

## Legal fictions in East Asia

### Recovering a forgotten mode of judge-centered jurisprudence

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In much of Western legal historical scholarship, legal fictions are understood to be devices for maintaining the integrity of text-based legal codes in the face of social change. However, while legal fictions as such were not a topic of scholarly inquiry in East Asia prior to the introduction of the concept from the West, East Asia is nevertheless rich in examples of another kind of legal fiction: jurisprudential legal fictions, or legal fictions effected by judges and rooted in culture (often including religion). The mythical, moral *xiezhi* beast in ancient China, and judge-centered moral reasoning in pre-modern Japan, point to legal fictions beyond the traditional categories of such in much of Western scholarship, as well as to legal fictions within the West now largely forgotten after the advent of Enlightenment thinking on textual law.

**Keywords:** *xiezhi* (*kaichi*); legal fictions; jurisprudence; China; Japan.

#### 1. Introduction<sup>1</sup>

Many people, and certainly everyone who has studied law, will have heard the term “legal fiction” before. For example, a common legal fiction is the age of majority. In many countries, legislatures have passed laws declaring that those who reach their eighteenth, or twentieth, or twenty-first, or some other, birthday, are adults, while those who have not are still minors. There is of course no magic change that happens on a particular birthday. But legal frameworks need to make distinctions between those who can, for example, be trusted to drive automobiles, or be punished for serious crimes, and those who cannot. The need to make that distinction in turn necessitates that a line be drawn where

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no line really exists. Hence the legal fiction, meant to satisfy the interior logic of the law, as to the age of majority. There are many other examples, such as when a missing person is declared legally deceased after a legislatively-defined length of time has elapsed. Whether the person is alive or dead, nobody knows. But there are wills to sort through, remarriages to consider, and property to divide, so the law allows that a death may be acknowledged at some point, even if that may not be the case in real life.

A legal fiction, in short, is a convenient falsehood that must be treated as true, in the context of the law, in order for the law to function as society expects. The law in books is incapable of reason, after all. It cannot think and is blind and inanimate. It can work only when certain kinds of information are fed into it by the law's authors and subjects: people. Human beings of course know that there is no real difference between someone who was seventeen until yesterday but has turned eighteen today. We also know that, sometimes, people disappear without a trace, and we must live with the uncertainty surrounding their fate. Whether we say a missing person is dead or alive does not really make it so. But the law, being a circumscribed epistemological space, cannot live with that kind of ambiguity. It must have some kind of hard information in order to produce the kinds of results which societies need in order to maintain order, and so we human beings sometimes need to use placeholder-type information—legal fictions—to satisfy legal logic and let the machinery of law go on working as we have designed it to, and as it must if, as many of us believe, we are to have any kind of civilization.

And yet, while legal fictions are so commonplace in Western legal systems that we hardly notice them, legal fictions, at least as they are understood in the context of Western law, are not so readily apparent in legal histories of East Asia. The term “legal fiction” has no equivalent in either Chinese or Japanese, for example, other than phrases imported from other languages and epistemes. It is possible to write “legal fiction” in various ways using Chinese characters, but such renderings are translations of the Western concept. In fact, the idea of a “legal fiction” does not find explicit expression in Chinese or Japanese prior to the introduction of Western legal ideas at all. More to the point, the Japanese term *rīgaru fuikushon* (リーガル・フィクション) is a straight transliteration into the Japanese syllabary of the English “legal fiction.”<sup>2</sup> Before East Asia's exposure, largely through the conduit of Japanese scholars, to Western jurisprudence, philosophy, science, and other fields from the middle of the nineteenth

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<sup>2</sup> Other terms include *hō(ritsu) ni okeru gisei* (“fictive models occurring in law”) and the German *Rechtsfiktion*. See Sasakura (2015) and, generally, Sasakura (2021).

century, there was no way to express overtly the insertion of some measure of openly-admitted falsehood into a legal regime in order to preserve its functioning in some way.<sup>3</sup>

The conscious practice of legal fictions in the West, by contrast, is almost as old as codified law itself. A good working definition of legal fictions comes from legal historian Sir Henry Maine (1822-1888), who wrote in *Ancient Law* (1861), “I [...] employ the expression ‘Legal Fiction’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified” (Maine 1917: 16). Maine began his study with ancient Roman law and continued through to his day, seeing in legal fictions a way in which a legal system might accommodate social change. This gap, as Maine saw it, between the law in books and the law in the streets was the heart of Maine’s legal fiction thinking. Maine’s work deals expressly with “ancient law,” but his premise is that legal fictions are an inescapable aspect of law. Maine also thought that legal fictions were becoming more necessary as time went on. On Maine’s view, modern Europeans have been, and will continue to be, moving away from whatever is written in lawbooks, because society is always progressing, and so whatever was written down and thereby condemned no longer to change had already fallen behind the dynamic law reflected in the social mores of the hour. Hence the need to blur reality a bit when presenting that reality for digestion within legal frameworks, because society and the law were always diverging. “Social necessities and social opinion [in progressive societies] are always more or less in advance of Law,” Maine writes. Maine then lists legal fictions, along with legislation and equity, as ways in which “Law is brought into harmony with society” (Maine 1917: 15). Maine understood this tension between law and society to be constant, and legal fictions, therefore, to be a necessary concomitant to the written law.

To read Maine is to puzzle anew at how differently the law has been thought of in East Asia. Whether Maine would have characterized East Asian societies as progressive under his legal-fictions rubric seems secondary to the fact that there is nothing approaching Maine’s definition of legal fictions in pre-modern East Asian legal texts. As far as I know, in pre-modern East Asia there is no term approximating “legal fiction” at all. This silence presents us with a choice to make. The absence of a term for a concept can mean one of two things: either the concept did not exist prior to contact with a

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<sup>3</sup> There are various definitions of “legal fiction” available in English. Lehman and Phelps (2005, vol 6: 421) give “An assumption that something occurred or someone or something exists which, in fact, is not the case, but that is made in the law to enable a court to equitably resolve a matter before it. In order to do justice, the law will permit or create a legal fiction. For example, if a person undertakes a renunciation of a legacy which is a gift by will the person will be deemed to have predeceased the testator—one who makes a will—for the purpose of distributing the estate.” Stewart (2006) gives: “something assumed to be true for the sake of convenience whether true or false.” <https://legal-dictionary.thefreedictionary.com/legal+fiction>

foreign episteme, or the concept was so much a part of deep-seated common experience as not to require naming at all. “Special relativity” is an example of the former. Prior to the work of Albert Einstein and other physicists in the late nineteenth and early twentieth centuries, the notion of a “space-time continuum” was part of no cultural fabric anywhere in the world (Kumar 2009). “Legal fiction,” however, is an example of the latter. Legal fictions were articulated explicitly by Western legal theorists due mainly to the Western emphasis on codified law, as well as to Maine’s and other thinkers’ essentially Hegelian assumption that society progresses, meaning that texts do not keep pace with social change. However, the Western nature of much legal fiction discourse does not change the necessity of fudging the law in order to match the vagueness of real life. This practice has been apparent in every mature legal system around the world. Legal fictions may be nominally new in East Asia, but they are actually of very ancient vintage.

In this paper, I will track the history of some legal fictions—of a kind different from those envisioned by Maine—in East Asia, specifically in ancient China and early modern and modern Japan.<sup>4</sup> On one reading, a comparison with legal ideas of the West could be taken to signify that the organic incorporation of legal fictions and *synderesis*-oriented jurisprudence as a corrective to mathematico-logical legal processes, while as common in China and Japan as in much of the Western world, is fundamentally different in key ways from place to place and age to age. However, my finding is that examples from East Asia confirm an insight which Henry Maine had in his own study of legal fictions, namely that some legal fictions are circumstance-driven workarounds adapted to the legal particularities which judges face in real time (Maine 1917: 15-16). I don’t think legal fictions hinge on progress, or textualism, or any other particularity. I think, at a much more basic level, they are just functions of how human beings make decisions in court settings. East Asian legal fictions are therefore expansions of the definition of the term, and should be viewed as part of the same kind of moral and ethical reasoning that judges use in courtrooms in the West. The difference is that, in East Asia, legal fictions do not get taken back up into positive law, but remain as performative acts, or as positions adopted in light of myths about how the law functions. In other words, contrary to many who see legal fictions as products of ancient Roman law or by-products of what might best be called a Whig interpretation of history—ways to keep the machinery of law working when the gears between law codes and social practices slip as society modernizes—I see legal fictions in East Asia as fundamentally jurisprudential, or judge-enacted and judge-made, arising from the kind of thing a court is and the

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<sup>4</sup> Cf. Sasakura (2015: 41-74). Sasakura (2015: 41, fn. 1) cites Suehiro’s definition of “legal fiction” (*Rechtsfiktion*) as *hōritsu ni okeru gisei*.

limitations of judges as fallible human beings (Butterfield 1965).<sup>5</sup> To be sure, there is judge-based legal reasoning in the West. The English Common Law, for instance, and its descendant in the United States, take the cumulative effect of reasoning in individual cases to be formative of the body of law itself.<sup>6</sup> In East Asia, by contrast, judicial reasoning has tended to be restricted to courtrooms, and not to be incorporated back into any body of textual law. The kinds of performative, ad hoc bridges in logic which some judges in East Asia have deployed to effect justice at a level below that of the abstractions envisioned in positive law are legal fictions, I argue, of a different kind than those typically emphasized in Western law—but they are still, for all that, legal fictions, and should be seen as complementary to those which Western scholars usually stress.

In all, legal fictions in the context of East Asian legal history reaffirm what Maine knew about ancient Rome, namely that legal fictions can be performative, undertaken by judges, as well as text-based and used to maintain the intellectual integrity of legal systems. What I do here is simply change the emphasis, away from codified law and toward judicial reasoning and performance. I do not see East Asian legal fictions as circling back to codified law as a kind of alternative mode of legislation, as Maine and others have asserted. I see East Asian legal fictions as beginning and ending in courts, and as incorporating cultural and even mythico-religious logics through the person of the judge, who embodies and enacts them in real time. While legal fictions are almost always traced by Western scholars through Western legal history, I argue that turning one's attention to non-Western, particularly East Asian, legal-historical contexts can help show that legal fictions are not always legal, as in law-textual, but are often jurisprudential, that is, useful for judges in the kind of work that they do, and performed by judges to effect justice outside the context of the written law. By this I mean that legal fictions in East Asia do not often work the way Maine describes, or the way legal fictions work in everyday legal practice—namely, to act as stop-gaps in legal machinery, placeholders of untrue “facts” which allow the law to carry on as an epistemological whole. In East Asia, legal fictions are often performative, done by judges in courtrooms, or in some way meant to influence how judges think or act. Those kinds of legal fictions usually have nothing to do with the written law, except to provide some pretense for skirting it.

The examples below from China and Japan demonstrate that legal fictions should be broken into two broad but interworking categories: classical or Maineian legal fictions, rooted in legal codes (as with the Roman law), and jurisprudential legal fictions, which are performative courtroom acts often

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<sup>5</sup> On “jurisprudence,” see Ross (1958: 24-28).

<sup>6</sup> See, for example, “III. The Application of Law,” in Pound (1922).

rooted, perhaps by nature necessarily so, more in culture (including religion) than in documentary law.<sup>7</sup> “Legal fiction” may be a concept which the West has made explicit, in other words, but it is, by the same measure, a practice which has been a part of East Asian legal history from antiquity.

## 2. Legal fictions: A comparative overview

There is a long legal-historical tail to the contemporary discourse, sketched above, surrounding legal fictions. Although Sir Henry Maine’s locus classicus discussion of legal fictions points to their origin in what Roman judges once did, almost all examples of legal fictions in the West are, in some way, grounded either in codified or common law, or in precedents in turn based on those. Consider another classic example of an ancient legal fiction in the West, again from ancient Rome. As legal scholar Paul Vinogradoff (1854-1925) related, possessors of estates in ancient Rome, constrained by law and tradition to leave an estate to someone “from the class of so-called ‘own-heirs’, or members of the family under the immediate ‘power’ of the father,” found a way of working around those constraints by “developing the doctrine of ‘possession of the estate’ (*bonorum possessio*),” thus placing “‘in the position of heir’ a person whom [the owner] considered to have a natural claim” (Vinodograff 1949: 155; emphases in original). This is a technical kind of fiction, a legal fiction rooted in the textual nature of much Western law, especially of the codified ancient Roman variety. By expanding the definitions involved in law and tradition (in this case, moving from *agnation* (“relationship based either on kinship through the male stock, or on artificial adoption into the family according to prescribed legal forms”) to *cognation* (“blood kinship in the modern sense, including, of course, relationship on the female side”), a legal fiction was effected, and the possessor of an estate gained more legal leeway, allowing him more latitude in the disposal of his property (Vinodograff 1949: 154-155; emphases in original). One can see the legal fiction at work plainly in the definitional stretching employed to allow parties to get away with practices which, *prima facie*, codified law seems to disallow. What was needed for legal fictions such as Vinogradoff describes was simply to fiddle with terms until the realities of a given case matched up with the wording in lawbooks. Legal fictions of this kind abound in Western legal history. Consider that today, as well, noted legal scholars Robert P. George and John Finnis argue, in the context of a discussion of how legal fictions are presented in the work of Blackstone, that “legal fictions are found on a spectrum ranging from legally stipulated definitions close to ordinary-language conceptions of

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<sup>7</sup> “Religion is a complex system, usually a combination of theology, dogma, ceremony and ritual, closely interconnected, in [Émile] Durkheim’s words, as ‘a sort of indivisible entity’” (Wang 2007: 305, quoting Durkheim 1976: 36).

natural or other realities, through more or less technical and artificial terms of art, to outright contrafactual (fictive) propositions of law such as [the English maxim] ‘[I]n contemplation of law, [the King] is always present in court.’<sup>8</sup> Consider also that the “spectrum” which George and Finnis posit is coterminous with the black-and-white, textual basis of the law, and is meant to help the law’s logic to function *qua* written law.

But text-based, logic-driven legal fictions, which seem to be an inescapable part of any codified legal regime (because no code is ever complete, and no definition can ever capture reality in its infinite variation), are not the only kinds of fiction which find a life in law. Recall from above that East Asian legal fictions, especially from a time before Western legal modes held sway in East Asia, point to a jurisprudential kind of legal fiction, more performative than textual and deeply rooted in culture, including myths and religion.<sup>9</sup> To be sure, the term “jurisprudential fictions” is not new in the West. Legal philosopher Lon Fuller (1902-1978) and other scholars have used the term before.<sup>10</sup> Fuller used “jurisprudential fictions” to denote “fictions that attempt to describe the ‘nature of law in general’,” and understood such fictions to “represent a precise parallel to the methods of the physical scientist[, being] attempts to reduce a complex reality to a simple formula, and thus render it tractable to calculation” (Fuller 1967: 127-128). My use of “jurisprudential fiction” is closer to what Fuller calls “procedural fictions,” which “serv[e ...] exclusively procedural ends” (Fuller 1967: 89). I would amend this to argue that “procedural fictions” are as concerned with arriving at justice as are other kinds of legal fictions. I would also amend “procedural fictions” to mean jurisprudential fictions steeped in— inseparable from—culture, especially religion. In making these amendments, though, I slide from legal fictions as Maine understood them, and as Fuller did as well, to legal fictions as they have often been practiced outside of societies with which Maine, or Fuller, would have been familiar. I am hewing closer here to philosopher Gottfried Wilhelm Leibniz’ (1646-1716) distinction between “presumptions that are laid down in positive law (such as the presumption that someone missing for several years is dead) [and] presumptions that consist in a particular kind of belief. While presumptions of the first kind belong to the realm of legal fictions, presumptions of the second kind are genuinely cognitive” (Blank 2006/2007: 209). Additionally, however, what I mean by “legal fictions” and “jurisprudential legal fictions” in the East Asian context sees myths, religion, and culture as part of the “cognitive” use of

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<sup>8</sup> Finnis and George (2022: 939, fn 19), citing Blackstone (1765: 270).

<sup>9</sup> The ancient Romans certainly understood that there were different kinds of legal fictions. See, e.g., de Zulueta (1953: 249-250, 255-258, 261-263).

<sup>10</sup> See, e.g., Del Mar (2013: 444), citing Fuller (1930-1931) and Quinn (2013).

performative falsehoods in courts of law, and also takes in conscience and what might be called natural law or moral reasoning as complements to the work that judges do in using falsehoods or other fictive postures to effect justice in courts.<sup>11</sup>

It should be noted again on this score that there is no dichotomy between East and West in legal fictions, only differences of emphasis. Take the ancient Greeks for example. J. Walter Jones posits that while the Greeks were not known to use legal fictions, they may have helped derive legal fictions, perhaps unwittingly, through the

substitution, by a more enlightened and human generation, of a beast or bloodless offering for a human sacrifice to the gods. At Sparta something of the same sort may account for the annual flogging of the *epheboi*, youths who had just attained the age of manhood, before the altar of Artemis Orthia. The use of *φάρμακοὶ* or scapegoats at Athens served the same purpose of propitiating the gods without inflicting harm on human beings. In these days of daylight saving by adjusting the hands of the clock it is easy for us to understand the mental processes of the Greeks when seeking by patent pretences to advance or postpone the time of religious festivals during which it was as impious to begin hostilities against the enemy as it was to execute a condemned criminal (Jones 1956: 305-306).

I take exception to Jones' rhetorical device of linking the delaying of war and executions to the modern practice of daylight savings time. The reason is that for moderns, the world has been disenchanting. For the Greeks, the gods were real, as real as the Copernican solar system is for us. What Jones sees, rightly I think, as the conceptual origins of later legal fictions were not, at first, attempts to make manmade things (like laws, or clock-time) comport internally, but were rather attempts to fit the messiness of human life in with the higher-order world of spirits beyond man's control. In short, Greek legal fictions were part of Greek culture, including religion. This was true in China and Japan as well. But it began to disappear in the West with the Enlightenment, during which time the idea of "legal fictions" as attempts to make social progress jive with outdated legal codes—Maine's thesis—came to hold sway.

The old nature of the legal fiction both East and West, which is to say the deliberate turning of a blind eye to the slippages between the reasons that men give for doing things and the compulsion that men feel to live lives worthy of the gods, may be brought forward by examining some of the ways in which legal fictions have been attacked in more recent centuries, as belief in the enchantedness of the world was crumbling. English philosopher Jeremy Bentham (1748-1832), for example, reacted violently to the ideas of jurist William Blackstone (1723-1780). To those who have read him, Blackstone

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<sup>11</sup> On conscience in law, see, e.g., Agnew (2018).



is, probably, eminently clear. Blackstone had a subtle and firm grasp on what the law was, how it was to be thought about, and how it was to be applied in courtroom settings. Blackstone's works on the English law continue to be consulted today.<sup>12</sup> Bentham, though, was unimpressed. Bentham, who is virtually synonymous with Enlightenment thinking, saw in Blackstone's legal philosophy "at all points a direct antithesis to the orthologous clarity which his [Bentham's] early horror of darkness made imperative" (Ogden 1932: xvii). That there could be "clarity" in the law, or any other field of human inquiry, was an Enlightenment ideal, and Bentham did not like, at all, the human element in Blackstone, the admission that those who work in the law must work at times with imperfect knowledge (Gaukroger 1992). Here we see what I take to be a very typical post-Enlightenment Western approach to law, namely that law and society must resemble one another as closely as possible, and ideally be mirror images of one another. In any event, Bentham's view was that law must change to fit society, and not that judges must do the work of interpretation and balancing to arrive at conclusions to difficult cases.

Ironically, such insistence on clarity obscured the way in which law (especially law in the hands of judges, which Blackstone was at pains to document) had operated in the past. The Common Law of England arose in just this way, through the accumulation of wisdom over time as judges applied their moral sense and reasoning to whatever case that was before them in court. For Bentham, though, the laws should be laid out by legislatures, and not left for judges to decide willy-nilly (as he saw it) on a case-by-case basis. Blackstone's methods were particularly abhorrent to Bentham because of their use of fictions. "A fiction of law may be defined a wilful falsehood," wrote Bentham, "having for its object the stealing legislative power, by and for hands which durst not, or could not, openly claim it; and, but for the delusion thus produced, could not exercise it" (quoted in Ogden 1932: xvii). Judge-made law, or using fictions to effect workarounds to stuck legal logic, with consequences for future cases in *stare decisis* legal environments, is indeed a classic example of legal fictions as Maine and others have understood them. Bentham seeks clarity without fiction, but in doing so Bentham, in his violent attacks on legal fictions, merely affirms their hazy origins in a distant past very much lacking in "orthologous clarity."<sup>13</sup> "In knowledge in general," says Bentham,

and in knowledge belonging to the physical department in particular, will the vast mass of mischief, of which perverted religion is the source, find its preventive remedy. It is from physical science

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<sup>12</sup> See, e.g., *Dobbs, State Health Officer of the Mississippi Department of Health et al. vs. Jackson Women's Health Organization et al.*, 597 U.S. (2022), 3, 17, 19 and elsewhere.

<sup>13</sup> The aggressive nature of Bentham's attacks has elsewhere been noted. See, e.g., Stolzenberg (1999) and Stone (1985).

alone that a man is capable of deriving that mental strength and that well-grounded confidence which renders him proof against so many groundless terrors flowing from that prolific source, which, by enabling him to see how prone to error the mind is on this ground, and thence how free from such error is all moral blame, disposes him to that forbearance towards supposed error, which men are so ready to preach and so reluctant to practise (quoted in Ogden 1932: xix).

Bentham sought to apply the strictures of physics to the practice of law, and attacked Blackstone for insisting on a hazier legal philosophy highly tolerant of performative bridgings of gaps in what the law, and human understanding more generally, could make clear.

These performative maneuvers—the reasoning of judges using *synderesis* to guide them in their attempt to effect justice in an imperfect world—would have been perfectly intelligible to many judges in East Asia. What they would not have expected, however, was for the fictions, the performances, that they deployed to have had an effect on the law itself or on future cases. The focus for them was not so much on the law, oftentimes, as on the case, and the best way to handle it, without regard for what other judges might have to do in their own courtrooms in the future. In understanding Bentham’s very different approach to fictions, we must remember that Bentham was from an emerging, Western Enlightenment modernity in which many, swooning with capitalized Reason, insisted on having things made perfectly clear. The principles which had guided the development of the Common Law, including the very important fact that it is impossible to make codified law complete because cases will always be unpredictable, contrast with the kind of legal idealism in which the justice which a judge sought was not to be worked out in the midst of human experience, but was to be approached by legislation (within the context of the general will) such as Bentham had envisioned (Gardner 1964).<sup>14</sup> And as the West moved out into the world and gained dominion over much of it, so, too, did the ways in which many Westerners had come to understand law. The tension between the written law and social norms, as Maine had laid it out in the middle of the nineteenth century in his theory of legal fictions, continued into the twentieth century, and extended its reach beyond the West. Austro-Hungarian legal scholar Eugen Ehrlich (1862-1922), for example, advanced a notion of the *Lebendes Recht* (“living law”) as a way to skirt the idealistic pronouncements of the written statutes. Ehrlich’s “living law” idea was taken up by enthusiastic legal realists in America (such as Harvard scholar Roscoe Pound (1870-1964)) and Japan

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<sup>14</sup> Bentham’s legal clarity paradigm gained traction in the West as the very material basis for that clarity, as Bentham supposed, began to quaver. The publication of German Kantian Hans Vaihinger’s (1852-1933) *The Philosophy of As-If*, for example, came in 1913, by which time a new kind of physics had completely undermined the solid certainty of the physical universe. See Ogden (1932: xxxi-xxxii), Smythe (2005) and Kurusu (1983).

(such as legal philosopher Suehiro Izutarō (1888-1951)).<sup>15</sup> Although it may not be readily apparent, however, there is much more of Blackstone in East Asia than of Bentham, and, before the West arrived in East Asia, there was virtually nothing of Bentham at all. Legal fictions were not directed at the written law, however, as in the Blackstonian understanding, but were simply part of a judge's repertoire in a courtroom.

### 3. Legal fiction in ancient China

Sir Henry Maine's conception is that the law lags behind society, which always moves forward. In ancient China, however, there was precisely the opposite assumption. In the Warring States-period (ca. 350 BC) Legalist text *Han Feizi*, for example, we find that "men of high antiquity strove for moral virtue; men of middle times sought out wise schemes; men of today vie to be known for strength and spirit" (quoted in Winston 2005: 346). The law was for re-humanizing fallen men, in other words, for in ancient China there was a kind of anti-Hegelianism, in which things got worse the farther away one moved from a golden age in the distant past. There is another big difference: judges in ancient China relied much more on culture, myths, and religion than did judges in the West in Maine's day. While it is true that justice in China did not achieve "cosmic importance" until much later in history, after the rise of Zhu Xi (1130-1200) thought and metaphysical Confucianism, this does not mean that early Chinese jurists did not have supernatural conceptions of what justice was and what judges, in their limited human capacities, could do (Ocko 1988: 291). This gesturing beyond the human judge to something much bigger and more powerful than he is a kind of jurisprudential fiction which one found, by definition, in many ancient Chinese law courts.

In courtrooms in modern-day Hong Kong, hearings are conducted and trials are carried out under the direction of a judge who presides over a room in which prosecutors, attorneys, experts, witnesses, and defendants present statements and evidence. These statements and evidence are weighed by juries and the judge before a decision or verdict is reached in a given matter (MacNaughton and Wong 2014: 150-174). The language is Cantonese, but the proceedings would be recognizable to anyone who has been in a courtroom in London, New York, or Buenos Aires. Sometimes witnesses are sworn in in Hong Kong courts using a Bible, but apart from this a courtroom is a place of strictly this-worldly deliberation. This may be standard legal practice in Hong Kong today, but in the Sinosphere of, say, two thousand years ago such secularism would have been unthinkable. In the past, Chinese justice was

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<sup>15</sup> See, e.g., Watanabe (1986: 85-100), Morgan (2019), and Suehiro (2007).

not predicated on the Enlightenment subject, the “unencumbered self” in philosopher Michael Sandel’s phrase (Sandel and D’Ambrosio 2018; see also Sandel 2006: 162). Rather, justice was pursued along what historian Paul R. Katz calls a “judicial continuum,” a “continuous series of elements often viewed as indistinguishable” and involving not just judges and hearings but also rituals, appeals to myths, religious interpretations, and interpersonal mediation (Katz 2019: 11). There was no strict separation in ancient China between the human courtroom and the justice of Heaven, and human beings conducted trials, if not *sub specie aeternitatis*, then at least in the shadow of the intervention of forces beyond human control or even understanding.

The very Chinese character for “law,” 法 (*fǎ*; J. *hō*) intimates the original understanding of law in China as a thing invested with otherworldliness. 法 is the standard ideograph used in both Chinese and Japanese to denote the body of rules, regulations, and practices taken as binding on a society and enforceable by the state’s agents to preserve public order—in other words, more or less the way that “law” is conventionally and colloquially used in English-speaking countries today. (法 also corresponds broadly to both *lex* and *ius*, *loi* and *droit*.) However, the character 法 hints at a much more complex and rather mysterious understanding of law that prevailed in the past. The ideograph is written today using two elements, three strokes on the left representing “water” (氵) and six on the right representing “to leave” (去). This does not make much sense. How does the combination of “water” and “to leave” result in the idea of “the law”? There is a folk etymology that “water leaves” is a reference to the alluvial plains left behind after floodwaters recede, flatlands somehow being indicative of the level justice expected under the law. But this is less an etymology of 法 than an explanation of how 法 ideally functions under a modern, Western-style legal regime. In fact, however, 法 does not mean “water leaves” at all. The original meaning is impossible to discern from 法 alone, though, because the ideograph has been simplified and key parts have been removed.<sup>16</sup>

The origin of 法 is actually 灋, also pronounced *fǎ* in Chinese and *hō* in Japanese (Takikawa 1927: 43; 1932: 73-76). The older version of 法, 灋, is, as readers can see for themselves, a very complex ideograph. It still contains the two elements of 法, namely, the three dots representing “water” on the left and the element 去, “to leave,” at the bottom. Above 去 and to the right of 氵, though, is the character 廌, which is unlikely to be familiar to most educated speakers of Japanese today, and would also probably be unfamiliar to native speakers of Chinese, whether from a simplified or traditional character milieu (i.e., whether from mainland China or Hong Kong/Taiwan). 廌 is the key to

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<sup>16</sup> On the ancient Chinese origins of familiar terms and expressions, see, e.g., Katō (1986).

understanding 灋. It is not that “water leaves,” as the pared-down modern ideograph 法 suggests, but rather that a mythical creature, a 麤, enters and judges as evenly as water seeks its own level, leaving the punishment to be carried out by the human actors. (In this character, 去 is not Chinese *qu*, Japanese *saru*, “to leave,” but rather a visual contraction of ideographs meaning “to punish”).<sup>17</sup> Law (and here the focus is on criminal law) in ancient China was not just a question of statutes and codes. It was also an encounter with the divine. Or, at least that was the story—the legal fiction to which judges appealed. A fantastic beast, a 麤, entered the courtroom, the story went, and judged the accused with an impartiality inaccessible to human beings. It was a terrible and swift judgment. If the accused was guilty of the charge brought against him, then the 麤 would burst into court, butt him with his horned head, and kill him, thus rendering both verdict and sentence in one fell swoop. The judgments that resulted from this kind of “trial” were therefore understood, whether truthfully or not, to be beyond reproach, unquestionable, above appeal, final, and fair (Katz 2009: 7, 11-14). The ideal of Chinese law was not that the law in books be satisfied, but that Heaven be satisfied.

But what was this thing, this 麤? Herein lies the rub of the legal fiction in ancient China. The character 麤 is pronounced *zhi* in modern Chinese and *chi* in Japanese. It refers to a creature most commonly known today in China as a *xiezhi*.<sup>18</sup> The *xiezhi* was a premodern legal fiction, an irruption of the inexplicable into the pursuit of justice which preserved the law while radically contravening it.<sup>19</sup> But of course no one had actually seen a *xiezhi*. The threat of its barging into court and butting a guilty party to death was never really realized. The *xiezhi* was thus a kind of mythmaking about what judges did. It was a legal fiction. Not a fiction that healed the wounded logic of textual law, but a fiction that a judge used in court in a dynamic, performative way. It was necessarily a jurisprudential legal fiction, as I am using the term, because the only medium which could stand as understudy for the *xiezhi* was

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<sup>17</sup> See, e.g., Vasilyeva (2019: 71-75), Shirakawa (1948: 785-786), and Shirakawa (1996: 1446-1447).

<sup>18</sup> The *xiezhi* is better known in South Korea as *haetae* 해태 and in Japan as *kaichi*, or more commonly *komainu*, denoting the pair of lion-dogs, often made of stone, guarding the entrances to temples. For a marvelously wild depiction of a *xiezhi*, see Tachibana (1720: vol. 9a, approx. page 10).

<sup>19</sup> There are various theories as to when the *xiezhi* became prevalent in Chinese jurisprudence and cultural understanding, with some scholars putting the date as early as the seventh century BC. On the *xiezhi*, including works of visual representation of the *xiezhi* and other mythical beasts, see, e.g., Takafuji (2009: 49-71), Yamada (1976, esp. 1-13), Yamada (1979, esp. 1120-1140), Terajima (1970: 437), Yoshida (1973: 29-72), Yamada (1975: 336-351), Maeno (1975: 68-70, 444-445, 736-737), and *Han Wei cong shu* (1970: 8-9). For a reception history of the *xiezhi* in the Tokugawa Period, see Kumazawa (2016: 21-37). See also Ishimoda (1971), Mishina (1973), Mishina (1970), Takahashi (1994: esp. 88-89, 100-103), Imamura (1981: 138-139), Iwaki (1998: 20-21), Mozume (1916: 490-491), Uesugi (2001: 22-29, 110-111), Suzuki (1993), Chang (2002: 18-23, 54-63), Ozaki (1986: 208-210, 719, 729-733, 738-739), Ozaki (1993: 508-510, 620-25), Shirakawa (1999: 259 and “Chitsujo no genri,” 84-113), and Shirakawa (2000: 34-37, 262-263).

the judge in the courtroom. The process of deliberating about a given case was carried out by people. The *xiezhi* was a token of the acknowledgement by those in Chinese antiquity that the reality of the law was ultimately beyond human reach. Shang divination may help explain the origins of the *xiezhi* (Wang 2007: 338-339). Renowned China scholar Victor Mair suggests that the *xiezhi* may be related conceptually to “trial by animal ordeal among Eurasian peoples” (Mair 2012: 91, fn. 8). In any event, the *xiezhi*, which has long been embroidered on the robes which Chinese magistrates wear, is a testament to the ultimately superhuman, supernatural character of law (Morgan 2021). Judges perform an impossibility in effecting justice, or bringing the world closer to it, and the otherworldly character of what judges in courtrooms purport to do is attested to by a mythical beast with a perfect penchant for dividing, with perfect accuracy, the righteous from the guilty.

This conception of the intervention of the supernatural in the life of the law was common in ancient China.<sup>20</sup> In the ambitions of the *Han Feizi* previously mentioned, the rituals of the Shang, and the divination-jurisprudence of the *xiezhi*, we can see a connection to the gods, or at least to religious sensibility. However, the Chinese case is not unique. It is just that, in the West, much of the enchanted nature of jurisprudence has been forgotten—perhaps, as Bentham’s example suggests, willfully so. For example, many appeals in pre-modern Europe to a justice inaccessible to human reason took the form of what in medieval England was called an “ordeal” (cf. German *Gottesurteil* and *Gottesgericht* and French *épreuve*; Shoemaker 2011; Hirakawa 2008). As in Europe, the ordeal in China involved trying a person, in the sense of “trying” meaning “to test,” by means of a fetish of physical objects, or an interaction between some physical object or objects and the accused’s body. There was no judicial reasoning here, only a surrender to how a certain kind of ritual unfolded in a courtroom setting.

Perhaps the most notorious example of the ordeal from Western legal history is the witch trial, during which those accused of practicing witchcraft were dunked in water and sometimes drowned. Witches sank, and non-witches floated. Either way, the case was closed once the ordeal was finished. There were many other kinds of ordeal, often involving the application of hot metal rods or hot stones to the hands or other parts of the body. Those who survived the grievous injuries incurred during such an ordeal were found innocent. Those who were guilty were dispatched by a power higher than the court alone could muster.<sup>21</sup> In this way, the divine was invited into the legal process, and guilt or innocence was determined by something other than human understanding. Western jurisprudence

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<sup>20</sup> It was also the foundation of Chinese writing (Keightley 1978, 2000, 2014).

<sup>21</sup> The ordeal in Europe was not always as straightforwardly an expression of God’s will as we may think today. See, e.g., Mäkinen and Pihlajamäki (2004), Bloomfield (1969), Radding (1979), Freedman and Spiegel (1998) and Cheyette (1963).

does not feature a *xiezhi*, but there are many similar ways in the West in which the judging powers of Heaven made themselves known in the world of men.

There are many more examples of performative legal fictions in both East and West. A principle of augury prevailed in both places, for instance, according to which there was a strange, but somehow discernible, symmetry between the behavior of bodies or physical objects and the desires of Heaven or the metaphysical workings of the cosmos. In the West, the flight patterns of birds were examined, or the entrails of sacrificial animals were scrutinized. These are irruptions of myth, religion, and culture into the workings of what we in the modern West would today understand as the proper purview of law. Things were not so different in the East. In ancient China, for instance, this general appeal to the gods, or to Heaven, in deciding cases was known as *shenpan*, 神判, literally “the judgment of the gods.” In one example from the Chinese courts of antiquity, a man who caught his wife and her lover *in flagrante delicto* and killed them both on the spot was subjected to a kind of final dialogue with the deceased adulterous pair. The faithless wife and cuckold were decapitated *post mortem* and their heads placed inside a large bucket filled with water. The bucket was spun around so that the heads also swam about inside it in a circular pattern. The bucket was then set down and the bobbing heads allowed to spin on until finally the heads and the water came fully to rest. If the heads were facing one another in the end, then it was affirmed that the decedents had indeed committed adultery with one another and their murderer was acquitted. If not—if the heads came to rest not facing one another—then the husband was punished for having killed two innocent people. The gods had spoken through the seemingly random movements of bodiless heads (Nakata 1943: 929).<sup>22</sup> This kind of practice is very far removed from the textual legal fictions emphasized by Maine and known to us from examples from Western law. It is not a “fiction” as Maine would have used the term, or even Blackstone. Far from it. But it is still, for all that, a kind of legal fiction, and one not foreign to Western legal history in the slightest. It is only that the way that we think of legal fictions in the West today has been so heavily influenced by Maine, and by the Hegelian assumptions which lie behind his thought, that we don’t think of legal fictions as once having been much less about texts, and much more about jurisprudential practice. But the business with the heads in the bucket, and the ordeal by hot metal, and so forth, should serve to remind us moderns that there are more kinds of legal fictions in human experience than those we call to mind today.

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<sup>22</sup> Such practices were not confined to China. See, e.g., Im, Lee and Lou (1971) and Kendall (1988). On the Ryūkyūs and China, see, e.g., Harada (2003).

#### 4. Legal fiction in China in the *Longue Durée*

The widespread reliance upon supernatural or extra-judicial modes of jurisprudence does not comport with the great edifice of scholarship predicated upon China's being a bureaucratic society. China is said to be bureaucratic even in the afterlife. As Paul Katz reminds us, for example, the semi-legendary magistrate Judge Bao was held to have been an irreproachably upright man in life, and even more inflexible as a bureaucratic shade:

A popular saying from the Northern Song capital of Kaifeng 開封 effectively embod[ies] local faith in the chthonic bureaucracy: 'Bribery will get you nowhere, for Old Bao (Judge Bao), the king of the underworld, is here' (Katz 2009: 180, citing Hayden 1978: 18).

But an undue emphasis on the bureaucratization of Chinese justice can obscure Katz' insistence on seeing Chinese justice and legal history as a continuum. I would emphasize that the continuum is not just thematic, but also diachronic. There have been changes in Chinese legal practice over the millennia, without any possible doubt or argument. But change does not necessarily mean epistemic rupture. To continue the quote from Katz immediately above:

Such sentiments [i.e., of faith in Judge Bao] persist in China, as may be seen in an article published in the *San Francisco Chronicle* dated November 25, 1994 which vividly describes the popularity of a revived Judge Bao temple in Hefei 合肥 (Anhui). According to the article, over 250 people visit the temple each day, most of whom seek the god's aid in their dealings with corrupt officials: 'With no one to turn to for recourse, dozens of Chinese come here [to the temple] each day to light incense and pray to Judge Bao, the Sung (Song) dynasty judge with a reputation for incorruptibility and the power to right almost any wrong' (Katz 2009: 180).

Judge Bao is an old idea, almost a legal fiction in his own right, but he maintains a great deal of currency even today. What is salient for our purposes is that Judge Bao is as otherworldly as a *xiezhi*. His status as a bureaucrat is of secondary importance at best.

There are more complications than these to be made to the understanding of China as a bureaucratic society. While the vaunted Chinese bureaucracy is held to be a rational organization, being rational-seeming on the surface and being rational all the way down to the logical roots are two different things. There are two senses in which the Chinese bureaucracy of, say, the Qing dynasty (1644-1911) concealed a very big and very much operative legal fiction within the recondite structures of its



departments and sections and ranks.<sup>23</sup> First, consider that magistrates even in early bureaucratic China used to wear robes when judging cases upon which were embroidered *xiezhi*, and judges wore headgear modeled on the mythical beast.<sup>24</sup> The magistrate was endowed with the extralegal. He bore in the very uniform of his office the pedigree of his task. His job was to effect justice, but in the final analysis justice was not really proprietary to the bureaucrat. There was always a vicarious nature to the jurisprudential art. The magistrate acted in the stead of the *xiezhi*, and against the background of countless trials in the past carried out by ordeal. The Chinese magistrate of the early bureaucratic era retained the *mysterium* of his predecessors' role while seeming to play a different role in the present. But in the end, it worked out the same way.

The reason that trials under the *xiezhi* and trials under the bureaucracy worked out essentially the same way is that, second, the bureaucracy itself, over time, took on the contours of the original legal fiction of the *xiezhi*, or the ordeal, or some other kind of appeal to the extra-rational in the course of a criminal or even civil trial. What I am calling jurisprudential legal fiction is nothing if not an admission, tacit or overt as the case may be, that the statutory law is not complete, or else is *too* complete to allow for the endless variety of real life to match up with the bureaucratic attempt to contain it. The kaleidoscopic nature of reality pushes bureaucracies to expand indefinitely in the futile attempt to compartmentalize the contingency of human affairs. Each new *sui generis* problem requires one more department, or bureaucrat, or budget line, or report. When crime threatens to upend the bureaucratic order—and what is crime if not chaos let loose in the cosmos?—the bureaucracy intervenes. Bureaucrats assign the crime a name in the form of an arraignment and indictment, categorize the criminal acts into processable charges, and thereby distill disorder down into statements, affidavits, testimonies, and, finally, a judgment and a sentence (intelligible words to tame the chaos of bad deeds). The jurisprudential legal fiction under the bureaucratic mode of justice is that there is an all-purpose legal order in the first place. The bureaucracy becomes a permanent *xiezhi* on retainer, and the ordeals it dispenses in the form of torture do not so much indicate innocence or guilt as impress upon the people that the bureaucracy will have order or else.

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<sup>23</sup> On the development of law as function of bureaucracy in China, see, e.g., Langlois (1988) and Mote (1988). For a history of the much older Western Zhou period, see Creel (1970, esp. ch. 8, "The Royal Government: Justice," 161-193). On symbolism, representation, and culture, see Hibino (1975). See also Weber (1946, 1951) and Sprenkel (1964, 348-370), all cited in Creel (1970). See also Mizuno (1966) and Shimada (1954).

<sup>24</sup> Katz (2009: 77). See also Yang, Yue and Wang (2021) and Shirakawa (2010, esp. "Kami no sabaki," 233-244, which contains an excellent explication of the etymology of 法). The *xiezhi* also appeared on the roofs of some Chinese buildings; see Li and Liu (2017: 5).

What was true in the Shang seems true in the present. It has often been remarked that the Chinese Communist Party is a recapitulation of the imperial system of the past (Salisbury 1992). In ordering the persecution of the intellectuals and the destruction of the Confucian works of morality, it is argued, Mao Zedong (1893-1976) was emulating the first Qin emperor, who did likewise. Moving from the personal to the institutional, the legal fiction of Han Feizi and the Legalists was that the law was absolute.<sup>25</sup> The legal fiction of the Party, by the same token, is that the Party is supreme and justified in dispensing brutal punishment to anyone who would question Party legitimacy.

But this seeming absolutism is also fragile. In this scenario, the *tianming* 天命, or mandate of Heaven, becomes a kind of higher order *xiezhi*, intermittently intervening to overturn the head of the bureaucracy itself and reset the legal order on solid epistemological and moral ground again. At one end and the other, bottom and top, the structure of state is open. The affairs of men are radically subject to contingency, to the intervention of Heaven to set right what has gone awry. The “mandate of Heaven” logic, according to which dynasties rise and fall as they pass into and out of favor with Heaven, continues to be the logic by which the rule of the Party is judged, the possibility of falling from Heaven’s esteem always hanging over the Party leader’s head. As with trials subject to intervention by the *xiezhi*, one never knows when Heaven, in the form of natural disasters, will intervene to rectify disorder in the Sinosphere. “Bureaucratic” Chinese justice and even supernaturalism are as non-bureaucratic as their Western counterparts. Legal fictions are as complex and varied in China as anywhere else.

## 5. Legal fiction in Japan

The history of legal fictions in Japan compliments that of China, in that Japanese judges, like judges in ancient China, made use of performative acts of falsehood to effect justice in court. From the earliest implantation of a Chinese-style bureaucracy and stable statecraft system among the restless courts of the Yamato kings, the Chinese bureaucracy provided a model which the Japanese statesmen formally copied. The transplantation was largely stylistic, to be sure (Seki 2014). The ranks and accoutrements from Chinese statecraft were imported into proto-Japan, but not the underlying philosophy. Still, the performative nature of justice, the jurisprudential nature of legal fictions, makes Japanese practices very close to those of China in that regard. The Japanese mode of jurisprudence tended to favor the pragmatic over the didactic, and to eschew mythical legal fictions while embracing the *synderesis* of a

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<sup>25</sup> See Kanaya (1994, esp. “Kaisetsu,” 9-18).

courtroom judge.<sup>26</sup> In the end it is the incomplete, radically contingent nature of courtroom proceedings that makes Japan and China part of a tradition of legal fictions which should remind scholars today that legal fiction is not a Western, and not a mainly text-based, part of legal history.

A few words of disclaimer are in order. There *are* records of trials by ordeal in Japan, although they are exceedingly rare.<sup>27</sup> We must also decide how to define “Japan.” The contentious issue of how to categorize the Ryukyus and Ainu enters into view here. While the categorization of the Ainu and Ryukyu cultures as Japanese or not Japanese is far beyond the scope of this paper, suffice it to say that the legal practices of the far north and far west of the Japanese archipelago exerted little to no influence on the jurisprudence of the political center of Yamatai, Yamato, Izumo, or, thereafter, Nara, Heian, Kamakura, or Edo (Tokyo).<sup>28</sup> Lastly, there is the harsh justice used by samurai among one another and against the population of commoners to consider. Performative justice and jurisprudential legal fictions, which sometimes involved resorting to ritual suicide in order to restore honor (raising the question of whether *seppuku* might not be a legal fiction in its own right), were not always carried out solely by judges.

But it is in the work of judges in Japan that one finds perhaps the most excellent examples of legal fictions in East Asia. One of the main reasons for this is the cultural expectation of fairness which influenced judges’ reasoning. This expectation of fairness could be expressed as *dōri* 道理, which might be defined as a practicable natural law. It is often expressed in Japanese with the phrase *yūzū ga kiku* 融通が効く, or “there is some bend in the law,” “there is some leeway in the rules.” *Dōri* is the moral force in man’s innermost being pairing with his reason and his feeling, his mind and his sentiments, to arrive at the best kind of justice available to human beings in a fallen world. Performative legal fictions in Japan indicate that the law in the lawbooks is optional, that not all disputes need filter through legislators’ brains in order for justice, or something close to it, to be achieved.

Scholar of Japanese legal history J. Mark Ramseyer calls this “second-best justice” in the context of Japanese private law. “In some classes of cases the cost of trying to get it ‘exactly right’ can be particularly pernicious,” Ramseyer writes. The Japanese system has adapted, via a highly regulated bureaucracy, a practice of getting dispute resolution “about right.” “Japanese courts do well by making do,” argues Ramseyer, and settlements are often made out-of-court “in the ‘shadow’ of the litigated

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<sup>26</sup> On the early Japanese state see Kishi (1986a, 1986b), Miwa (1981) and Tokoro (2009).

<sup>27</sup> Nakata Kaoru says that the practice was completely missing from the times of the earliest Japanese state until it was rediscovered during the Ashikaga and Warring States periods. Nakata (1943: 930.) See also Bock and Hirai (1990: 55-57). On interactions between Japan and China in antiquity, see, e.g., Noguchi (1996-1997). See also Mishina (1971, 1973) and Hou (1997).

<sup>28</sup> See also Nakata (1943: 933, 937 ff.), and Batchelor (1901: 286 ff.; 1905: 211, 212).

outcome” that is averted by opting for an equitable arrangement instead of a contentious trial (Ramseyer 2015: 5, 6). This “second-best justice” has often been the touchstone of Japanese jurisprudence. Even the Tokugawa laws, for example the Kujikata Ōsadamegaki promulgated in 1742 by the eighth shogun, Tokugawa Yoshimune (1684-1751), were predicated on their being overturnable if adhering to the black letter of the law would bring about an injustice. There was a kind of built-in *xiezhi* in the later Tokugawa laws. The words of the law went only so far; after that, something higher would have to intervene. Likewise, while Kujikata Ōsadamegaki criminal trial guidelines applied to the domains directly affiliated with the Tokugawa house, the daimyo had latitude in how to keep order in their respective domains. The metaphysical predilection for a perfect law code gave way, by temperament and long custom, to a “second-best justice” for the parties in a given dispute.

Second-best justice was effected in Japan by a person, as in China, although not a person wearing an image of a mythical beast. Jurisprudential legal fictions were judge-performed, just as in Japan’s continental neighbor. In Japan, the task of adjudicating law cases during the Edo Period (1600-1868) fell to a shogunal official known as the *machi-bugyō* 町奉行, or domanical magistrate.<sup>29</sup> The most famous *machi-bugyō*, Ōoka Tadasuke, Echizen-no-Kami (titular lord of the province of Echizen) (1677-1752), was exemplary of *yūzū ga kiku* jurisprudence.<sup>30</sup> His verdicts are legendary in Japan for their creative justice. Arriving at a just verdict often required Ōoka to bend the law, or to bend the putative facts to fit the law, or to skirt the shogunal decrees, or to close his eyes to what the black letters on white paper in the books demanded of him and to look directly at the people in his courtroom and ask himself how human lives upset by crime and tragedy could be made right again. It was not the exaltation of the law for which Ōoka aimed. For him, the groping for justice—*dōri*, a form of equity—was separate, or at least conceptually separable, from the laws of the central government.<sup>31</sup>

To give some idea of the centrality and primacy of the human person (what I am calling jurisprudential legal fictions) in the judgments of Ōoka Tadasuke, and of the non-ideological, case-by-case style of jurisprudence in the Edo Period in Japan (which, in turn, largely typifies the jurisprudential style of much of Japanese history), it is helpful to introduce one of Ōoka’s more representative court decisions.<sup>32</sup> In one court case brought before Magistrate Ōoka, a woman had

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<sup>29</sup> I am grateful to Professor J. Mark Ramseyer for explaining the Kujikata Ōsadamegaki to me.

<sup>30</sup> For an episode from Ōoka’s tenure as *machi-bugyō* illustrating his people-centric style of administration, see Hatano (1993) and Uno (1967, esp. part 2, “Machi-bugyō jidai,” 39-215).

<sup>31</sup> On Ōoka and the fictions that arose later in his name, see entry for オオオカタダスケ in *Banyū hyakka daijiten: encyclopedia genre Japonica* (1973).

<sup>32</sup> On Tokugawa justice, see, e.g., Nakata (1943: 866). See also Asada (2019) and Andō (2007).

plotted to murder a bandit in revenge for his having murdered her husband. Mistakenly, though, she killed the bandit's partner in crime, and only wounded the man actually guilty of her husband's murder. Ōoka, instead of condemning her to death (as the law strictly prescribed, since the woman had not, in fact, been able to avenge her husband's death, which would have been legal, but had instead killed an unrelated party), found that the woman had actually performed a great service to the state. The man the woman killed was guilty of a host of other capital crimes, while the wounded man—the one really guilty of killing the woman's husband—was able to be tried by the state instead of being murdered for blood guilt. This, Ōoka pointed out, was the far more just course of action all around.<sup>33</sup> A *xiezhi* could not have done better. The law was treated a bit roughly, but, to my mind, in sparing the woman's life Ōoka acted much more justly than the law would have allowed. A fiction, a kind of legal lie, saved a woman's life. This is not as Maine would have used the term legal fiction, but surely it is a fiction, and is used in the context of law, and, as such, and insofar as a judge used it without expectation of legislating from the bench, it was a jurisprudential legal fiction.

It should be remembered that Ōoka was a product of his time, and so not only used torture to extract confessions from suspects but also had to tailor his judgments to suit the likes and dislikes of the shogun, at the time the aforementioned promulgator of the Kujikata Ōsadamegaki, Tokugawa Yoshimune (Uno 1967: 196). Ōoka was no Pollyanna. He did not let those who were really guilty of crimes go free. Also, many of the famous cases associated with Ōoka are apocryphal. There was a famous stage act based loosely on Ōoka's career which has come to be conflated with the historical Ōoka and his well-documented case log.<sup>34</sup> On top of all this, Ōoka was not trained as a judge. He was an amateur, largely winging it in court. But in many ways this is all precisely the point. The fact that Ōoka was not a legal scholar and did not equate the preservation of a systematic corpus of law with the advancement of his own career left him free to decide cases in concert with a higher law, the natural law, *dōri*.<sup>35</sup> Ōoka's attainment of legendary status among the populace also attests, where historical facts do not, to the felt need by common people for judgments responsive to the exigencies of their lives. It was for these reasons that later Japanese legal scholars rehabilitated the old Tokugawa figure. He was a layman, and not an expert in law, and so could bring his human reason to bear on cases instead

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<sup>33</sup> See "Keisei Segawa ikken," in Nishino (1989: 205-218). This paragraph very closely follows paragraph in Morgan (2020: 19).

<sup>34</sup> See Sasakura (2015) and JapanKnowledge database entry, 大岡忠相.

<sup>35</sup> On the non-judicial nature of sources of law in the Edo (Tokugawa) Period, see, e.g., Nakata (1984, esp. "Shogen," 15-16). For an intellectual background of the Tokugawa Period, see Ooms (1985, esp. ch. 4, "Disseminators of Ruling Ideas: Monks, Laws, Bestsellers," and "Legislation," 143-151).

of trying to shoehorn events in the real world into boxes made of words of laws in lawbooks (Suehiro 1923: 4 ff.).

## 6. Legal fiction lost and found in modern Japan

This abiding current of the judge-performed legal fiction in Japan was dammed up and sent underground when Japan was suddenly faced with a potentially existential challenge in the form of Western contact and the looming shadow of imperialism in East Asia beginning in earnest with the Opium Wars in 1839. The centralized Edo state, although militarily highly centripetal, was administratively, and especially jurisprudentially, surprisingly centrifugal. Domain lords continued to take responsibility for quelling disturbances and adjudicating disputes in their respective domains even as the Edo bureaucratic apparatus began to intervene more and more in the workings of the emerging national economy and other affairs of centralized government. This process accelerated rapidly as the threat from outside Japan seemed, to many, to necessitate a strong state to mount an effective response, and a comprehensive defense of the archipelago. The sinews of government thickened and hardened. The suppleness of the law was increasingly lost as the Westphalian paradigm of “shell-hard” states reinforced with systematic regulations and laws intruded into a Japan which had largely been kept at peace by what one scholar has called the “performance” of order.<sup>36</sup> But performance of order is often the opposite of performance of justice. In the former, the state is prioritized, while in the latter, individuals are. People want a legal order that provides both “fairness” and “hard-and-fast rules” (*shakushi jōgi* 杓子定規; Suehiro 1923: 33). But in the Edo Period there was also a great deal of “turning a blind eye” (Suehiro 1923: 12 and elsewhere) to inconvenient facts for the sake of maintaining a harmonious social order. This flexibility was eroded by an overbearing state (Wagatsuma 1987).

In the rush to “modernize” and “Westernize” at the close of the Edo period, the vicissitudes of geopolitics caused many in Japan to forget the wisdom of their own past and to rush to put on the armor of their potential enemies in order to protect themselves from what was clearly a more advanced material culture. Beset by gunboats, the Japanese rapidly took up the study of the countries that had sent the big ships to menace their shores. The end result of this was a sweeping away of many old practices and the setting up of new and largely foreign (in both senses of the term) legal mores. It was

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<sup>36</sup> The term “iron cage” is Talcott Parsons’ from his 1930 translation of *The Protestant Ethic and the Spirit of Capitalism*, and differs from the literal translation of “steel-hard case/shell.” See Baehr (2001), Morgan (2020: 57-58), Rheinstein (1954) and Roberts (2012).

decided by the Meiji authorities, for example, that the Ōsadamegaki, although fully functional and highly sophisticated, would be scrapped, and a legal code on the Napoleonic model drawn up.<sup>37</sup> As part of this, Gustave Emile Boissonade (1825-1910), a French legal scholar of tremendous reputation in his own country and abroad, was hired by the Japanese government to help write a legal code for Japan.<sup>38</sup>

The inherent problem in this was that French law was very different from the law that had developed in Japan. The French Code was the product of a very long history in Europe, stretching back to the late Roman empire (and even earlier, when the incorporation of even pre-imperial cultural practices such as the *paterfamilias* is taken into account), of the codification of various laws into one Pandect, in German *Pandekten*, by which an entire territory would be ruled.<sup>39</sup> If there were any disputes arising, then henceforth they would be decided, not by a person relying on *dōri*, *synderesis*, natural wisdom, and the working of the natural law, but by connecting various strands of a given case to a gigantic apparatus of law, much like a switchboard operator would plug wires into holes to complete a circuit. Everything fed into the central board, the Code. The law became a creature of the state, and *dōri* was taken out of the hands of the judges.<sup>40</sup> It wasn't that the Code decided all cases, of course. No code, no document, no matter how detailed, could ever predict the future in all its complexity. The law is never complete. The point was that cases were decided *through* the Code. Judicial reasoning was fed into the Code and the Code became the locus of how the law worked. As in the West, and under the influence of Western, Enlightenment-era jurisprudence, judge-performed legal fictions moved into the background, and in many ways were almost lost.

This process continued in the realm of constitutional law, as well. There had never been a full-fledged constitution in Japan as the term “constitution” is generally understood today. To be sure, Prince Shōtoku (574-622) had issued a famous seventeen-point “constitution” in 604. But this was a short admonition to act uprightly and respect the government of the realm, as well as a procedural maneuver to strengthen Shōtoku's clan and their standing at court while paving a way for the adoption of Shōtoku's preferred religion, Buddhism, in Japan.<sup>41</sup> Prince Shōtoku was not acting as a legislator and

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<sup>37</sup> On the civil code, see Suehiro (1954a, esp. “Furoku: minpō wo manabu hitobito no tame ni,” 802-849). On the reception of foreign legal orders with a consideration of the Japanese case, see Jean-Louis Halpérin (2014) and Seiichi (1962).

<sup>38</sup> For an overview of early foreign specialists in Japan see Ida (2008). On early thinking in Japan about civil codes, see Hozumi *et al.* (1997). On Boissonade, see Boissonade and Mori (2012), Namura (1999), and Boissonade (2002, 2003a, 2003b).

<sup>39</sup> See Sasakura (2007, esp. ch. 11, “Kindaihō,” 135-177). For a good overview of the development of Western law, see Johnson (1976, 133 ff.), and Berman (1983).

<sup>40</sup> See, e.g., Sasakura (2007, esp. ch. 2, “Kodai Rōma,” 66-93).

<sup>41</sup> I am grateful to an anonymous reviewer for clarifying Shōtoku's position for me.

was certainly not trying to found a new legal order, as the men at the Constitutional Convention of 1787 in Philadelphia were. It was not until the late nineteenth century that the Japanese government set about writing a formal, internally coherent, adventitious constitution intended to be the unmoved mover of the civil code. The Meiji constitution of 1889 was modeled largely on the Prussian constitution, because the imperial household, as the new and putative custodian of the emerging constitutional order, was being rejiggered along Prussian lines, with a strong-willed emperor at the pinnacle of a battle-ready state. This hardening of tradition into a high-modern reprisal, such as occurred in many other places around the world in the late nineteenth and twentieth centuries, elevated former contingencies to absolute necessities.<sup>42</sup> The typically loose diachronic *ie*, or household, became the *ie seidō*, or household system, touted by ultramodernist “conservatives” as the heart of the constitutional order.

But once this big wave of Westernization was over, some in Japan began revisiting the old ways and finding them to be surprisingly fresh, even radical. One of these was Suehiro Izutarō, a legal scholar who grew disillusioned with the *Pandekten* system and hearkened back to the “*menschlich* trials” (*ningenmi no aru saiban*) that Suehiro saw Ōoka as having carried out.<sup>43</sup> The Japanese state had become very strong, but the individual Japanese people had often not benefitted from rapid economic growth and increasing military might, and the courts had lost much of their empirical grounding in the facts of individual cases, a grounding that was said to have prevailed under the wise magistrate, Ōoka Tadasuke. In his return to Ōoka, Suehiro Izutarō, and the law-and-society movement that blossomed worldwide and in Japan in the years following World War I, recognized what had been lost with the adoption of the abstract *Pandekten* system, the species of jurisprudential idealism especially ascendant in Japan during Suehiro’s time. For Suehiro and other law-and-society thinkers, judges in Japan were too focused on law, and not at all focused enough on people in courtrooms. Instead of trying to solve social problems by effecting justice in courtrooms, Suehiro and his colleagues thought, judges sought to solve legal problems as abstract puzzles, using cases as so many approaches to the intellectual question of what the law meant. The Civil Code was a triumph of *Pandekten*-style thought, but it was, in the end, not Japanese, and did not keep faith with the prevalence of legal fictions and the willingness to bend the law in the service of justice that had characterized the Edo past. (Maybe judges in Germany or France bent the law as much as, or more than, Edo judges did. I would like to think that this must be true, but more research must be done to find out). Suehiro looked back to a native legal philosophy

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<sup>42</sup> On the development of the Meiji state, see Haraguchi (1968).

<sup>43</sup> This phrase is taken from the title of Ch. 2 of Suehiro (1923). See also, e.g., Suehiro (1930).



that was much more sensitive, he thought, to the needs of average people. It was in Ōoka that Suehiro found a model for the re-harmonization of a society out of joint, a re-harmonization that he thought could work in the shadow of the edifice of modern law and help right some of the social wrongs bedeviling Japan.<sup>44</sup>

Suehiro thought that the way to save Japan from collapse was through the re-introduction of the legal fiction. His manifesto for rejecting the architectonics of the code-based legal system in favor of a looser arrangement more in tune with the realities of life was titled *Uso no kōyō* (嘘の効用 “On the efficacy of lies”), published in the progressive journal *Kaizō* in 1922. Suehiro’s essay, and the work that followed it (both Suehiro’s and others’), changed the jurisprudential landscape of modern Japan. Suehiro’s contention in *Uso no kōyō* is that the lie (*uso* 嘘), which he broadly equates with legal fictions, has not just a legal function, but a much broader social one as well (Suehiro 1923: 28 ff.). Without the lie, Suehiro says—such as the lie deployed in ancient Rome that a deformed child was not really a child but a “monstrum,” and so therefore abandoning the child to die was not murder, because murder applies only to human beings—society gets stuck in its own rules. One other example that Suehiro gave was the age of majority, the example mentioned at the beginning of this essay. There is little if any qualitative difference, Suehiro argued, between someone who will be, say, twenty tomorrow and the same person’s turning twenty today, but it is necessary for the functioning of the law, and for social order overall, that there be such fictions at work in the world as dividing lines between adolescence and adulthood (Suehiro 1925: 198 ff.). What is striking about *Uso no kōyō* is that Suehiro, who admired what I am calling the jurisprudential legal fictions of Ōoka Tadasuke, presents legal fictions in a way almost synonymous with the work of Henry Sumner Maine. Suehiro sought the radical, pre-Western world of Ōoka of the lost Edo times, but he still could not think past the conceptual constructs by which even the most progressive—and perhaps here was the problem—legal thinkers in Japan understood twentieth-century Japanese law and society.

As with post-Enlightenment thinkers in the West, Suehiro appears to have forgotten a time before the written law overpowered performative courtroom expressions of higher justice. Suehiro wanted some leeway in the law, not necessarily for things as extreme as infanticide, but in general some space for judgments to be rendered without the law’s bearing down and distorting the various nuances of the facts on the ground.<sup>45</sup> Legal fictions on the Suehiro-Maine reading are not the same as the Ōoka-style

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<sup>44</sup> Paragraph closely follows Morgan (2020: 4-5).

<sup>45</sup> In this, Suehiro was greatly influenced by the legal realism he had imbibed at such places as Harvard Law School, under Roscoe Pound, and at the University of Chicago. See Hayashida (1992-1993).

jurisprudence of the Edo Period, or the general “turning a blind eye” to unpleasant things of the past. Suehiro’s legal fiction, unlike those earlier modes, takes into account the existence of a big legal system, and is predicated upon the operation of a code and constitution set such as prevails in most countries today. The legal fiction as expounded by Suehiro was that the law, even the *Pandekten*-style Civil Code, had, as it were, trap doors in it through which hard-to-categorize facts could pass so that the law could still stand despite being bent in actual practice. Suehiro was still thinking of legal fictions in terms of law as written down in books.

And yet, there is something very performative after all—something of the flourish of the *xiezhi* even—about Suehiro’s legal fictionalism. The Suehirian approach to law is rooted, ultimately, in the person. This concern for the person led Suehiro to pioneer labor law in Japan, as a way to preserve societal harmony by allowing workers to negotiate with managers without resorting to violent insurrection.<sup>46</sup> However, the key person in the Suehirian arrangement was not the manager but the judge (Suehiro 1953). Suehiro saw the judge as the person capable of cutting through specious logic and tendentious codified law in order to arrive at fuller justice—a continuation of sorts of the very old Japanese practice of eschewing abstract legal reasoning and seeking justice over didactic legalism (*Han Feizi* has no counterpart in Japanese history, so perhaps a judge in Japan could get by without appealing to a mythical creature to override a law that was supposed to be absolute).<sup>47</sup> In a kind of prolegomenon to the work of Nobel Prize recipient Ronald Coase (1910-2013), the courts under Suehiro’s legal fiction view are venues for increasing social order by avoiding the transaction costs involved with working within the complex network of the law itself (Coase 1937, 1960).<sup>48</sup> This is different in overarching concept from what Ōoka or *xiezhi* did, but remove the modern theorizing and the jurisprudential legal fiction element remains.

## 7. East Asian legal fictions and the American constitutional order

Suehiro spent much of his time abroad studying law in the United States. Suehiro’s conceptions of how law worked were thus not, strictly speaking, Western so much as American. In this sense, as well as in the broader context of the big changes taking place in the world in which Suehiro lived, the history of

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<sup>46</sup> See Suehiro (1954b). The first two sentences of Suehiro’s introduction read, “All human beings have individuality. Not just individual human beings, but races, ethnicities, societies, and states also all each have their own individuality.”<sup>1</sup> See also Suehiro (1947; 1926, esp. 122-134, 447-511; 1954a, esp. ch. 12, “Rōdō no hōritsu,” 517-582).

<sup>47</sup> See, e.g., Ramseyer (2015: 8), and Minjihō Hanrei Kenkyūkai (1935).

<sup>48</sup> I am grateful to Professor J. Mark Ramseyer for pointing out the relevance of Coase’s work to this paper.

the legal fiction in East Asia can highlight the changing nature of legal systems both inside and outside of that region, such as by accentuating the vicissitudes of the constitutional order in the United States.<sup>49</sup> For example, the first three words of the United States Constitution, “We the people,” conceal a “formation of the people,” a concept absolutely central to the United States as it is constituted in both law and political-cultural terms. “The people,” reflection will show, is a fiction, deployed by the framers to set up a bigger fiction of a document purporting to actuate and regulate the enormous array of laws and regulations pendant therefrom (Morgan 1988).<sup>50</sup>

The ways in which the American constitution has been interpreted are also largely fictions. Consider, for instance, the originalist school—hardly at the top of many lists of those who would rank schools of legal thought in terms of affinity with legal fiction. And yet, originalists tend to assert that the correct interpretation of a given question is to be arrived at by returning to the time period when a given law was passed and divine, by means of documents from that time, what was the general cultural and legal milieu in which the law was written and what the writers of the law intended by their words (Whittington 2006). Most scholars will surely argue the opposite, but I find that this mode of legal interpretation is not substantially different from that of those who, beginning around the time of Oliver Wendell Holmes (1841-1935), Louis Brandeis (1856-1941), and Woodrow Wilson (1856-1924)—the age of “the living constitution” and the Progressivist abandonment of interpretive guidelines beyond the tautology of Progressivism—have argued that the constitution is malleable within the hands of people alive today. Whether the reference point is people now or people then—whether one likes, in other words, the Maineian notion that society changes while law does not, or tries to overcome the notion by anchoring legal interpretation to the moment at which legislatures wrote laws—it is still a fiction that law comes from people at all.<sup>51</sup> Those who interpret laws in light of natural law, by contrast, might argue that the separation of the positive law from the natural law has produced a creature that grows virtually exponentially in a quest for ever more control over the contingencies of human life. There have been as many attempts to reform this split as there have been scholars who have lamented it, from Friedrich Hayek’s (1899-1992) “constitution of liberty” to Bruno Leoni’s (1913-1967) judge-centered freedom precedents to Bruce Benson’s “enterprise of law”.<sup>52</sup> But originalist or natural legalist,

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<sup>49</sup> On East Asian law in a comparative perspective, see, e.g., Kure (2016).

<sup>50</sup> But for a different argument see Arcioni (2014).

<sup>51</sup> See Rommen (1998) and St. Thomas Aquinas, “On Law and Natural Law. *Summa theologiae*, I-2, 90-94 (1271),” in McNerny (1998: 611-652).

<sup>52</sup> Hayek (1960, esp. part II, “Freedom and the Law”), and Barry (1979, esp. ch. 4, “Liberty and Coercion,” and ch. 5, “The Theory of Law”). See also Nishiyama and Leube (1984), Leoni (1961), and Benson (1990).

or whatever other strain of American law one might like to consider, there is a great deal of affinity between *procedural* attempts to bind the divide between legal theory and legal practice, on the one hand, and the appeal to *dōri*, or even to a mythical beast with a flair for interrupting trials with dramatic entrances, on the other. In East or West, that it to say, jurisprudential legal fictions are overlain by text-centric ones of the Maineian variety. Suehiro's conundrum, in other words, is, on this reading, an American one as well.

When Western scholars discover a natural law at work behind the positive law and the myriad of changes in any given legal order and social and cultural background to that order, they are taking part in a way of thinking very much like the judges in courtrooms in China and Japan in the past. And the heart of it all is jurisprudential legal fictions, or performative judge-centered law. The ancient Chinese mythology of the *xiezhi* is thus not just a hoary tale, but a real commentary on how the law works. In the end, judgments are made, not by the machinery of the legal system, but by people acting in the roles of judge. It is of course a fiction to say that an imaginary animal storms into a courtroom and headbutts the guilty party in a dispute. But, as with legal fictions in text-heavy legal orders, the fiction is as necessary as it is transparently untrue. The psychology of deferring the responsibility of judgment to a figment of the cultural imagination is a function of the legal fiction, a by-product of the human element countenanced, paradoxically, by the supernatural irruption of the *xiezhi*.

The Chinese examples point to their Japanese counterparts as well, because the ancient Chinese legal fictions, and the “continuum” Katz posits between old Chinese law and more systematic, bureaucratized law and institutions developed down the dynastic ages, were all in some way gestures towards the humanity of the legal process, of *synderesis* and the careful weighing of right and wrong, cause and effect, evidence and testimony, justice and mercy, that must go into any court decision. If the law is strictly a human institution, then it is odd that so many civilizations should find need to resort to fictions to humanize it. The history of the legal fiction in East Asia is a reminder that there has always been more to the law, East and West, than what is written in books, and that the human person in all of his or her depth and complexity, and not the intellectual edifices that he or she creates, has historically been the real life of any legal culture. This nearly-lost history of jurisprudential legal fictions, of judge-centered moral reasoning, can be found in East Asia—and in the West, if one looks for it. That rediscovery ought to remind people in the West that jurisprudential legal fictions were once how the law worked everywhere.

## References

- Agnew, Sinéad. 2018. "The Meaning and Significance of Conscience in Private Law." *Cambridge Law Journal* 77/3: 479-505.
- Anan Seiichi. 1962. "Some Trends of Legal Thought and Natural Law Study in Japan: Note." *Natural Law Forum*, Paper 75: 109-119.
- Andō Yūichirō. 2007. *Edo no erito Keizai kanryō, Ōoka Echizen no kōzō kaikaku*. Tokyo: Nihon Hōsō Shuppan Kyōkai.
- Asada Jirō. 2019. "Runin dōchūki," serialized in *Yomiuri Shimbun*, esp. morning editions, August 15 and 16 (nos. 397 and 398).
- Arcioni, Elisa. 2014. "Democracy and the Constitution: The People Deciding the Identity of 'the people.'" *Law and Democracy: Contemporary Questions*, edited by Glenn Patmore and Kim Rubenstein, 11-25. Canberra: ANU Press.
- Baehr, Peter. 2001. "The 'Iron Cage' and the 'Shell as Hard as Steel:' Parsons, Weber, and the Stahlhartes Gehäuse Metaphor in the Protestant Ethic and the Spirit of Capitalism." *History and Theory* 40/2: 153-169.
- Banyū hyakka daijiten: encyclopedia genre Japonica*. 1973. Tokyo: Shogakukan.
- Barry, Norman P. 1979. *Hayek's Social and Economic Philosophy*. Hampshire: The Macmillan Press.
- Batchelor, John. 1901. *The Ainu and their Folk-Lore*. London: Religious Tract Society.
- Batchelor, John. 1905. *An Ainu-English-Japanese Dictionary*. Tokyo: Methodist Publishing House.
- Benson, Bruce L. 1990. *The Enterprise of Law: Justice without the State*. San Francisco, CA: Pacific Research Institute for Public Policy.
- Berman, Harold J. 1983. *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge, MA: Harvard University Press.
- Blackstone, William. 1765. *Commentaries on the Laws of England*, vol. 1. Oxford: Clarendon Press.
- Blank, Andreas. 2006/2007. "Leibniz and the Presumption of Justice." *Studia Leibnitiana* 38/39: 209-218.
- Bloomfield, Morton W. 1969. "Beowulf, Byrhtnoth, and the Judgment of God: Trial by Combat in Anglo-Saxon England." *Speculum* 44/4: 545-559.
- Bock, Felicia G. and Hirai Naofusa. 1990. "'Ritsuryō to daijōsai: miyohajime shogishiki', Takikawa Masajirō." *Kokugakuin Zasshi* 91/9: 55-57.
- Boissonade, Gustave-Émile de Fontarabie. 2002. *Boisonādo ronbunsen*, 2 vols. Tokyo: Shinzansha.
- Boissonade, Gustave-Émile de Fontarabie. 2003a. *Histoire de la Réserve Hérédetaire et de son Influence Morale et Économique*. Tokyo: Shinzansha.
- Boissonade, Gustave-Émile de Fontarabie. 2003b. *Histoire des Droits de l'Époux Survivant*. Tokyo: Shinzansha.
- Boissonade, Gustave-Émile de Fontarabie and Mori Yorimasa. 2012. *Minpō bengi*, 2 vols. Tokyo: Ryūkei Shosha.

- Butterfield, Herbert. 1965. *The Whig Interpretation of History*. New York, NY: Norton.
- Chang Ching. 2002. *Zusetsu: Chūgoku bunka hyakka, vol. 2: Ten kakeru shinborutachi: gensō dōbutsu no bunkashi*. Tokyo: Keiyousha.
- Cheyette, Frederic L. 1963. “Custom, Case Law, and Medieval ‘Constitutionalism’: A Re-Examination.” *Political Science Quarterly* 78/3: 362-390.
- Coase, Ronald. 1937. “The Nature of the Firm.” *Economica* 4/16: 386-405
- Coase, Ronald. 1960. “The Problem of Social Cost.” *Journal of Law and Economics* 3/1: 1-44.
- Creel, Herrlee G. 1970. *The Origins of Statecraft in China, vol. 1, The Western Chou Empire*. Chicago, IL: University of Chicago Press.
- Del Mar, Maksymilian. 2013. “Legal Fictions and Legal Change.” *International Journal of Law in Context*, 9/4: 442-465.
- Durkheim, Émile. 1976. *The Elementary Forms of the Religious Life*, tr. Joseph Ward Swain. London: Allen and Unwin (reprinted) (original: *Les formes élémentaires de la vie religieuse: le système totémique en Australie* (reprinted). Paris: Presses Universitaires de France: 1968).
- Finnis, John and Robert P. George. 2022. “Equal Protection and the Unborn Child: A Dobbs Brief.” *Harvard Journal of Law and Public Policy* 45: 927-1031.
- Freedman, Paul and Gabrielle M. Spiegel. 1998. “Medievalisms Old and New: The Rediscovery of Alterity in North American Medieval Studies.” *The American Historical Review* 103/3: 677-704.
- Fuller, Lon L. 1967. *Legal Fictions*. Stanford, CA: Stanford University Press.
- Gardner, James A. 1964. “Legal Idealism and Constitutional Law.” *Villanova Law Review* 10/1: 1-42.
- Gaukroger, Stephen. 1992. “Descartes’ Early Doctrine of Clear and Distinct Ideas.” *Journal of the History of Ideas* 53/4: 585-602.
- Han Wei Cong shu*. 1970. Taipei: Xinxing Shuju.
- Halpérin, Jean-Louis. 2014. “Transplants of European Normativity in India and in Japan: A Historical Comparison.” *Rechtsgeschichte/Legal History, Journal of the Max Planck Institute for European Legal History* 22: 150-157.
- Harada Nobuo. 2003. *Ryūkyū to Chūgoku, wasurerareta sappōshi*. Tokyo: Yoshikawa Kōbunkan.
- Haraguchi Kiyoshi. 1968. *Nihon kindai kokka no keisei*. Tokyo: Iwanami Shoten.
- Hatano Jun. 1993. “Ōoka Tadasuke no bōka toshi seisaku.” In: “Tōkyōjin” Henshūshitsu (eds.). *Toshi no purannātachi: Edo, Tōkyō wo tsukutta hitobito*, 133-153. Tokyo: Toshi Shuppan.
- Hayashida Seimei. 1992-1993. “Jissenteki suiron to Puragumachizumu hōgaku: wagakuni hōritsugaku no kadai to Amerika hōritsugaku no tenkai 1, 2, 3, 4.” *Hōritsu Jihō* 64/11-12: 6-16; 65/1-3: 69-76.
- Hayden, George A. 1978. *Crime and Punishment in Medieval Chinese Drama: Three Judge Bao Plays*. Cambridge, MA: Harvard University Press.
- Hayek, Friedrich A. 1960. *The Constitution of Liberty*. Chicago, IL: University of Chicago Press.
- Hibino Takeo. 1975. *Me de miru Chūgoku no rekishi (Chūgoku no rekishi, vol. 10)*. Tokyo: Tokyo Inshokan.
- Hirakawa Minami. 2008. *Nihon no rekishi, vol. 2, Nihon no genzō*. Tokyo: Shōgakukan.

- Hou Wailu (Ōta Yukio, Okada Isao, and Iio Hideyuki, tr.). 1997. *Chūgoku kodai shakaishi ron*. Tokyo: Meicho Kankōkai [orig.: *Zhongguo gudai shehuishi lun*. Beijing: Renmin Chubanshe: 1955].
- Hozumi Nobushige, Tomii Masaakira and Ume Kenjirō. (eds.). *Teikoku Minpō (Meiji 29nen) seikai*, vol. 1, *sōsoku*. Tokyo: Shinzansha.
- Ida Kiyoko. 2008. *Edo chishikijin no sekai ninshiki*. Tokyo: Suiseisha.
- Im Dong-Kwun, Lee Won-Shik and Lou Tsu-K'uang (eds.). 1971. *Lee Nung-hwa. Studies on Ancient Korean Shamans*. Taipei: The Orient Cultural Service.
- Imamura Yoshio. 1981. *Yūyō zasso* (5 vols.). Tokyo: Heibonsha.
- Ishimoda Shō. 1971. *Nihon no kodai kokka*. Tokyo: Iwanami Shoten.
- Iwaki Hideo (tr.). 1998. *Go zasso* (8 vols.). Tokyo: Heibonsha.
- Johnson, Paul. 1983. *A History of Christianity*. New York, NY: Touchstone.
- Jones, J. Walter. 1956. *The Law and Legal Theory of the Greeks*. Oxford: The Clarendon Press.
- Kanaya, Osamu (tr.). 1994. *Kan Pishi*, 4 vols. Tokyo: Iwanami Shoten.
- Katō Michitada. 1986. *Gendai ni ikiru Kango*. Tokyo: Tōyō Shoten.
- Katz, Paul R. 2009. *Divine Justice: Religion and the Development of Chinese Legal Culture*. Oxford: Routledge.
- Katz, Paul R. 2019. "On the Judicial Continuum and the Study of Chinese Legal Culture." In: *Concepts and Methods for the Study of Chinese Religions III: Key Concepts in Practice*, edited by Paul R. Katz and Stefania Travagnin, 11-36. Berlin & Boston: Walter de Gruyter.
- Keightley, David. 1978. *Sources of Shang History: The Oracle-Bone Inscriptions of Bronze Age China*. Berkeley, CA: University of California Press.
- Keightley, David. 2000. *The Ancestral Landscape: Time, Space, and Community in Late Shang China (ca. 1200-1045 B.C.)*. Berkeley, CA: University of California Press.
- Keightley, David. 2014. *These Bones Shall Rise Again: Selected Writings on Early China*. Albany, NY: SUNY Press.
- Kendall, Laurel. 1988. *The Life and Hard Times of a Korean Shaman: Of Tales and the Telling of Tales*. Honolulu, HI: University of Hawai'i Press.
- Kishi Toshio (ed.). 1986a. *Matsurigoto no tenkai*. Tokyo: Chūō Kōronsha.
- Kishi Toshio (ed.). 1986b. *Ōken wo meguru tataikai*. Tokyo: Chūō Kōronsha.
- Kumar, Manjit. 2009. *Quantum: Einstein, Bohr and the Great Debate about the Nature of Reality*. London: Icon Books.
- Kumazawa Miyu. 2016. "Kinsei buke ni okeru shinjū hakutaku no juyō." *Aichi Kenritsu Daigaku Bungaku Bunkazai Kenkyūsho Kiyō* 2: 21-37.
- Kure Asao. 2016. "Hiroike Chikurō 'Tōyō hōseishi joron' no tokushoku to gakusetsu shijō no igi: 'hō=nori'ron wo chūshin toshite." *Moraroji Kenkyū* 78: 21-44.
- Kurusu Saburō. 1983. "Moderu to gisei: 'hō ni okeru gisei' ron no junbi no tame no gakushū nōto." *Hōgaku Kyōkai Hyakushūnen Ki'nen Ronbunshū* 1: 3-9.

- Langlois, John D. Jr. 1988. “The Hung-wu reign, 1368-1398.” In: *The Cambridge History of China*, vol. 7, *The Ming Dynasty: 1368-1644, Part I*, edited by Denis Twitchett and John K. Fairbank, 107-181. Cambridge University Press.
- Leoni, Bruno. 1961. *Freedom and the Law*. Princeton, NJ: D. Van Nostrand.
- Lehman, Jeffrey and Shirelle Phelps (eds.). 2005. *West’s Encyclopedia of American Law*, 2e. Detroit, MI: Thomson/Gale.
- Li Xianda and Liu Yu. 2017. “The ‘shape’ and ‘meaning’ of the roof arts in Chinese classical architecture.” *IOP Conference Series: Earth and Environmental Science* 61/5: 1-6.
- MacNaughton, Andrew S. and Kam Bill Wong. 2014. 「死と市民安全の司法化—香港における検死官裁判所の市民の代弁者としての役割」 [Judicializing Death and Public Safety: The representative roles of the Coroner’s Court in Hong Kong] 『中国 21』 41: 150-174.
- Maeno Naoaki. 1975. *Sangaikyō, Retsusenden*. Tokyo: Shūeisha.
- Maine, Sir Henry. 1917. *Ancient Law*. London: Everyman’s Library.
- Mäkinen, Virpi and Heikki Pihlajamäki. 2004. “The Individualization of Crime in Medieval Canon Law.” *Journal of the History of Ideas* 65/4: 525-542.
- Mair, Victor H. 2012. “Religious Formations and Intercultural Contacts in Early China.” In: *Dynamics in the History of Religions between Asia and Europe: Encounters, Notions, and Comparative Perspectives*, edited by Volkhard Krech and Marion Steinicke, 85-110. Leiden: Brill.
- McInerny, Ralph (ed.). 1998. *Thomas Aquinas: Selected Writings*. London: Penguin.
- Minjihō Hanrei Kenkyūkai (ed.) 1935. *Hanrei minjihō*. Tokyo: Yūhikaku.
- Mishina Akihide, 1970. *Nihon shinwaron*. Tokyo: Heibonsha.
- Mishina Akihide. 1971. *Shinwa to bunkashi*. Tokyo: Heibonsha.
- Mishina Akihide. 1973. *Kodai saisei to kokurei shinkō*. Tokyo: Heibonsha.
- Miwa Nobuo. 1981. *Tennō kenkyū: tennō sonzai no igi wo saguru*. Kashiwa, Chiba: Hiroike Gakuen Shuppanbu.
- Mizuno Sei’ichi (ed.). 1966. *Tōyō no rekishi*, vol. 1. Tokyo: Jinbun Ōraisha.
- Morgan, Edmund S. 1988. *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York, NY: W.W. Norton & Co.
- Morgan, Jason. 2019. “A Practical Approach to Legal-Pluralist Anarchism: Eugen Ehrlich, Evgeny Pashukanis, and Meaningful Freedom through Incremental Jurisprudential Change.” *Journal of Libertarian Studies* 23: 64-90.
- Morgan, Jason. 2020. *Equity under Empire: Suehiro Izutarō and the Law-and-Society Movement in Japan*. Amherst, NY: Cambria Press.
- Morgan, Jason. 2021. “Moralogy, the Xiezhi, Casuistry, and Jewish Law: Finding the Mean in Jurisprudential Openness to the Divine.” *Morarojī Kenkyū* 86: 41-59.



- Mote, Frederick W. 1988. "The Ch'eng-hua and Hung-chih reigns, 1465-1505." In: *The Cambridge History of China*, vol. 7, *The Ming Dynasty: 1368-1644, Part I*, edited by Denis Twitchett and John K. Fairbank, 343-402. Cambridge University Press.
- Mozume Takami. 1916. *Mozume Takakazu, Kōbunko* (book 4). Tokyo: Meicho Fukyūkai.
- Nakata Kaoru. 1943. *Hōseishi ronshū*, vol. 3, part 2. Tokyo: Iwanami Shoten.
- Nakata Kaoru. 1984. *Tokugawa jidai no bungaku ni mietaru shihō*. Tokyo: Iwanami Shoten.
- Namura Taizō. 1999. *Boissonade kōgi: Fukkoku chizaihō kōgi*. Tokyo: Shinzansha.
- Nishino Tatsukichi (tr). 1989. *Ōoka seidan*. Tokyo: Kyōikusha Shinsho.
- Nishiyama Chiaki and Kurt R. Leube (eds.). 1984. *The Essence of Hayek*. Stanford, CA: Hoover Institution Press.
- Noguchi Tetsurō (ed.). 1996-1997. *Senshū, Dōkyō to Nihon*, vol. 1, *Dōkyō no denpan to kodai kokka*; vol. 2, *Kodai bunka no tenkai to Dōkyō*. Tokyo: Yūzankaku.
- Ocko, Jonathan K. 1988. "I'll Take It All the Way to Beijing: Capital Appeals in the Qing." *Journal of Asian Studies* 47/2: 291-315.
- Ogden, Charles Kay. 1932. *Bentham's Theory of Fictions*. London: Routledge & Kegan Paul.
- Ooms, Herman. 1985. *Tokugawa Ideology: Early Constructs, 1570-1680*. Princeton, NJ: Princeton University Press.
- Ozaki Yūjirō. 1993. *Kundō setsumon kaiji chū, hisago satsu*. Tokyo: Tōkai Daigaku Shuppankai.
- Ozaki Yūjirō. 1986. *Kundō setsumon kaiji chū, ishi satsu*. Tokyo: Tōkai Daigaku Shuppankai.
- Pound, Roscoe. 1922. *An Introduction to the Philosophy of Law*. New Haven, CT: Yale University Press.
- Quinn, Michael. 2013. "Fuller on Legal Fictions: A Benthamic Perspective." *International Journal of Law in Context* 9/4: 466-484.
- Radding, Charles M. 1979. "Superstition to Science: Nature, Fortune, and the Passing of the Medieval Ordeal." *The American Historical Review* 84/4: 945-969.
- Ramseyer, Mark. 2015. *Second-Best Justice: The Virtues of Japanese Private Law*. Chicago, IL: University of Chicago Press,
- Rheinstein, Max (ed.), Edward Shils (tr.). 1954. *Max Weber on Law in Economy and Society*. Cambridge, MA: Harvard University Press [orig.: *Wirtschaft und Gesellschaft*. Tübingen: J.C.B. Mohr, Paul Siebeck: 1922. Partial translation].
- Roberts, Luke S. 2012. *Performing the Great Peace: Political Space and Open Secrets in Tokugawa Japan*. Honolulu, HI: University of Hawai'i Press.
- Rommen, Heinrich A. 1998. *The Natural Law: A Study in Legal History and Social History and Philosophy*. Indianapolis, IN: The Liberty Fund.
- Ross, Alf. 1958. *On Law and Justice*. London: Stevens & Sons.
- Salisbury, Harrison E. 1992. *The New Emperors: China in the Era of Mao and Deng*. New York, NY: Little, Brown & Co.

- Sandel, Michael J. 2006. *Public Philosophy: Essays on Morality in Politics*. Cambridge, MA: Harvard University Press.
- Sandel, Michael J. and Paul J. D'Ambrosio (eds.). 2018. *Encountering China: Michael Sandel and Chinese Philosophy*. Cambridge, MA: Harvard University Press.
- Sasakura Hideo. 2007. *Hō shisōshi kōgi, ge, zettai ōseiki kara gendai made*. Tokyo: University of Tokyo Press.
- Sasakura Hideo. 2015. "Suehiro Izutarō 'Usō no Kōyō' kō: awasete Kurusu Saburō 'Hō to fuikushon' ron." *Waseda Hōgaku* 90/2: 41-74.
- Sasakura Hideo. 2021. "'Fuikushon', 'kashō' gainen no ran'yō ni tsuite: Kurusu Saburō 'Hō to fuikushon' to kinji no shimin shakairon." *Waseda Hōgaku* 96/2: 1-62.
- Seki Yūji. 2014. *Jinja ga kataru kodai 12 shizoku no shōtai*. Tokyo: Shodensha Shinsho.
- Shimada Masao. 1954. *Ryō sei no kenkyū*. Tokyo: Nakazawa Insatsu.
- Shirakawa Shizuka. 1948. *Jitō*. Tokyo: Heibonsha.
- Shirakawa Shizuka. 1996. *Jitsū*. Tokyo: Heibonsha.
- Shirakawa Shizuka. 1999. *Shirakawa Shizuka chosakushū 1, Kanji 1*. Tokyo: Heibonsha.
- Shirakawa Shizuka. 2000. *Shirakawa Shizuka chosakushū 12, Zassan*. Tokyo: Heibonsha.
- Shirakawa Shizuka. 2010. *Keitō zakki, shūi*. Tokyo: Heibonsha.
- Shoemaker, Karl. 2011. *Sanctuary and Crime in Medieval Europe, 400-1500*. New York, NY: Fordham University Press.
- Smythe, William E. 2005. "On the Psychology of 'As If.'" *Theory and Psychology* 15/3: 283-303.
- Sprenkel, Otto B. van der. 1964. "Max Weber on China." *History and Theory* 3/348-370.
- Stewart, William J. 2006. *Collins Dictionary of Law*. Glasgow: Collins.
- Stolzenberg, Nomi. 1999. "Bentham's Theory of Fictions: A 'Curious Double Language.'" *Cardozo Studies in Law and Literature* 11: 223-261.
- Stone, Marjorie. 1985. "Dickens, Bentham, and the Fictions of the Law: A Victorian Controversy and Its Consequences." *Victorian Studies* 29/1: 125-154.
- Suehiro Izutarō. 1923. *Usō no kōyō*. Tokyo: Kaizōsha.
- Suehiro Izutarō. 1925. "Seinen nenrei no hanashi." *Hōsō kanwa*, 198-203. Tokyo: Kaizōsha.
- Suehiro Izutarō. 1926. *Rōdōhō kenkyū*. Tokyo: Kaizōsha.
- Suehiro Izutarō. 1930. "Horitsu to hito." *Hōritsu Jihō* 2/3: 31.
- Suehiro Izutarō. 1947. *Rōdōhō no hanashi*. Tokyo: Ichiyōsha.
- Suehiro Izutarō. 1953. "Hanrei no hōgensei to hanrei no kenkyū," "Hōgen toshite no jōri," "Genri to rippōsha no ishi," and "Jijitsutaru kanshū." In: *Suehiro chosakushū II, Minpō zakkichō*, vol. 1, 29-67. Tokyo: Hyōronsha.
- Suehiro Izutarō (Kainō Michitaka ed. rev.). 1954a. *Minpō kōwa*, vol. 2. Tokyo: Iwanami Shoten.
- Suehiro Izutarō (Nihon Rōdō Kumiai Undōshi Kankōkai, ed.). 1954b. *Nihon Rōdō Kumiai Undōshi (ketteiban)*. Tokyo: Chūō Kōronsha.

- Suehiro Izutarō. 2007. “Ērurihhi no hōshakaigaku.” In: *Suehiro Izutarō to Nihon no Hōshakaigaku*, edited by Rokumoto Kahei and Yoshida Isamu, 87-94. Tokyo: Tōkyō Daigaku Shuppankai.
- Suzuki Hiroshi. 1993. *Chūgoku no shinwa densetsu*, vol. 1. Tokyo: Seidosha.
- Tachibana Morikuni (Yūzei). 1720. *Ehon shahōbukuro*. N.p.
- Takafuji Harutoshi. 2009. “Wasurerareta zuijū: kai, sono zuzōgakuteki bunrui no kokoromi.” *Bunsei Kiyō* 21: 49-71.
- Takahashi Tadahiko. 1994. *Bunsen (fuhēn)*, vol. 2. Tokyo: Meiji Shoin.
- Takikawa Masajirō. 1927. “Kaichi kanmuri.” *Hōritsu Shunjū* 2/5: 43-44.
- Takikawa Masajirō. 1932. “Kaichi kanmuri.” In: Takikawa Masajirō, *Hōritsu shiwa*, 73-76. Tokyo: Ganshōdō.
- Terajima Ryōan. 1970. *Wa Kan sansei zue*, vol. 1. Tokyo: Tōkyō Bijutsu.
- Tokoro Isao. 2009. *Rekidai tennō no jitsuzō*. Kashiwa, Chiba: Moralogy Kenkyujo.
- Uesugi Chisato. 2001. *Komainu jiten*. Tokyo: Ebisukosyo Publication.
- Uno Shūhei. 1967. *Ōoka Echizen no kami*. Tokyo: Nihon Hōsō Shuppan Kyōkai.
- Vasilyeva, Klavdiya K. 2019. “‘A Law’ and ‘Right’ in Everyday Life and Legal Practice of Modern China.” *Modern Journal of Language Teaching Methods* 9/1: 71-75.
- Vinodograff, Paul. rev. H.G. Hanbury. 1949. *Common Sense in Law*. Oxford University Press/Kinokuniya Book Store Co., Ltd.
- Wagatsuma Sakae. 1987. *Hōritsu ni okeru rikutsu to ninjō*. Tokyo: Nihon Hyōronsha.
- Wang Tao. 2007. “Shang ritual animals: colour and meaning (part 1).” *Bulletin of the School of Oriental and African Studies* 70/2: 305-372.
- Watanabe Yōzō. 1986. *Hō wo manabu*. Tokyo: Iwanami Shinsho.
- Weber, Max (tr. ed. Hans H. Gerth). 1946. *Essays in Sociology*. New York, NY: Oxford University Press.
- Weber, Max (tr. and ed. Hans H. Gerth). 1951. *Religion of China: Confucianism and Taoism*. Glencoe, IL: Free Press [orig.: *Die Wirtschaftsethik der Weltreligion Konfuzianismus und Taoismus*. Tübingen: J.C.B. Mohr, Paul Siebeck: 1915/1920].
- Whittington, Keith E. 2006. “Review of Johnathan O’Neill, *Originalism in American Law and Politics: A Constitutional History* (Johns Hopkins Series in Constitutional Thought).” *The American Historical Review* 111/3: 876-877.
- Winston, Kenneth. 2005. “The Internal Morality of Chinese Legalism.” *Singapore Journal of Legal Studies*: 313-347.
- Yamada Katsumi. 1976. *Ronkō*, vol. 1. Tokyo: Meiji Shoin.
- Yamada Katsumi. 1979. *Ronkō*, vol. 2. Tokyo: Meiji Shoin.
- Yamada Taku. 1975. *Bokushi*, vol. 1. Tokyo: Meiji Shoin.
- Yang Shuran, Yue Li and Wang Xiaogang. 2021. “Study on the structure and virtual model of ‘xiezhi’ gown in Ming dynasty.” *Journal of Physics: Conference Series* 1986: 1-6.

Yoshida Kenkō. 1973. *Shiki, 1 (Honki)*. Tokyo: Meiji Shoin.

Zulueta, Francis de. 1953. *The Institutes of Gaius, Part II: Commentary*. Oxford: The Clarendon Press.

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