwen huibian* (大理院刑事判決全文彙編), a collection of Supreme Court verdicts for the period 1912–1927; the *Zuigao fayuan panli huibian* (最高法院判例彙編), a collection of Supreme Court cases from the period 1929–1937; the *Daliyuan jieshili quanwen* (大理院解釋例全文), interpretations from the Republican-era Supreme Court before 1928; and the *Sifayuan jieshili quanwen* (司法院解釋例全文), interpretations of legal provisions issued by the Judicial Yuan between 1929 and 1946.

The archival materials were collected from two areas in China—Beijing and Chongqing, Sichuan—for both the Qing dynasty and the Republican era. For the Beijing area, I gathered cases from the Beijing Xianshen ("immediate examination" [現審]) collection of records from the Qing dynasty, housed at the First Historical Archives in Beijing. The Xianshen cases were local Beijing matters, handled directly by the Board of Punishments due to their proximity to the capital. For the Republican-era Beijing counterpart, I used cases from the rich collection of the Beijing Municipal Archives, which contains criminal cases from the Beijing District Court (*Beijing difang fayuan* 北京地方法院).[25] Many of these materials contain not only records of the trial at the (local) district court (*difang fayuan* 地方法院), but of the superior court (*gaodeng fayuan* 高等法院) and Supreme Court (*Zuigao fayuan* 最高法院) appeals as well, making it possible to trace some Republican-era cases from first investigation to final appeal. Turning to the Chongqing area, I have used local Qing-era cases

25 This court was officially named the Beiping difang fayuan (北平地方法院). Until 1929, it was known as the Capital District Court (*Jingshi difang shenpanting* 京市地方審判庭) (Bernhardt 1999: 83).

from Ba County, Sichuan (which includes present-day Chongqing), housed at the Sichuan Provincial Archives in Chengdu. The Republican-era cases for this area came from the Chongqing Municipal Archives' collection of local and provincial Chongqing court cases from the 1930s and 1940s, as well as Sichuan Superior Court records housed at both the Chongqing Municipal and Sichuan Provincial archives. Such documents, particularly the local-level cases containing records of testimony, evidence, autopsy reports, plaints, and magisterial opinion, are the best source available for understanding the workings of the law in practice.