

Mythology and the Origin of Law in Early Chinese Thought

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Introduction

Did the Chinese attribute a secular or a religious origin to law? One influential view has strongly asserted the secular origin.¹ Recently, some scholars have mounted a strong challenge, arguing that this view has overlooked or distorted a vital fragment of evidence that, in their opinion, shows conclusively that law had a religious origin.² Before the texts adduced by the proponents of the two views, together with other evidence, are examined, certain preliminary issues need to be raised.

This paper is not concerned with an examination of the general issue of the relationship between law and religion in early China. It examines only the controversial question of the ascription of law to a divine creator or a religious source. Other issues, such as the significance of the inscription of early codes on bronze vessels, the occurrence of technical legal terms arguably borrowed from religious contexts, the use of oaths in the legal process or of covenants for the making of agreements, or the general system of belief, including religious, within which the Chinese legal system itself operated are here left aside.³ It is enough to say that the

¹ See Leang Ki-tch'ao, *La Conception de la loi et les théories des légistes à la veille des Ts'in*, tr. J. Escarra and R. Germain (Peking: China Booksellers, 1926), pp. 2-4 (also Liang Ch'i-ch'ao, *History of Chinese Thought during the Early Tsin Period*, tr. L.T. Chen (Taipei: Ch'eng Wen, 1968), Appendix VI, "The Origin of Legal Concepts," pp. 161-2); J. Escarra, *Le droit chinois* (Peking/Paris: Henri Veitch/Sirey, 1936), p. 87; D. Bodde and C. Morris, *Law in Imperial China* (Philadelphia: University of Pennsylvania, 1967), pp. 11-5, 559-60; F.W. Mote, *Intellectual Foundations of China* (New York: Knopf, 1971), p. 26; K. Bünger, "Entstehung und Wandel des Rechts in China", in *Entstehung und Wandel rechtlicher Traditionen*, ed. W. Fikentscher, H. Franke, and O. Köhler (Freiburg/München: Alber, 1980), pp. 462-3; P. Chen, *Law and Justice. The Legal System in China 2400 B.C.-1960 A.D.* (New York/London: Dunellen, 1973), pp. 14-7; A.F.P. Hulswé, "Ch'in and Han Law," in *The Cambridge History of China, Volume I. The Ch'in and Han Dynasties*, eds. D. Twitchett and M. Loewe (Cambridge: University of Cambridge, 1986), pp. 525-6; Yongping Liu, *Origins of Chinese Law. Penal and Administrative Law in its Early Development* (Hong Kong: Oxford University Press, 1998), p. 13. See also the remarks of G. MacCormack, "Religion and Law in Traditional China," in *Law, Morality, and Religion. Global Perspectives*, ed. A. Watson (Berkeley: Robbins Collection, University of California, 1996), pp. 100-2.

² See M.E. Lewis, *Sanctioned Violence in Early China* (Albany, New York: State University of New York, 1990), pp. 195-8; M.R. Dutton, *Policing and Punishment in China. From Patriarchy to the People* (Cambridge: Cambridge University, 1992), pp. 111-4; L.A. Skosey, "The Legal System and Legal Tradition of the Western Zhou (ca 1045-771 B.C.E.)" (University of Chicago Dissertation, 1996), pp. 191-9. The evidence said to be overlooked is contained in the "Lü xing 呂刑," chapter of the *Shangshu* 尚書 discussed in detail below.

³ For discussion of these issues see D. Harper, "A Chinese Demonography of the Third Century B.C.," *Harvard Journal of Asiatic Studies* 45.2 (1985), pp. 471-4, 478-9; S. Weld, "Covenant in Jin's Walled Cities: The Discoveries at Houma and Wenxian" (Harvard University Dissertation, 1990), pp. 435-40; L. von Falkenhausen, "Ritual Music in Bronze Age China: An Archaeological Perspective" (Harvard University Dissertation, 1988), pp. 662, 676, 683-92, and "Issues in Western Zhou Studies; A Review Article," *Early China* 18 (1993), pp. 146-7; R.D.S. Yates, "State Control of Bureaucrats under the Qin: Techniques and Practices," *Early China* 20 (1995), pp. 332-42, 364-5; Skosey, "The Legal System," pp. 201-17; Lewis, *Sanctioned Violence*, pp. 67-70; Liu, *Origins*, chapter 5; M.E. Lewis, *Writing and Authority in Early China* (Albany, New York: State University of New York, 1999), pp. 18-35

arguments deployed to prove some indissoluble connection between law and religion do not prove either that gods or spirits were believed to have 'created' law or that divine approval was necessary for its validity or authority. They show merely that knowledge of laws or legal transactions might be communicated to the gods or spirits, that the help of these entities might be sought to provide sanctions for the breach of agreements or the utterance of lies in law suits, or that religious belief played an important part in the way ordinary people as well as nobles or officials conducted their daily lives.

At its most general level, the issue for consideration can be put in the form: did the early Chinese attribute a secular or religious origin to law? The dichotomy 'secular/religious' requires some clarification. The term 'secular' is reasonably straightforward since it may refer either to the creation of law by specific human figures or to its emergence as a part of social evolution. The term 'religious' is more opaque. One may understand it in the first place as referring to the world of gods or spirits and hence as pointing to the creation of law by a particular god or spirit or indeed by the gods or spirits collectively. But 'religious' may refer more broadly to a mythology that includes a cosmology that seeks to explain the origin of the universe and natural or social phenomena without recourse to the idea of a 'god.' In the Chinese context this sense of 'religious' is peculiarly appropriate in view of the Daoist focus upon the *Dao* 道 as that from which all things emerged.⁴ From this perspective, law may be deemed to have a 'religious origin' if it appears in myths detailing the creation of the universe.

The term 'origin' also conceals some obscurities. A statement that the Chinese attributed law to a human or a divine origin suggests that the focus of interest had been upon the identification of the being, whether human or divine, who had introduced law and punishments to mankind. While we cannot discount altogether that this was a genuine object of inquiry by early Chinese thinkers, the evidence actually suggests that their interest was more complex. Sometimes the context suggests that the author of a passage on the 'origin' of law was concerned primarily with the question of the proper use of laws and punishments. Sometimes the main point being made was the advantage or disadvantage of law to society. Was the introduction of law and punishments one of the blessings brought by civilization to a savage and anarchic society, or, conversely, was a primitive simplicity and harmony corrupted through their appearance? Where a text instances law as one of the benefits bestowed upon mankind by a particular being, there is a further implication that the association of law with that being bestowed upon it a particular authority, even sanctity. From the perspective of these different objectives the precise identity of the creator of law is of less significance than its creation in a

(and cf. also his "Ritual Origins of the Warring States," *Bulletin de l'École Française d'Extrême-Orient* 84 (1997), pp. 75-89.

⁴ See in particular N.J. Girardot, "The Problem of Creation Mythology in the Study of Chinese Religion," *History of Religions* 15 (1975-6), pp. 289-318, "Myth and Meaning in the Tao Te Ching: Chapters 25 and 42," *History of Religions* 16 (1976-7), pp. 296-9, 321-5, and "Behaving Cosmogonically in Early Taoism," in *Cosmogony and Ethical Order: New Studies in Comparative Ethics*, ed. R.W. Lovin and F.E. Reynolds (Chicago: University of Chicago Press, 1985), pp. 67-75; L. Kohn, *God of the Dao. Lord Lao in History and Myth* (Ann Arbor: Center for Chinese Studies, University of Michigan, 1998), pp. 191-4 (though still distinguishing the early Daoist cosmogony from the later religious Daoist concept of divine creation).

period of remote antiquity. Even where law is attributed to the *Dao*, the emphasis is not so much upon the specific act of its creation as upon the fact that it forms part of the composition of the universe in the same way as natural phenomena like the sea and moon

Further, we have to bear in mind a critical distinction between two quite separate questions, namely, (i) did the author of a passage which ascribes the introduction of law to a particular being or to the *Dao* regard that being as human or attribute a 'religious' (mythological) sense to the *Dao*, and (ii) was that particular being at any time or by any author in the history of Chinese thought regarded as a god or was the *Dao* likewise at any time or by any author regarded as the centerpiece of a myth of creation? A failure always to distinguish these questions leads to confusion or distortion in the interpretation of individual texts.

Finally, we should note that the Chinese sources use a number of different terms to convey the idea of laws and punishments. Sometimes the emphasis is placed upon the notion of rules that contribute to the good ordering of society, such as those that regulate the behavior of relatives to each other, or define the relationship of superior and inferior, or regulate weights and measures. Where this is the case we find terms like *fa* 法, *dian* 典, *zhi* 制, and *du* 度. Such terms (or a combination of them) may include a reference to punishments, but the penal aspect of law is not the principal idea to be conveyed. Where the emphasis is placed upon punishments or penal rules, the term most frequently used is *xing* 刑. A writer's precise frame of reference, whether he is thinking of rules for the proper conduct of family and social relationships, or primarily of the rules imposing punishments for offenses, may depend upon his objective. Passages concerned with the proper use of law or its benefit to society will tend to emphasize the former group of rules, whereas those concerned to demonstrate the corrupting influence of law may draw attention primarily to the latter.

The texts to be examined, supplying accounts of the origin of social and legal institutions, are contained in writings composed during the Warring States Period 戰國(481–221 B.C.) or Han 漢(206 B.C.–A.D. 221) periods. The date of composition is significant. As Michael Puett has shown, texts in the Warring States were often written to express support for or opposition to the centralization of power and the use of penal laws in the states of that period.⁵ The view taken in such texts as to the 'origin' of law is determined by the author's underlying purpose. Texts will be considered from two aspects: the kind of statement that is made about the origin of law, and the identity of the being or entity to whom the origin of law is ascribed. Once this double analysis has been completed, we shall return to the question of the religious or secular origin.

Statements about the Origin of Law

(a) *Benefit to Society*

⁵ M. Puett, "Sages, Ministers, and Rebels: Narratives from Early China concerning the Initial Creation of the State," *Harvard Journal of Asiatic Studies* 58.2 (1998), pp. 425-79.

A number of texts stress the benefit to society achieved through the introduction of law. Paragraph twenty three of the earliest Legalist classic, the *Book of Lord Shang*, (*shangjunshu* 商君書)⁶ discusses the origin of government in antiquity at a time when there was no distinction between superiors and inferiors, no distinction between prince and subject, and the people were in a state of disorder. Accordingly, the sages (*shengren* 聖人) established *inter alia* laws and regulations, weights and measures, in order to prohibit wrongdoing.⁷ The context suggests that Lord Shang was here ascribing the origin of laws, in the sense of rules for right conduct backed by punishments, to the wisest among humans, the early sage rulers. A somewhat similar view is expressed in a Legalist sounding passage contained in chapter nine entitled “The Art of Ruling” (*zhushu* 主術) of the *Huainanzi* (淮南子), a collection of Daoist, Legalist, and Confucian writings on the cosmos, society, and government completed in the middle of the second century B.C.⁸ This states: “Law (*fa*) comes from rightness (*yi* 義), rightness from the various kinds of right measure, and right measure is consistent with the human heart and mind. This is the crucial factor in proper order (*zhi* 治).⁹

Xunzi(荀子, ca.310-ca.211 B.C.), probably the greatest of the early Confucian thinkers, wrote in the last quarter of the third century B.C.¹⁰ an essay on the evil nature of man. In this essay he argued that man's intrinsically evil nature prompted him to desires that, if unrestrained, led to confusion and anarchy. The strong would prey upon the weak. There would be no observance of correct moral principle or the hierarchical structure of society required by moral principle.¹¹ Accordingly, the sage kings of antiquity, who had managed through self cultivation

⁶ This work is composed of sections of varying dates. Paragraph twenty-three is probably to be dated to the third century B.C., J.J.L. Duyvendak, *The Book of Lord Shang* (London: Arthur Probsthain, 1963), pp. 147-8. Cf. also a passage from paragraph eight (Duyvendak, p. 238) discussed by K. Turner Gottschang, “Chinese Despotism Reconsidered: Monarchy and its Critics in the Ch'in and Early Han Empires” (University of Michigan Dissertation, 1983), pp. 166-7, and K. Turner, “Sage Kings and the Laws in the Chinese and Greek Traditions,” in *Heritage of China Contemporary Perspectives on Chinese Civilization*, ed. P.S. Ropp (Berkeley/Los Angeles/Oxford: University of California, 1990), p. 97.

⁷ For the text, see *Shangjunshu jiegu dingben* 商君書解詁定本, with annotations by Ju Shiye 朱師轍 (Taipei, 1975), p. 84; Duyvendak, *Lord Shang*, p. 314. Compare also Bodde and Morris, *Law in Imperial China*, p. 14; Liu, *Origin*, pp. 178-9.

⁸ See C. Le Blanc, “*Huai nan tzu*,” in *Early Chinese Texts: A Bibliographical Guide*, ed. M. Loewe (Berkeley: Institute of East Asian Studies University of California, 1993), p. 189-90.

⁹ *Huainanzi* 淮南子, ed. Zhuang Kuiji 莊達吉 (Taipei: Jonghua shuzhu), 9. 14a; R.T. Ames, *The Art of Rulership. A Study in Ancient Chinese Political Thought* (Honolulu: University of Hawaii, 1983), p. 191.

¹⁰ On the date, see J. Knoblock, *Xunzi. A Translation and Study of the Complete Works, Volume I* (Stanford: Stanford University Press, 1988), p. 11.

¹¹ Cf. in general, G. MacCormack, “Hsün Tzu on Law and Society,” *Indian Socio-Legal Journal* XVIII (1992), pp. 73-84.

to transcend the evilness of their own natures, introduced for the government of humanity the correct principles of ritual and morality (*li yi* 禮義) and, further, laws and regulations. The expression employed by Xunzi to denote 'laws and regulations' is *zhi fa du*. This expression almost certainly comprises, although it is not co-extensive with, the penal law by which punishments were imposed to ensure that people behaved in the morally correct way.¹²

A view similar to that expressed by Xunzi is to be found in one of the essays contained in the *Guanzi* 管子, a collection of writings on economic, social, and political issues, put together in the first half of the first century B.C.¹³ An essay included in this collection, entitled "Prince and Minister," (*junchen* 君臣) probably originally written during the middle of the third century B.C.,¹⁴ postulates a time in the past when the fundamental social distinctions did not exist. Through the offices of the 'wise' (*sheng* 聖) or the 'worthy' (*xian* 賢) humanity was benefited by the introduction of 'correct standards of virtue,' rewards and punishments in response to distinctions between right and wrong, and the status of superior and inferior.¹⁵ These references to the 'wise' and the 'worthy,' although they do not qualify 'kings,' point to the same kind of person as the 'sage kings,' responsible for ensuring that humans no longer lived like the beasts.

Some of the essays in the *Mozi* 墨子 invoke the sages as the originators of human crafts and institutions. This work is a collection of writings recording the thought of the Mohists, a school that developed in opposition to the Confucians on the basis of the teachings of the philosopher Mozi at the end of the fifth century B.C. The actual date of composition of the book's various components is not known with certainty, but on the whole they appear to have been written in the third or fourth century B.C.¹⁶ The sixth essay, "Indulgence in Excess," (*ziguo* 辭過) attributes to the sage kings the introduction of the arts of building houses, of producing cloth and silk, of cooking, and of boat building.¹⁷ An essay entitled "Exaltation of the Virtuous" (*shang xian* 尚賢) gives a version of the "Punishments of Lü (*Lü xing*," one of the documents contained in the *Book of Documents* (*shangshu*),¹⁸ according to which the 'august emperor'

¹² Cf. Knoblock, *Xunzi, Volume I*, pp. 102-3, 298n68; Knoblock, *Xunzi, Volume II* (Stanford: Stanford University Press, 1990), pp. 4-6, 9-11.

¹³ See W.A. Rickett, "Kuan tzu," in Loewe, *Chinese Texts*, p. 244.

¹⁴ W.A. Rickett, *Guanzi, Volume I* (Princeton, New Jersey: Princeton University, 1985), p. 412.

¹⁵ Rickett, *Guanzi, Volume I* pp. 412-3.

¹⁶ Cf. A. Forke, *Geschichte der alten chinesischen Philosophie*, 2nd ed. (Hamburg: Cram, de Gruyter, 1964), pp. 372-5; A.C. Graham, "Mo tzu", in Loewe, *Chinese Texts*, pp. 337-8.

¹⁷ Yi-pao Mei, *The Ethical and Political Works of Motse* (Taipei: Ch'eng Wen, 1974), pp. 22-7.

¹⁸ For a discussion of the *Shangshu* version of the "Lü xing" passage see below.

(*huangdi* 皇帝)¹⁹ ordered Bo Yi 伯夷, known as a minister of Shun 舜, to "hand down the statutes (*dian*) and restrain the people with punishments."²⁰ Reference is also made to the "Lü xing" in a further essay, "Identification with the Superior," (*shangtong* 尚同) in which the sage kings are said to have made the 'five punishments' to bring order to the world, punishments afterwards wrongly applied by the Miao 苗.²¹ An essay entitled "Economy of Expenditure" (*jieryong* 節用) states that the sage kings laid down the regulations for the law (*fa*) governing matters such as economy in the use of resources, consumption of food and drink, and the conduct of funerals.²² Generally, therefore, Mohist teaching appears to have emphasized the role of the sage kings as the persons who created for mankind both its essential crafts and its fundamental moral and legal institutions.

A passage attributed to the fourth century B.C. philosopher, Shen Buhai 申不害, perhaps belongs in this context. In order to illustrate the government of the sage rulers it cites the laws (*fa*) established by the Yellow Emperor (*huangdi* 黃帝) and states that he never changed them, so as to make the people content and happy.²³

(b) *Disadvantage to Society*

Other texts stress, by contrast, the fact that the introduction of law and punishments disturbed or corrupted the simplicity and harmony of the earliest society viewed as a Golden Age. So far from putting an end to disorder, they were responsible for its appearance in society. The collection of Daoist writings entitled *Zhuangzi* 莊子²⁴ contains an essay, probably written towards the end of the third century B.C., which represents a point of view that has been

¹⁹ The Chinese commentators identify the *huangdi* with Yao. See, for example, *Mozi jijie* 墨子集解, edited by Jang Chunyi 張純戈 (Taipei, 1982), p. 85.

²⁰ This is the translation of B. Watson, *Mo Tzu. Basic Writings* (New York/London: Columbia University, 1963), p. 32. Mei, *Works of Motse*, p. 46, translates; "Po Yi delivered the laws and statutes and taught therewith the people."

²¹ *Mozi jijie*, p. 114; Mei, *Works of Motse*, p. 64. See also M. Puett, "Sages, Ministers, and Rebels," pp. 442-3.

²² Mei, *Works of Motse*, pp. 120-2.

²³ See H.G. Creel, *Shen Pu-hai, A Chinese Political Philosopher of the Fourth Century B.C.* (Chicago/London: University of Chicago, 1974), pp. 356-7. At p. 357n7, Creel argues for the interpretation of *fa* as 'methods' rather than 'law'; also L.S. Chang and Y. Feng, *The Four Political Treatises of the Yellow Emperor* (Honolulu: University of Hawaii, 1998), p. 39. There is a similar passage in the *Renfa* 任法 chapter of the *Guanzi* which states that Huangdi ruled by establishing laws that he did not change. It adds that *ren* 仁 (benevolence), *yi* (justice or righteousness), *li* (ritual, the rites), and music all came from it. W.A. Rickett, *Guanzi, Volume II* (Princeton, New Jersey: Princeton University, 1998), p. 145.

²⁴ On this work, see Harold Roth, "Chuang tzu", in Loewe, *Chinese Texts*, p. 56.

denominated 'Primitivist' or 'Utopian'.²⁵ In this essay the time of Shen Nong 神農 is portrayed as a Golden Age in which men lived peacefully as equals without the need for government, laws, or punishments. This age began to be disturbed when the Yellow Emperor (huangdi) "used benevolence and righteousness (*renyi* 義) to meddle with the minds of men," a disturbance intensified when Yao 堯 and Shun established 'laws and standards' (*guei* 規 *fa* 法 *tu*).²⁶

Chapter nine of the *Huainanzi*, from which we have already quoted a passage reminiscent of the views of Lord Shang, also records a different tradition on the history of law in the Golden Age. At this time, when Shen Nong reigned as emperor, there were still laws and punishments. However, the people were influenced by the 'charisma' of the ruler to behave so well that the laws (*fa*) were few and liberal, and there was no need to apply the punishments (*xing*).²⁷ Between the time of Shen Nong and Shun the punishments had become cruel. It is said that when Gao Yao 皋陶 became minister of justice (traditionally in the time of Shun) the world became free of cruel punishments.²⁸ This line of thought accepts that law and punishments had been instituted even in the time of Shen Nong, but had subsequently become excessive and cruel until revised by Gao Yao.²⁹ The underlying idea is that law had become a regrettable necessity for the control of human behavior.

A passage in Sima Qian's 司馬遷 (ca. 145-86 B.C.), *The Grand Scribe's Record* (*Shiji* 史記), probably completed sometime in the first century B.C.,³⁰ reports a conversation between Duke Mu of Qin 秦穆公 (659-621 B.C.) and an envoy of the barbarian Rong 戎 people. The duke wished to hear how the Rong, lacking the Chinese institutions of the classics, music, the rites, and law, still managed to govern themselves. The envoy replied that disorder really

²⁵ Roth, "Chuang tzu," p. 56; A.C. Graham, *Studies in Chinese Philosophy and Philosophical Literature* (Singapore: Institute of East Asian Philosophies, 1986), pp. 90, 95, 301-7.

²⁶ *Zhuangzi jijie* 莊子集解, ed. Wang Xianqian 王先謙 (Hong Kong: Poling chubanshe), *Neiyu*, p. 64; B. Watson, *The Complete Works of Chuang Tzu* (New York: Columbia University Press, 1968), pp. 116-7; A.C. Graham, *Chuang-Tzu. The Inner Chapters. A Classic of Tao* (London: Mandala, 1986), p. 212; Knoblock, *Xunzi. Volume II*, pp. 14-5; J. Needham, *Science and Civilization in China, Volume II. History of Scientific Thought* (Cambridge: University of Cambridge, 1956), p. 108.

²⁷ Zhuang, *Huainanzi*, p. 9.1b-2a; Ames, *Art of Rulership*, pp. 169-70.

²⁸ Zhuang, *Huainanzi*, 9.3b; Ames, *Art of Rulership*, p. 171. During the Han a solid tradition attributed the creation of law or law codes to Kao Yao. See Hulsewé, *Remnants of Han Law, Volume I* (Leiden: Brill, 1955), p. 27, and the texts there cited.

²⁹ We probably have here an allusion to the other accounts, such as that recorded in the "Lü xing" (below), according to which the Miao people applied the five punishments as 'tortures' until they were exterminated on the orders of the 'august emperor,' a personage often identified with Shun.

³⁰ Hulsewé, "Shih chi," in Loewe, *Chinese Texts*, pp. 405-6.

commenced with the creation by the Yellow Emperor of the rites, music, and laws and measures. It was better to live in a state of simplicity without these institutions.³¹

Chapter eighteen of the *Book of Lord Shang*,³² attributes the origin of the basic social and moral institutions, as well as of the punishments (described here as 'the executioner's axe'), to the Yellow Emperor. The innovations of the Yellow Emperor are contrasted with the preceding period under the emperor Shen Nong when people lived simply and harmoniously without the need for laws.³³

(c) *Proper Use of Laws and Punishments*

There are several passages in which the point of the reference to 'origins' is to bring out the proper way in which laws and punishments should be employed. The "Legal Treatise" (xingfazhi 刑法志) contained in the official *History of the Former Han Dynasty (Han shu 漢書)*, completed by Ban Gu 班固 (A.D.32–92) at the end of the first century A.D.,³⁴ contains some remarks on the origin of law. The treatise postulates a background of men coming together in groups under the guidance of sage rulers. These rulers established the institutions necessary for government, including the rules prescribing the way men were to behave towards each other (*li*) and the punishments (*xing*). However, the sage rulers understood the wishes of Heaven and Earth and so "in making ritual rules (*li*), in establishing laws (*fa*), and in instituting punishments, always conforming to the wishes of the people, they took Heaven and Earth as their model and example. . . . (They made) punishments and penalties (*fa* 罰) and (they had) awe-inspiring lawsuits (*wei song* 威訟) by means of which they emulated the killing and destruction of Heaven's thunder and lightning. . . . Therefore the sages according to Heaven's advancing instituted the Five (types of) Rules of Ceremonious Behavior (*li*), and according to Heaven's punishing they made the Five Punishments."³⁵

³¹ *Shiji* (Peking: Jonghua, 1959), p. 122; *The Grand Scribe's Record, Volume I. The Basic Annals of Pre-Ch'in China* by Ssu-ma Ch'ien, ed. W.H. Nienhauser, Jr (Bloomington/Indianapolis: Indiana University, 1994), p. 100; E. Chavannes, *Les Mémoires historiques de 'Se-ma Ts'ien, Volume II* (Paris: Leroux, 1897), p. 41; Graham, *Studies in Chinese Philosophy*, p. 74.

³² *Shiji* (Peking: Jonghua, 1959), p. 122; *The Grand Scribe's Record, Volume I. The Basic Annals of Pre-Ch'in China* by Ssu-ma Ch'ien, ed. W.H. Nienhauser Jr. (Bloomington/Indianapolis: Indiana University, 1994), p. 100; Chavannes, *Mémoires historiques, Volume II*, p.41; Graham, *Studies in Chinese Philosophy*, p. 74.

³³ *Shangjunshu jiegou*, p. 64; Duyvendak, *Lord Shang*, pp. 284-5. See also Graham, *Studies in Chinese Philosophy*, p. 72; R.P. Peerenboom, *Law and Morality in Ancient China. The Silk Manuscripts of Huang-Lao* (Albany, New York: State University of New York, 1993), p. 86; Puett "Sages, Ministers, and Rebels," pp. 452-3.

³⁴ See Hulsewê, "Han shu," in Loewe, *Chinese Texts*, pp. 129-30.

³⁵ *Hanshu* (Peking: Jonghua, 1962), p. 1079; Hulsewé, *Han Law*, pp. 321-2. Cf. Bodde and Morris, *Law in Imperial China*, p. 15. There is a strong echo of part of this passage in the *Zuo zhuan* 左傳 (on which see A. Cheng, "Ch'un ch'iu, Kung yang, Ku liang, and Tso chuan," in Loewe, *Chinese Texts*, pp. 67-71) which Hulsewé, p. 352nl0, identifies as the source of the section in the *Hanshu* referring to punishments, penalties, and lawsuits as emulating Heaven's thunder and lightning. See J. Legge, *The Chinese Classics, Volume V* (Taipei, n.d.), p. 708.

The particular interest of this passage lies in the emphasis placed upon the fact that the sages were following the wishes of, or modeling themselves upon Heaven.³⁶ What is the significance of this appeal to Heaven? It does not seem as though Ban Gu's meaning is that Heaven, whether conceived impersonally or as a personal god, revealed to the sage rulers the details of the rules and institutions that they were to introduce for the regulation of humans. Rather, the meaning is that the sages discerned Heaven's general preferences for the way in which men should live, and worked out the specific rules and institutions themselves.³⁷ Alternatively, the reference to understanding the 'wishes of Heaven' may simply be a more graphic way of stating what is elsewhere expressed in terms of taking Heaven as model. In this context the idea is that human phenomena should reflect or mirror the phenomena of the heavens. Just as Heaven has thunder and lightning, so humans should have punishments and awe-inspiring lawsuits.

A way of thinking which prevailed at the end of the Warring States Period, expressed in texts such as the *Guanzi*³⁸ and especially the newly discovered silk manuscripts providing a repository of what is often termed Huang Lao 黃老 thought,³⁹ located the origin of law (*fa*) in the *Dao* ('Way'). The language expressing the relationship between *fa* and *Dao* varies. Sometimes the emphasis is on the fact that *Dao* is the source of *fa*, sometimes it is on the fact that *fa* must be modeled on *Dao*. Thus, in the *Guanzi* one passage says; "legal statutes (*xian* 憲), laws (*lü* 律), regulations (*zhi*), and measures (*du*) must be patterned (*fa* 法) on the moral way (*Dao*)."⁴⁰ Another passage in the same work says: "Laws are derived from political power (*quan* 權) and political power is derived from the way (*dao*)."⁴¹ The *Canon (or Classic) of law (Jingfa 經法)*, one of the newly discovered silk essays, opens with the statement: "The *Dao* produces law.... He who grasps the *Dao* therefore produces law."⁴²

³⁶ Earth is mentioned as well, but not so prominently.

³⁷ See the remarks of Bodde and Morris, *Law in Imperial China*, p. 15n29.

³⁸ Rickett, "*Kuan tzu*," in Loewe, *Chinese Texts*, p. 244.

³⁹ On the silk manuscripts, see Peerenboom *Law and Morality*, chapter 1; R.D.S. Yates, *Five Lost Classics: Tao, Huang-Lao, and Yin-Yang in Han China* (New York: Ballantine, 1997), Introduction; and Chang and Feng *Four Political Treatises*. To be noted, however, are the observations of Puett, "Sages, Ministers, and Rulers," p. 458n87, protesting against the tendency to treat the silk manuscripts as expressing a single ideology described as Huang Lao.

⁴⁰ *Guanzi jiaozheng* 管子校正, ed. Dai Wang 戴望 (Taipei: Shijie shuzhu, 1981), *Fa fa*, p. 90; Rickett, *Guanzi, Volume I*, p. 250, suggests that the text from which this passage is taken was probably written in the latter part of the third century B.C. His translation at p. 256 has been slightly modified.

⁴¹ *Guanzi jiaozheng*, "*Xinshu shang* 心術上," p. 221; Rickett, *Guanzi, Volume I*, p. 47. The passage is taken from a work that Rickett attributes to the latter part of the second century B.C. (p. 70).

⁴² Yates, *Five Lost Classics*. Cf. Chang and Feng, *Four Political Treatises*, p. 100; Puett, "Sages, Ministers, and Rebels," p. 456.

The silk manuscripts also establish a connection between law (*fa*), principles (*li* 理), heaven (*tian* 天), and the Way (*Dao*). In the essay entitled the “Four Measures” (*sidu* 四度), it is said: “He who grasps the *Dao* and follows principles must begin from the basis, compliantly act according to the constant standards, prohibit and punish those who deserve being held guilty of crimes and must be centered on the principles of Heaven (*tianli*

天).”⁴³ Particularly emphasized with respect to the relationship of law and Heaven is the necessity for the law to follow the regular processes of the universe, such as the cycle of the four seasons. The essay entitled “Assessing Destruction” (*wanglun* 亡論) argues that Heaven will destroy a ruler who upsets the order of the seasons, as by disturbing the agricultural season of summer with the start of building projects.⁴⁴ The essay on “Assessing Essentials” (*lunyue* 論約) says: “That the four seasons have regularities is the principle of Heaven and Earth.... That three seasons are for coming to completion and achievement and one season {winter} is for punishment and killing is the *Dao* of Heaven and Earth.”⁴⁵

What is meant by the crucial terms *Dao*, *fa*, *li*, and *tian*, and how is the connection between them to be understood? Given the obscurity of the language in which the texts are expressed, precise answers or even ones that will command general acceptance cannot be expected. *Dao* is defined in different ways by scholars who have made a special study of the manuscripts. Tu Wei-ming says of *Dao*: “This ultimate reality or non reality is undifferentiated, indeterminate, and ineffable. Yet it is generative, autonomous, unchangeable, and complete. As the inexhaustible source of the cosmos, *Dao* can neither be delimited by material things nor delineated by words. It is the One, above and matchless. It is also the wholeness from which all divergent beings come into existence.”⁴⁶ Jan Yun-hua defines *Dao* as “the universal, absolute, and unnameable nature.”⁴⁷ Karen Turner takes *Dao* as “an abstract, universal, and timeless principle of nature.”⁴⁸ She further says: “The *Dao*...can be viewed as a metaphor for universal kingship. It was unified, passive, universal, timeless, and could work as a fundamental standard

⁴³ Yates, *Five Lost Classics*, p. 75. Cf. Chang and Feng, *Four Political Treatises*, p. 123.

⁴⁴ Yates, *Five Lost Classics*, pp. 89-90. Cf. Chang and Feng, *Four Political Treatises*, p. 136. See also the essay on “Assessments” (*Lun*) that also emphasizes the importance of government in conformity with the four seasons (Yates, *Five Lost Classics*, p. 81; Chang and Feng, *Four Political Treatises*, p. 127).

⁴⁵ Yates, *Five Lost Classics*, p. 95. See Chang and Feng, *Four Political Treatises*, pp. 138-9.

⁴⁶ Tu, Wei-ming, “The Thought of the *Huang-Lao*; A Reflection on the *Lao Tzu* and *Huang Ti* Texts in the Silk Manuscripts of Ma-wang-tui,” *Journal of Asian Studies* 39.1 (1979), p. 103.

⁴⁷ Jan, Yun-hua, “*Tao*, Principle, and Law: The Three Key Concepts in the Yellow Emperor Taoism,” *Journal of Chinese Philosophy* 7 (1980), p. 219.

⁴⁸ Turner, “Sage Kings and the Laws,” p. 91.

for making decisions without itself being transformed.”⁴⁹ R.P. Peerenboom defines *Dao* as “the mysterious metaphysical source or ground of all things, both human and non-human,” and as “the natural order itself.”⁵⁰ Livia Kohn notes that the doctrine of Huang Lao, as developed in the *Huainanzi* and the silk manuscripts, had “its own particular version of the *Dao*, seeing it as the most elementary force of creation at the root of all existence, ordering both the human world and the world at large. The *Dao*, the power of cosmic harmony, then pervades all to the effect that there is no significant qualitative difference between the different levels of cosmos, nature, state, and the human body.”⁵¹

From these descriptions of the *Dao* we may single out two points of significance. The first is that *Dao* is a term that in some way expresses the order of nature itself. It is the principle that underlies or runs through the whole of the cosmos including both natural phenomena and living beings. At the same time, it is not just a way of describing nature but is rather a 'force' or 'power' that gives rise to and sustains the phenomena of the universe. The second point is that one of the qualities possessed by *Dao* is its passivity. It denotes the passive and not the active power of nature. This means that it presents a model or pattern to be followed by humans in their conduct and is not a principle (or force) that actively interferes in human affairs.

Heaven (*tian*) is used in these essays not as a deity, but rather as an aspect (conceived impersonally) of nature. It may occur more or less as a synonym for *Dao*, expressing the entirety of the natural order. It may appear along with Earth as the 'model' or 'pattern' for humans to follow. In the essays it is hard to differentiate Heaven from *Dao*. Heaven's way is the *Dao* itself. But in one respect there is a difference. We have noted the passive aspect of *Dao*. *Tian*, on the other hand, is presented in the texts as a more active agency. It is the force that is invoked as the scourge of the ruler who transgresses the way. In other words, if the *Dao* is not followed, Heaven will send down punishment for the ruler.⁵²

Principles in the silk manuscripts are the basic patterns, uniformities, or regularities of nature, as, for example, the cycle of the four seasons each characterized by different manifestations of natural phenomena. Sometimes one finds the phrase Heaven's principles in which Heaven again stands for nature or the cosmos. Peerenboom states: "In the silk manuscripts (*boshu* 帛書), principles are underlying patterns inherent in nature; they are the principles that structure the natural order.”⁵³

⁴⁹ K. Turner, “War, Punishment, and the Law of Nature in Early Chinese Concepts of the State,” *Harvard Journal of Asiatic Studies* 53.2 (1993), p. 319.

⁵⁰ Peerenboom, *Law and Morality*, p. 51.

⁵¹ Kohn, *God of the Dao*, p. 41.

⁵² Cf. especially Peerenboom, *Law and Morality*, p. 54; Turner, “War, Punishment,” p. 320 (a somewhat different view is expressed in Turner Gottschang, “Chinese Despotism Reconsidered,” p. 320, where *tian* is presented as a principle higher than *Dao*).

⁵³ Peerenboom, *Law and Morality*, pp. 46-7. See also Tu Wei-ming, “The Thought of the Huang Lao,” p. 104; Jan Yun-hua, “*Tao*, Principle and Law,” p. 219.

The term *fa* may be rendered by the English expressions 'pattern,' 'model,' or 'law.' It also conveys a sense of regularity and uniformity, the presence of natural standards that are to be followed by men. It is sometimes difficult to distinguish from 'principle' (*li*).⁵⁴ However, it is probable that *fa* rather than *li* is used to express the standards governing social institutions, such as the relationship between superior and inferior, father and son, or husband and wife. *Fa* also embraces specifically the penal laws that in turn must follow and implement the models given by nature.⁵⁵ The fundamental point expressed in the texts is that law is part of the immutable pattern of the universe; rulers responsible for its implementation must ensure that it remains true to its nature. Law must follow the way of Heaven, the *Dao*.

The “*Lü xing*” is the document that has been described by Bodde and Morris as preserving the earliest extant account of the origin of law.⁵⁶ It purports to contain the instructions given by King Mu 周穆王 of Zhou to his minister, the Prince of Lü 呂侯, for the drafting of a code of rules governing the application of the punishments. A recent computation puts King Mu's reign in the years 956-918 B.C.⁵⁷ The “*Lü xing*,” however, was written at a much later time.⁵⁸ In its opening sentences, those with which we are concerned, it sets out some general propositions on the history of the punishments. The following summary is based upon the translation by B. Karlgren.⁵⁹

Paragraph two states that, according to ancient traditions, Chi You 蚩尤 was the first person to rebel and create disorder. The result was that the ordinary people became robbers, traitors, and murderers. The next paragraph (three) then abruptly switches to the iniquities of a barbarian people, the Miao 苗. They governed not by means of moral example, but by means of

⁵⁴ Cf. Tu Wei-ming, “The Thought of the *Huang-Lao*,” who discusses *fa* and *li* together as a compound *fa-li*, translating the former term as 'model' and the latter as 'pattern.'

⁵⁵ Cf. Jan Yun-hua, “*Tao, Principle and Law*,” p. 216; Peerenboom, *Law and Morality*, pp. 48-9; K. Turner, “The Theory of Law in the *Ching fa*”, *Early China* 14 (1989), p. 62.

⁵⁶ Bodde and Morris, *Law in Imperial China*, p. 13.

⁵⁷ “Appendix II: Chronological Tables”, in Loewe, *Chinese Texts*, p. 509.

⁵⁸ Scholars suggest various dates but tend to place it in the Spring and Autumn 春秋 (771-481 B.C.) or Warring States (481-221 B.C.) periods. See especially H.G. Creel, *The Origins of Statecraft in China Volume I. The Western Chou Empire* (Chicago/London: University of Chicago, 1970), pp. 161, 463; E.L. Shaughnessy, *Before Confucius. Studies in the Creation of the Chinese Classics* (Albany, New York: State University of New York, 1997), p. 90; Shaughnessy, “*Shang shu*,” in Loewe, *Chinese Texts*, p. 380; Skosey, “The Legal System,” p. 198.

⁵⁹ Karlgren, “The Book of Documents,” *Bulletin of the Museum of Far Eastern Antiquities Stockholm* 22 (1950), pp. 74-6 (cited from off print). L. Vandermeersch, *Wangdao ou la voie royale. Recherches sur L'esprit des institutions de la Chine antique. Tome II. Structures politiques. Les rites* (Paris: École Française d'extrême orient, 1980), p. 445, has a completely different interpretation of the text. He supposes that Huangdi (the Yellow Emperor) created the punishments in order to reduce to submission the lawless Miao.

punishments (*xing*). They made the five oppressive punishments and called them the law (*fa*). In applying the various mutilating punishments they went to excess, harming the innocent as well as the guilty. Consequently (paragraph four) the people appealed to the High God (*shangdi* 上帝) who found that virtue had gone from them. We now have another apparently abrupt transition in paragraph five, introducing the figure of the 'august sovereign' (*huangdi* 皇帝). He is said to have pitied the innocent, and to have exterminated the Miao. Paragraph six relates that the charge was given to Chong 重 and Li 黎 (that is, by the *huangdi*) to break the communication between heaven and earth. The sovereign ruler (*junhou* 群后)⁶⁰ made clear to the people the nature of the previously adopted irregular practices. Paragraph seven continues this theme. The august sovereign (*huangdi*) made inquiries of the people and listened to their indictments of the Miao. He commanded (paragraph eight) his ministers to help the people. Bo Yi sent down the regulations. For the control of the people there were also the punishments.⁶¹

We will return later to the question of the identification of the *dramatis personae* that feature in this account of the 'origin' of law. For the moment we turn to the question, how should the "Lü xing" be interpreted as a document on the origin of law and punishment? Is the purpose of the author of the "Lü xing" really to describe the origin of law and punishments, or rather to make a different kind of statement about them? This question assumes a particular importance when we recall that the "Lü xing" is the critical piece of evidence cited in the controversy between those who favor a religious and those who favor a secular origin for law. A related problem concerns the sense in which we are to understand the terms *fa* (law) and *dian* (statutes), and the relationship these terms bear to punishments. It is a mistake to interpret the opening paragraphs of the "Lü xing" as solely concerned with the origin of law. The author was not interested in describing the process that gave birth to the social institutions of law and punishments. Rather, he was concerned to make a point (concerning the proper use of punishments) relevant to the time in the Eastern Zhou (771-221 B.C.) at which he was writing. He made his point by appealing to past practice and reinforced it by citing as the model for good government one of the sage rulers of antiquity. We see this already in the condemnation of the Miao. The point is not really that the Miao were the first to create punishments, but that they put them to an improper and excessive use. They possessed only the punishments and not law (*fa*) itself. *Fa* has to be understood here as a term covering the rules necessary for the good ordering of social relationships and the proper administration of the state.⁶² These rules might be backed by punishments, but the latter were not the primary means for the control of the people. The *huangdi* exterminated the Miao and established a new order characterized by the introduction of

⁶⁰ On this phrase, see Karlgren, "Glosses on the Book of Documents," *Bulletin of the Museum of Far Eastern Antiquities Stockholm* 21 (1949), p. 179, gl. 2035, where he identifies *chünhou* with the 'king' (the *huangdi*) of the previous paragraph.

⁶¹ For this interpretation see Karlgren, "Book of Documents," p. 180, gl. 2038.

⁶² The context shows that among these rules will be included those for the proper administration of justice, those by which the guilty were distinguished from the innocent.

proper rules for human behavior (*dian*) in which the role of the punishments was simply to ensure compliance with these rules.

While we can construe the story told in the "Lü xing" loosely as an account of the origin of law and punishments, the emphasis is more on the proper role of the law and the proper use of punishments than upon their source. The text is not so much making the point that the punishments originated with the Miao as that they did not know how to use them and so lacked the rules for right behavior. One can, at the risk of some distortion, read the text chronologically and say that the punishments were first invented by the Miao who did not use them properly. Subsequently, the *huangdi* rectified the position by destroying the Miao, introducing rules for right behavior, and limiting the punishments to the enforcement of those rules. But to see this as the primary purpose of the text is arguably to mistake its message.⁶³

Beings or Entities to Whom the Origin of Law is Ascribed

The passages that have been summarized in the previous section postulate a number of different sources for law and punishments. Several cite the sages or the sage kings as the persons responsible for the introduction into human society of laws and punishments. These are paragraph twenty-three of the *Book of Lord Shang*, particular essays in the collections entitled *Xunzi*, *Mozi*, and *Guanzi*, and the "Legal Treatise" of the *Hanshu*.⁶⁴ It is not without significance that the passages that invoke the sages or the sage rulers are precisely those that point to the benefits conferred on mankind through the bestowal of law. The element of benefit is already implicit in the qualification of the early rulers as 'sage.' Who were the sage rulers? Xunzi regarded the line of sage kings to have ended with King Wu and the Duke of Zhou at the beginning of the Zhou dynasty (ca. 1100-221 B. C.).⁶⁵ The Zhou kings commonly denominated 'sage' are Tang 湯, the founder of the Shang dynasty (ca. 1500-ca. 1100 B.C.), as well as Yao, Shun, and Yu 禹 who were believed to have reigned even prior to the establishment of the Xia 夏 dynasty (ca. 2000-ca. 1500 B.C.). The even earlier figure of the Yellow Emperor was sometimes included in the general denomination of 'sage kings.'⁶⁶ Collectively the sage rulers were conceived by early Chinese writers as having conferred upon mankind the various blessings of civilized life though, as we have seen, the Yellow Emperor and his successors were also by some theorists regarded as corruptors of an ideal simplicity.

Sometimes, instead of a general reference to the sages or the sage rulers, we find invoked as the being responsible for the introduction of law a particular ruler, such as Yao or Shun. Examples are supplied by the so-called 'primitivist' chapters of the *Zhuangzi*⁶⁷ and probably also

⁶³ See also Puett's discussion of the text in his "Sages, Ministers, and Rebels," pp. 436-40.

⁶⁴ See notes 6, 12, 15, and 35 above.

⁶⁵ J. Knoblock, *Xunzi, Volume III* (Stanford: Stanford University Press, 1994), pp. 151, 153-4, and see 148-9.

⁶⁶ See note 23 above.

⁶⁷ See note 26 above.

by the “Lü xing,” a text that requires a more extended discussion. The “Lü xing” mentions two principal figures in its account of the introduction of law: Shangdi and the *huangdi*. Shangdi is the supreme god of the Chinese universe. The term is known in particular as the designation of the high god of the Shang found in the oracle bone inscriptions. Identification of the *huangdi*, however, has presented a problem still not satisfactorily resolved. The old Chinese commentators of the *Shangshu* tended to favor Quanxu 顓瑒, Yao, or Shun, all featuring in the list of the Five Emperors who stand at the beginning of Chinese history.⁶⁸ Several of the western translations of the “Lü xing” have opted for Shun.⁶⁹ A different approach has been taken by some modern scholars investigating the mythology of ancient China. They tend to identify the *huangdi* with Shangdi, treating both expressions as referring to the supreme god⁷⁰, or go even further and explain the three expressions, Shangdi, the *huangdi*, and Huangdi (Yellow Emperor)⁷¹ as all referring to the same deity.⁷²

Several comments may be made on the views that, in the context of the “Lü xing,” assert an identity between Shangdi and the *huangdi* (august emperor) or between both and Huangdi

⁶⁸ Cf. *Shangshu zhushu ji buzheng* 尚書注疏及補正 (Taipei, 1985), containing *Shangshu zhengyi: Lüxing*, with commentaries by the Han scholar Kong Anguo 孔安國 (ca. 156-ca. 74 B.C.) and the Tang scholar Kong Yingda 孔穎達 (A.D. 574-648); *Shangshu jinguwen zhushu* 尚書令古文注疏 (Taipei, 1970), pp. 388, 389 (commentary of the Qing scholar Sun Xingyen 孫星衍 (A.D. 1753-1818); *Shangshu zhinguwen jijie* 尚書令古文集解 (Taipei, 1977), p. 564 (commentary of the Qing scholar Liu Fonglu 劉逢祿 A.D. 1776-1829); J. Legge, *The Chinese Classics Volume 3* (Taipei, n.d.), p. 593n; Skosey “The Legal System,” p. 195n33.

⁶⁹ W.G. Old, *The Shu King or the Chinese Historical Classic* (London/Benares: Theosophical Publishing Society, 1904), p. 290n2; Legge, *The Chinese Classics, Vol. 3*, pp. 592-3n; S. Couvreur, *Chou King* (Taipei: Ch'eng Wen, 1971), p. 378. Cf. also N.E. Fehl, “Notes on the Lu Hsing,” *Chung Chi Journal* 9.2 (1969), pp. 12, 20. Karlgren appears to identify the *huangdi* with one of the early rulers, probably Shun (“The Book of Documents,”) p. 179, gl. 2035; “Legends and Cults in Ancient China,” *Bulletin of the Museum of Far Eastern Antiquities Stockholm* 18 (1946), pp. 236, 251, 252, 256).

⁷⁰ Henri Maspero, “Légendes mythologiques dans le Chou King,” *Journal Asiatique* 204 (1924), pp. 96-7; D. Bodde, “Myths of Ancient China,” in *Essays on Chinese Civilization*, ed. Charles Le Blanc and Dorothy Borei (Princeton, New Jersey: Princeton University Press, 1981), p. 65; Anne Birrell, *Chinese Mythology: An Introduction* (Baltimore/London: The Johns Hopkins University Press, 1993), pp. 93, 95; Skosey “The Legal system,” p. 195n33; Puett, “Sages, Ministers, and Rebels,” p. 438 and n38. See also *Xinyi Shangshu duben* 訥譯尚書讀本 (Taipei, 1977), p. 177n14 (translation and notes by Wu You 吳璵).

⁷¹ There are two characters *huang* written differently, one denoting 'august', the other 'yellow.'

⁷² Fehl, “Notes on the Lü Hsing,” pp. 11, 14-5, 30; Le Blanc, “A Re-Examination of the Myth of Huang-ti,” *Journal of Chinese Religions* 13/14 (1985-6), p. 45n1; Lewis, *Sanctioned Violence*, pp. 197, 314 n16. Cf. also M. Czikszenmihalyi, “Emulating the Yellow Emperor: The Theory and Practice of Huanglao, 180-141 B.C.E.” (Stanford University Dissertation, 1994), pp. 73-4. D.W. Pankenier, “The Cosmo-political Background of Heaven's Mandate,” *Early China* 20 (1995), p. 154n60, without commenting on Shangdi, takes the *huangdi* to be the Yellow Emperor.

(Yellow Emperor). First, the temptation to identify Shangdi and the *huangdi* derives from the proximity in which these two expressions occur. Paragraph four states that the oppressed appealed to Shangdi who then surveyed the people and found there to be no evidence of virtue. Paragraph five then continues with the statement that the *huangdi* pitied the innocent and thereupon proceeded to the extermination of the Miao. Rather than concluding that the conjunction of Shangdi and the *huangdi* in these two paragraphs points to their identity, we might argue that it demonstrates the reverse. Why should Shangdi immediately be called by a different name? The natural course, if he were the subject of both paragraphs, would be to omit a further reference in paragraph five. The identification of Shangdi as the source of help in the previous paragraph would be understood as equally applicable to what immediately followed. Furthermore, as Jan Yun-hua has observed, the role of the two beings is different. Shangdi notes the problem, and the *huangdi* acts to remove it.⁷³ It may further be suggested that the high god would not himself have communicated directly with the people.

What of the proposed identification of the *huangdi* (august emperor) and Huangdi (Yellow Emperor)? There appear to be two principal reasons for this. One is that paragraph two introduces the 'first rebel,' Chi You, whose antagonist and Conqueror is known from other sources to have been the Yellow Emperor.⁷⁴ However, the paragraph says nothing of the Yellow Emperor. There is no strong reason for accepting that the prior mention of Qi You necessitates the identification of the *huangdi*, introduced several paragraphs later in a different context, with the Yellow Emperor.⁷⁵ The second reason rests on the alleged fact that the two *huang* characters, 'yellow' 黃 and 'august,' 皇 are interchangeable and might be used for each other.⁷⁶ This cannot be taken as conclusive since some scholars have strongly denied the philological basis of the argument.⁷⁷

If the *huangdi* is neither Shangdi nor the Yellow Emperor, can he be identified with any other of the early rulers enumerated in Chinese tradition? An important indication here is supplied by the use of the word *di*. Although this expression in pre-Qin texts often denominates a god⁷⁸, it does not necessarily do so. Anne Birrell has pointed out that in other documents

⁷³ Jan, Yun-hua, "Images: the Yellow Emperor in Chinese Literature," *Journal of Oriental Studies* 19.2 (1981), pp. 119-20. Skosey, "The Legal System," p. 196 and n35, makes the additional point that the verb used to describe the 'sending down' (*jiang* 降) of the statutes by Bo Yi carries the sense of 'descending from heaven,' here pointing to the *huangdi* as a god of heaven (*shangdi*). It is difficult to read so much into the use of one word. Cf. Karlgren, "Grammata Serica Recensa," *Bulletin of the Museum of Far Eastern Antiquities Stockholm* 29 (1957), p. 266, gl. 1015, giving the meaning of *jiang* as just 'to send down.'

⁷⁴ For an account of the legend see Birrell, *Chinese Mythology*, pp. 132-4.

⁷⁵ Cf. the observations of Jan Yun-hua, "Images," pp. 119-20, and Puett, "Sages Ministers, and Rebels," p. 438n38.

⁷⁶ Cf. Le Blanc, "Myth of Huang-ti," p. 45n1; Lewis, *Sanctioned Violence*, pp. 197, 314n16.

⁷⁷ Sarah Allan, *The Shape of the Turtle: Myth, Art, and Cosmos in Early China* (Albany, New York: State University of New York Press, 1991), p. 65; Anne Birrell, "Studies on Chinese Myth since 1970: An Appraisal, Part 2," *History of Religions* 34 (1994), pp. 75, 86.

⁷⁸ Cf. Skosey, "The Legal System," p. 195n33.

contained in the *Book of Documents*, the “Canon of Yao” and the “Canon of Shun,”⁷⁹ the early rulers Yao and Shun are referred to as *di*. She observes: “in the historicizing texts, the demythologized rulers, Yao and Shun, are given the title, *Di*, signifying an idealized earthly ruler.”⁸⁰ The use of *di* in the “Lü xing” may therefore point to such an “idealized earthly ruler” as Yao or Shun. The fact that *di* is prefixed with *huang* (august) simply emphasizes the elevated status of the ruler. Hence, it seems perfectly in order to take the *huangdi* as referring to one of the rulers of the ‘golden Age’ of Chinese antiquity, most likely Yao or Shun as the Chinese commentators have long suggested.

Several passages either explicitly ascribe the introduction of law and punishments to the Yellow Emperor (*huangdi*) or associate him strongly with their use. These are a passage from Sima Qian's *Shiji*,⁸¹ paragraph eighteen of the *Book of Lord Shang*,⁸² a fragment from Shen Buhai,⁸³ the “Reliance on Law” (*renfa*) chapter of the *Guanzi*,⁸⁴ and the silk manuscripts in general.⁸⁵ The particular interest of these texts, in the present context, lies in the fact that the Yellow Emperor is often regarded as the most significant of the Chinese culture heroes.

The introduction of law is not always ascribed to the direct initiative of a particular being. Sometimes, as in the tradition given prominence in the silk manuscripts, law is ascribed to the impersonal entity known as the Way understood loosely as nature or heaven.⁸⁶ Another approach, found in chapter nine of the *Huainanzi*, simply treats law as having arisen spontaneously from social conditions, in particular from the hearts of men responding to a conception of what was right. It is said specifically that law dropped neither from heaven nor earth, but arose from human society itself.⁸⁷ A related line of thinking can be detected in the passage from the “Legal Treatise” of the *Hanshu* that speaks of the sage rulers as “conforming to the feelings of the people.”⁸⁸ It may be misleading to dissociate the approach based on social conditions and people's feelings altogether from that based on the Way. Quite possibly the social

⁷⁹ Both these documents were probably written at much the same time as the “Lü xing.”

⁸⁰ Anne Birrell, “The Four Flood Myth Traditions of Classical China,” *T'oung Pao* 83 (1997), p. 239n75.

⁸¹ See note 31 above.

⁸² See note 33 above.

⁸³ See note 23 above.

⁸⁴ See note 23 above, and following.

⁸⁵ See in particular “Establishing the Mandate” (*Li ming* 立命) and “Observations” (*Guan* 觀), Yates, *Five Lost Classics*, pp. 104-9; Puett, “Sages, Minister, and Rebels,” pp. 458-60.

⁸⁶ See note 39 above, and following.

⁸⁷ See note 9 above.

⁸⁸ See note 35 above.

conditions and human feelings which gave rise to law were themselves conceived as determined by, or acting in accordance with, the *Dao*.

In sum, we may identify two different kinds of source to which law is ascribed. One is a being described generally as a 'sage ruler,' or identified more particularly as one of the rulers from the earliest stage of China's recorded history. The other is the impersonal concept of nature described as Heaven or the Way.

Origin of law: Religious or Secular?

We may now return to the question with which this paper commenced. We have seen that there are several distinct traditions that speak of the introduction into human society of law and punishments. In general, the point of a tradition is not to express a neutral observation on, or description of, the process by which law and punishments first came into being. Rather, the traditions tend to reflect various views of the contribution made by law and punishments to the human condition and of the way in which they should properly be used. Nevertheless, these accounts can be construed as postulating a certain origin for law, whether this may be a sage ruler, the *Dao*, or society itself perhaps understood as an aspect of the *Dao*. We may, therefore, ask, do these ascriptions of law to determinate sources point on the whole to a belief in a divine being or entity as origin? This question can be reformulated in the form: were the sage kings, in particular the Yellow Emperor, Yao, or Shun, regarded as deities or cultural heroes with divine characteristics, or rather as pre-eminently wise human beings? Was the *Dao* regarded as an entity with qualities that marked it out as belonging to the realm of the divine?

We may take first the issue presented by the evaluation of the *Dao* as the source of law. Modern scholars have differed as to whether we have here evidence of a religious or secular origin for law. Mark Edward Lewis states: "While the Chinese did not speak of law revealed by an omnipotent deity, they believed it was created by superhuman culture heroes under the inspiration of Heaven in accord with divine patterns. As the Huang Lao text *{Jingfa}* stated in its opening line: 'The Way gave birth to the law.' Law is not supernatural, but it was divine."⁸⁹ On the other hand, Jan Yun-hua, referring to the same text, stresses the social origin of law and cites approvingly Derk Bodde's conclusion that written law in China was never credited with a divine origin.⁹⁰ Further, Michael Puett in his discussion of the *Jingfa* states: "The emergence of laws is thus explicitly presented as a perfectly natural act, a part, indeed, of the generative process of nature."⁹¹

In order to place into perspective the question of divine or secular origin, one point has to be emphasized. *Dao*, whether described merely as the 'Way' or more specifically as 'Heaven,' is to be understood as an impersonal force that suffuses and gives meaning to nature. There is no

⁸⁹ Lewis, *Sanctioned violence*, p. 198.

⁹⁰ Jan Yun-hua, "Tao, Principle, and Law," pp. 215-6.

⁹¹ Puett, "Sages, Ministers, and Rulers," p. 456.

reference to a deity or divine being as the inspirer, creator, or founder of nature. Nature denotes each and every part of the cosmos. Man has no choice but to follow nature's 'principles,' flowing from the *Dao*, if he is to avoid destruction.⁹² Consequently, the statement that law is born from the Way does not point to a divine origin of law, where this phrase carries the implication of a god or personal deity as the creator of all things. But we have to ask whether the phrase 'divine origin' be given an impersonal, rather than a personal, reference? We have already noted the view that the *Dao* may be interpreted as part of a myth of creation. Such a myth provides an explanation for the origin of the universe that transcends the purely human; nor does it purport to be merely a description of events occurring in nature. We recall the idea of the *Dao* as a mysterious and unfathomable entity. Where law is presented in this context as arising from or governed by the *Dao*, the law itself forms part of the myth. Consequently, we may ascribe to it a mythic source that is neither human nor natural. Although the word 'divine,' which implies the existence of a deity, may not be appropriate to describe such a cosmogony, the broader term 'religious' has more appropriately been applied by some scholars to myths of creation centered on the *Dao*.⁹³ Accordingly, we may accept that a religious origin is ascribed to law in texts that treat it as emerging from the *Dao*.

Consideration of the Yellow Emperor and the sage rulers generally raises different issues. In the first place, the sage rulers of remote antiquity are often described by modern writers as legendary rulers, as culture heroes, or even in some cases as gods. Founding largely on the work of Gu Jiegang 顧頡剛,⁹⁴ scholars appear to have reached a consensus that personages such as the early sage kings (typified by the Yellow Emperor, Yao, Shun, or Yu) were originally gods, divine beings, nature spirits, or ancestral spirits.⁹⁵ However, according to this consensus, the Zhou period saw a process, culminating in the time of the Warring States (481-221 B.C.), in which these deified beings were gradually transmuted into historical, human persons. These persons

⁹² Cf. the remarks of K. Turner, "Rule of Law Ideals in Early China?," *Journal of Chinese Law* 6.1 (1992), p. 24, and Kohn, *God of the Dao*, p. 191.

⁹³ See note 4 above.

⁹⁴ On whom see L.A. Schneider, *Ku Chieh-kang and China's New History: Nationalism and the Quest for Alternative Traditions* (Berkeley/Los Angeles/London: University of California Press, 1971), chapters 6, 7. Cf. also the utilization of Gu's approach by Sarah Gates, "Model Emperors of the Golden Age in Chinese Lore," *Journal of the American Oriental Society* 56 (1936), pp. 51-76.

⁹⁵ We may note that recently there have been suggestions against this trend. Archaeologists have conceded that figures such as Yu may have had an historical existence. See, for example, Li Liu, "Settlement Patterns, Chiefdom Variability, and the Development of Early States in China," *Journal of Anthropological Archaeology* 15 (1996), p. 275. Historians are also increasingly inclined, for various reasons, to accept the accuracy of the list of kings (including Yu) noted in the *Bamboo Annals* (*zhushu jinian* 竹書紀年) and the *Shiji*. See, for example, D.W. Pankenier, "Mozi and the Dates of Xia, Shang, and Zhou: A Research Note," *Early China* 9/10 (1983-5), pp. 175-83; L.G. Fitzgerald Huber, "The Bo Capital and Questions Concerning the Xia and Early Shang," *Early China* 13 (1988), pp. 46-77; D.S. Nivison and K.D. Pang, "Astronomical Evidence for the *Bamboo Annals'* Chronicle of Early Xia," *Early China* 15 (1990), pp. 87-95, with comments at 97-196. The assumption that the rulers associated with the establishment of the Xia 夏 (Shun and Yu) or earlier figures such as Yao were originally gods or nature spirits may require reexamination.

were regarded as possessing pre-eminent qualities of leadership and wisdom, even a special charisma, but they were located firmly in the human and not in the divine world.⁹⁶ A further complication is constituted by the hypothesis that during the late Warring States period and especially the Han (206 B.C.-A.D.221), the process of 'humanizing' was reversed and a number of early divinities who had been 'historicized' were now re-mythologized as gods, not necessarily bearing much relation to their original divine function and character.

This latter hypothesis may be illustrated from the various roles that have been assigned to the Yellow Emperor. In the literature of the Warring States and Han periods this figure assumes many different aspects. In some sources he appears as a wise, human ruler, the first ancestor, and the originator of many social crafts and institutions, whereas in others he appears as a deified being.⁹⁷ Generally speaking, the texts that treat Huangdi as a god are later than those that treat him as an historic personage.⁹⁸ This does not necessarily mean that the Yellow Emperor was originally a human ruler, subsequently, in the course of time, transformed into a god. It is possible that he was originally a god, then came to be regarded as a human ruler, and was finally transformed back into a god.⁹⁹ Whatever view is taken of this process, it seems to be clear that most references in texts of the Warring States or even early Han periods are to Huangdi as an historical ruler, perhaps pre-eminently wise, but not deified.¹⁰⁰

Before we can legitimately utilize any of these hypotheses on the original nature of 'legendary' rulers in the construction of a theory about the origin of law, we must bear in mind the distinction between two very different questions. One question concerns the original nature of the sage kings as gods or as humans with a subsequent transformation into gods. A second question is whether the writers of the particular texts that invoke the sage kings as the introducers of law and punishments understand them to be human or divine beings? In the texts which we have

⁹⁶ Maspero, "Légendes mythologiques," pp. 1-2; Karlgren, "Legends and Cults," pp. 341-3; (emphasizing that the legendary figures, even when historicized, were given some supernatural qualities); Bodde, "Myths," pp. 48-52; K.C. Chang, *Art, Myth, and Ritual. The Path to Political Authority in Ancient China* (Cambridge/London: Harvard University Press, 1983), p. 2; Le Blanc, "Myth of Huang-ti," p. 58; Birrell, "Studies on Chinese Myth," pp. 70-1, 78 (especially the treatment of myth in the *Shangshu*); Allan, *The Shape of the Turtle*, pp. 21-2; J. Ching, "Who were the Ancient Sages?," in *Sages and Filial Sons. Mythology and Archaeology in Ancient China*, ed. J. Ching and R.W.L. Guisso (Hong Kong: Chinese University Press, 1991), pp. 9, 12; Lewis. *Sanctioned Violence*, pp. 167-70.

⁹⁷ A clear description of the 'secular' and 'divine' aspects is given in Le Blanc, "Myth of Huang-ti," pp. 45-63, with a useful summary of information in the chart at pp. 50-1. See also Jan Yun-hua, "Images," pp. 105-28.

⁹⁸ Le Blanc, "Myth of Huang-ti," pp. 57-8; Yates, *Five Lost Classics*, p. 18.

⁹⁹ Le Blanc, "Myth of Huang-ti," pp. 57-8

¹⁰⁰ The earliest surviving reference to the Yellow Emperor is in a bronze inscription from the fourth century B.C., in which the ruler of the state of Qi invokes the Yellow Emperor as his 'high ancestor' (Jan, "Images," p. 118; Le Blanc, "Myth of Huang-ti," p. 53; Puett, "Sages, Ministers, and Rulers," p. 450). The most detailed version of the Yellow Emperor as an historical ruler is to be found in Sima Qian's *Shiji* of the first century B.C. (Nienhauser, *Grand Scribe's Records, Volume I*, pp. 1-5, and cf. the observations of Burton Watson, *Ssu-ma Ch'ien, Grand Historian of China* (New York: Columbia University Press, 1958), pp. 16-7, 231-2 at n4). It is, however, interesting, not to say surprising, that Anne Birrell refers to Ssu-ma Ch'ien as establishing the Yellow Emperor as "the ultimate and supreme deity" (n. 77 above, "Chinese Myth," p. 86; and cf. her *Chinese Mythology*, pp. 19-20.

considered above, whether they emanate from the Warring States or the Han periods, it seems to be beyond doubt that their authors regarded the sage kings, including the Yellow Emperor, as human rulers and not as gods or supernatural beings. The context in all cases is that of the development of human society to which the principal actors themselves belonged. Only in one text, the “*lü xing*,” is there a clear and unambiguous reference to a god, namely, Shangdi or God on High. We have seen, however, that the origin of laws and (proper) punishments is ascribed not to Shangdi but to the *huangdi*, a being probably to be identified with one of the earliest sage rulers. The hypothesis that the Yellow Emperor, Yao, or Shun were originally gods, divine culture heroes, or the like, even if verifiable, does not entail the conclusion that these figures were so regarded by the authors of the texts discussed above. Consequently, where the Yellow Emperor or other early ruler is credited with the introduction of the punishments or law, we have to postulate a secular and not a religious origin. Nor can one accept a possible argument to the effect that, provided the early sage rulers at any time were regarded as gods or spirits, law can thereby be shown to have a divine origin. One is limited to existing texts that refer to the creation of law by a sage ruler, texts in which the focus is firmly upon the human nature of the creation.

Conclusion

The argument presented above has attempted to show that the controversy as to the secular or religious origin of law, displayed in the literature cited, rests on insecure foundations. In the first place, the passages that refer to the emergence of law and punishments in human society are concerned not so much with the question of origin as with that of the contribution, good or bad, which these institutions have made to the regulation of the human condition. In this context, the emphasis may be upon the rules that prescribe the behavior appropriate to particular family and social roles or upon the punishments themselves, the latter often being of secondary importance. These rules and punishments are attributed to a ruler from the remote past, normally with the purpose of demonstrating their authority and legitimacy, although sometimes they are treated as corrupting rather than purely beneficial devices. In no case is there an unequivocal ascription of law to a divine legislator.

In the second place, the thesis advocating a religious origin has failed to distinguish between what may be termed the internal and the external perception of figures such as the Yellow Emperor, Yao, or Shun. From the external perception of the modern investigator looking into the intellectual and religious history of China, these personages may be gods or divine culture heroes who have conferred upon humankind the benefits of civilized existence. The internal perception, on the other hand, requires us to consider the frame of reference within which a particular Chinese thinker was working when he invoked the Yellow Emperor or other ruler standing at the beginning of Chinese history. His frame of reference may, indeed, have been that of a world inhabited by divinities, but it may, on the contrary, have been purely that of the human world. The authors of the works that attribute the emergence of law and punishments to the activity of a 'sage ruler' clearly treat the latter as a member of the human not the divine world.

One line of thought in the pre-Han texts attributes law not specifically to a sage ruler but rather to the 'Way' or *Dao*. We may accept that, at least in some contexts, we have the invocation of law as part of a creation myth. Law appears, along with other phenomena, as the world first emerges from chaos or comes into being. The characteristics possessed by law flow from the *Dao* and so are eternally given, determining for all time the right way in which humans are to govern their affairs. One may speak in this sense of a religious origin of law.

Three further points and a proviso should be made. First, the tradition associating law with a myth of creation was considerably less prominent than that which viewed law as the creation of a particularly wise human ruler. Second, the ascription of law to the *Dao* is not so much a statement about 'origin' or even 'creation' as an affirmation of law's status as part of the eternally given order of things and hence not subject to arbitrary human control. Third, the incorporation of law in myths that attribute the origin of all phenomena to the operation of an impersonal *Dao* still constitutes China a special case in comparison to other cultures that favor the will of a divine creator.¹⁰¹

One proviso has to be added to the arguments discussed in this paper. The texts considered have been those written during the Warring States (or earlier) and the Han periods. They represent the earliest streams of thought on the origin of law. However, it is possible that later developments, especially in the context of Daoism, led to a different perspective. What is sometimes called religious Daoism (to distinguish it from its earlier philosophic antecedents) treated Lord Lao as a creator god responsible for the introduction of all culture, including law, in the universe.¹⁰² This development must here be left aside as a topic for independent investigation.

¹⁰¹ Cf. the remarks of Girardot, "Behaving Cosmogonically," p. 73.

¹⁰² See on this point, Kohn, *God of the Dao*, pp. 217-34.