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Rule of Law Ideals in Early China?

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Traditional Chinese legal culture has generally been characterized by its deeply entrenched predilection for authoritarian, one-man rule over the more impersonal rule of law.[1] But new materials on law from Chinese archaeological sites have prompted a reassessment of the role of law in the late classical period — a discussion that has taken on particular meaning in the present as Chinese reformers and scholars scrutinize their traditions in light of the urgent need to reform contemporary legal institutions.[2] This article argues that certain key concepts generally considered fundamental to the ideal of a Rule of Law can be detected in writings produced in the era that witnessed the founding of the first centralized state in China in 221 B.C., its

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[1] See a critique of this position in William Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986). *See also* Karen Turner, *Sage Kings and Laws in the Chinese and Greek Traditions*, *in* THE HERITAGE OF CHINA 86 (P. Ropp ed., 1990).

[2] *See generally* notes 4-12 and accompanying texts. I use the term "late classical" in this article to refer to the period that spanned the mid-Warring States through the Han dynasty. The political thinking produced in this era is unified by its preoccupation with legitimating the centralized state, a process that began at least a century before the Qin unification and continued through the Han dynasty.

disintegration less than two decades later, and the gradual consolidation of the empire under the Han dynasty after 206 B.C.[3] As I hope to demonstrate, the legal theory that emerged in this period of state-building supported an authoritarian government, but it did not necessarily sanction an arbitrary, lawless abuse of power. I am not arguing that true proponents of the Rule of Law, as it is articulated in contemporary American theory, existed in early China, or that institutions that supported the ideal of the Rule of Law emerged at that time, since these are relatively recent developments in the West itself. But I do suggest that evidence from a range of third and second century eclectic texts demonstrates that the differences that separate classical Chinese and Western political theory are to be found not so much in the relative weight that each tradition assigned to law and standardized procedures as in their assumptions about the limits of participation in legal decisions.

Part I of the article points out that any discussion of a Rule of Law in China is inevitably comparative, because the notion is so closely linked with the deeply ingrained respect for law in the Western classical tradition and the institutional developments peculiar to the nation states that emerged in early modern Europe. Even "socialist legality" is defined in reaction to bourgeois conceptions of the Rule of Law.[4] A brief survey of modern Chinese writing on the topic demonstrates that a Western-centered concept of the Rule of Law continues to serve as a benchmark for modern Chinese scholars as they reflect on the role of law in their past and present. This section briefly notes how new materials on law from Qin and Han archaeological sites have altered perceptions of the role of law in the early empires in China, but points out that despite the interest in law that these new finds and interpretations have stimulated, a workable conceptual framework for discussing law in early China has not been established. I then extract from recent American writings on the Rule

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[3] Throughout the article the author has relied on various source materials for which no English translations are readily available. In such cases, the author's expertise is relied upon in place of independent verification of the citation. All translations are the author's own work, but major translations of texts that have been consulted are indicated. The pinyin system of romanization is used in the article, but original romanizations of titles are maintained in the footnotes. Titles of classical texts are kept in the original because these are best known by their original Chinese titles and conventions for translating them are not consistent.

[4] *See* Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, 15 LAW & SOCIAL INQ. 633 (1991). For a useful survey of current writing on the function of law in a socialist society in transition, see Frankie Fook-lun Leung, *Some Observations on Socialist Legality of the People's Republic of China*, 17 CAL. W. INT'L L.J. 102 (1987).

of Law the major themes that can serve as categories for sorting out fundamental features of Chinese legal thinking. Part II demonstrates that a comparison of classical Chinese and Western considerations of the problems of balancing formal laws and moral leadership in government illuminates the attention that certain Chinese writers paid to the value of subordinating rulers to laws. In Part III, I discuss the development of a transcendent, universal standard for positive law, and in Part IV I show the importance that Chinese texts assigned to clear laws, consistent punishments and accountable officials. That law in China meant far more than coercion, and indeed was believed to guide the use of force, is demonstrated in Part V. I conclude the article by cautioning that the application of a Western-centered theory to the Chinese case does not take account of how fundamental epistemological and cosmological notions affected legal theories and institutions.

I. METHODS AND MATERIALS

The Western notion of the Rule of Law has often served as a benchmark for evaluating early Chinese legal culture. For example, in his comprehensive study of classical Chinese political philosophy, Hsiao Kung-ch'uan, writing in the 1940s, found evidence in Warring States (771-221 B.C.) texts of the theoretical importance assigned to law as a measure to guarantee certainty in punishments, to preserve public interests over private concerns, and even to guide the ruler himself. He called these features of Chinese thinking "acceptable," but then lamented: "Throughout the two thousand years of China's imperial history, when did there ever appear a single instance of a government embodying the Rule of Law?"[5] In a similar search through the past for the roots of modern political institutional instability in China, Liang Ch'i-ch'ao (1873-1929) had earlier found a more positive role for law in the Chinese tradition; but like Hsiao Kung-ch'uan, he believed that the lack of a formal, Western-style constitution hindered law from serving as a supreme authority in the Chinese state and prevented the development of a constitutional monarchy and a democratic government.[6] For these thinkers, as for most Western sinologists, *fazhi* (rule by law) in classical Chinese

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[5] HSIAO KUNG-CH'UAN, A HISTORY OF CHINESE POLITICAL THOUGHT 446 (F. Mote trans., 1979).

[6] LIANG CH'I-CH'AO, HISTORY OF CHINESE POLITICAL THOUGHT 113 (L. Chen trans., 1930).

thought meant in reality, *renzhi* (rule by man), because the Legalists placed the ruler above the law and the Confucians valued the judgment of moral men more than legal institutions creating good government. Moreover, in the general view, *fazhi* never referred to the institutionalization of a "genuine" Rule of Law but to a regime governed by harsh laws, in particular the punitive laws advocated by the fourth and third century Legalist theoreticians and implemented in the state of Qin in the mid-fourth century.[7] This argument has recently been reiterated by Liang Zhiping in an essay that compares concepts of law in China and classical Greece. The author finds little to admire in the early Chinese tradition, in large part because the Legalists, who led the way in legal reform, operated as the "supporters of fanatic absolute monarchy."[8] According to Liang:

> Law was punishment. . . . According to traditional ideas, law was above all a tool of suppression. It was one of countless methods of governing, which could be used and constituted at will by the ruler. . . . [T]here were rulers, but there were no laws of governing. . . . This fact was the source of what the ancient Chinese political system considered the "rule of man."[9]

Similarly, China's "feudal past," which was dominated by a devotion to rule by man, was castigated in a 1982 article in *People's Daily* that declared: "No modern man [sic], particularly a modern socialist citizen, will want to see 'Rule of Law' replaced by 'Rule of Man,' nor will he compare our cadres of today with the officials of the past."[10] This author praises China's most recent constitution as a necessary element of modern statehood, because Western states have been founded on constitutional governments and the principles of the

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[7] A survey of opinions about the historical significance of Qin's imperial system is in LI YUNING, THE FIRST EMPEROR OF CHINA: THE POLITICS OF HISTORIOGRAPHY (1975). For a standard description of law in China, see CHARLES HUCKER, CHINA'S IMPERIAL PAST 163 (1975) ("Chinese law was always merely an instrument of government; it was not thought to have divine sanction, nor was it considered an inviolable constitution."); VITALY RUBIN, INDIVIDUAL AND STATE IN ANCIENT CHINA: ESSAYS ON FOUR CHINESE PHILOSOPHERS 70 (1976) ("Legalist law was intended to serve the despot, not to limit him.").

[8] Liang Zhiping, *Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 81 (1989).

[9] *Id.* at 89.

[10] Feng Bing, *From 'Rule by Man' to 'Rule by Law'*, RENMIN RIBAO [PEOPLE'S DAILY], Dec. 7, 1982 at 8, *translated in* Joint Publication Research Service [JPRS], July 7, 1986. In this paper I have used the term "man" rather than "human" when it seems to me that only males are included in the category of persons affected by these discussions.

Rule of Law. Indeed, even one of the most outspoken Western critics of the Rule of Law, Roberto Unger, uses the negative example of classical China to demonstrate that only in modern Europe did conditions exist to support a "legal order," which he defines as a society based on the Rule of Law.[11] Therefore, a "true" legal order is often identified, even by Chinese scholars, as one based on the Rule of Law. Moreover, implicit in these arguments is the notion that China must reject its own "flawed" classical heritage in order to build a modern legal system.

Before beginning a discussion of the attributes of the Rule of Law, it is important to note that despite the attractions of a formal legal system for curing the ills of contemporary Chinese society, the value and efficacy of legal formalism has been challenged at various times in the West.[12] Whether rigid formal laws or creative human judgments can most effectively promote justice is a problem that has plagued thinkers since Plato's celebration of the rule of the philosopher king as the best form of government. The dilemma is a natural one, as Morris Cohen points out: "It would thus seem that life demands of law two seemingly contradictory qualities, certainty or fixity and flexibility; the former is needed that human enterprise be not paralyzed by doubt and uncertainty, and the latter that it be not strangled by the hand of the dead past."[13] Thus the problem of defining an appropriate balance between human discretion and the mechanistic application of laws has continued to trouble legal theorists. H.L.A. Hart, for example, argues that laws created according to rules recognized by the community as legitimate can then be applied uniformly, while Ronald Dworkin defines law as "an interpretive concept." According to Dworkin,

> [l]aw is not exhausted by a catalogue of rules or principles, each with its own dominion over some discrete theater of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or

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[11] ROBERTO UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 86-87 (1976)

[12] For a useful survey of the many debates on the Rule of Law, see Dean Spader, *Rule of Law v. Rule of Man: The Search for the Golden Zigzag Between Conflicting Fundamental Values*, 12 J. CRIM. JUST. 379 (1984).

[13] MORRIS COHEN, LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 261 (1967).

> power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense.[14]

The letter of the law is far too simple to square complex ideals with actual implementation in Dworkin's utopian scheme: "That is, anyway, what law is for us: the people we want to be and the community we aim to have."[15] Not only do theorists disagree about the merits of the formal laws in a Rule of Law system, they also argue about the aims of a legal order. Some view law as promoting economic efficiency,[16] while others argue that it guards individual rights and happiness against manipulation by the officials of the state,[17] serves as a purposive instrument for social cohesion and provides a set of guideposts for individuals, particularly legislators.[18] And in the view of the most serious critics of the Rule of Law, such a system does not serve justice at all but simply masks the interests of the ruling class.[19]

Despite these different opinions about values and definition, however, one is struck by a common assumption that a legal system as a whole must operate according to rules that transcend the system itself — even if particular laws must be abandoned at times in the interest of fairness. Nor do those critics who challenge the value of the Rule of Law advocate that decisions be rendered in an institutional and normative vacuum. As Judith Shklar has noted, "[t]he natural lawyer and the legal positivist agree about the necessity of following rules; they disagree about what to do when a conflict between rules exists."[20] Thus, the Rule of Law has been challenged, but most theorists share an understanding of its basic features.[21]

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[14] RONALD DWORKIN, LAW'S EMPIRE 410-11 (1986).

[15] *Id.*

[16] *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).

[17] *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)

[18] *See* LON FULLER, LAW AND MORALITY (1964)

[19] *See, e.g.*, UNGER, *supra* note 11.

[20] JUDITH SHKLAR, LEGALISM 106 (1964). *See also* Tim Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?* 14 J. LAW & SOC. 303-20 (1987).

[21] It is important to point out, however, that despite similar assumptions about the content of the Rule of Law, the German theory of the *Rechtsstaat*, which is linked to the historical emergence of the state as a creation of the bourgeoisie in the nineteenth century, is different from the English doctrine of the Rule of Law, which arose out of conflicts between the King and Parliament in the seventeenth century. Briefly, according to Franz Neumann, "[i]n the British doctrine, the centre of gravity lies in the determination of the content of the laws by Parliament. The German theory is uninterested in the genesis of the law, and is immediately concerned with the interpretation of a positive law, somehow and somewhere arisen. . . . The English bourgeoisie translated its will into law through the medium of Parliament; the German

The essential requirements for a legal system that subordinates ruling elites to law, the ultimate objective of the Rule of Law, are described most clearly by contemporary natural law theorists, in particular Lon Fuller and John Finnis.[22] But their categories are used in other contemporary writings as well.

1) The first requirement, that laws be general in scope and application, gets to the heart of the problem of distinguishing laws from more immediate and narrowly intended rules and commands.[23] As F. A. Hayek stated, laws differ from commands by virtue of their generality and universality; law is a "once and for all command directed to unknown people."[24]

2) Furthermore, most theorists would agree that implicit in the notion of the generality of law is the idea that in a government committed to the ideal of the Rule of Law, the law must not be created and altered simply by dint of the will of any single individual. In a Rule of Law system, certain conditions must be met: The formal laws created by a legitimate authority should be clear, mutually consistent, prospective rather than retrospective, publicly announced, altered only through established procedures, and reasonably possible to enforce and obey.[25]

3) Procedural integrity is a key aspect of implementation in a Rule of Law system. So, when scrutinizing the mechanisms that actually limit the power of rulers to dominate individuals, one must look for procedures that guarantee that law is enforced in a manner that regularizes due process for arrest and trial, an organized system for appeals, and a principled application of punishments. "Procedure in

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bourgeoisie found given laws which were systematised and interpreted in a very refined way in order to secure the maximum liberty against a more or less absolute state." FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 179-86 (1986). For a useful discussion of how the medieval conception of the supremacy of law is applied in the modern American state, see ELLIS SANDOZ, A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING 229-34 (1990). Sandoz sees English constitutional law as emerging out of the set of reciprocal obligations that characterized feudal society.

[22] *See* FULLER, *supra* note 18; FINNIS, *supra* note 17.

[23] *See* FULLER, *supra* note 18, at 46-48. Most contemporary legal positivists would not agree with Austin's contention that laws are commands backed by the threat of coercion. The generality of law is a characteristic that seems to be essential to the concept of law itself. *See* H.L.A. HART, THE CONCEPT OF LAW 25-48 (1961). *See also* UNGER, *supra* note 11, at 67.

[24] HAYEK, *supra* note 16.

[25] FULLER, *supra* note 18, at 49-81; FINNIS, *supra* note 17, at 250.

criminal cases is what this Rule of Law is all about," according to a recent critique of the history of the Rule of Law.[26]

4) In the American tradition, contemporary legal systems are judged healthy only if judicial bodies remain free from executive pressure and political control: "The idea is not so much to ensure judicial rectitude and public confidence, as to prevent the executive and its many agents from imposing their powers, interests, and persecutive inclinations upon the judiciary. The magistrate can then be perceived as the citizen's most necessary, and also most likely, protector."[27] Importance is also placed on the interpretive role of legal professionals imbued with a commitment to abide by the laws and restrained by procedures that inhibit manipulation.[28]

5) The Rule of Law rests on congruence between the law and the behavior of officials who produce, interpret and implement it. As Fuller points out, "[t]his congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power."[29] He goes on to state that in the American system, it is the courts that attempt to maintain conformity between the law as it is declared and its actual administration. The requirement of offical accountability in ensuring the predictability of law is emphasized by John Finnis: "Those people who have the authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the laws consistently. . . ."[30]

6) An underlying concern of post-War theorists has been to distinguish a system that utilizes either the formal rules of law or malleable natural law theories to serve the evil purposes of rulers from one that views law as a means to attain substantive ideals of justice that serve a wider community.[31] It seems that it is a consonance between universal norms and laws that distinguishes a Rule by Law from a genuine Rule of Law. As the Nazi state taught the Western world,

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[26] Judith Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 4-5 (Alan Hutchinson & Patrick Monahan eds., 1987).

[27] *Id.* at 5.

[28] FINNIS, *supra* note 17, at 270-71.

[29] FULLER, *supra* note 18, at 81.

[30] *See* FINNIS, *supra* note 17, at 270-71.

[31] The student of Chinese legal history will find much of value in this regard in the discussions in FULLER, *supra* note 18 and NEUMANN, *supra* note 21.

simply holding rulers and magistrates accountable before the law was not sufficient to guard justice, since laws can serve immoral ends. Thus, standards that transcend the positive laws themselves, and that represent goals other than those defined by the state, must exist to judge the legitimacy of the legal system as a whole.[32]

In early China, as in the classical West, there is little evidence that the judicial system remained institutionally separate from executive pressure. Nor can we identify a distinct class of legal professionals charged with interpreting the law or a conception of natural rights. Indeed those who claim that the institutional Rule of Law is a recent and unique product of European political development are correct. But other more universal characteristics of the Rule of Law can be found in the writings of the major Legalists and certain well-known eclectic writings from the mid- to late-Warring States period through the first century of the Han dynasty, particularly the *Huainanzi* and *Guanzi*. Newly discovered writings have played an important role in adding to the information already available in the transmitted tradition.

A more positive assessment of the role of law in early China has been generated by the discovery of legal materials in excavations from two early imperial sites. The Mawangdui texts found in a Western Han dynasty (206 B.C.- A.D. 9) tomb in 1973-74 and the Shuihudi materials unearthed from a Qin (221-206 B.C.) site in 1975, yielded materials previously unknown to the world of scholarship. These texts began to be analyzed seriously in China after the end of the Cultural Revolution, a time when the importance of bolstering legal institutions to temper the human factor in government became a concern that extended far beyond the world of scholarship. These new materials have been discussed in many contexts, but generally scholars agree that the Shuihudi materials on bamboo, which date from about 217 B.C., represent the laws of China's first unified state. The cache does not include the complete Qin statutes but rather pro forma documents and sample questions and answers to guide local officials charged with investigating and reporting crimes to their bureaucratic superiors. The great attention shown in these materials for conducting careful investigations of crimes and applying correct punishments demonstrates

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[32] According to Roberto Unger, transcendent religion is necessary for generality and uniformity in a legal system and is one major requirement of the Rule of Law that China lacked. *See* UNGER, *supra* note 11, at 80. John Finnis notes that modern legal thinkers who repudiate the concept of natural law cannot separate their conception of law from some "practical viewpoint as the standard of relevance and significance in the construction of his descriptive analysis." FINNIS, *supra* note 17, at 18.

that the Qin central government had developed a highly complex and centralized legal system that aimed above all to control bureaucratic corruption with strict guidelines.[33] From what little we know, the more recently discovered legal materials in a Han dynasty tomb in 1984 at Jiangling in Hubei Province demonstrate that the Han dynasty continued and amplified the Qin imperial legal system.[34] According to these newly found materials, the Chinese imperial organization from its very inception reflected a greater concern with legal procedure than has been recognized in the standard view of traditional Chinese law.

Classical Chinese legal theory has also become more of interest as the theoretical reflections found in the Mawangdui tracts on law are analyzed, because these treatises connect positive law and consistent punishments with universal, natural standards. Indeed, the Mawangdui materials have prompted some scholars in China to determine that the evolution of a conception of law based on a universal standard, the *dao*, marked the transition from the patrimonial society of the Spring and Autumn (1077-771 B.C.) to the bureaucratic state of the Warring States period, a time when, "the rule of law, *fazhi*, replaced rule by rites, *lizhi*."[35] The clear importance assigned to law as a model for all of the activities of government, including war, punishment, and the implementation of official laws in the *Jingfa*, the most theoretically interesting of the Mawangdui texts, has also led to speculation that

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[33] The procedural guidelines have been interpreted and translated by Robin Yates and Katrina McLeod, *Forms of Ch'in Law: An Annotated Translation of the Feng-chen Shih*, 4 HARV. J. ASIATIC STUD. 111 (1981); and A. HULSEWE, REMNANTS OF CH'IN LAW: AN ANNOTATED TRANSLATION OF THE CH'IN LEGAL AND ADMINISTRATIVE RULES OF THE 3RD CENTURY B.C. DISCOVERED IN YUN-MENG PREFECTURE, HU-PEI PROVINCE, IN 1975 (1985) [hereinafter HULSEWE REMNANTS OF CH'IN LAW]. Professor Hulsewe has also described the Han laws and punishments as they are discussed in the Hanshu [History of the Han Dynasty] in REMNANTS OF HAN LAW (1955) [hereinafter HULSEWE REMNANTS OF HAN LAW].

[34] On current Chinese views of the relationship between the laws of Han and Qin see Zhang Tinghao, *Jiangsu Lianyungang Shi Qutu de Handai Falu Bandu Kaoshu [Textual Analyis of the Han Laws Unearthed in Lianyungang, Jiangsu]*, 3 WENBO [CULTURAL STUDIES] 29 (1984). For a Marxist assessment of the development of the Qin laws see Shang Qingfu, *Qin Xinglu de Yuanyuan Jiqi Yanjin [The Source and Development of Qin Criminal Law]*, 5 LISHI LUNCONG [HISTORICAL DISCUSSION] 15 (1985). Lian Shaoming described the Jiangling Han materials, which have been unavailable to Western scholars, in a paper, *Categories of Han Law*, presented at the Asian Studies Annual Meeting, Boston, April 1987.

[35] Jin Chunfeng, *Lun Huang Lao Boshu de Juyao Sixiang [On the Significant Issues in the Huang Lao Silk Manuscripts]* 2 QIU SUO [EXPLORATIONS] 54 (1986). Scholars continue to debate the authorship and dating of the anonymous books written on silk, but most agree that they were produced between about 300 B.C. and the date of their burial in 168 B.C. in the tomb of the Marquis of Dai, Chief Minister to the kings of Changsha. For a survey of opinions on dating the texts and the important legal issues and history of scholarship on the silk books, see Karen Turner, *The Theory of Law in the Ching-fa*, 14 EARLY CHINA 55 (1989).

certain classical Chinese thinkers linked law with transcendent ethical standards that resemble aspects of the late classical Western notion of natural law.[36] These new materials are important because they provide evidence to challenge the opinion that the early Chinese were incapable of conceiving of transcendent norms as models for juridical principles and that this particular failure blunted China's subsequent scientific and political development.[37] The significance of the arguments that these newly-found texts put forth to support a legal system characterized by clear, public laws and consistent punishments has been noted by recent Chinese scholarship.[38]

Many scholars have identified these Mawangdui legal texts on silk as representative of Huang-Lao thought, a syncretic blend of Legalist, Daoist, Mohist and Confucian notions of statecraft that described the *dao* as a universal and transcendent standard for guiding all of the important decisions of government, from making war to implementing punishments, collecting taxes, appointing and controlling subordinates and creating new laws.[39] The ideas in these texts have attracted attention in contemporary China in part because they resonate with current concerns. Scholarly work in China in the 1980s examined early legal activity as a vehicle for justifying current laissez faire economic policies, by arguing that the Huang-Lao ideals represented in the Mawangdui texts curbed the power of the central government in local affairs and allowed the people to prosper.[40] More generally, contemporary Chinese reformers and scholars who seek to bolster the contemporary legal system are resurrecting the positive elements of their legal tradition to criticize indirectly interference by the Commu-

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[35] For further details on the argument that the Mawangdui texts contain elements of a natural law theory that resembles in some respects Stoic notions of natural law, see Turner, *supra* note 1 at 86-111. See also R.P. Peerenboom's assertion that the law of the silk books from Mawangdui represent a tradition of rule of law, *Natural Law in the Huang-Lao Boshu*, 40 PHIL. EAST & WEST 309 (1990).

[37] See the most important discussion of this view in JOSEPH NEEDHAM, 2 SCIENCE AND CIVILIZATION IN CHINA 518-83 (1956).

[38] *See, e.g.*, Rao Xinxian, *Hanqu Huang Lao Xuepai Falu Sixiang Lueshuo [An Overview of the Legal Theory of the Huang Lao School in the Early Han]*, 3 FALU LUNCENG [DISCUSSIONS ON LAW] 326 (1983).

[39] The most complete and current presentation of the tradition, context, and modern commentary on the Huang-Lao texts is in R.P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF CHINA (forthcoming 1993). The author argues that the silk books are Huang-Lao texts and presents a useful up-to-date survey of opinions about their dating and attribution.

[40] *See, e.g.*, Huo Cunfu and Su Jin, *Huang Lao de Falu Sixiang yu Wen Jing zhi Zhi [The Legal Thought of Huang Lao and the Government of Emperors Wen and Jing]*, 4 JILIN DAXUE SHEHUI KEXUE XUEBAO [JILIN UNIVERSITY OF SOCIAL STUDIES] 15 (1985).

nist Party and informal extra-legal bodies in the legal process.[41] In the past decade in China, as pragmatic and scholarly efforts have focused on defining the role of law in a society that is economically progressive and politically conservative, the Rule of Law has become an even more important baseline.[42] But none of these studies has seriously attempted to define the meaning of the Rule of Law either in Western or Chinese contemporary discourse or in its classical formulations.

There are legitimate reasons for exercising caution when attempting to use categories derived from the Western experience for analyzing ancient China. First, comparative studies of Chinese legal history can offer useful information only if similar periods of legal development are compared. Too often, early China is judged a failure by standards that apply only to the modern Western system. For example, if a formal separation of powers defined by a written constitution, an independent judiciary, and a class of legal experts is deemed essential for a healthy legal system, then any ancient government will fall short of the modern ideal, for as I noted earlier, these are relatively recent developments in the West itself.[43]

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[41] For a discussion of how contemporary reformers and scholars in China use the past tradition of rule of law to criticize the present, see Jonathan Ocko, *Using the Past to Make a Case for the Rule of Law*, Paper presented at the annual meeting of the Association of Asian Studies, New Orleans (April 1991).

[42] *See, e.g., Special Columns for the Discussion of Rule of Law or Rule by Man*, 1980 FAXUE YANJIU [STUDIES ON LAW] Nos. 2 & 4, 40-52, 61-64 (1980). In the more popular press, see *Fazhi yu Renzhi Buneng Fenkai Ma? [Can Rule of Law and Rule of Man be Separated?]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Sept. 14, 1988 and in English, *The Rule of Law*, CHINA DAILY, June 29, 1985. For a discussion of the rule of law in China since the Tiananmen massacre of June 1989, Jerome Cohen, offers an updated perspective in *Tiananmen and the Rule of Law, in* THE BROKEN MIRROR (G. Hicks ed., 1990).

[43] Unger identifies a "legal order" with the postfeudal, modern liberal state. *Supra* note 11, at 52-54. This order is characterized by a separation of politics and adjudication, and by a separate body of legal norms, institutions, doctrines and professionals. Unger compares ancient China with the modern European liberal state to point up the unique, Western experience that produced a Rule of Law. Historical treatments of the early medieval tradition offer a far more useful point of comparison with early China. For example, the conviction that the King was bound by laws that transcended his will is one important aspect of early Medieval European thought that competed with absolutist conceptions of kingship. As Fritz Kern has shown, the ideal that law was sovereign emerged from the tribal notion that the King was subject to guard the "good old laws" of the community and the Christian vision that the King must bow before Divine Law: "To the Middle Ages, law was an end in itself, because the term 'law' stood at one and the same time for moral sentiment, the spiritual basis of human society, for the Good, and therefore for the axiomatic basis of the State. For the Middle Ages, therefore, law is primary, and the State only secondary." *See* FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 153 (1956). The implementation of this ideal in the common law tradition, however, is a product of the seventeenth century, when Parliament claimed the right

Secondly, while some of the late classical Chinese sources are richly rewarding for a study of legal theory, they must be read as expressions of goals rather than actual practices. Even the Qin code from Shuihudi reveals only what sort of performance the state expected from its officials rather than how they actually carried out their duties or were sanctioned for their misdemeanors. And the Han historians may well have painted a somewhat idealistic picture of the way that law and coercion were used by their rulers to demonstrate that the dynasty they served had won the empire by legitimate force and that it maintained its authority by continuing to use violence according to the rules.

Third, problems of language and interpretation confound cross-cultural legal studies.[44] My interpretations challenge the pervasive notion that law in China referred only to the coercive force of the state, as Liang Zhiping and others have argued.[45] There are good reasons for interpretive differences in this matter. The problem of deciding whether the Chinese character *fa* should be rendered as "law" or "standard" or "punishment" poses a problem for sinologists,[46] not only because law in contemporary China seems so closely linked with coercion that the present is inevitably read into the past, but because descriptions of law in the classical Chinese texts themselves are fraught with ambiguity. Yet, if the late classical Chinese writings are taken on their own terms, *fa*, which I have chosen to translate in this article in all cases as "law," can be seen to embody a range of meanings similar to the notion of law in the contemporary West; *fa* refers to laws backed by coercion as well as to laws linked with moral standards; to positive laws issued by the state and to the more specific rules for special skills, such as military strategy. A.P. d'Entreves'

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to protect its subjects from the improper demands of the King. At this time, under the influence of Sir Edward Coke, the medieval conception of the supremacy of law was applied to the modern state. *See* SANDOZ, *supra* note 21, at 235.

[44] The notion of law and its relation to rights, coercion and justice continue to shift in the Western tradition, therefore compounding interpretive problems. See discussions in NEUMANN, *supra* note 21. A very clear assessment of the nature of the Rule of Law and its implications for rights can be found in FINNIS, *supra* note 17. For critiques of Finnis see Ruth Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 YALE L.J. 1250 (1982); Tim Kaye, *Natural Law Theory and Legal Positivism: Two Sides of the Same Practical Coin?* 14 J. LAW & SOC. 303 (1987).

[45] *See supra* note 8.

[46] A provocative critique of interpretations of *fa* as either model or law, depending on the modern scholar's perception of the philosophical orientation of individual classical thinkers was presented by C. Hansen, *Fa: Laws or Standards*, New England Association for Asian Studies Meeting, Middletown CT (Oct. 1988).

definition of law in the West carries a range of meanings that could be applied to late classical Chinese notions of law: "Law is a standard, a model, a pattern from which the quality of a particular action, the relevance of certain situations and facts may be inferred. The primary function of law is not to command but to qualify; it is a logical as well as a practical proposition."[47] But this is only one definition, and the arguments about the meaning and function of law that appear in twentieth century Western legal theory demonstrate that the problem of describing a relation between law and morality, between law and coercion and between rules and discretion has not been resolved in the West.[48] Indeed, this ambiguity was present in Max Weber's influential writings on law, for Weber viewed law as both power and authority, as both coercion and the "structured source of guidelines for right conduct."[49]

Finally, the contemporary postmodernist rejection of totalistic grand theories that focus exclusively on external models that obscure cultural differences calls into question the validity of any comparative project.[50] This current concern with multiple perspectives can be valuable, however, because it points up how in the Chinese case, the Confucian view of law has become a powerful and all-embracing grand theory. The Confucian model, which celebrates the moral man over the law, ritual over legal systems, and the familial over the impersonal model of society, has so deeply influenced our understanding of law in China that attempts to escape Western paradigms at times fall back on the Confucian grand theory.[51] And I think that the Confucian view has obscured the importance of other discussions about government in early China that looked toward formal laws and models derived from abstract standards as ways mitigate the influence of particularized, kin-based conceptions of the state. Such concerns with

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[47] A.P. D'ENTREVES, NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 78 (1951).

[48] For an assessment of the development and influence of Max Weber's conception of law, which included both normative and coercive elements, see David M. Trubek, *Max Weber and the Rise of Capitalism*, 3 WIS. L. REV. 720 (1972).

[49] *Id.* at 726.

[50] For a very useful analysis and critique of postmodernist theory, see STEVEN BEST & DOUGLAS KELLNER, POSTMODERN THEORY: CRITICAL INTERROGATIONS (1991).

[51] William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 946-56 (1986), calls for caution when evaluating the character of the Chinese legal system and correctly points up the need to be aware of the dangers of using grand theory in comparative work. But in his own attempt to escape Western-centered definitions of the traditional Chinese legal system, the author places undue emphasis on the Confucian model of fiduciary relationships between ruler and ruled that mirror the ideals of kinship ties.

positive law and impersonal rules have generally been viewed as limited to the Warring States Legalists. But as the new texts on law found in the past two decades in China demonstrate, this view was not limited to the early Legalist thinkers, for a commonly recognized fund of principles did exist, about the need for clear laws, consistent punishments, official accountability, fixed practices for making and changing the laws, and for formulating strict procedures for investigating and deciding proper sentences for behavior defined as criminal. Most importantly, the ultimate aim of the Rule of Law, the subordination of rulers to the laws, was discussed in early China. In fact when some of these early Chinese deliberations on the nature of the state and the problem of balancing law and discretion are compared with similar debates in the Western classical tradition, we find that Chinese thinkers in some cases seem to have been even more aware than their Greek and Roman counterparts of the implications of unbridled human intervention in government.

II. FORMAL LAWS AND HUMAN JUDGMENT

The Rule of Law demands above all that human judgment and will remain subordinate to formal laws. In the West, this basic principle is considered an integral part of our classical heritage. Therefore, when searching for the most fundamental theoretical assumptions that have encouraged the fully developed institutional Rule of Law in the modern West, legal theorists almost inevitably refer back to Aristotle's (384-322 B.C.) famous declaration in the *Politics*: "The rule of law . . . is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law."[52] Similar statements about the superiority of law over individual rulers can be found in late classical Chinese writings.

Important though his legacy may be in the Western tradition of the Rule of Law, Aristotle by no means offered a philosophy of law that was inclusive and universalistic. His political theory represented a response to cynics who viewed law and government as merely conven-

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[52] ARISTOTLE, POLITICS 3.16. Discussions of Aristotle's legacy are too numerous to cite here, but for comparative purposes especially interesting are A. P. D'ENTREVES, *supra* note 47; C. MORRIS, THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE (1959). In a preface justifying his selections, Morris writes: "One Greek seemed to be about all I could afford, and the choice seemed clearly to be Aristotle—the most influential, the most representative."

tional constructs unrelated to ethical concerns.[53] And some of his most eloquent writings describe conflicts in obligation that arose when the enacted laws of the state stood at odds with customs so revered that they seemed natural. Antigone's famous refusal to obey her king's orders because they contradicted higher, more authoritative laws, was used by Aristotle to illustrate the deep hold of laws so timeless that they were experienced as both natural and sacred: "Not of today or yesterday they are, but live eternal. None can date their birth."[54] As Margaret Nussbaum has written, Aristotle's concern for law as a guardian of institutional stability emerged not only from his view of politics but from his assessment of the fragility of human nature, because Aristotle, in stark contrast with Plato (ca. 428-348 B.C.), "wants to investigate and in some way to preserve as true the idea that luck is a serious influence on the good life, that the good life is vulnerable and can be disrupted by catastrophe."[55] Aristotle viewed the laws of the past as one guide for the present and the ideal king as one who maintained tradition as a framework for politics. His conception of a government of laws was based on the notion that law must be linked with normative values, that the ruler must serve as the guardian of the laws, that the laws must restrain the magistrates and that law was but one mechanism to support a state whose primary mission was to encourage the moral development of the very narrow group of persons that were believed capable of participating in politics. It was not with positive law or with specific institutions alone that Aristotle was concerned in his discussion of the role of law, but with finding a reliable beacon for reaching fair decisions in a changing world, an environment in which human wisdom all too often could not be trusted. Law was a necessary mechanism to guide and check the power of the magistrates, because law fixed boundaries, defined privileges and duties and encouraged good habits. And above all, law was one means to curb tyranny, which Aristotle defined as, "the arbitrary power of an individual which is responsible to no one, and governs all alike, whether equals or betters, with a view to its own advantage, not to that of its subjects, and therefore against their will."[56]

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[53] For a clear discussion of the milieu in which Plato and Aristotle wrote, *see* L. WEINREB, NATURAL LAW AND JUSTICE 20-35 (1987).

[54] RHETORIC 1.15.

[55] MARGARET NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 322 (1986).

[56] POLITICS 4.10

Like Aristotle, late classical Chinese thinkers were concerned with a new and fundamental problem, that of defining a place for formal laws in a society that did not fully accept their legitimacy. It is interesting for the early China specialist to note that Drako's laws on homicide were greeted as a harsh imposition on private rights in seventh century Greece[57] just as the public laws advocated by Shang Yang (d. 338 B.C.) were — according to the textual tradition — greeted with suspicion in fourth century China. Shang Yang's debate at the court of King Xiao of Qin in 359 B.C. reflects just how dangerous the act of reforming the old laws to create a public domain that separated law from tradition seemed at the time in China. Shang Yang's argument that the laws must be reformed to suit the times so that they could benefit the state finally prevailed despite his opponent's strong arguments that the laws should not be changed and the ruler's obvious fear that he would be criticized for changing them.[58] In both classical traditions, then, the process of legitimating official law generated controversy.

In very general terms, it was the Chinese Confucians who would have agreed with Aristotle that the state existed to provide a moral environment and who celebrated the laws of the former kings as a reliable guide for the present. The Legalists, on the other hand, valued law as a means to secure institutional continuity and to control the bureaucrats in the interest of preserving the resources of the state. The cynicism of the two major Legalist writers in classical China, Hanfeizi (ca. 280-233 B.C.) and Shang Yang, about the essential weakness of humans was based not on a philosophical awareness of the essential fragility of human goodness but more on the assumption that scarce resources generated competition. They based their legal and political theory on the premise that human behavior could be manipulated by a careful disposition of rewards and punishments established in a strict, clear, and public legal code.[59] As well, they were concerned with protecting the state from incompetent or misguided rulers. Thus, Shang Yang argued in an Aristotelian vein that only through laws could the personal passions of rulers and magistrates be tempered and institutional continuity guaranteed: "Sages cannot transfer to others the

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[57] DOUGLAS MACDOWELL, THE LAW IN CLASSICAL ATHENS 41-43 (1978).

[58] *See* SHANGJUNSHU 1.1a-2b for this debate. I have used the SHANGJUNSHU JIEGUKU ed. (Chengdu, 1935). *See* THE BOOK OF LORD SHANG (J. Duyvendak trans., 1928) [hereinafter Duyvendak].

[59] For a useful overview of Legalist theory, see BENJAMIN SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA 321-43 (1985).

personality and nature that is inherent in them; only through law can this be accomplished."[60] More strongly than Aristotle — who admitted in his later writings that a sage king might be able to govern without the guidance of law — the Chinese Legalists seem more doubtful about the ability of any individual ruler to govern effectively without laws. Shang Yang separated the interests of the state from the interests of its rulers and declared that the state would remain viable and strong and the people obedient only if the ruler heeded the law in his activities: "Therefore the enlightened ruler is careful about the the laws and regulations. He does not heed words that are not centered in law; he does not exalt actions that are not centered in law, and he does not carry out state activities that are not centered in law."[61] On the important issue of the origins of law, Shang Yang implies that the ruler should act as a lawmaker.[62] But Shang Yang never justifies outright the ruler's right to break the laws that he made. One can guess that this concern that the ruler abide by established law stemmed not so much from Shang Yang's desire to protect the rights of individual subjects or to enhance the welfare of the community, but to preserve the state from the weaknesses and ambitions of rulers.

The Legalist thinkers viewed the state not as a community rooted in tradition, but as an artificial construct that could survive only if freed from tradition. A comparison of Plato's early writing on law with the political theory of the Chinese Legalists reveals that Plato was equally wary of the blinding power of tradition and equally concerned with preserving order.[63] Justice, for Plato, was assured only when all humans filled their appointed roles in the state and when a common acceptance of the rightness of this hierarchical order became a principle of governing. All citizens had defined roles — and it was the job of the philosopher king to act with wisdom and

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[60] SHANGJUNSHU 4.9a. *See* Duyvendak, *supra* note 58, at 274.

[61] SHANGJUNSHU 5.7b. *See* Duyvendak, *supra* note 58, at 317.

[62] For example, Shang Yang discussed the principles that a ruler should follow when making the law and the relationship between the ruler and the ministers who implement the law. The law should be clear so that subordinates could understand it, according to Shang Yang, but the ruler should personally oversee and institute the law. SHANGJUNSHU 5.11a-b. Duyvendak, *supra* note 58, at 327.

[63] For a discussion of Plato's view of tradition as a barrier to reform, see ERNST CASSIRER, THE MYTH OF THE STATE 72-73 (1946). For views of the Legalist's legacy, see Liang Zhiping, *supra* note 8, at 4. For a survey of opinions about the legacy of Shang Yang, see LI YUNING, SHANG YANG'S REFORMS AND STATE CONTROL IN CHINA (1977). Similar opinions about Plato's theoretical contribution to the totalitarian state can be found in KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1962).

moderation.[64] Similarly, the Chinese Legalists viewed law as one means to maintain boundaries that would ensure that the best men were appointed for office. But for them merit based on experience, loyalty and technical expertise rather than on moral training or charisma became the criterion for filling government appointments. On the question of the ultimate function of law, however, Plato would have disagreed with the Legalists, for he saw law as a hindrance to the free play of the ruler's abilities, which could best be used to adjust laws to new circumstances if they were not restrained by conventional standards: "Law does not perfectly comprehend what is noblest and most just for all and therefore cannot enforce what is best."[65] Plato, like Aristotle, however, recognized that ideals and realities would always remain in tension in any government, and that tyranny always constituted a threat to order. In his later writing, he spelled out how laws could distinguish good and evil governments and curb despotism.[66]

One of the most eloquent statements about the problem of balancing law and discretion in any tradition comes from Xunzi (b. 310 B.C.), who took the Confucian stance that education and exemplary rulership offered the most effective means to govern, but who also produced a theory for applying institutional violence that moved beyond earlier Confucian thought. Xunzi's contribution to legal theory deserves particular recognition, because he discussed the importance of articulating an ethic of war and punishment and finding a means to achieve a workable balance between moral men and strict laws. First of all, Xunzi acknowledged that the state both imposed great burdens and presented tangible benefits for society. But the state could survive only if it balanced human wisdom with institutional stability:

> Laws cannot stand alone . . . for when they are implemented by the right person they survive but if neglected they disappear. . . . Law is the basis of good government but the superior man is the basis of law. So when there is a superior man, the law even if sparse will cover any situation, but when there is no superior

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[64] *See* ERNST BARKER, GREEK POLITICAL THEORY 204 (1960).
[65] STATESMAN para. 254.
[66] *See* LAWS IV and VI.

> man, even if the laws are all-embracing, they will neither apply to all situations nor be flexible enough to respond to change.[67]

Xunzi was a realist who understood that institutions could never operate without human guidance and in common with other early Confucian thinkers, he leaned toward the exemplary ruler and morally educated magistrates as the linchpin of a just government; but he placed greater emphasis on the need for a legal system to frame their decisions.

Once the empire was established, the dilemma of balancing personal intervention with formal laws continued. The later Han historian, Ban Gu (A.D. 32-92), surveyed in his "Treatise on Punishments" in the Hanshu the efforts of early Han rulers to temper the harsh laws. Here Ban Gu relates the story of Han Xuandi (r. 74-49 B.C.), who attempted to inject equity into the system by establishing four high-level officials charged with bringing doubtful decisions to the emperor's attention before the autumn assizes, the time of executions. But the Emperor's decision was criticized by a local official known for his attention to strictness in applying the laws. He argued that it was far better to cleanse the statutes of ambiguity than to appoint new officials, because once the laws were made clear they could not be manipulated.[68] In other cases, Ban Gu illustrated the point that even the best of rulers and ministers could not reform the laws in just one generation; imperial interference merely offered temporary relief from injustice.[69] In this instance, Ban Gu seems to regard a code that correctly categorized crimes and punishments as at least as important as the presence of exceptionally wise and benign rulers. Ironically, the early Confucians had castigated rulers for recording laws because the people would manipulate them; but later Confucians like Ban Gu advocated written law as an important means of guarding against official corruption. This idea that law and good rulers must operate in tandem is expressed in strong terms in the *Huainanzi*, an eclectic text completed around 139 B.C. This text places great importance on the art of rulership, but it also recognizes the vital necessity of law: "A

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[67] XUNZI (SBBY ed.) 8.1. For a useful new translation of this text, see XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS: VOL. 1, BOOKS 1-6 (John Knoblock trans., 1988) and XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS: VOL. 2, BOOKS 7-16. (John Knoblock trans., 1990.)

[68] HANSHU (1962) 23.1102.

[69] *Id.* at 23.1103.

state on the brink of disaster is not one without a ruler but one without laws."[70]

The authority of law is further demonstrated in Han writings by accounts that show some reformers chafing against the restrictions of the old laws. One of the most famous critics was Du Zhou (d. 95 B.C.), one of Han Wudi's (r. 141-87 B.C.) harshest Commandants of Justice (*tingwei*). To a charge that he ignored the written laws to cater to the ruler, he asked where the written laws originated in the first place and then argued: "Whatever earlier rulers considered right was recorded as statutes and what later rulers said was right was added on as ordinances. If what is right is decided by timeliness, of what use are the old laws?"[71] Du Zhou was castigated by his contemporaries for disregarding the old laws, which implies that his willingness to manipulate the law did not meet with universal approval and that his cynicism about the laws of the past was not wholly shared. Moreover, this passage indicates that it was the power of the old laws that troubled him most — for they hindered men like him from manipulating the legal system with impunity. It seems, then, that by the first century of the Han dynasty, the issue was not whether laws should exist in government, but how to maintain clarity and consistency in the codes so that laws could protect the state from the vagaries of rule by personality.

Despite their strong arguments for a legitimate function for law in government in these eclectic texts, however, one of the most important contributions of classical Chinese political theory to comparative legal thought was its deep skepticism about the corrective function of law. Even those Chinese philosophers who argued in favor of law never declared that formal rules alone could create order. The Legalists recognized that laws could be easily employed for personal gain and the Confucianists contended that rites, customs, and the rules of groups subordinate to the state prevented deviance far more efficiently than laws that merely punished those who had already committed crimes. These early Chinese thinkers rarely fell into what would be called "legal formalism" in contemporary social science theory.[72]

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[70] HUAINANZI (SBBY ed.) 9.14. For a discussion of this important chapter on rulership, see ROGER AMES, THE ART OF RULERSHIP: A STUDY IN ANCIENT CHINESE POLITICAL THOUGHT (1983); for a new history of this text, see HAROLD ROTH, THE TEXTUAL HISTORY OF THE HUAI-NAN-TZU, The Association for Asian Studies Monograph Series, No. 46 (forthcoming Ann Arbor, University of Michigan Press).

[71] SHIJI (1959 ed.) 106.2825.

[72] See a discussion of the limits of formalism in PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977).

They acknowledged early on that the official legal system was but one mechanism for achieving stability and that various groups in society would naturally develop different strategies for using or abusing it. Perhaps this very understanding stimulated the production of a legal philosophy that took so realistic an account of the dangers posed by human intervention in legal decisions.

III. General Laws and Universal Standards

A major requirement of the Rule of Law, that laws be conceived as universal in scope and application, existed at least by Hanfeizi's time. In his writings, *fa* carried a broad meaning, distinguished from statutes, *lu*, orders, *ming*, and punishments, *xing*: "Law includes the written ordinances displayed in official offices, the corporal punishments that the people accept as inevitable, the material rewards due to the lawful ones, and the punishments imposed on those who pervert the ordinances. It is what the officials and people take as their guide."[73] In Han Fei's scheme, law was public, written, universal and a model for rewards and punishments. His conception of a general and universal law was linked in part with a rejection of the models of the past. Hanfeizi pointed out that only after the *Book of Poetry* and the *Book of History*, the most revered sources for ancient models of rulership, were destroyed were the laws and ordinances of Qin made clear under Shang Yang's guidance.[74] Other writers pointed out good reasons for finding new models for laws. The old laws simply presented linguistic and interpretive problems, according to the third century text, *Lushi Chunqiu*: "Why is it that even those on high do not follow the laws of the former kings? It is not that these [laws] are not worthy but rather that they have no way to follow them. [Moreover], since the laws of the former kings have their origins in antiquity, people have sometimes augmented and sometimes abridged them."[75] Once the tradition was viewed as vague and restrictive, a different and more abstract principle for guiding government had to be found.

After about 300 B.C. in China for some thinkers this ultimate principle became the *dao*, which is most often simply translated as the "Way." In a wide variety of texts, *dao* was called upon as a metaphor for political life, a useful model for ruling because it was at once uni-

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[73] Hanfeizi Jishi (Shanghai 1958 ed.) 17.906.

[74] Hanfeizi Jishi 4.239.

[75] Lushi Chunqiu (SBBY ed.) 15.17b.

fied and the source of all things. The *Jingfa* presents one of the most systematic arguments for the *dao* as a practical guide to the art of ruling. As the text has been reconstructed, the anonymous author opens with this statement: "The *dao* gives birth to the law and law is what marks success and failure. Used as a marking line, it clarifies what is crooked from what is straight."[76] The treatise then describes the *dao* as a timeless, universal, impartial standard and the law that it generates as a reliable guide for the hard decisions that fall to any ruler: when to begin a military campaign and when to wait until conditions are suitable, when to punish the people and when to show lenience, how to obtain clear, trustworthy information from subordinates, and how to organize officers according to their abilities. The ruler who conquered a territory and attempted to establish a legitimate government was clearly one target for this author, who advised him to abide by the established laws, and to issue commands for labor and military service only after gaining the people's trust and learning of their customs and habits.[77] A great portion of the *Jingfa* focuses on the need to create a public realm that distinguishes just war from useless slaughter and appropriate punishments from personal vengeance. Only by following laws founded in the *dao* could he understand the boundaries between just and unjust actions: "Laws and regulations are of the utmost importance in governing. There is no confusion in the government of a [ruler] who relies on them and no disorder once the laws and regulations are produced. If you are public-spirited and without private bias, and your rewards and punishments are trusted, you will have a good government."[78] Law rather than human emotions must guide the ruler, and the text warned the ruler who made arbitrary decisions to punish and to make war that he would himself be destroyed by violence.

The *Jingfa*'s vision of a standard that could mediate between conflicting views of the past and competing local customs was not the product of an eccentric local visionary, for other late Warring States and early Han texts present *dao* as a useful model. The *Guanzi* explicitly links the *dao* with the legal system:

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[76] From Daofa, the first section of the JINGFA, included in MAWANGDUI HANMU BOSHU (1980). References are to the nine short section titles. A translated and analysis of the political theory in the JINGFA is found in Karen Turner-Gottschang, Chinese Despotism Reconsidered: Monarchy and its Critics in the Ch'in and Early Han Empires (1983) (Ph.D. dissertation, University of Michigan).

[77] This discussion is in the *Chunzheng* section of JINGFA.

[78] In Daofa. A very similar statement can be found in GUANZI 6.1a.

> Therefore it is said that statutes, regulations and measures must be modeled on the *dao*. Commands and ordinances must be clear and open, rewards and punishments trusted and definite. These are the constant standards for bringing justice to the people. . . . When an enlightened ruler is on the throne, laws modeled on *dao* are implemented throughout the realm and the people will give up what they like and do what would [ordinarily] be abhorrent to them.[79]

This concept of *dao*, a standard of nature that served as a basis for law was not represented as a law-giving deity, but as a model for ruling and law-making.[80] And I think that *dao* was valued as a normative principle precisely because it represented a mechanistic principle of nature free of the fickle personality traits of an anthropomorphic deity. The *dao* could not be influenced, manipulated, changed, or disturbed in its regular patterns and therefore it could serve as a metaphor for a model ruler who would oversee the world with clarity and wisdom while remaining above its vicissitudes and temptations. Such a ruler would naturally govern with predictability and justice. As R.P. Peerenboom has argued, the Huang-Lao philosophy of law presentedy a theoretical constraint on the ruler, who was bound to adhere to a pre-determined moral order that provided a standard "to curtail the discretionary latitude of and potential for abuse of power by sage judges in Confucius' legal system."[81] The *dao* represented a unified standard, a "rule-governed natural order" that served as a model for the social and political order.[82] Thus the laws that emanated from *dao* could apply to all peoples, regardless of their customs and traditions.

Although the Han historians relate how certain rulers and officials in the early Han period subscribed to Huang-Lao thought, we cannot trace a direct link between the Mawangdui texts and particular policies.[83] But it is obvious why the thinking in these texts could

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[79] GUANZI 6.4b-5a.

[80] *See* LEO CHANG AND HSIAO PO-WANG, THE PHILOSOPHICAL FOUNDATIONS OF HAN FEI'S POLITICAL THEORY, Monographs of the Society for Asian and Comparative Philosophy, no. 7 (University of Hawaii Press, 1986), for an analysis of Han Fei's concept of *dao* and why it is not comparable with Western notions of logos.

[81] *See* PEERENBOOM, *supra* note 39, at 245.

[82] *Id.* at 250.

[83] See my discussion of the link between theory and practice, Turner, *supra* note 35, at 74-76. I argue that while some aspects of the philosophy in the Mawangdui texts must have been attractive to Han rulers, it is difficult to understand why they would have supported an

serve a ruler who strove not only to create a unified empire, but who also understood the need to establish a government that would be viewed as legitimate by the people he conquered. Such a principle would have been useful in the early imperial period in China, a time when centralization at all levels of government was desired by rulers and bureaucrats whose status derived from government service rather than ascriptive ties. Therefore, as the state expanded, it became necessary to formulate an inclusive notion of law. A similar historical process and intellectual response was at work in the late classical West. Most modern writers agree that a political theory that placed all humankind within the same moral and legal universe was articulated in Greece only after Alexander's empire brought the Greeks into direct contact with the cultures of the East. It is generally agreed that it was the thinkers of the Stoic school who refined a theory in which natural law became a source for enacted law, a law that extended to all humankind and that rejected the parochialism of the earlier Greek thinkers.[84] Perhaps the most important tenet of the natural law of the Stoics was that all humans are equal before it, allied by a bond that could not be severed by artificially created institutions or misfortune. In his study of the political theory of the Middle Ages, Charles McIlwain writes: "The Stoic doctrine of the brotherhood of man and the citizenship of the world was not ill-suited to a state that seemed destined to bring all races within its political control."[85] The statement of the most famous spokesman for natural law theories, Cicero (106-43 B.C.), agrees most closely with notions of law and nature in some of the eclectic Chinese texts. Natural law, according to Cicero is a "true law . . . of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law . . . or to abolish it."[86] This description mirrors the *Jingfa*'s notion of law as a universal, transcendent, and unchanging standard for human decisions.

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ideology that so clearly restrained the individual authority of rulers. Peerenboom takes a more positive stance on the actual influence of the theory in the silk books, *supra* note 40, at 345-50.

[84] *See* CHARLES ROBINSON, HELLAS: A SHORT HISTORY OF ANCIENT GREECE (1948).

[85] CHARLES MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST: FROM THE GREEKS TO THE END OF THE MIDDLE AGES 106 (1932).

[86] THE REPUBLIC 3.22.

In China as in the West, natural law rarely had any actual force to curb the ambitions of rulers.[87] But the development of a moral link between enacted law and transcendent principles indicates an important conceptual leap in any society. Roscoe Pound's assessment of the role of natural law theory in the West could apply in many aspects to the Chinese case:

> The theory of natural law was worked out as a means of growth, as a means of making a law of the world on the basis of the old strict law of the Roman city. But it was worked out also as a means of directing and organizing the growth of law so as to maintain the general security. It was the task of the jurists to build and shape the law on the basis of the old local materials so as to make it an instrument for satisfying the wants of the whole world while at the same time insuring uniformity and predictability. The technique was one of legal reason; but it was legal reason identified with natural reason and worked out and applied under the influence of the philosophical ideal.[88]

But in the Chinese texts that describe links between law and nature, the *dao* was not put forth as a means by which all humans could assess the legitimacy of law. Rather, the Chinese celebrated the intuitive capacity of the sage ruler to follow the law of nature as a model for directing the world on behalf of all humans.

IV. CLEAR LAWS, CONSISTENT PUNISHMENTS AND ACCOUNTABLE OFFICIALS

As they worked out a philosophy of law in the period of the development of centralized states, third and second century Chinese thinkers articulated some of the fundamental premises of the Rule of Law: that the ruler must abide by laws; that laws are more general and universal than commands, and that law should be measured against transcendent norms. Moreover, these authors discussed the utility of clear, publicly announced laws that were based not on the

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[87] ALAN WATSON, THE MAKING OF THE CIVIL LAW (1981) traces the ways that the natural law theories preserved in Roman law, particularly Justinian's *Corpus Juris Civilis*, influenced Western jurists' interpretations of civil law. In China, there is no single text that serves as a manual for the application of natural law, although one might argue that the Confucian classics began to play such a role by the end of the Han dynasty.

[88] ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 10-11 (1954).

past but on natural principles that could remain immune from human history and will. Thus, clear laws that guaranteed predictable and consistent punishments, important features of the Rule of Law in the early West, were deemed significant in China as well. Shang Yang, for example, declared that positive laws could be constructed clearly and applied universally, unlike customary laws, which had grown out of more particular experiences. Just as he believed that truly talented rulers were scarce indeed, so too he held that most of the people had only a limited understanding of the actual mechanics of government and could be reached only if the laws were clear, simple, and unambiguous: "Laws should not be made so that only the intelligent ones can understand them. . . . Therefore when the sages created laws, they made them clear and easy to understand."[89] Other authors offer similarly pragmatic reasons for clear laws. The *Guanzi* connected clear laws with the *dao* and stated that clear laws and trusted punishments would encourage the people to "give up what they like and do what would [ordinarily] be abhorrent to them."[90] Presumably the text implies here that the people would willingly perform such duties as paying taxes, providing labor services, and serving in the armies if they understood the laws and trusted the penal system. Hanfeizi considered clear, public laws so absolutely essential for order that he warned the ruler that neglecting to clarify the laws would seriously weaken his position.[91] He compared the laws to a mirror that would reflect reality properly only when they remained clear. If like an immobile reflection in a mirror, the laws remained clear, the people could see for themselves how to obey them. If the laws were muddied with contradictions, they would lose their guiding function. In his opinion, knowledge of the laws should neither be the exclusive domain of the legal officials nor the special province of the scholars.[92] In a wide range of texts, the argument is made that laws must be clear because only then would the ruler and his officials possess the means

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[89] SHANGJUNSHU 5.14a; Duyvendak, *supra* note 58, at 334.

[90] GUANZI 6.4b-5s; *see* A. RICKETT, KUAN-TZU 256-57 (1965).

[91] HANFEIZI JISHI 19.309. Hanfeizi's writings are translated in the two volumes titled THE COMPLETE WORKS OF HAN FEI TZU: A CLASSIC OF CHINESE LEGALISM (W. Liao trans., 1939). ERIC HAVELOCK, THE GREEK CONCEPT OF JUSTICE (1978), analyzes how metaphors of vision became important as written documents began to replace the oral tradition in Greece. In China, finding a means to produce clear laws seems to have been a preoccupation in the period that witnessed the emergence of codified public laws.

[92] HANFEIZI JISHI 19.309.

to carry out the critical business of ensuring that correct and appropriate punishments be applied to crimes.[93]

Rule of Law theorists consider predictability an important product of the Rule of Law.[94] In the Chinese texts I use here, predictability depended on law. "When laws are established, punishments will be consistent," Han Fei declared.[95] The law creates a constant standard that encourages the people to behave well, according to Shang Yang, but laws must be consistently clear and commands consistently carried out.[96] Most importantly the force of the state must be used carefully. The *Jingfa* offered the ruler a particularly compelling reason to take care in issuing punishments: "Inappropriate punishment will bring calamity upon the ruler himself."[97] In the cosmological scheme in which these writers formulated their political theory, the ruler and his ministers bore ultimate responsibility for maintaining harmony between the natural and human worlds by assigning punishments that would cancel out the destabilizing influence of deviance.[98] Consistent punishments had a more immediate purpose as well. By the first century of the Han dynasty, the problem of maintaining a system that matched crimes with appropriate punishments was a matter of great concern. The Han emperor Wen (r. 180-157 B.C.), for example, embroiled in a dispute with officials who challenged his proposal to render more lenient the system of collective responsibility for crime, stated his philosophy of law: "When laws are just and punishments appropriate, the people will follow them."[99] Ban Gu's survey of legal reform in the Han demonstrates the great attention that Han rulers and ministers paid to clarifying the codes so that crimes and punishments would match. He cited Xunzi's statement as the theoretical basis for this activity: "There is no greater misfortune than when punishments do not match crimes."[100] Therefore, legal reforms, including clarifi-

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[93] *See* GUANZI 55.3a; HANFEIZI JISHI 19.309, 16.5a-b; JINGFA, *Lun* section.

[94] *See* FINNIS, *supra* note 17, at 272.

[95] HANFEIZI JISHI 9.549.

[96] For a discussion of this theme, see SHANGJUNSHU, ch. 5. *See* Duyvendak, *supra* note 58, at 314-35.

[97] JINGFA, *Gouci* section.

[98] MARK LEWIS, SANCTIONED VIOLENCE IN EARLY CHINA 137-38 (1990) discusses violence and correlative thinking in early China.

[99] SHIJI 10.418-19.

[100] HANSHU 23.1111; see Hulsewe's translation in REMNANTS OF HAN LAW, *supra* note 33, at 347. For translations of selected HANSHU chapters, see also, THE HISTORY OF THE FORMER HAN DYNASTY BY PAN KU (Homer Dubs trans., 1938-55); COURTIER AND COMMONER IN ANCIENT CHINA: SELECTIONS FROM THE HISTORY OF THE FORMER HAN BY PAN KU (Burton Watson trans., 1974).

cation of the laws regarding the death penalty, simplification of the codes to prevent official abuse of laws, and changes in the harshest corporal punishments, were usually stimulated by the need carefully to match crimes and punishments. The Han philosopher and reformer, Jia Yi (201-169 B.C.), for example, warned the ruler who used his power to punish to serve his personal grudges that he would in turn become the object of vengeance. He goes on to state: "If the punishment is appropriate for the crime, you can punish many people without being at fault. If the punishment is not right and you kill one person [wrongly], your crime will be reported to highest Heaven."[101] Other writers describe how Heaven's displeasure would be manifested concretely — through mutations in the natural world: "Oppressive laws and ordinances stimulate plagues of insects and furthermore if the innocent are put to death, the countryside will dry up in drought."[102]

Han writers in general made good use of the Qin dynasty to bolster their argument for consistent laws and fair punishments. Some pointed out that it was not Qin's legal system in itself that aroused the hatred of the people but its inconsistent use of punishments. For example, the Han official Chao Cuo (d. 154 B.C.) castigated the Qin regime for allowing petty laws to proliferate and for failing to control the magistrates, who "took advantage of the numerous, confusing laws to bolster their authority . . . and to make life and death decisions according to their own wanton lights."[103] The most famous Han Confucian thinker, Dong Zhongshu (ca. 179-104 B.C.), declared: "Qin failed to convince the good that they would be safe from violence and the evil that they would face certain punishment."[104] Dong Zhongshu adopted the Confucian position that benevolence must outweigh strict harshness in government, but like most of his contemporaries, he agreed that the death penalty must never be remitted once a sentence was determined; it was for this reason that the categories of crimes warranting death had to be kept clear. Justification for maintaining consistency in using the death penalty was stated most clearly in the *Guanzi*: "When the people know that the death penalty is inevitable they will fear it."[105] Hanfeizi argued that the kings of old could use the harshest punishments without inciting vengeance because they

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[101] XINSHU (SBBY ed.) 7.4b.

[102] HUAINANZI 3.2a-b. John Henderson discusses correlative thinking in Chinese thought in THE DEVELOPMENT AND DECLINE OF CHINESE COSMOLOGY (1984). I follow his translation for this passage.

[103] HANSHU 49.2296.

[104] HANSHU 49.2296 and 56.2510.

[105] GUANZI 7.8a.

never used force for capricious or malicious reasons.[106] Moreover, the intelligent ruler would restrain his magistrates with laws and use measures to correct their errors. . . ." And then there need be no release from the death penalty."[107] Therefore, the subjects' obligation to submit to the force of the state was not unconditional. Only if the state used violence against its own people according to laws that removed life and death decisions from the passions of the ruler and his magistrates could order and obedience be secured and only if the people trusted the ruler's laws regarding death would they be willing to die for him in battle, as the *Jingfa* pointed out in the *Junzheng* section. The need for clear laws and consistent punishments, administered by rulers and magistrates concerned not with partisan interests but with the public welfare, is reiterated in this text's sections on law.[108]

In the Qin and Han legal and historical materials there is evidence that clarifying the laws was considered an important duty of the ruler and his officials. Even the first emperor, Qin Shihuangdi (r. 221-210 B.C.) — the supposed ultra-legalistic manipulator of law — was described in his own propaganda not as a legislator but as one who "made regulations and clarified the law."[109] Several instances are recorded in which Han emperors began their reigns by promising to clarify and reform the laws. Han Yuandi (r. 49-33 B.C.), for example, declared that the laws had become so confused that they could not be understood and applied carefully and that he intended to oversee their clarification.[110] Thus, a conservative tradition generally seemed to dominate the process of legislation and legal reform. Although we know from reading the histories that laws proliferated and were in fact changed, the historians rarely presented the ruler as the actual legislator — despite the standard view held by scholars that the Chinese ruler was the chief legislator as well as the highest judge.[111] Instead, according to the histories, the task of legal reform was shouldered by court officials. The early example of the Legalist reformer, Shang Yang, who reformed the laws in the face of a reluctant ruler's objections, is modified somewhat in the descriptions of reform in the Han historical sources, which show that legal reform

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[106] *See* HANFEIZI JISHI 27.500 and 45.946.

[107] *Id.* at 1.4.

[108] See especially the *Mingfa* and *Fafa* sections of the GUANZI for extensive discussions on law and government.

[109] SHIJI 6.245; for views of the First Emperor of China, see LI YUNING, *supra* note 7.

[110] HANSHU 23:1103. *See* HULSEWE REMNANTS OF HAN LAW, *supra* note 33, at 339-40.

[111] *See, e.g.*, HULSEWE REMNANTS OF HAN LAW, *supra* note 33, at 14.

was usually directed by imperial command. According to the mythology created to rationalize the Han dynasty's use of force to win the empire, Gaozi (r. 202-195 B.C.) legitimated his forceful entry into the old Qin homeland by promising to simplify the Qin laws. It was his Prime Minister, Xiao He (d. 193 B.C.), who augmented the code to render it workable.[112] Later, at the peak of the dynasty's power, Han Wudi called to court Zhang Tang (d. 116 B.C.) to "establish and settle the laws and ordinances," but this intrepid official was warned by a contemporary that he deserved to be wiped out along with his kin for tampering with the old ways.[113] Jia Yi (201-169 B.C.), a prominent scholar-official with expertise in both legal procedures and the Confucian scriptural sources, reformed the laws and died in exile. Perhaps the historians were presenting a Huang-Lao ideal of rulership, one in which a non-interventionist ruler simply clarified the laws he inherited from his predecessors. Or perhaps the rulers were convinced that they would survive longer if they could transfer the blame for problems in the legal system to their officials.

Not as lawmakers were Han rulers described in contemporary sources then, but as supervisors of legal reform and as supreme judges, who at times demonstrated their benificence by attempting to temper the harshest punishments — at times in face of objections from their counsellors. In one case, Han Wendi argued with his high officials, who resisted his proposal to eliminate the mutilating punishments on the grounds that softening the force of the law would encourage disobedience. The Emperor appealed to tradition to support his case, citing the *Book of Songs* as the authority for his benevolent intentions. The officials who protested also appealed to the past, stating that the mutilating punishments had a long history; they proposed an alternative system of precisely defined application of the bastinado that in reality was more harsh than mutilation since people died from the beatings. As Ban Gu comments, nothing changed.[114] And it is interesting to note that those who committed crimes defined as acts against the dynasty or the state were almost never exempted from the harshest punishments.[115] Nonetheless, Han monarchs did not make decisions about law and punishment in isolation, but in close consultation with their high officers. Nor were laws changed capri-

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[112] HANSHU 23.1096.

[113] *Id.* at 1101.

[114] *Id.* at 1097-1100.

[115] *See* BRIAN MCKNIGHT, THE QUALITY OF MERCY: AMNESTIES AND TRADITIONAL CHINESE JUSTICE 156-62 (1981).

ciously in the ideal legal system. According to the *Guanzi* priority should be assigned to maintaining stability in the law: "The laws are more important than the people . . . so do not twist the laws and statutes out of affection for the people."[116] From reading the histories, it seems that what Henry Maine called the "legal fiction" was at work in the early empires in China: new laws were constructed according to the myth that they simply reinforced old values.[117] Han Chengdi (r. 33-7 B.C.), ordering his legal officials to clarify the ambiguities in the regulations governing the death penalty, declared: "We must strive to conform with the laws of antiquity."[118]

Removing ambiguity from the codes was one means to curb bureaucratic corruption and to institutionalize official accountability, an important condition for the realization of the Rule of Law. Certainly the precise procedural models for official reporting that are included in the Shuihudi materials demonstrate that the Qin state was concerned with accountability and that it at least attempted to control its magistrates through constant scrutiny. It is known from a manual recovered from the Shuihudi site that the state expected its local officials to carry out their duties efficiently, with a clear understanding of the laws and in a spirit of public duty.[119] Moreover, the magistrates were held accountable for their treatment of criminals by virtue of elaborate guidelines and constant supervision, procedures which might have, however inadvertently, offered some protection for the common people. Particular attention was paid to maintaining elaborate procedures to curb official corruption and dishonesty,[120] and from the Qin legal materials we can see how carefully the state outlined procedures for criminal investigation. Hulsewe recounts some of the measures taken to establish an appropriate punishment:

> Starting with the juridical material, one is struck by the care bestowed on the investigation of criminal suits. It started with detective work, on which detailed reports were required. A report on the corpse of a man found murdered in the highway describes the exact location of the body, the fatal wounds, the man's clothes, and even his shoes found at some distance from the body. . . . Once caught the suspect was interrogated. The investigating offi-

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[116] GUANZI 15.6a-b.

[117] HENRY MAINE, ANCIENT LAW 20-28 (1888).

[118] *See* HANSHU 23.1103 and HULSEWE REMNANTS OF HAN LAW, *supra* note 33, at 340.

[119] YATES AND MCLEOD, *supra* note 33.

[120] HULSEWE REMNANTS OF HAN LAW, *supra* note 33, at 7-50.

> cials are urged, not to lose their patience when the suspect continued to prevaricate and when it was evident that he was lying; they should not be too quick in applying torture in the form of beating, in order to obtain a confession, only doing so in cases where the statutes permitted this. A confession wrung from a suspect by means of torture was considered inferior.[121]

Clearly this system had draconian aspects, since guilt was assumed and the use of torture condoned. But, as Hulsewe has shown in his study of Qin and Han law, appeal was possible in some cases.[122] According to Ban Gu's history of punishments, the Han dynasty's practice of submitting doubtful cases to a higher authority began with the founding emperor and was refined by later rulers. In Jingdi's reign (r. 157-141 B.C.), an edict was issued that stated that whenever there was a doubtful case, even if it had been decided according to the letter of the law, it must be referred up — to the Commandant of Justice and the Emperor himself if doubt remained at any level. Moreover, to protect lower-level officials, it was stated that even if an ordinance existed to cover the crime and even if the higher authority disagreed with the original verdict, the local official would not be liable for punishment for a wrong judgment.[123] It seems then that legal officials empowered to investigate and try cases were not given latitude for arbitrary decisions, because they were held accountable for any mistake in establishing a correct punishment for crimes that came under their jurisdiction.

Guidelines for officials dealing with legal cases were extensive and specific, but a separate judicial system — an element in modern legal systems characterized by the Rule of Law — cannot be identified in the early empires, because legal duties were deemed but one aspect of the officials' charge at most levels of the state organization. Yet, the highest law officer in the realm, the Commandant of Justice, operated as the head of the bureaucratic process of determining punishments. The tingwei's duty was to "bring equity in criminal suits and to memorialize sentences that were suitable."[124] He also pronounced

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[121] HULSEWE REMNANTS OF CH'IN LAW, *supra* note 33, at 6-7.

[122] *See* HANSHU 23.1106; HULSEWE REMNANTS OF HAN LAW, *supra* note 33, at 343.

[123] HANSHU 23.1106.

[124] *See* A.F.P. Hulsewe, *The Functions of the Commandant of Justice During the Han Period, in* CHINESE IDEAS ABOUT NATURE AND SOCIETY: STUDIES IN HONOUR OF DERK BODDE 249-62 (Charles Le Blanc & Susan Blader eds., 1987). It is interesting to note that a premeditated crime was given a harsher punishment than one committed without prior intent. A section of the Qin laws from Shuihudi, which Hulsewe has translated as "Answers to

judgment on difficult cases submitted from the commandaries and kingdoms. He collected precedents, supervised legal reform, acted as the highest appellate judge, and supervised criminal cases that involved highly placed members of the bureaucracy. From Hulsewe's useful survey of cases involving the Commandant of Justice, it seems that his duties focused primarily on guarding the dynasty against rebellion, corruption and slander. It was also his particularly difficult duty to guard the state against the crimes of the imperial kin and he was quite often involved in sentencing and punishing members of the imperial clan whose ambitions threatened the state.[125] The most difficult issues regarding the imperial family itself then, were subject to legal procedures. As Benjamin Wallacker has described, the dangerous task of dethroning an unsuitable emperor followed a strict procedure and precedents worked out in Han times took on the force of law for later dynasties.[126]

Moreover, the principles held by the highest legal bureaucrat could on rare occasion overrule even the emperor's will in legal matters. In one case, a particularly idealistic and tough-minded Commandant of Justice, Zhang Shizhi, disagreed with Emperor Wen about how to handle a case in which a commoner had inadvertently endangered the ruler. To back his proposal for a lighter sentence than the irate ruler demanded, Zhang Shizhi argued: "The Commandant of Justice is the one who keeps the empire balanced. To allow even one deviation in the laws would cause them no longer to be taken seriously. And then how would the people know how to behave?" More importantly, he placed the ruler and the people within the same legal and normative universe: "The law is what the Son of Heaven shares with the people. If it were made heavier in this case, the people would no longer trust it."[127] To be sure, the Emperor reminded his righteous official that he could have had the unfortunate man executed on the spot. It seems, however, that once certain cases entered the domain of the legal officials, decisions about punishments were negotiated between the

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Questions Concerning Qin Statutes" includes the following query: "In a fight one uses a needle . . . or an awl; if the needle . . . or the awl wound people, how is each (of these cases) to be sentenced? (When this was done during an un-premeditated) fight, this warrants a fine of two suits of armour; when (with) murderous intent), it warrants tattooing and being made a ch'eng-tan [laborer for the state]." HULSEWE REMNANTS OF CH'IN LAW, *supra* note 33, at 142. I have slightly altered punctuation and have added a translation for *cheng tan*.

[125] HULSEWE, *supra* note 124.

[126] *See* Benjamin Wallacker, *Dethronement and Due Process in China*, 21 J. ASIAN HIST. 48 (1987).

[127] HANSHU 50:2310.

throne and the bureaucracy.[128] Han Wendi was an insecure and malleable ruler and Zhang Shizhi an unusually upright official — he had censured the heir apparent for impropriety, for example. Yet this incident suggests that at least in theory, legal decisions were placed on a separate plane from imperial command. It is true that early China produced no courts and no administrative organs capable of punishing a lawless ruler. But prescribed notions of kingship were so clear that what Weber has called "psychic coercion," fear of criticism and ostracism by the community, did at times seem to exercise restraint over some individual rulers. Even the strong-willed Han Wudi (r. 147-87 B.C.), for example, explained that he was deferring to the laws of his ancestors when faced with the unpleasant task of sentencing to death a nephew. Wudi, like other Han emperors, may well have manipulated this conception of the old laws as a means to control his troublesome kin. But he seems to have judged it more strategically sound to appeal to a higher authority than his own will.[129]

Despite the clear arguments for natural law in the philosophical texts, the old laws, filial duty, or perhaps strategic concerns seemed to curb imperial ambitions far more effectively than natural law, which seems to have served as an intellectual construct rather than a powerful deterrent against the abuse of power. Indeed, instances in which the *dao* was called upon to legitimate a legal decision are rarely found in the histories. Instead, as the Confucian literati began to dominate court affairs, the oldest books served more and more frequently as repositories of wisdom for finding consensus about how to handle difficult legal decisions.[130] The old books that Han dynasty Confucian erudites claimed to be authoritative guides to decision-making in their own day became more widely used during the second century of the Han dynasty, and as Confucian values began to dominate the legal system, ascriptive rather than bureaucratic values became encoded in the laws.[131] Therefore, law remained closely tied to normative values throughout the imperial period in China. But it is important that assessments of legal theory in early China recognize that at a significant moment in Chinese history, ideals of predictability, impartiality, consistency, and bureaucratic as well as imperial

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[128] For a study that demonstrates that government in the Han rested on a fluid balance of power between the ruler and the bureaucracy, see HANS BIELENSTEIN, THE BUREAUCRACY OF HAN TIMES (1980).

[129] HANSHU 65.2852.

[130] Benjamin Wallacker, *The Spring and Autumn Annals as a Source of Law in Han China*, 2 J. CHIN. STUD. 59 (1985).

[131] *See* DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA (1967).

accountability were articulated, and at times put into practice. Moreover, these ideals were linked with a universalistic model of state and society.

V. THE RULE OF LAW AND JUSTICE

As I hope to have demonstrated, even a rudimentary comparison of deliberations about the nature and function of law in the Western and Chinese traditions brings to light the complex legal theory that the classical Chinese world produced. Chinese thinkers discussed the utility of law in government, the difference between laws and commands, the need for universal and clear standards for guiding the ruler, the importance of a principled, predictable application of punishments, and the necessity of proceeding with caution when changing the laws. They put forth a model of government that relied on standards designed to remove the arbitrary, personal element from ruling and that transcended particularistic interests and customs. But this was only one model, and it coexisted with the Confucian ideal that moral men who based their decisions on human feelings, a broad understanding of the welfare of the community, and the complexity of human behavior, could arrive at the best possible decisions.[132]

In this final section, I will assess the benefits and the limitations of using the Rule of Law as a heuristic device for interpreting law in early China. On the positive side, I think that a familiarity with some of the vast literature generated in the West on the problem of mitigating the Rule of Law with the discretionary judgment of moral men allows students of Chinese law to engage in questions of universal concern. Thus, modern observers of the contemporary Chinese Communist legal system, dismayed with good reason over its disregard of law, can see that the unalloyed Rule of Law may not be the only solution for China's contemporary ills. Certainly, as I pointed out earlier, the Rule of Law has not consistently been viewed as an ultimate human good in the West. The value of general and fixed laws to achieve justice in the face of the complexity of human situations has been seriously questioned since Plato's argument in favor of the wise man as the most effective guardian of the common welfare. The limits of formal law were noted even by Aristotle, who brought up the problem of the "matters of detail about which men can deliberate but

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[132] For a very useful and new interpretation of Confucian concepts of justice, see R.P. Peerenboom, *Confucian Justice: Achieving a Humane Society*, 30 INT'L. PHIL. Q. (1990).

which cannot be included in legislation."[133] Modern thinkers continue to grapple with the problem of finding ways to overcome the limitations of general laws to cover unique circumstances. Even those writers who criticize legal formalism acknowledge the need for legal and administrative frameworks to confine the decisions of officials who must make judgments after the facts and the laws are known. For example, Kenneth Davis points out that discretion is exercised at all levels of the official system and is not limited to substantive choices but "extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary practices."[134] Thus Western legal theory has alternated between periods when excessive attention to certainty and rigid rules seemed to provoke counter-demands for creativity and flexibility in law.[135] Furthermore, it is obvious that no government has ever managed to devise a legal system that could afford to tolerate creative decisions unfettered by rules or that could mechanistically implement laws without human intervention.

It is interesting for the specialist in Chinese law to learn that some Western legal theorists who have doubted the capacity of formal law to ensure justice have found elements of the Chinese past attractive. Judge Jerome Frank, one of the most controversial of the Legal Realists, for example, eloquently argued for discretionary justice in terms that echo the Confucian view of the moral magistrate:

> The rules are a sort of legal machinery. But legal machinery will not suffice. The men who operate that machinery must be keenly alive to their immense responsibilities to the citizens. We could not, if we would, get rid of emotions in the administration of justice. The best we can hope for is that the emotions of the trial judge will be sensitive, nicely balanced, subject to his own scrutiny. The honest, well-trained trial judge, with the completest possible knowledge of the character of his powers and of his own prejudices and weakness, is the best guaranty of justice. The wise course is to acknowledge the existence of "personal element" and act accordingly.[136]

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[133] POLITICS 3.16.

[134] KENNETH DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969).

[135] *See* Spader, *supra* note 12, at 107.

[136] JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 411-12 (1949).

Not surprisingly, Judge Frank admired the Chinese legal system, which like that of ancient Greece, attempted to reach equitable justice through negotiation and arbitration and avoided litigation as a "virtually immoral" process. Frank's positive evaluation of the Chinese system was based on an incomplete perception of the complexity of Chinese legal history; but it can serve to caution observers of Chinese trends that while the Rule of Law may seem to be an unqualified good by those who deplore China's modern authoritarian governments, China's ancient system can offer a positive model to Westerners disillusioned with the rigid Rule of Law. Furthermore, as the history of modern criticism of the Rule of Law demonstrates, judgments about its value are not made in a political vacuum, but respond to perceived problems in the judicial system and to more general intellectual and political forces.[137] When viewing Chinese political culture, either in the past or in the present, contemporary observers might do well to recognize that the Western tradition itself is complex. Just as Western theorists cannot trace a clear line from Aristotle to the present, so too should scholars of Chinese law not expect the Chinese tradition to have produced a fully developed legal order.

Nor is it productive to blame a single group of early Legalists for all of the problems in the legal system--past and present. If one attempts instead to understand the problems confronted by responsible thinkers and reformers who worked in a premodern society in which institutions were fragile and personal leadership inevitably dominant, one can better understand the range of their choices. Discussions of the evolution of the Rule of Law in the West make it possible to view the Chinese Legalists not as immoral Machiavellian creatures who served the ruler's whims but as self-interested bureaucrats, whose livelihood depended on institutional stability and the maintenance of a bureaucratic organization. As Max Weber suggested for the early modern West, legal uniformity served rulers who desired unity and bureaucrats who valued widespread employment opportunities: "While thus the bourgeois classes seek after 'certainty' in the administration of justice, officialdom is generally interested in 'clarity' and 'orderliness' of the law."[138] Moreover, if one looks at pragmatic motives, the Confucian theorists seem not so much simple-minded opponents of law but supporters of the value of the models of the past, a stance that by the time of the end of the Han dynasty allowed them to secure

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[137] *See* Spader, *supra* note 12, at 107.

[138] MAX WEBER, 2 ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 847-48 (Guenther Roth & Claus Wittich trans. & eds., 1978).

dominance as interpreters of the law by keeping an exclusive hold on textual exegeses. In an article on current debates about relativism and objectivism, Prasenjit Duara notes that the tendency to equate power with knowledge is universal: "All forms of knowledge are born in historical society and become implicated with the dynamics of power in this society." He goes on to declare that the extreme relativist position often sees societies as cohesive entities and the dominant orthodox voice as representative of the whole.[139] It would seem, then, that an analytical framework generated from outside the pervasive Confucian view enables the modern reader to view different attitudes about law that emerged in China's early period of centralization as but one expression of a complicated power struggle between ruling elites in a period of change and expansion. The model of Rule of Law offers students of Chinese history a framework to move beyond judgments based on moral indignation when evaluating legal reform early China.

On the negative side, while a valuable paradigm for analyzing legal philosophy and institutions in early China, the Rule of Law is less effective for uncovering how ideals of justice and law intersected. Any attempt to apply a universal standard of justice to the Chinese case is complicated by problems of translation, debates in the Western tradition about the relationship between law and justice, and by different ideals of justice in elite and popular views. If Western theorists cannot agree on what is just in their own legal culture, how much more difficult it is to understand what was considered a just legal solution in early China. Social cohesion was certainly one goal of government in China and it is generally agreed that economic livelihood has always taken precedence over individual freedoms. But from the official point of view in the early imperial period, justice had a more specific, culture-bound connotation.

In the Huang-Lao and Legalist writings, and from the Shuihudi codes, it seems that the substantive goal of the legal system was that it should serve as a standard for assigning an appropriate punishment for crime. For example, the term that seems to offer the most appropriate translation of justice in Chinese, *zheng*, is often associated with discussions of law and carries a range of meanings from "to correct," "straighten," "make right" and "punish." *Zheng* differs from

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[139] Prasenjit Duara, *Knowledge and Power in the Discourse of Modernity: The Campaigns Against Popular Religion in Early Twentieth-Century China*, 50 J. ASIAN STUD. 68, 73 (1991).

yi, the norms governing behavior between humans,[140] and it is sometimes associated with *zhi*, the term for straight—as opposed to crooked. A passage in the Qin laws offers a clue about what the state considered a "just solution." In "Answers to Questions Concerning Qin Statutes," Hulsewe translates the following passage:

> In pronouncing judgment in criminal cases, [what is meant by] "not straight"? When a crime warrants a heavy (punishment) and purposely to lighten it, or when a crime warrants a light (punishment) and purposely to make it heavy, that is the meaning of "not straight."[141]

The assignment of a correct, even if harsh, punishment, constituted the state's version of what was right, a view that emerged in part as a response to cosmological assumptions about the relation between appropriate punishment and natural and social harmony. Such careful calculations about punishment can lead one to speculate that predictability and standardization removed a certain amount of arbitrary official interference in the lives of Qin and Han subjects.

A careful reading of the legal materials demonstrates, however, that the state was concerned not with guarding individual rights or with enhancing the quality of its subjects' lives by allowing them to know the rules, but with preserving human and material resources for its own use. For example, fines or labor in the service of the state were the most common punishments meted out to commoners, who are described in the Qin code in terms of physical attributes or talents that might be useful for the state. Furthermore, the Shuihudi materials demonstrate that the Qin state paid a great deal of attention to any action on the part of officials or commoners that would deplete its resources. Hulsewe indicates from his study of the materials that officials were harshly punished for neglecting government stores and for failing to deliver local men for military and labor service.[142] This concern with controlling human life might be similar to the idea of the "bio-power" of the state that emerged in the early modern West. According to Michel Foucault: "The sovereign exercised his right of life only by exercising his right to kill, or by refraining from

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[140] BERNARD KARLGREN, ANALYTIC DICTIONARY OF CHINESE AND JAPANESE 340, 384 (1974). ROBERT ENO, THE CONFUCIAN CREATION OF HEAVEN: PHILOSOPHY AND THE DEFENSE OF RITUAL MASTERY 112-14, 216 (1990) discusses the nature of *yi* in the Confucian tradition.

[141] HULSEWE REMNANTS OF CH'IN LAW, *supra* note 33, at 144.

[142] *Id.*

killing . . . the right which was formulated as the 'power of life and death' was in reality the right to take life."[143] Foucault traces this juridical form of sovereignty to an historical society in which state power defined itself as the ability to seize human labor, produce, time, and life itself. We see from the Mawangdui texts that the state is given the right to kill its subjects and the duty to grant more lenient sentences if they so deserved. And these activities were to be carried out at the proper time, and with the appropriate degree of severity.[144] But from the Qin code, it seems that humans were spared death, not necessarily because of any concern for human rights or dignity, but quite possibly because they were viewed as valuable resources. Therefore, Foucault's writing on the state's utilitarian view of human beings warns us that we must view the early imperial Chinese state's attempts to preserve its subjects from official abuse not as an expression of concern for procedural justice to protect individual rights but as a means to preserve human and material resources for its own purposes. The stability that procedures designed to ensure predictability and consistency brought to early Chinese subjects was but an incidental effect of other more pragmatic considerations.

Furthermore, while the model of the Rule of Law as it is derived from the Western experience allows the sinologist to see the Chinese case from a viewpoint quite different from that presented by the dominant Chinese Confucian elites, it does not offer a means to analyze the perceptions and interests of subaltern groups in Chinese society. The interests of minority groups do not come to life, not only because the sources are limited, but because the Rule of Law focuses on official, state law. Only by moving beyond paradigms that adopt the elite standpoint can it become possible to see how women, slaves, and artisans might have fared better at times under customary law than bureaucratic law, for example. Certainly, it is suggestive that so many of the metaphors for describing law as a standard measure, such as a marking line or a balance-beam, reflect the language of the artisan and the merchant, groups with relatively low standing in the orthodox Confucian hierarchy, but as in the case of merchants, with significant real power at various times throughout the imperial period.

Finally, the concept of the Rule of Law fails to take account of how fundamental assumptions about knowledge and human nature can affect legal institutions. As this article points out, there are some remarkable

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[143] MICHEL FOUCAULT, THE FOUCAULT READER 158-60 (P. Rabinow ed., 1984).

[144] This theme is most clearly discussed in the *Zhunzheng* section of the *Jingfa*.

similarities between Stoic notions of natural law and those put forth in some of the late classical eclectic texts in China. The historical context in which conceptions of law based on nature evolved in China and in the West are functionally alike, for in both early societies the construction of a unified imperial state created a need for a single source of law that transcended particular customs and laws. But late classical thinkers in China worked with notions about human nature and epistemological assumptions and ideas about the relationship between the human and natural worlds that were different from those held by their counterparts in the West. Third and second century Chinese theorists were not attempting as were the Stoic thinkers to transcend a tradition that held that only certain humans could be reached by moral prescriptions. From its beginnings, Chinese political theory based its arguments for ideal government on the assumption that all humans operated within a common normative universe. The Confucian ideal of the efficacy of moral leadership and education was founded on the belief that all humans could potentially respond to common values. And the Legalists based their advocacy of strict impartial laws on the grounds that all humans would ultimately yield to the lure of rewards and the fear of punishments. But if the notion of a moral and social community described by the Chinese political theorists was fundamentally inclusive, their theory of knowledge was exclusive. The universal, timeless idea of nature embodied in the *dao* — which formed a basis for all laws and institutions in some of the eclectic texts was not a principle, like logos, that could be shared by all humans by virtue of reason; only the sage could attain the clarity of vision that would enable him intuitively to understand and grasp its meaning.[145] Nor were Chinese thinkers concerned with the rights of individuals to weigh their obligation to obey the laws as in the

[145] For a description of the qualities of the sage, see Harold Roth, *The Early Taoist Concept of Shen: A Ghost in the Machine?, in* SAGEHOOD AND SYSTEMATIZING THOUGHT IN WARRING STATES AND HAN CHINA (K. Smith ed., 1990); SCHWARTZ, *supra* note 59, at 248. Professor Schwartz aptly describes the sage ruler bound to the *dao* as possessing a quality of "mystic gnosis." This quality has instrumental aspects in other societies. Schwartz quotes Lovejoy: "[The] otherwordly philosopher is made the ruler or secret ruler of the world. The mystic or the saint becomes the most powerful and sometimes the shrewdest of politicians. There is perhaps nothing so favorable to success in the world's business as a high degree of emotional detachment from it."

West[146] or with the problem of understanding the limits of human will in a determinate moral universe.[147]

The Chinese political theorists I have used for this study couched their arguments to reach rulers who bore a fiduciary responsibility to maintain harmony between the human and natural worlds. The law of nature in China was conceived not as a principle available to all humans to judge the justice of the state's laws and commands by virtue of reason, but as a guide for those special humans who possessed the power to establish laws and institutions on behalf of the universal community of humankind. Perhaps we can trace the preference for trial by jury in the West to the belief that all humans could reasonably judge their fellows and the fiduciary ideal in China to the assumption that justice could best be found by a few morally superior individuals. Thus, in both traditions, natural law served as a measure to transcend territorial laws during periods of unification; but the ultimate purpose and level of participation included in the definition of natural law was different. For the Stoics, as for early medieval European thinkers, natural law served as one yardstick that "reasonable" men could call upon to gauge the legitimacy of the state's laws and punishments. In time in the West, some thinkers would link natural law with the natural rights of humans vis-a-vis the state. But early Chinese thinkers did not separate the natural world from the social and political realms; for them all actions in one sphere resonated in the other. Natural law in ancient China existed not as a principle available to all humans to measure the justness of the state's commands and laws but as a guide that would allow the enlightened ruler to determine how to use force correctly, that is, in a manner that would cancel out the evil and disruptive effects of deviance on behalf of all society. Most importantly, a comparison of Western notions of the Rule of Law with early Chinese ideals demonstrates that these thinkers rarely seemed willing — or able — to conceive of law as valid simply because it was created, implemented, and changed according to formal rules. The rules were important, but they were less important than the ultimate ends that the system itself should serve. And paradoxically, precisely because procedural justice was deemed less important than substantive justice, more latitude existed for manipulation. Notions of what was natural, good, or traditionally

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[145] FINNIS, *supra* note 17, at 272-73.

[147] WEINREB, *supra* note 53, at 4-6. For a survey of the intellectual and moral issues generated by the notion of natural law in the Western tradition, see D'ENTREVES, *supra* note 47.

correct could all be altered to suit the interests of different dominant groups in Chinese society.

It is this ultimate focus on the decisions of rulers and officials to guide and to define the goals of the legal system that distinguishes the classical Chinese idea of the function of law from that produced in classical Greek and Rome. And from what the late classical Chinese theoretical texts, legal procedural manuals and histories demonstrate, the elites who formulated and implemented the law were servants of the state, charged above all with protecting its interests. The law was a component of an authoritarian state, and when it operated in such a way that the good of the state coincided with the good of the larger community, one might argue that law served "justice." But the idea that all humans possessed the means and the right to decide what is just and lawful did not take root in early China.