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. 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. 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. These issues


are complex and deserve a separate, detailed treatment. Perhaps it is enough to isolate here one assumption that commonly characterizes their treatment. It often appears to be thought that the mere occurrence in a religious context of what are arguably legal rules proves that there is some indissoluble connection, even identity, between law and religion. This assumption is dangerous. Just as the invocation of God in a modern court does not prove that the laws applied by the judge are believed to have been derived from God, so the inscription of legal texts on ritual bronzes or the use of oaths in the early Chinese legal process does not prove 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 it was important to give information about laws or legal transactions to the gods or spirits, or that the help of these entities might be sought to provide sanctions for the utterance of lies in law suits.

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. 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

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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 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) 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. 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**

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) 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. 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. This states: “Law (fà) 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).”

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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. 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. Accordingly, the sage kings of antiquity, who had managed through self-cultivation 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.

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. 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., 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 贤) 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. 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

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13 See W.A. Rickett, “Kuan tzu,” in Loewe, Chinese Texts, p. 244.


third or fourth century B.C. The sixth essay, “Indulgence in Excess,” (ziguó 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. An essay entitled “Exaltation of the Virtuous” (shàng xiān 尚賢) gives a version of the “Punishments of Lū ((Lú xíng 吕刑),” one of the documents contained in the Book of Documents (Shangshu 尚書), according to which the 'august emperor' (huángdì 皇帝) ordered Bo Yi 伯夷, known as a minister of Shun 舜, to “hand down the statutes (dìan) and restrain the people with punishments.” Reference is also made to the “Lú xíng” in a further essay, “Identification with the Superior,” (shàng tóng 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. An essay entitled “Economy of Expenditure” (jié yòng 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. 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 (huángdì 黃帝) and states that he never changed them, so as to make the people content and happy.

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18 For a discussion of the Shangshu version of the “Lū xíng” passage see below.

19 The Chinese commentators identify the huángdì with Yao. See, for example, Mo ji jie 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 Moji jie, 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.

(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 contains an essay, probably written towards the end of the third century B.C., which represents a point of view that has been denominated 'Primitivist' or 'Utopian.' 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 仁義) to meddle with the minds of men,” a disturbance intensified when Yao 堯 and Shun 顓頊 established 'laws and standards' (guei 規, fa du 律).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

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

Chapter eighteen of the *Book of Lord Shang*, 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.

(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” (xinfazhi 刑法志) contained in the official History of the Former Han Dynasty (Han shu 漢書), and completed by Ban Gu 班固 (A.D.32–92) at the end of the first century A.D., 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

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(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 (weisong 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."

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. 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. 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 and especially the newly discovered silk manuscripts providing a repository of what is often termed Huang Lao 黃老 thought, 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


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.
laws (li律), regulations (zhi制), and measures (du度) must be patterned (fa法) on the moral way (Dao). Another passage in the same work says: “Laws are derived from political power (quan權) and political power is derived from the way (dao).” 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.”

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天理).” 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. 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.”

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

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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).


44 Yates, Five Lost Classics, pp. 89-90. Cf. Chang and Feng, Four Political Treatises, p. 136. See also the essay on “Assessments” (Lun 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.
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. Jan Yun-hua defines *Dao* as “the universal, absolute, and unnameable nature.” Karen Turner takes *Dao* as “an abstract, universal, and timeless principle of nature.” 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 for making decisions without itself being transformed.” Peerenboom defines *Dao* as “the mysterious metaphysical source or ground of all things, both human and non-human,” and as “the natural order itself.” 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.

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

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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

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

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.


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,

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

57 “Appendix II: Chronological Tables,” in Loewe, Chinese Texts, p. 509.
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.\textsuperscript{59}

Paragraph two states that, according to ancient traditions, Chi You 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. They governed not by means of moral example, but by means of 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) 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). He is said to have pitied the innocent, and to have exterminated the Miao. Paragraph six relates that the charge was given to Chong and Li (that is, by the huangdi) to break the communication between heaven and earth. The sovereign ruler (junhou) 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.\textsuperscript{60}

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


\textsuperscript{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 junhou with the 'king' (the huangdi) of the previous paragraph.

\textsuperscript{61} For this interpretation see Karlgren, “Book of Documents,” p. 180, gl. 2038.
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. 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 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.

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

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.

63 See also Puett's discussion of the text in his “Sages, Ministers, and Rebels,” pp. 436-40.
Shang, particular essays in the collections entitled Xunzi, Mozi, and Guanzi, and the “Legal Treatise” of the Hanshu. 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 周 dynasty (ca. 1100-221 B.C.). The Zhou kings commonly denominated 'sage' are Tang 湯, the founder of the Shang 商 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.' 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 莊子 and probably also 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 舜書 tended to favor Quanxu 覇祇, Yao, or Shun, all featuring in the list of the Five Emperors who stand at the beginning of Chinese history. Several of the western translations of the “Lü xing” have opted for Shun. A different approach has

64 See notes 6, 12, 15, and 35 above.
66 See note 23 above.
67 See note 26 above.
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:
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 god, or go even further and explain the three expressions, Shangdi, the huangdi, and Huangdi (Yellow Emperor) as all referring to the same deity.

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 (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. It may further be suggested that the high god would not himself have communicated directly with the people.


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.'
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. However, the paragraph says nothing of the Yellow Emperor. There is no strong reason for accepting that the prior mention of Chi You necessitates the identification of the huangdi, introduced several paragraphs later in a different context, with the Yellow Emperor. 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. This cannot be taken as conclusive since some scholars have strongly denied the philological basis of the argument.

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 帝. Although this expression in pre-Qin texts often denominates a god, it does not necessarily do so. Anne Birrell has pointed out that in other documents contained in the Book of Documents, the “Canon of Yao” and the “Canon of Shun,” 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.” 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, paragraph eighteen of the

73 For an account of the legend see Birrell, Chinese Mythology, pp. 132-4.
78 Both these documents were probably written at much the same time as the “Lü xing.”
80 See note 31 above.
Book of Lord Shang, a fragment from Shen Buhai, the “Reliance on Law” (renfa) chapter of the Guanzi, and the silk manuscripts in general. 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. 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. 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.” 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 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

81 See note 33 above.
82 See note 23 above.
83 See note 23 above, and following.
84 See in particular “Establishing the Mandate” (Li ming) and “Observations” (Guan), Yates, Five Lost Classics, pp. 104-9; Puett, “Sages, Minister, and Rebels,” pp. 458-60.
85 See note 39 above, and following.
86 See note 9 above.
87 See note 35 above.
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. 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. 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.

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 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. 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

88 Lewis, Sanctioned violence, p. 198.
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. 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, 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. 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 were regarded as possessing preeminent qualities of leadership and wisdom, even a special charisma, but they were located firmly in the human and not in the divine world.

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92 See note 4 above.


94 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 (Shun and Yu) or earlier figures such as Yao were originally gods or nature spirits may require reexamination.

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. Generally speaking, the texts that treat Huangdi as a god are later than those that treat him as an historic personage. 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. 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.

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 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


98 Le Blanc, “Myth of Huang-ti,” pp. 57-8

99 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 n 4). It is, however, interesting, not to say surprising, that Anne Birrell refers to Sima Qian as establishing the Yellow Emperor as “the ultimate and supreme deity” (“Chinese Myth,” p. 86; and cf. her Chinese Mythology, pp. 19-20).
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 me right way in which humans are to govern their affairs. One may speak in this sense of a religious origin of law. Such a view was shared only by certain writers and thinkers. It by no means constituted a *communis opinio*.

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.100

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.101 This development must here be left aside as a topic for independent investigation.103

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100 Cf. the remarks of Girardot, “Behaving Cosmogonically,” p. 73.


102 I would particularly like to thank the Journal’s referees for their comments on a draft of this paper and the editor for his very considerable help in preparing it for publication.