

The Conception of Fornication

—From The Han Code to The Tang Code

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Abstract: The articles in the Tang Code include the content that the sexual intercourse in the case of unmarried couple still constitutes a crime. And if the intercourse is made in mutual agreement, it means “和姦 he jian” (fornication by consent), on the other hand if it is forced one, it is defined as “強姦 qiang jian (assault)”. In this article, I would like to examine these three points.

i Is it correct that the word 姦 jian means illicit sexual intercourse between unmarried couple?

ii Has such a stipulation in The Tang Code existed since the laws in the Qin and Han?

iii Is it true that if unmarried person have sexual intercourse, it constitutes a crime to be punished in the pre-modern China?

Keywords: Sexual intercourse Fornication Tang code Han code

I The fornication prescribed in The Tang Code

In my contribution to the publication to mark the 30th anniversary of the foundation of Institute for Chinese Ancient Legal Documents, China University of Political Science and Law, I would like to discuss the notion of fornication between Confucius ethical concept and effective criminal statute.

Now we should enter the articles of The Tang Code (唐律).

There are following articles on sexual intercourse between male and female in

the Miscellaneous Statute (雜律) in The Tang Code.

All cases of illicit sexual intercourse punish both partners by one and one-half years of penal servitude. If the woman has a husband, her punishment is two years of penal servitude. If personal retainers, general bondsmen, and government bondsmen have illicit sexual intercourse with commoners, the punishment is increased one degree in each case. Illicit sexual intercourse with a government or private female slave is punished by ninety blows with the heavy stick.

Illicit sexual intercourse with another person's personal retainer's wife, or a general bondsman's or government bondsman's wife or daughter, is punished by one hundred blows with the heavy stick. If force is used, the punishment is increased one degree in each case. If a tooth or more is broken or the person is wounded, the punishment for breaking or wounding in an affray is increased one degree. (410)

All cases of illicit sexual intercourse with relatives within the fifth degree of mourning or their wives, or a daughter of a wife's former husband, or half-sisters of the same mother but a different father, are punished by three years of penal servitude.

If force is used, the punishment is life exile at a distance of 2000 *li* (里). If a tooth or more is broken or the person is wounded, the punishment is strangulation.

If the person is a concubine, the punishment is reduced one degree. (411)^①

According to the article 410, “姦 *Jian*” between man and woman warrants one-half years of forced labor. In this article, what is the meaning of the word “姦

① “*The Tang Code*” translated with an introduction by Wallace Johnson, Princeton University Press, New Jersey, 1979

諸姦者、徒一年半、有夫者、徒二年。部曲·雜戶·官戶姦良人者、各加一等、即姦官私婢者、杖九十、(奴姦婢、亦同)姦他人部曲妻·雜戶·官戶婦女者、杖一百。強者、各加一等。折傷者、各加鬪折傷罪一等。410

諸姦總麻以上親及總麻以上親之妻、若妻前夫之女及同母異父姊妹者、徒三年、強者、流二千里、折傷者、絞。妾、減一等(餘條姦妾、準此)。411

諸姦從祖祖母姑·從祖伯叔母姑·從父姊妹·從母及兄弟妻·兄弟子妻者、流二千里、強者、絞。412

諸姦父祖妾·(謂曾經有父祖子者)伯叔母·姑·姊妹·子孫之婦·兄弟之女者、絞。即姦父祖所幸婢、減二等。413

諸奴姦良人者、徒二年半、強者、流、折傷者、絞。其部曲及奴、姦主及主之期親、若期親之妻者絞。婦女減一等、強者、斬。即姦主之總麻以上親及總麻以上親之妻者、流、強者、絞。414

諸和姦、本條無婦女罪名者、與男子同。強者、婦女不坐。其媒合姦通、減姦者罪一等(罪名不同者、從重減)。415

Jian”? Wallace Johnson translates it “illicit sexual intercourse” as above.

However, what is the illicit act? Why is the sexual intercourse between male and female illicit, illegal, and wrong?

The 410 – 411 articles in The Tang Code should include the content that even if it is in the case of unmarried couple, the sexual intercourse still constitutes a crime. And if the intercourse is made in mutual agreement, it means “和姦 *he jian*” (fornication by consent), on the other hand if it is forced one, it is defined as “強姦 *qiang jian* (assault)” .

I completely agree that the article 410 of the Miscellaneous Statute is the stipulation on the fornication of unmarried male and female. Nevertheless here I dare to ask following questions:

i Is it correct that the word 姦 *jian* means illicit sexual intercourse between unmarried couple?

ii Has such a stipulation in The Tang Code existed since the laws in the Qin and Han?

iii Is it true that if unmarried person have sexual intercourse, it constitutes a crime to be punished in the pre-modern China

In this presentation, I would like to examine these three points. As the initial step, I am entering the room of analyzing the meaning of the word 姦 *jian*.

The Tang Code prescribes 姦 *jian* as a crime in many articles. “内乱 *nei luan* (inner disorder)”, one of the ten abominations, is the crime of sexual intercourse with relatives who are of the fourth degree of mourning or closer and the sexual intercourse with one’s father’s or paternal grandfather’s concubines, including those who give their consent. ①

Indeed the word 姦 *jian* appears in reference to the sexual act between male and female, but in some articles this word is used as the illicit or evil deed, like robbery, villainy and falsity.

In the military bases of the frontier, if it occurs that foreign villains successfully enter China or Chinese villains go abroad and the lookout is not aware of it, he is punished by one and one-half years of penal servitude. ②

① 十曰内乱（謂姦小功以上親·父祖妾及與和者）。名例律 十惡

② 諸緣邊城戍、有外姦內入（謂非衆成師旅者）、內姦外出、而候望者不覺、徒一年半、主司、徒一年（謂內外姦人出入之路、關於候望者）。其有姦人入出、力所不敵者、傳告比近城戍。若不速告及告而稽留、不即共捕、致失姦寇者、罪亦如之。衛禁 89

This is the article of the Imperial guard and prohibitions (衛禁律) in The Tang Code. It is obvious that the word 姦 *jian* in this regulation never means the illicit sexual intercourse.

Next we should examine the Han code and other historical sources in the Jin-Han periods.

II The fornication prescribed in Qin-Han Statute

We can find the articles on the crime of 姦 *jian* fornication in the statute of Qin and Han periods.

奴與庶人奸、有子、子爲庶人。189 Miscellaneous Statute (雜律 張家山出土漢律)

If a slave fornicates with a commoner to have a child, the child should belong to a commoner.

奴取(娶)主、主之母及主妻、子以爲妻、若與奸、棄市。190MS

If a slave takes his master or his master's mother or wife or child to his wife, or if he fornicates with them, he is punished by execution at the market place.

同產相與奸、若娶以爲妻、及所取(娶)皆棄市。其強與奸、除所強。191MS

If a brother commits incest with his sister or takes her to his wife, they are punished by the execution at the market place. If it is the case of assault, she is not punished.

諸與人妻和奸、及其所與皆完爲城旦舂。其吏也、以強奸論之。192MS

If a man fornicates with a married woman by consent, both he and she are punished by forced labor without mutilation. If an officer commits it, he is sentenced for assault.

強與人奸者、府(腐)以爲宮隸臣。193MS

If a person commits fornication by force, he is punished by castration to be a palace servant.

同母異父相與奸、可(何)論。棄市。秦律法律答問 172

If children of the same mother but of different fathers fornicate with each other, how are they sentenced? It is execution at the market place.

However, we must bear it in our mind that in the other articles of The Han Statute there are the words “奸 *jian* (姦)” which meaning is evil or evildoer as The Tang Code.

嗇夫不以官爲事、以奸爲事、論可毆……答 61

How an overseer to be is sentenced who does not apply himself to the business of his office, but to evil things?

III The meaning of the word 姦

Regarding the two words “奸 *jian*” and “姦 *jian*”, *Explaining Writing and Analysing Characters* Vol. 12 說文解字 gives separate interpretation.

奸：犯姦也。[段注、此字謂犯姦姦之罪、非即姦字也。今人用奸爲姦、失之。]

The word 奸 means to commit 姦 *yin* (license) .

[Duan comment (段玉裁注), this word means the crime of 姦姦 (licentious evil), and is not same as the word of 姦 *jian* . Though contemporary persons think 奸 is 姦, it is not correct.]

姦：△也。[段注、△下曰姦衰也。(△9篇上、△、姦衰也。)]

The word 姦 *jian* means △ *si* (evil) .

[Duan comment, In the explanation on △ *si*, it is said this word means evil].

姦：△逸也。[段注、△音私。姦衰也、逸者、失也。失者縱逸也、姦之字、今多以淫代之、淫行而姦廢矣。]

姦 *yin*: △ *si* means 逸 *yi* (excessive) .

[Duan comment, the pronunciation of △ *si* is same as 私 *si*, its meaning is evil.

逸 *yi* means 失 *yi*, which meaning is to be excessive.]

Though 姦 *jian* and 奸 *jian* came to be used in the same meaning, the word 奸 means to commit? *yi* (excessive evil) and the other 姦 *jian* is the noun which means evil. This is the comment of 段玉裁 *Duan Yucai*. Actually these two words are used in the same category in other historical record in the Han period. *Exempli gratia*, the book of interpretation on the words named *Shi Ming* 釋名/言語 explains that the word 姦 *jian* is same as the word 奸 *jian* . Its meaning is to break the canonical regulation, i. e. elicit act, evil, excessive misdeed, etc.

Here I ask once again. What kind of act between male and female constitutes the evil and illegality? And is it true that if unmarried person had sexual intercourse, it constituted a crime to be punished in Han and Tang? Was the sexual intercourse admitted only under the condition of married couple?

IV Sexual intercourse in the Han bamboo slips

Now I can quote very interesting and fruitful archeological documents in order to examine the conception of 姦 *jian* in Qin-Han period. It is the Han bamboo slips excavated from the Han tomb at 江陵張家山 *Jiang Ling Zhang Jia Shan* in 1983. About 200 slips named as 奏讞書 *Zou Yan Shu*, are the records of the judicial controversy, in which there is an affair of a sexual intercourse. I am presenting the outline of it.

A widow 甲 *ja* had sexual intercourse at an inner chamber behind the coffin of her late husband. It was during mourning when the funeral ceremony had not completed yet. The controversy was on the crime and punishment applied to her.

The first opinion: The widow did not only conduct funeral proceedings without grief but also unbelievably had sexual intercourse with other man beside her husband's coffin. If this were the funeral case of her husband's parent, her act should have corresponded to the crime of lack of filial devotion. Actually, it was under the situation of her husband's funeral proceedings. So the crime of impertinent and irreverent behavior in the funeral ceremony should put on her and the punishment sentenced to her should be forced labor without mutilation reduced one degree.

The rebuttal opinion: If a married woman has sexual intercourse with other man, her deed should correspond to disloyalty to her husband. Such guilt, however, is not applied to the situation in which her husband was already dead. Additionally, there is no record of pretrial investigation for this judicial affair. Therefore she should be judged "not guilty".^①

Here what I would like to indicate as the most important matter is that

① 故律曰、死夫以男爲後、毋男以父母、毋父母以妻、毋妻以子女爲後律曰「諸有縣官事而父母若妻死者、歸寧卅日、大父母同產十五日、赦悍、完爲城旦舂、鐵袂其足、輸巴縣鹽、教人不孝、次不孝之律、不孝者棄市、棄市之次、黥爲城旦舂、當黥公士、公士妻以上完之、奸者耐爲隸臣妾、捕奸者、必案之校上」

今杜濬女子甲夫公士丁疾死、喪棺在堂上、未葬、與丁母素夜喪環棺而哭、甲與男子丙偕之棺後內中和奸、明旦素告甲吏、吏捕得甲、疑甲罪、廷尉穀正始監弘廷史武等卅人、議當之、皆曰、律「死置後之次、妻次父母、妻死歸寧與父母同法」、以律置後之次人事計之、夫異尊于妻、妻事夫、及服其喪資、當次父母、如律妻之爲後、次夫父母、夫父母死、未葬奸喪旁者當不孝、不孝棄市、不孝之次、當黥爲城旦舂、赦悍完之、當之妻尊夫當次父母、而甲夫死不悲哀、與男子和奸喪旁、致之不孝、赦悍之律二章、捕者雖弗案校上、甲當完爲舂、告杜論甲

concerning 甲 *Jia*'s act, the sexual intercourse itself never involves illicitness, but it comes to constitute a crime under certain conditions. The conditions are mourning period, or act ignoring filial devotion, or disloyalty to her husband, or impertinent and irreverent behavior in the funeral ceremony and so on. If these conditions are not met, the sexual intercourse between male and female could not be guilty. In this framework, does "unmarried" meet the condition which constitutes the crime of fornication?

The context of the 奏讞書 *Zou Yan Shu*, I quoted above, is far from proving it. In addition to the excavated sources, it is impossible to find the verifiable examples in any historical data in the Han period.

The word 姦 *jian* in the historical sources including 史記 *Shi Ji* and 漢書 *Han Shu* mainly means an evil act/person which is unrelated from the crime of sexual matter between male and female. Even limited in the meaning of fornication, the crimes of 姦 are following acts.

(1) 永光二年，坐強姦人妻，會赦，免。 王子侯表

(2) 建元六年，侯生嗣，八年，元朔二年，坐與人妻姦，免。 高惠高后文功臣表

(3) 元鼎元年，坐母公主卒未除服姦。《高惠高后文功臣表》

(4) 建始四年，坐尚陽邑公主與婢姦主旁，數醉罵主，免。 景武昭宣元成功臣表

(5) 五鳳中，青州刺史奏終古使所愛奴與八子及諸御婢姦。 高五王傳

• 今廷史申繇使而後來、非廷尉當、議曰、當非、是律曰「不孝棄市、有生父而弗食三日、吏且何以論子、廷尉穀等曰「當棄市」。
有曰「有死父、不祠其家三日、子當何論」。
廷尉穀等曰「不當論」。
「有子不聽生父教、誰與不聽死父教、罪重」。
穀等曰「不聽死父教、毋罪」。
有曰「夫生而自嫁、罪誰與夫死而自嫁罪重」。
廷尉穀等曰「夫生而自嫁及取者、皆黜為城旦舂。夫死而妻自嫁、取者毋罪。」
有曰「欺生夫、誰與欺死夫罪重」。
穀等曰「欺死夫毋論」。
有曰「夫為吏居官、妻居家日、與它男子奸、吏捕之弗得□之何論。」
穀等曰「不當論」。
曰「廷尉史議皆以欺死父罪、輕於侵欺生父、侵生夫罪、 [輕] 于侵欺死夫、
□□□□□□與男子奸棺喪旁、捕者弗案校上、獨完為舂、不亦重乎。穀等曰誠失之。」

(6) 地節元年，王年嗣，四年，坐與同產妹姦，廢遷房陵，與邑百家。
諸侯王表

The details of these deeds are:

A: Sexual intercourse with a married woman either by consent or by violence (assault)

B: Fornication in the mourning period of their parents

C: Sexual intercourse between close relatives (incest)

D: Sexual intercourse between commoner and slave, or master and slave

We cannot seek the evidences that unmarried couple's intercourse constituted crime to be punished in any historical data in the Qin-Han period.

It is possible to think that the period when 奏讞書 *Zou Yan Shu*, was completed must be in Han 高帝 *Gaodi* reign. This shows the Han statute had not the regulation that the sexual intercourse between unmarried couple was fornication to constitute any crime.

It is beyond certain "boundary" like above A-D that the sexual intercourse should come to be a crime. The original meaning of the word 姦 (淫) *yin* is "licentious", which means the licentiousness beyond self-control. In this context, the interpretation of 說文解字 can correspond to it.

V Confucian influence toward the Tang period

The social notion on the fornication between male and female changed in a half millennium from Han to Tang. Although mere sexual intercourse between unmarried male and female was not the crime in the Han statute, it changed in The Tang Code to be prescribed as the crime of fornication. It is the article 410 of the Miscellaneous Statute in Tang Code.

What caused the change? And when did the sexual intercourse between unmarried couple come to constitute the criminal act?

As it is well-known, the strict distinction between male and female is prescribed in the ritual of Confucianism. In the chapter named Inner Rule 內則 of the Note of Ritual 禮記, we can find out a lot of sentences expressing strict distinction,^① which

① 『禮記』內則：禮始於謹夫婦。為宮室。辨外內。男子居外。女子居內。深宮固門。閤寺守之。男不入。女不出。男女不同櫛櫛。不敢縣於夫之櫛櫛。不敢藏於夫之篋笥。不敢共湑浴。夫不在。斂枕篋簟席。禡器而藏之。少事長。賤事貴。咸如之。

lead the Confucian morality and chastity expected to woman.

The influence of Confucianism could be verified in *The Commentary of Tang Code* 唐律疏議 on the Inner disorder 内亂 prescribed in the Statute of General principals 名例律, i. e. *The Book of the Zuo Commentary* 左傳 *Zuo Zhuan* states: “The woman has her husband’s house ; the man has his wife’s chamber; and there must be no defilement on either side.” If this is changed, then there is incest. …… the rules of morality are confused. Therefore this is called inner disorder.

The meaning of the idiom 内亂 *nei luan* is nothing but the confusion (亂) of familial/ inner regularity. (内則 *nei ze*)

It is certain that the Confucian morality appeared even in the crime of 奸 *Jian* in the Han Statute, such as in the case of ignoring mourning ceremony and filial devotion. However there is no evidence that breaking strict sexual distinction written in Inner rule of the Note of Ritual constitutes a crime to be punished.

Whether the regulation prescribed in the Miscellaneous Statute in Tang Code was actually applied as a penal code in the judicial decision or not, putting aside the effectiveness of Tang Code, now I am discussing the historical stage of the increasing impact of Confucian morality into the ancient and medieval Chinese codes.

To my examination on this, there were five stages toward the Tang period.

The first stage is the reign of 漢武帝 Han *Wudi*, 100BC. Then the Han Statute was decided to be written on bamboo slips three 尺 *chi* in length. It means both legal

夫婦之禮。唯及七十。同藏無間。故妾雖老。年未滿五十。必與五日之御。將御者。齊。漱。澣。慎衣服。櫛。緝。笄。總角。拂髦。衿纓。綦屨。雖婢妾。衣服飲食。必後長者。妻不在。妾御莫敢當夕。六年。教之數與方名。七年。男女不同席。不共食。八年。出入門戶。及即席飲食。必後長者。始教之讓。九年。教之數日。十年。出就外傅。居宿於外。學書記。衣不帛襦袴。禮帥初。朝夕學幼儀。

請肄簡諒。十有三年。學樂誦詩。舞勺。成童。舞象。學射御。二十而冠。始學禮。可以衣裳帛。舞大夏。惇行孝弟。博學不教。內而不出。三十而有室。始理男事。博學無方。孫友視志。四十始仕。方物出謀發慮。道合則服從。不可則去。五十命為大夫。服官政。七十致事。

○女子十年不出。姆教婉婉聽從。執麻枲。治絲繭。織紵組紃。學女事。以共衣服。觀於祭祀。納酒漿籩豆菹醢。禮相助奠。十有五年而笄。二十而嫁。有故。二十三年而嫁。聘則為妻。奔則為妾。

『書經』益稷「朋淫于家、用殄厥世」朋、羣也。丹朱習於無水陸地行舟、言無度。羣淫於家、妻妾亂用、是絕其世、不得嗣、(羣淫於家、言羣聚妻妾、恣意淫之、無男女之別、故言妻妾亂也、用是之惡、故絕其世位、不得嗣父也。)

statute and Confucian classics were put on the same level as imperial canon. This is the first step toward the Tang situation.

The secondly, it is in the Jin Dynasty 晋泰始律令 *Jin Tai Shi Statute and Ordinance* were enacted in 268 AD (晋泰始四年). Regarding the establishment of *Jin* law, I have published one article to discuss the development from the Han Statute to the Jin law.

In this stage two kind of Chinese law are codified, i. e the criminal code (律 *lü*) and administrative code (令 *ling*). In particular Jin Administrative Code (令) in 40 volumes, was strongly influenced by the Confucian Ritual Code (礼典).

The third stage, the matter concerns the intercourse between male and female.

In the year 339, when the Northern *Wei* 北魏 still maintained the non-Chinese tribal state before they transformed themselves into an imperial state like China in the North, the stipulation that the sexual intercourse without the ritual should warrant the death penalty was enacted.^①

It is quite doubtful whether the word “禮 ritual” in this article “不以禮交皆死” corresponds to the ceremonial way of Confucianism. Considering it was the affair in early 4th century, I think it should be a strict ordinance on conjugality which prohibits the endogamy. However, I think the historical fact that they established the strict ordinance on the intercourse or marriage between male and female could relate the regulation on the fornication of the 北魏 *Bei Wei* penal code enacted in 5th century, even if the conception of prohibition was totally different in between.

And the fourth stage, when the *Bei Zhou* 北周 code and ordinance, which formed the foundation of the 隋 *Sui* law, were enacted, one of the Confucian canon, 周禮 *Ritual in Zhou* had a significant influence on the legislation. Though the direct effect of *Zhou Li* was appeared in the administrative ordinances, it could be possible that the rigorous observance of normative ethics led to the severe punitive statute. The Confucian morality and distinction between male and female described in Inner Rule of *Note of Ritual* 禮記 came to be embodied in the criminal code from *Bei Zhou* to Tang.

① 『魏書』刑罰志

昭成建國二年(339)、當死者、聽其家獻金馬以贖;犯大逆者、親族男女無少長皆斬;男女不以禮交皆死、民相殺者、聽與死家馬牛四十九頭、及送葬器物以平之、無繫訊連速之坐;盜官物、一備五、私則備十、法令明白、百姓晏然。

And the last, while the criminal code came close to the ritual code, *Lü* 律 reduced the function as effectual legal stipulation. In the year 541, *Dong Wei* period, a new ordinance named *Ge* 格 was added to the history of codified law in medieval China. It was the 15 volumes of 麟趾格 *linzhi Ge*. It has been thought that the new ordinance named *Ge* 格 is a secondary law as an aid to the Criminal Code 律. I myself, however, the *Ge* 格 was the effectual and practical code which should be applied to real affairs instead of the Criminal Code.

The Tang Code was enacted in the year 624 and was revised in 651 and 653. As we discussed it, there are articles on sexual intercourse between male and female in the Miscellaneous Statute in The Tang Code. But it is impossible to seek the actual adjudication according to the article 410 in the Miscellaneous Statute in any historical sources.

It is because The Tang Code changed itself from norms of adjudication (裁判規範) to norms of conduct (行為規範) after the several stages from Han to Tang mentioned above.

附：奸罪的观念

——从汉律到唐律*

[日] 富谷 至 著 赵 晶** 译

摘要：《唐律》的条文规定，未婚男女之间的性交行为亦构成犯罪。若是双方合意，则名为“和奸”；反之，若一方被迫，则称之为“强奸”。本文拟检证以下三点：第一，“奸”是否确实意指未婚男女之间的非法性交？第二，秦汉法律中是否已经存在如唐律这般的规定？第三，在前近代中国，未婚之人若有性交行为，是否真的会因此构成犯罪而被处罚？

关键词：性交 奸罪 唐律 汉律

* 此文据本辑所载富谷至 (Itaru Tomiya) 教授英文稿译出，仅供读者参考。

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一 《唐律》对奸罪的规定

在这册纪念中国政法大学法律古籍整理研究所成立 30 周年的专刊中，我拟探讨介于儒家伦理观念与生效律典之间的奸罪概念。

我们从探讨唐律开始。在《唐律·杂律》中，有如下关于男女性交的条文：

第 410 条：诸奸者，徒一年半；有夫者，徒二年。部曲、杂户、官户奸良人者，各加一等。即奸官私婢者，杖九十（奴奸婢，亦同）。奸他人部曲妻，杂户、官户妇女者，杖一百。强者，各加一等。折伤者，各加斗折伤罪一等。

第 411 条：诸奸缌麻以上亲及缌麻以上亲之妻，若妻前夫之女及同母异父姊妹者，徒三年；强者，流二千里；折伤者，绞。妾，减一等。（余条奸妾，准此）^①

根据第 410 条，男女和奸将被判处 1 年半的劳役刑。在此条中，何为“奸”？Wallance Johnson 在英译本《唐律》中将它译为“违法的性交”。然而，何为违法行为？为何男女之间的性交是违法的、错误的？

唐律第 410、411 条涵盖以下内容：即便是未婚男女，其性交依然构成犯罪；而且如果是双方合意的性交，即名为“和奸”，反之则是被迫，名为“强奸”。

我完全同意《杂律》第 410 条是有关未婚男女之间奸淫的规定，但对此有如下疑问：

1. “奸”是否确实意指未婚男女之间的非法性交？
2. 秦汉法律中是否已经存在如唐律这般的规定？

3. 在前近代中国，未婚之人若有性交行为，是否真的会因此构成犯罪而被处罚？

^① 有关这些条文的英译本，参见 *The Tang Code*, translated with an introduction by wallnce Johnson, Princeton University Press, New Jersey, 1979。除上述 2 条外，还有以下诸条：第 412 条“诸奸从祖祖母姑、从祖伯叔母姑、从父姊妹、从母及兄弟妻、兄弟子妻者，流二千里；强者，绞”；第 413 条“诸奸父祖妾、（谓曾经有父祖子者）伯叔母、姑、姊妹、子孙之妇、兄弟之女者，绞。即奸父祖所幸婢，减二等”；第 414 条“诸奴奸良人者，徒二年半；强者，流；折伤者，绞。其部曲及奴，奸主及主之期亲，若期亲之妻者绞。妇女减一等；强者，斩。即奸主之缌麻以上亲及缌麻以上亲之妻者，流；强者，绞”；第 415 条“诸和奸，本条无妇女罪名者，与男子同。强者，妇女不坐。其媒合奸通，减奸者罪一等（罪名不同者，从重减）”。

在本文中，我拟逐一考察这三点，而最先要做的，便是分析“奸”字的意涵。

唐律有数条律文将“奸”定为犯罪。作为十恶之一，内乱是指“奸小功以上亲、父祖妾及与和者”。

虽然“奸”字确实与男女之间的性行为相关，但在一些条文中，该字却被用于表示非法或罪恶的行径，如劫掠、恶行和诈伪。如《唐律·卫禁律》第89条载：

诸缘边城戍，有外奸内入，（谓非众成师旅者）内奸外出，而候望者不觉，徒一年半；主司，徒一年。（谓内外奸人出入之路，关于候望者）其有奸人入出，力所不敌者，传告比近城戍。若不速告及告而稽留，不即共捕，致失奸寇者，罪亦如之。

显然，在这一条文中，“奸”字与非法性交无关。

以下，我们将考察汉律及其他秦汉时代的史料。

二 秦汉律对奸罪的规定

我们可以在秦汉时代的法律中找到以下有关奸罪的条文，如《张家山出土汉律·裸律》载：

奴与庶人奸，有子，子为庶人。189

奴取（娶）主、主之母及主妻、子以为妻，若与奸，弃市……190

同产相与奸，若娶以为妻，及所取（娶）皆弃市。其强与奸，除所强。191

诸与人妻和奸，及其所与皆完为城旦舂。其吏也，以强奸论之。192

强与人奸者，府（腐）以为宫隶臣。193

《秦律法律答问》载：

同母异父相与奸，可（何）论？弃市。172

然而，我们必须牢记，其他汉律条文与唐律一样，也存在着表示恶行或恶人的“奸”字用例，如《法律答问》载：

嗇夫不以官为事，以奸为事，论可毆……61

三 “姦”的字义

有关“姦”与“姦”两个字，《说文解字》卷一二分别解释为：

姦：犯姦也。（段注：此字谓犯姦姦之罪，非即姦字也。今人用姦为姦，失之。）

姦：亼也。〔段注：亼下曰，姦衰也。（亼九篇上：亼，姦衰也。）〕

姦：亼逸也。（段注：亼音私，姦衰也。逸者，失也。失者，纵逸也。姦之字，今多以淫代之，淫行而姦废矣。）

虽然“姦”与“姦”趋于同义，但“姦”字意为犯逸（放纵之过），而“姦”字作为名词，表示罪恶。这是段玉裁的注释。事实上，在汉代的其他文献中，这两个字也被释为同义，如《释名·言语》载：“姦，姦也，言姦正法也”，即意指违反正当性的规则，即违法、犯罪、罪行等。

于此，我将再度追问：男女之间发生何种行为方构成犯罪？未婚之人进行性交，是否构成犯罪并为汉、唐法律所惩处？合法的性交是否只能发生在已婚者之间？

四 汉简中的性交

我将引用非常有趣且丰富的考古资料，来考察秦汉时期有关“姦”的观念。这批约为200枚的汉简于1983年出土于江陵张家山汉墓，被命名为“奏谳书”，是有关司法争议的记录。其中有一件与性交相关的案例，以下则述其大要：

寡妇甲的丈夫死亡，停柩堂中，甲在灵柩之后与人性交。此事发生在葬仪未完的居丧期间。所争论者，乃是甲之罪、罚为何。

最初的意见是：该寡妇不但在丧仪进行中全无哀戚，竟然还与其他男子在丈夫灵柩旁进行性交。如果服丧对象是她的公婆，那么她的行为将被定为“不孝”。而事实上，该行为发生于其为丈夫服丧期间，所以她应适用丧中敖悍之条并被处以完城旦舂的刑罚。

反驳意见则认为：如果一个已婚妇女与其他男子性交，其行为应被定为欺漫丈夫。但若丈夫已死，则不构成欺漫。此外，此案并未做成审前调查取

证的公文书，因此寡妇甲应被判为“无罪”。^①

于此，我想指出其中最重要的一点：有关甲的行为，其性交本身并不违法，只是在特定条件之下才构成犯罪。这些条件包括居丧期间、不孝、欺漫丈夫或葬仪期间的敖悍行为等。如果并不满足这些条件，则男女之间的性交并不是罪。据此，“未婚”是否是构成奸罪的条件之一？

上开所引《奏谏书》的案例无法证实这一点。除了出土文献之外，我们也无法从其他汉代的史料中找到可据以为证的例子。

在《史记》、《汉书》等史料中，“奸”字主要表示罪行或罪人，而与男女之间的性犯罪无关。即便仅限于表示奸罪之意，有关“奸”的犯罪行为亦有如下数端：

(1) 永光二年，坐强奸人妻，会赦，免。（《王子侯表》）

(2) 建元六年，侯生嗣，八年，元朔二年，坐与人妻奸，免。（《高惠高

① 故律曰：死夫以男为后，毋男以父母，毋父母以妻，毋妻以子女为后。律曰：诸有县官事而父母若妻死者，归宁卅日，大父母同产十五日。敖悍，完为城旦舂，铁袂其足，输巴县盐。教人不孝，次不孝之律，不孝者弃市，弃市之次，黥为城旦舂，当黥公士、公士妻以上完之。奸者耐为吏臣妾，捕奸者，必案之校上。

今杜濬女子甲夫公士丁疾死，丧棺在堂言上，未葬，与丁母素夜丧环棺而哭，甲与男子丙偕之棺后内中和奸，明旦素告甲吏，吏捕得甲，疑甲罪。廷尉鞅正始监弘廷史武等卅人，议当之，皆曰：律“死置后之次，妻次父母，妻死归宁与父母同法”，以律置后之次人事计之，夫异尊于妻，妻事夫，及服其丧资，当次父母，如律妻之为后，次夫父母，夫父母死，未葬奸丧旁者当不孝，不孝弃市，不孝之次，当黥为城旦舂，敖悍完之，当之妻尊夫当次父母，而甲夫死不悲哀，与男子和奸丧旁，致之不孝、敖悍之律二章，捕者虽弗案校上，甲当完为舂，告杜论甲。

• 今廷史申繇使而后来，非廷尉当，议曰：“当非，是律曰不孝弃市，有生父而弗食三日，吏且何以论子？”廷尉鞅等曰：“当弃市”。

有曰：“有死父，不祠其家三日，子当何论？”

廷尉鞅等曰：“不当论”。

“有子不听生父教，谁与不听死父教，罪重？”

鞅等曰：“不听死父教，毋罪。”

有曰：“夫生而自嫁，罪谁与夫死而自嫁罪重？”

廷尉鞅等曰：“夫生而自嫁及取者，皆黥为城旦舂。夫死而妻自嫁，取者毋罪。”

有曰：“欺生夫，谁与欺死夫罪重？”

鞅等曰：“欺死夫毋论。”

有曰：“夫为吏居官，妻居家日，与它男子奸，吏捕之弗得□之何论？”

鞅等曰：“不当论。”

曰：“廷尉史议皆以欺死父罪，轻于侵欺生父，侵生夫罪，[轻]于侵欺死夫，□□□□□□与男子奸棺丧旁，捕者弗案校上，独完为舂，不亦重乎？”鞅等曰：“诚失之。”（《奏谏书》180~196）

后文功臣表》)

(3) 元鼎元年，坐母公主卒未除服奸……（《高惠高后文功臣表》）

(4) 建始四年，坐尚阳邑公主与婢奸主旁，数醉骂主，免。（《景武昭宣元成功臣表》）

(5) 五凤中，青州刺史奏终古使所爱奴与八子及诸御婢奸……（《高五王传》）

(6) 地节元年，王年嗣，四年，坐与同产妹奸，废迁房陵，与邑百家。（《诸侯王表》）

这些行为的具体情节为：

- A. 强奸已婚妇女或与之和奸；
- B. 居父母丧时犯奸；
- C. 近亲之间的性交；
- D. 庶人与奴婢或主、奴之间的性交。

我们无法在秦汉时期的任何史料中找到未婚者之间性交构成犯罪并被惩罚的证据。

《奏谏书》可能成书于汉高帝时期。这说明，汉律并未将未婚者之间的性交定为奸罪。只有上述这些 A—D 的“越界”性交，才构成犯罪。“姪（淫）”字的原始含义是过度、放逸，换言之，是无法自制。在这种情况下，《说文解字》的解释是与之契合的。

五 汉唐之间的儒学影响

汉唐之际的五百年间，有关男女之间奸罪的社会观念发生了变化。未婚男女之间的性交虽然在汉律中不被作为犯罪，但在唐律中却被改定为奸罪。这便是《唐律·杂律》第 410 条。

因何导致了这种变化？未婚者之间的性交从何时起被定为犯罪？

众所周知，严格的男女之防规定于儒家礼制之中，《礼记·内则》之中便有许多与此相关的内容，^①体现了儒家对妇女的道德和贞操要求。

^① 礼始于谨夫妇。为宫室，辨外内。男子居外，女子居内，深宫固门，闾寺守之，男不入，女不出。男女不同檐枷，不敢县于夫之榦，不敢藏于夫之篋笥，不敢共湑浴。夫不在，敛枕篋簟席，襦器而藏之。少事长，贱事贵，咸如之。

夫妇之礼，唯及七十，同藏无间，故妾虽老，年未五十，必与五日之御。将御者，齐、漱、澣、慎衣服，栉、緦、笄、总角、拂髦、衿纓、綦屨。虽婢妾，衣服饮食，必后长者。妻不在，妾御莫敢当夕……

六年，教之数与方名。七年，男女不同席，不共食。八年，出入门户，及即席饮食，必后长者，始教之让。九年，教之数日。十年，出就外传，居宿于外，学书记。衣不帛襦袴。礼帅初，朝夕学幼仪，请肄简谅。十有三年，学乐诵诗，舞勺。成童，舞象，学射御。

儒学影响可为《唐律疏议·名例律》有关“内乱”的解释所证实，即“《左传》云：‘女有家，男有室，无相渎。易此则乱。’……紊乱礼经，故曰‘内乱’”。内乱之义无他，扰乱家庭或内部规则（内则）而已。

可以确定的是，儒家的道德业已体现在汉代有关奸罪的法律之中，如居丧为奸、不孝。然而，没有证据显示，违反《礼记·内则》所定男女之防便会被定为犯罪并受到惩罚。

不论《唐律·杂律》的规范是否如刑法典一般为司法判决所适用，即暂且撇开《唐律》的实效性问题的，儒家道德对于中国古代、中世法典的影响可谓日益加深，我拟讨论这一历史变迁的阶段性问题。

在我看来，这一逐步发展至唐代的过程经历了五个阶段：

第一阶段为汉武帝时代（100BC）。那时规定，汉律应写于三尺长的竹简上。这意味着，汉律在帝国的典制序列中取得了与儒家经典相同的地位。这是走向唐代的第一步。

第二阶段为晋朝。泰始律令颁布于晋泰始四年（268）。有关晋法的形成，我已发表专文，探讨从汉律到晋律的发展。在这一阶段，有两种法典被编纂，即刑事法典（律）和行政法典（令），尤其是40卷的行政法典（令），受到儒家礼典的强烈影响。

第三阶段则事涉男女性交。公元339年，彼时的北魏仍然处于非中国的部落时代，尚未进入北中国的帝国时代。北魏颁布了一项法律规定，不符合礼的性交将受到死刑的处罚。^①令人怀疑的是，“不以礼交皆死”的“礼”是否对应儒家的礼仪之道。考虑到这发生在4世纪前期，我认为这是一条严禁同姓婚姻的法令。然而，他们所制定的有关男女性交或婚姻的法令可能与5世纪的北魏刑法典中有关奸罪的规定相关，虽然两种禁令背后的理念截然

二十而冠，始学礼，可以衣裘帛，舞大夏，惇行孝弟，博学不教，内而不出。三十而有室，始理男事，博学无方，孙友视志。四十始仕，方物出谋发虑，道合则服从，不可则去。五十命为大夫，服官政。七十致事……

女子十年不出，姆教婉婉听从，执麻枲，治丝茧，织纴组紃，学女事，以共衣服。观于祭祀，纳酒浆、笾豆、菹醢，礼相助奠。十有五年而笄。二十而嫁，有故，二十三年而嫁。聘则为妻，奔则为妾。

《书经·益稷》曰：“朋淫于家，用殄厥世”。疏曰：“朋，群也。丹朱习于无水陆地行舟，言无度。群淫于家，妻妾乱，用是绝其世，不得嗣”；“群淫于家，言群聚妻妾，恣意淫之，无男女之别，故言妻妾乱也。用是之恶，故绝其世位，不得嗣父也”（引自《尚书正义》）。

① 《魏书·刑罚志》载：“昭成建国二年（339），当死者，听其家献金马以赎；犯大逆者，亲族男女无少长皆斩；男女不以礼交皆死；民相杀者，听与死家马牛四十九头，及送葬器物以平之，无系讯连逮之坐；盗官物，一备五，私则备十。法令明白，百姓晏然。”

不同。

第四阶段是北周律令的制定。它体现了儒家经典《周礼》在立法层面的重要影响，奠定了隋朝法律的基础。虽然《周礼》仅直接作用于行政法令方面，但它在道德规范上的严格要求，可能催生严厉的惩罚性规范。《礼记·内则》所记载的儒家伦理与男女之分由此进入从北周到唐代的刑法典中。

最后一个阶段是，随着刑法典的经书化，律的实用性被降低。东魏兴和三年（541），一种名为“格”的新兴法典在中世中国诞生，这就是15卷的《麟趾格》。既往研究认为，“格”是辅助刑法典（律）的副法，但是我认为，作为具有实效性的法典，格在实际适用上取代了律。

唐律颁布于624年，修订于651年并于653年颁布《律疏》。如上所及，《唐律·杂律》中存在着有关男女性交的条款，但我们无法在任何史料中找到适用第410条的司法裁决。这是因为经历了上述汉唐之际的数个历史阶段，《唐律》业已由裁判规范转变成了行为规范。