

## The *Dao* of Politics: *Li* (Rituals/Rites) and Laws as Pragmatic Tools of Government

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American philosopher John Dewey spent more than two years in China (1919–1921). During and after his visit, he wrote some fairly perceptive and insightful commentaries on China. These were published in periodicals such as the *New Republic*, *Asia*, and the *China Review*, and sometimes in newspapers such as the *Baltimore Sun*.

However, there is hardly any discussion of Chinese philosophy in Dewey's published works or even his papers and correspondence. Among his rare mentions of Chinese philosophy was an article published in 1922, "As the Chinese Think," which discussed the teachings of Lao Zi and Confucius.<sup>2</sup> This was an attempt to improve Western (or at least American) understanding of Chinese attitudes and actions in international negotiations and business. It describes the influence of Confucianism and Daoism as merging "to create a definite contempt for politics and an aversion to government

as the West understands the term."<sup>3</sup> It goes on to describe the Chinese polity in these words:

The emperor did not govern. He ruled by not governing, by not interfering with the real government, the customs of the people, which were so immemorial and so interwoven with agriculture, with the operations of nature that they themselves were like the workings of nature.<sup>4</sup>

A later work, *The Public and its Problems*, contrasts "the Orient" with Western society, in which the public is capable of being organized into a state between the "too close and intimate" and "the too remote and disconnected."<sup>5</sup> In "the Orient,"

Politics is not a branch of morals; it is submerged in morals. All virtues are summed up in filial piety. Wrongdoing is culpable because it reflects upon one's ancestry and kin. Officials are known but only to be shunned. To submit a dispute to them is a disgrace.<sup>6</sup>

Dewey considered it a common feature of early societies, and not just of the Orient, that customs rather than laws had been the main means of achieving and maintaining social order and dealing with crises.<sup>7</sup> As a principle of organization,<sup>8</sup> customs consist of the various ways in which key relationships in a society are regulated.<sup>9</sup> They are "approved ways of acting, common to a group, and handed

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<sup>2</sup> Citations of Dewey's works give volume and page number from Dewey's *Early Works* (E), *Middle Works* (M), and *Later Works* (L), in Jo Ann Boydston, ed., *Collected Works of John Dewey* (Carbondale: Southern Illinois University Press,

1972–1985). Dewey, "As the Chinese Think," M13:217–27.

<sup>3</sup> M13:225.

<sup>4</sup> M13:225.

<sup>5</sup> L2:260.

<sup>6</sup> L2:262.

<sup>7</sup> L2:262; M7:399.

<sup>8</sup> M6:413.

<sup>9</sup> L7:50.

down from generation to generation,”<sup>10</sup> including language, polite manners, social conventions, and a large part of the content of morality. Dewey cited China as an example of a civilized society in which the materials and ideals of education derive almost entirely from customs.<sup>11</sup>

What Dewey referred to as China’s “customs” overlap significantly with what Confucians call *li* 禮, translated as “rites” or “rituals,” among several possibilities.<sup>12</sup> According to Dewey, ritual is the “great positive agent” of customs and “works by forming habits, and operates through associations formed by actually doing certain acts, usually under conditions which appeal to the emotions.”<sup>13</sup> Dewey used “ritual” mostly in connection with religion and occasionally in connection with primitive society.

Although the Chinese *li* 禮 also has a religious origin, Confucian *li* is much broader and more akin to “custom” in Dewey’s usage:

Do not look unless it is in accordance with the rites [*li*]; do not listen unless it is in accordance with the rites; do not speak unless it is in accordance with the rites; do not move unless it is in accordance with the rites.<sup>14</sup>

Examples of *li* in the *Analects* include norms regulating and distinguishing various

important relationships, facilitating social interaction, and “Of the things brought about by the rites [*li*], harmony is the most valuable.”<sup>15</sup>

Confucian *li*, like Dewey’s customs, are also means of dealing with the crises of life, such as war and death, and of celebrating important events, such as birth and coming of age. Dewey’s contrast of customs as the real government in China and the typical Chinese disparagement of punishments and litigation implicitly refers to the traditional opposition in Chinese thought between *li* 禮 and *fa* 法 (laws) as tools of government.

I shall examine the opposition between *li* and *fa* through an engagement between Confucianism and Dewey’s pragmatism.<sup>16</sup> Does this opposition enlighten or obscure our understanding of Chinese political philosophy? What are its inadequacies? Could Deweyan pragmatists learn something from its strengths?

## China’s “Society without Litigation”

While law and legal language dominate the way Americans think of themselves and their society, the Chinese have always prided

<sup>10</sup> M5: 54.

<sup>11</sup> M6:413.

<sup>12</sup> Other translations include “rites, propriety, or rules of proper conduct,” in Antonio A. S. Cua, “Li: Rites or Propriety,” in *Encyclopedia of Chinese Philosophy*, ed. Antonio A. S. Cua (London: Routledge, 2003), pp. 370–384, at p. 370. Dubs listed these possible translations of *li*: “religious rites, ceremony, deportment, decorum, propriety, formality, politeness, courtesy, etiquette, good form, good behavior, good manners” (Homer H. Dubs, *Hsiüntze: The Moulder of Ancient*

*Confucianism* [London: Arthur Probstain, 1927] p. 113n).

<sup>13</sup> M5:58.

<sup>14</sup> *Analects* 12.1. All translations of the *Analects* are derived from D. C. Lau, trans., *Confucius: the Analects* (Harmondsworth: Penguin, 1979), unless otherwise stated.

<sup>15</sup> *Analects* 12.1.

<sup>16</sup> Like most “isms,” pragmatism is heterogeneous and too broad to be covered comprehensively; this essay is only concerned with the version found in John Dewey’s works.

themselves on their “kingdom of rituals and ceremonies” (*liyì zhī bāng* 禮儀之邦).<sup>17</sup>

**“Of the things brought  
about by the rites [*li*],  
harmony is the most  
valuable.”**

Chinese society has often been seen as preferring *li* to *fa* in its approach to regulating social interactions. The radical difference between China and the West where law is concerned has become an orthodoxy since Montesquieu’s description of China as “a despotic state whose principle is fear” highlighted a “property peculiar to the government of China,” which “confused religion, laws, mores, and manners.” China was well governed only when a way was found to make *li* be observed exactly.<sup>18</sup>

This orthodoxy has also been borne out in the works of Chinese scholars, such as the sociologist Fei Xiaotong, whose fieldwork in Chinese villages during the 1930s and 1940s reveals a “society without litigation.” Chinese villagers thought of a “*songshi* 訟師, a litigation monger,” as “a trouble-maker,” as “someone who creates social discord.”<sup>19</sup>

According to Fei, rural society in China was ruled by *li* and not by laws in the sense of “regulations maintained by state power.”<sup>20</sup> *Li* provide both guidance for behavior and rules by which Chinese communities resolved conflicts through mediation by their elders. Recent writings on Chinese law by Western scholars still refer to a “sometimes ambivalent attitude that Chinese popular culture maintained towards the likelihood that justice could be achieved through resort to formal state sanctioned legal institutions and practices.”<sup>21</sup>

One could trace the philosophical inspiration for Fei’s “society without litigation” and the “rule of ritual” to the *Analects*:

The Master said, “Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites [*li*], and they will, besides having a sense of shame, reform themselves.”<sup>22</sup>

Other texts, such as the *Zuo zhuan* 左傳 and *Liji* 禮記 (*Book of Rites*), also mention *li* as a tool of virtuous government.<sup>23</sup> In contrast,

<sup>17</sup> On American identification with law, see Alexis de Tocqueville, *Democracy in America* (1835; Vintage Books, 1990), p. 280. Ruskola argues that the portrayal of China as lacking in law is an exercise in constructing Western cultural identity against China in terms of law and criticizes it as “legal orientalism” (Teemus Ruskola, “Legal Orientalism,” *Michigan Law Review* 101 [2002]: 179–235, at pp. 209–212).

<sup>18</sup> Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws*, trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), pp. 128, 318.

<sup>19</sup> Fei Xiaotong, *From the Soil*, trans. Gary Hamilton and Wang Zheng (Berkeley: University of California Press, 1992), p. 101.

<sup>20</sup> *Ibid.*, p. 96.

<sup>21</sup> Janet E. Ainsworth, “Categories and Culture: On the ‘Rectification of Names’ in Comparative Law,” *Cornell Law Review* 82 (1996): 19–42, at pp. 37–38.

<sup>22</sup> *Analects* 2.3.

<sup>23</sup> For some examples, see 11th year of Duke Yin, in the *Zuo zhuan*, trans. James Legge in *The Chinese Classics*, 5 vols. (Hong Kong: Hong Kong University Press, 1960), vol. 5, pp. 31, 33; *Liji jiji*, ed. Sun Xidan (Beijing: Zhonghua Shuju, 1989), pp. 8–9, 583, 605–607, 1260. See also *Liji*, chap. 5, “Regulation of the King,” on *li* regulating government functions and actions.

penal codes in Chinese society were seen as responses to disorder resulting from the decline of virtuous rule.

***Li* provide both guidance for behavior and rules by which Chinese communities resolved conflicts through mediation by their elders.**

The chapter on Lü Xing 呂刑 (“The Prince of Leu on Punishments”) in the *Shangshu* 尚書 (*Book of Documents*) contrasts the Chinese use of moral influence (*de* 德) with the use of punishments to restrain a “barbarian” people, the Miao.<sup>24</sup>

The *Zuo zhuan* tells of how, in the sixth year of Duke Zhao’s rule, the state of Zheng, under the able minister Zi Chan, had similarly cast tripods with a code of punishments on them. This act of promulgation in the sixth century B.C.E. was criticized as incompatible with good government in terms that Confucians would agree with:

When the people know what the exact laws are, they do not stand in awe of their superiors. They also come to have a contentious spirit, and make their appeal to the express words, hoping to be successful in their argument. They can no longer be managed ... When once the people know the grounds for contention, they will cast propriety [*li* 禮] away, and make their appeal to your descriptions. They will all be contending about a matter as small as the point of an awl or a

knife. Disorderly litigations will multiply, and bribes will walk abroad.<sup>25</sup>

In the narrative above, the term *fa* was not actually mentioned: “When people know what the exact laws are” translates *min zhi you pi* 民知有辟. However, the term *fa* is explicitly employed in the narrative of the twenty-ninth year of Duke Zhao, which attributes to Confucius the following remarks about the casting of tripods inscribed with penal statutes by the state of Jin: “[it is presumed] to make these articles with the penal statutes, to form the laws of the State. This is giving an example of lawlessness.”<sup>26</sup>

In Confucian political philosophy, it is more important to have virtuous people in government than to have a good system of laws. While every aspect of life is to be guided by *li*, which exemplifies the appropriate forms of all civilized behavior, including but not limited to ethical behavior, laws are at best necessary evils. At their worst, laws undermine efforts at achieving a polity of virtuous people.

Critics of Confucianism, who usually understand it in terms of the state ideology of imperial China, often blame Confucians’ negative attitude toward laws for the longevity of despotism, the difficulty of establishing the rule of law, and the lack of respect for human rights in China. While some observers find direct and indirect evidence of a move toward rule of law in China, critics worry that this product of Western society cannot be transplanted to China, and attempts to do so will only disrupt the existing social order.<sup>27</sup>

<sup>24</sup> Legge, *Chinese Classics*, 3:590–591.

<sup>25</sup> *Ibid.*, 5: 607, 609.

<sup>26</sup> *Ibid.*, 5: 729–730, 732. (*shan zuo xing qi yi wei guo fa shi fa yi ye* 擅作刑器以為國法是法姦也).

<sup>27</sup> For a balanced scrutiny of such arguments, see Randall Peerenboom, *China’s Long March toward the Rule of Law* (New York: Cambridge University Press, 2002), p. 126. For a discussion of various Western definitions of “rule of law,” see

Even if there is a generally more negative attitude toward law, its development in China is complex and cannot simply be blamed on Confucian philosophy. We should question if the objections to publicizing penal codes and the criticism of a government's use of punishment in early Confucian texts amounted to a rejection of law per se.

William Alford contends that those who accept at face value the Confucian worldview of government as effecting social order through moral transformation rather than legal restraint tend to underestimate the role of law throughout Chinese history.<sup>28</sup> Other scholars, including Robin Yates, Karen Turner, Melissa Macauley, Kathryn Bernhardt, and Philip Huang, have begun to fill this gap in our understanding of China.<sup>29</sup>

Passages from early texts, such as the *Shangshu* and the *Zuo zhuan*, mention various penal codes, including one of the Xia dynasty. Some contemporary Chinese scholars trace the origin of Chinese laws to the times of the legendary sage-kings Yao and Shun.

Since the 1980s, new archaeological finds have generated a spate of discussions in Chinese scholarly journals regarding the existence and nature of a legal system during the Shang and Zhou dynasties.<sup>30</sup>

**In Confucian political philosophy, it is more important to have virtuous people in government than to have a good system of laws.**

Although Derk Bodde maintained that “the written law of pre-modern China was overwhelmingly penal in emphasis,” others contend that early Chinese laws were not restricted to penal codes, even if there is insufficient evidence to believe that China had a comprehensive civil law system from very early times.<sup>31</sup> According to Geoffrey McCormack, administrative laws were well developed by the Qin dynasty (221–206 B.C.E.).<sup>32</sup>

Michael Neumann, *The Rule of Law: Politicizing Ethics* (Aldershot: Ashgate, 2002), pp. 23–50.

<sup>28</sup> William P. Alford, “The Inscrutable Occidental? Implications of Roberto Unger’s Uses and Abuses of the Chinese Past,” *Texas Law Review* 64 (1986): 915–972.

<sup>29</sup> Robin Yates, “Second Status in the Ch’in: Evidence from the Yun-meng Legal Documents,” *Harvard Journal of Asiatic Studies* 47 (1987): 197; Karen Turner, “War, Punishment, and the Law of Nature in Early Chinese Concept of the State,” *Harvard Journal of Asiatic Studies* 53 (1993): 285–324; Kathryn Bernhardt and Philip C. C. Huang, eds., *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994); Melissa Macauley, *Social Power and Legal Culture* (Stanford: Stanford University Press, 1998). In his study of the Western Zhou period, Creel also maintained that the Western Zhou had legal codes that were probably written down (Herrlee G. Creel, “Legal Institutions and

Procedures during the Zhou Dynasty,” in Jerome Alan Cohen, R. Randle Edwards, and Fumei Chang Chen, eds., *Essays on China’s Legal Traditions* [Princeton: Princeton University Press, 1980], pp. 26–55, at p. 29).

<sup>30</sup> A discussion of such literature can be found in Zhang Peitian, *Zhongguo fawenhua sanlun* (Essays on Chinese legal culture) (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 1993), pp. 16–23.

<sup>31</sup> Derk Bodde and Clarence Morris, *Law in Imperial China* (Cambridge, MA: Harvard University Press, 1967), p. 3. See also Alford, “The Inscrutable Occidental,” pp. 927–929; Herrlee G. Creel, *The Origins of Statecraft in China* (Chicago: University of Chicago Press, 1970), vol. 1, pp. 161–193; Bernhardt and Huang, *Civil Law in Qing and Republican China*, chap. 2.

<sup>32</sup> Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996), p. 20.

There is no conclusive evidence of a clear distinction between criminal and civil law, the former involving punishments and penalties—loss of freedom, property, and life—and the latter involving directives for the losing party to compensate the winning party for injuries suffered.<sup>33</sup> The existence of criminal laws is presupposed by the Confucian view that, even if necessary, punishments are inferior instruments of government, and a good government that cares about social harmony and the people's virtues and welfare should aim to minimize its own use of such negative instruments. The reference to not differing from others in hearing litigations even though the ideal is to make litigations unnecessary might presuppose the existence of civil law as well, but "litigation" (*song*) during this early period could also mean a formal practice of bringing civil disputes for judgment by respected persons in the community, without necessarily applying any codified civil law, which might be a latter development.<sup>34</sup>

Some attribute the Confucian dislike for laws to the fact that the law had been used primarily as an arbitrary instrument in the

hands of despotic rulers.<sup>35</sup> The long absence of democracy in China means that we should not expect the same kind of respect for law as recommended in democratic societies, where the law has different origins and functions vis-à-vis the people. In the historical rivalry between Confucianism and Legalism (*fajia* 法家), Legalists are traditionally seen as advocating the use of law as a tool of "government of the ruler, by the ruler, for the ruler."<sup>36</sup>

In texts such as the *Shangjunshu* 商君書 and the *Hanfeizi* 韓非子, *fa* 法 comprises clearly formulated, widely promulgated, and uniformly applied rules of behavior that the people must conform to; obedience brings rewards, and transgressions harsh punishments.<sup>37</sup> Imperial China owed most of its state machinery to the Legalists, who gained power under Qin rule. Authoritarian politics did not allow the people to use the laws for their own protection, especially against the ruling class.

Confucian concern for the people's welfare, not surprisingly, then led them to condemn what had turned out to be a tool of oppression. Most of those who accept an

<sup>33</sup> I thank the anonymous reviewer for pointing out the need to address directly the difference between criminal law and civil law. The reviewer also pointed out that this distinction is complicated by the practice in some systems of law of awarding punitive damages in civil cases to the plaintiff rather than the state, but it could be argued that such punitive damages are compensation for harm to the community represented by the harm to the plaintiff.

<sup>34</sup> See *Analects* 12.13. The term *song* is also used in *zisong* 自訟 to mean "self-accusation," in *Analects* 5.27. Bernhardt and Huang note that "Though the early empire saw widespread judicial enforcement of private contracts, surviving documents do not indicate that the state promulgated a body of rules to determine results in such cases" (*Civil Law in Qing and Republican China*, p. 35).

<sup>35</sup> Julia Ching, "Human Rights: A Valid Chinese Concept?" in *Confucianism and Human Rights*, ed. Wm. Theodore de Bary and Tu Wei-ming (New York: Columbia University Press, 1997), pp. 67–82, at p. 74.

<sup>36</sup> Roger Ames, *The Arts of Rulership* (Honolulu: University of Hawai'i Press, 1983), p. 50. For a summary of Confucian and Legalist arguments against and for the use of laws, see Bodde and Morris, *Law in Imperial China*, pp. 20–27.

<sup>37</sup> On the codification and necessary publicity of laws, and the need for laws to be comprehensible to people, see *Hanfeizi jijie*, ed. Wang Xianshen (Beijing: Zhonghua Shuju, 1998), pp. 380, 448; *The Complete Works of Han Fei Tzu*, trans. W. K. Liao (London: Arthur Probstain, 1939), vol. 2, pp. 188, 284.

opposition between *fa* and *li* operate with John Austin's famous definition of law (equated with *fa*) as a sovereign's command made obligatory by the threat of punishment for violation. This is only one among many different theories about what the law is, and one which has been strongly criticized and, if Dewey himself is to be believed, was already well on its way to obsolescence by the 1940s.<sup>38</sup>

Although it is not clear whether *fa*, if understood as laws, would include civil law in pre-Qin China, we could still consider whether the Confucian disapproval of punishments and penal codes might not extend to modern civil law, which does not involve punishment (if we set aside the complication of punitive damages). The directives to compensate the winning party for injuries suffered might be voluntarily complied with once a verdict is reached without any need for coercion, and oppression by government is not an issue. However, this voluntary compliance does not mean that the threat of coercion is absent; the directives could be coercively enforced if they are ignored. The

Confucian concern that coercion would result only in external compliance without moral transformation would still be valid in such cases.

Moreover, the need to bring a civil suit to court indicates a failure in social harmony, a lack of virtue in one or more of the parties involved, of which Confucians would also disapprove. There is also the danger that the civil suit would result in even more acrimony and hostility, which would further damage social relations.

There is evidence that the Chinese did not treat *fa* as merely a tool of oppressive government even in the pre-Qin period. Confucians often cite the *fa* of ancient kings to criticize the existing practices of rulers.<sup>39</sup> Chad Hansen argues that Legalist *fa* is anti-bureaucracy rather than anti-people.<sup>40</sup> The Legalist Shang Yang's insistence on meting out punishment when the crown prince of Qin broke a law is in the direction of turning laws into tools that could be wielded against, as well as for, the ruling class.<sup>41</sup>

Though not commonly practiced, the Chinese, including many Confucians over

<sup>38</sup> For Dewey, see L7:120. For Austin, see John Austin, *Province of Jurisprudence Determined* (1832; London: Weidenfeld and Nicolson, 1954, p. 350). Dewey first criticized Austin's theory of law in an article published in *Political Science Quarterly* in 1894, "Austin's Theory of Sovereignty" (E4:70–90). According to Dewey, Austin's view had lost its appeal because advances in the social sciences have "tended to make sovereignty at best an expression of the working of a vast multitude of social forces, and at worst a pure abstraction" (L14:120). Herbert Hart, one of the most influential philosophers of law of the twentieth century, also criticized Austin's reduction of law to generalized commands sanctioned by the State's use (or threatened use) in *The Concept of Law* (Oxford: Oxford University Press, 1961), chaps. 2–4. Hart, however, noted that the Austinian view possessed "perennial attractions."

<sup>39</sup> *Mencius* 4A1, in D. C. Lau, trans., *Mencius* (Harmondsworth: Penguin, 1970); *Xunzi* 6.6, in John Knoblock, trans., *Xunzi: A Translation and Study of the Complete Works*, 3 vols. (Stanford: Stanford University Press, 1988–1994).

<sup>40</sup> Chad Hansen, *A Daoist Theory of Chinese Thought* (Oxford: Oxford University Press, 1992), p. 359.

<sup>41</sup> J.J.L. Duyvendak, trans., *The Book of Lord Shang* (London: Arthur Probstain, 1928), p. 16. It was not the crown prince but his tutor who was actually punished. The event was recorded in Shang Yang's biography in the *Shiji* (Record of the Grand Historian) (Beijing: Zhonghua Shuju, 1997), *juan* 68, p. 2227. Han Fei went to the extent of recommending "extirpation of the policy of love" to ensure that the law will not be undermined by partiality resulting from love, even when it is love for the ruler (*Hanfeizi jijie*, pp. 335–336; Liao, *The Complete Works of Han Fei Tzu*, 2 :124–126).

the centuries, have had the ideal that when the “son of heaven” breaks a law, he should be punished in the same way as the common people. In the seventeenth century, the Confucian Huang Zongxi, contrary to the earlier Confucian view, asserted that only if there is “rule by law” (*fazhi*) can there be “rule by men” (*renzhi*). He used the “higher law” of the early kings cited by Confucius and Mencius to criticize positive dynastic laws and conceived of the former *fa* as higher than the state or ruler.<sup>42</sup> Randall Peerenboom argues that the Huang-lao thought of the pre-Qin and Han periods subscribes to a natural-law theory that sees a necessary relationship between law and morality.<sup>43</sup>

If laws were not always perceived as immoral or at best amoral instruments of arbitrary despotic rule, then *fa* and *li* in early Chinese politics may not have been as far apart as some Confucians believe. Those wishing to reduce the distance between *li* 禮 and *fa* 法 often point out that early Chinese texts oppose *li* with *xing* 刑 or *xingfa* 刑罰, punishments and penalties, or penal codes, and not *fa*. Modern Mandarin translates law as *fa* or *falü* 法律, but in the pre-Qin period, it may

be misleading to view Chinese *fa* 法 through the Western modern concept of law.<sup>44</sup>

According to Herrlee Creel, during the Zhou and Warring States periods, *fa* had a whole range of related meanings: “model,” “method,” “technique,” “rule,” “regulation,” and “law.”<sup>45</sup> In early Chinese texts such as the *Analects*, *fa* is better translated as “model” or “standard.”<sup>46</sup> D.C. Lau uses “standard” (and similar terms) more than “law” in translating *fa* in the *Mencius*.<sup>47</sup> John Knoblock translates *fa* sometimes as “standard” and sometimes as “law” in the *Xunzi*.<sup>48</sup> This mixture of meanings is common to many texts of the Warring States period or earlier. Which meaning is dominant in a text varies. Scholars generally consider “law” an appropriate translation of *fa* in the *Shangjunshu* and the *Hanfeizi*. Creel insisted that Shen Buhai was not a Legalist because *fa* did not mean “law” for Shen.

Scholars such as Benjamin Schwartz, Angus Graham, and Roger Ames believe that the meaning of *fa* changed during the Warring States period, and by the time of Xun Zi and Han Fei, just before the Qin unification, *fa* came to duplicate *xing*.<sup>49</sup> According to this view, the later meaning of *fa* as laws

<sup>42</sup> Wm. Theodore de Bary, *Waiting for the Dawn: A Plan for the Prince (Huang Zongxi's (1610–1695) Min Yi Dai Fang Lu, 1662)* (New York: Columbia University Press, 1993), pp. 97–99.

<sup>43</sup> Randall Peerenboom, *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao* (Albany: State University of New York Press, 1993).

<sup>44</sup> Mark Edward Lewis, *Writing and Authority in Early China* (Albany: State University of New York Press, 1999), p. 18.

<sup>45</sup> Creel, *The Origins of Statecraft*, 1: 147–148. For samples of these different meanings of *fa*, as they are used in different early Chinese texts, see *Zhongwen da cidian*, 8th ed. (1973; Taipei: Zhongguo Wenhua Daxue [China Cultural University], 1990), vol. 5, p. 1043.

<sup>46</sup> *Analects* 9.24, 20.1.

<sup>47</sup> Only in 4A1 and 6B15.

<sup>48</sup> Lau, *Mencius*; Knoblock, *Xunzi* 11.1a, includes both translations.

<sup>49</sup> Herrlee G. Creel, *Shen Bu Hai: A Chinese Political Philosopher of Fourth Century B.C.E.* (Chicago: University of Chicago Press, 1974), pp. 136–151; Benjamin Schwartz, *The World of Thought in Ancient China* (Cambridge, MA: Harvard University Press, 1985), p. 321; Angus C. Graham, *Disputers of the Tao: Philosophical Arguments in Ancient China* (La Salle: Open Court, 1989), p. 275; Roger T. Ames, *The Art of Rulership: A Study in Ancient Chinese Political Thought* (Honolulu: University of Hawai'i Press, 1983), p. 108.

is restricted to penal codes coercively imposed at the ruler's whim.

By the Han dynasty, this reduction of *fa* to *xing* seems fairly established; the Han lexicon, *Shuowen jiezi* 說文解字, explains *fa* in terms of *xing*. The Duan commentary, instead of treating this as a reduction from a broader meaning, treats *xing* as the primary meaning of *fa*, which had been “extended to mean all models.”<sup>50</sup> However, Chad Hansen argues against the meaning-change thesis and maintains that *fa* means not “laws” but “objective standards” even for the Legalists. Not until it was used to translate “dharma” when Buddhism was introduced to China, a century after the rise of Legalism, did *fa* come to mean “law,” in the sense of “universal propositions (sentences) with either descriptive or prescriptive necessity (causation or obligation).” Hansen maintains that, before then, China did not have a concept of law.<sup>51</sup>

The earliest and widest meaning of *fa* probably includes standards of measures, standards of language use and interpretation, and norms or models that need not be articulated as propositions. Among these are *li*, which were norms of behavior, traditionally believed to be established by sage-kings but which more probably emerged from practices socially sanctioned over time, as well as codified prescriptive rules imposed by rulers

on subjects and coercively enforced, which could be identified as laws. Both provide “standards” of what to do and the consequences of various actions in specific circumstances. I believe that this accounts for the overlaps between *fa* and *li* as well as between *fa* and *xing*.

## Li as Laws

Different relationships between *li* and *fa* could be inferred from different chapters in the *Xunzi*. Instead of one encompassing the other, the two may be on par as two major kinds of human “artifice” (*wei* 偽).

To deal with bad nature in human beings, the sage, “having created ritual principles and moral duty (*li-yi* 禮義), institutes the regulations of laws and standards (*fa-du* 法度).”<sup>52</sup> Insofar as *fa* can be translated as laws, some Chinese scholars have argued that in the *Xunzi*, *li* forms the moral basis of *fa*, indicating a moralistic view of laws.<sup>53</sup> However, the close association between *li* and *fa* in the *Xunzi* leads others to view Xun Zi as more Legalist than Confucian; to them, what Xun Zi calls *li*, which can rectify the

<sup>50</sup> Xu Shen, *Shuowen jiezi zhu* (Shanghai: Shanghai Guji Chubanshe, 1981), p. 470a.

<sup>51</sup> Chad Hansen, “Fa (Standards: Laws) and Meaning Changes in Chinese Philosophy,” *Philosophy East and West* 44 (1994): 435–488, at pp. 452 and 456.

<sup>52</sup> *Xunzi* 23.2a, cf. 25.18. Knoblock’s translation interprets *li* as being created before, and forming the basis for *fa*, although the Chinese text could also be translated as “the sages created *liyi* and instituted *fadu*.”

<sup>53</sup> *Xunzi jijie*, ed. Wang Xianqian (Beijing: Zhonghua Shuju, 1988), p. 33. See discussion in

Yang Xiugong, *Kong Meng Xun lifa sixiang de yanbian yu fazhan* (Evolution and development of Confucius’, Mencius’, and Xun Zi’s thinking on *li* and *fa*) (Taipei: Wenshizhe Chubanshe, 2000), pp. 152–159. Cai Renhou characterizes this relationship in terms of Confucians treating “*li* as substance and *fa* as use,” in his *Ruxue yu lifa* (Confucianism, rites, and laws) (Singapore: Institute of East Asian Philosophies, 1986), pp. 21. Cf. Yang Jingfan and Yu Ronggen, who see *li* as including *fa* and *xing*, in *Kongzi de falü sixiang* (Confucius’ legal thought) (Beijing: Qunzhong Chubanshe, 1984), p. 49.

person and the state, is the same as what the Legalists call *fa*.<sup>54</sup>

Chinese legal scholar Mei Zhong Xie considers it a unique characteristic of ancient China that it had “directive and preventive” laws, which are known as *li*, in contrast to corrective and suppressive laws known as *xing*.<sup>55</sup> Roberto Unger sees *li* as “customary or interactional law,” even though *li* were “tacit models of exemplary conduct” that are either unformulated or formulated as moral anecdotes, and therefore different from *fa*, which possesses the defining qualities of bureaucratic or regulatory law in being positive and public.<sup>56</sup>

Criticizing Unger’s description of *li* as “not rules at all,” Alford maintains that *li* comprises “specific, public rules.” Manuals of *li*, such as the *Zhouli* 周禮 and the *Yili* 儀禮, existed as early as the fourth and third centuries B.C.E.<sup>57</sup> Confucius lamented the lack of records of rites of earlier dynasties, which implies that *li* could be written down.<sup>58</sup> However, the records Confucius was lamenting need not be formulated as rules and could have been a record of moral anecdotes. Later, *li* formulated as rules of

behavior were written into the dynastic statutes. Ch’ü T’ung-tsu’s study of “traditional Chinese law” (from the Han dynasty to the Qing dynasty) is as much about *li* as it is about *fa*.<sup>59</sup>

Ainsworth sees *li* and *fa* as “two competing normative legal concepts.” This “communicates something significant about the imperial Chinese legal sensibility that sought to incorporate” both Confucian and Legalist views about human nature and normative order. To Ainsworth, *li* are “prescriptive social rules” even though they are “unwritten and lacking in details.”<sup>60</sup> Besides legal scholars, sinologists and philosophers also often conceive of *li*, whether written or unwritten, as rules of behavior aiming at social harmony. Wm. Theodore de Bary maintains that “there was a considerable overlap in the conceptions of ‘rites’ and ‘laws’ in Confucian usage” and considers *li* “a basic constitutional order.”<sup>61</sup> Both are about “corporate or systemic models” that are required to realize personal virtue in government; the difference lies only in *li* working through voluntary self-restraint, while laws employ external incentives or disincentives.

<sup>54</sup> Chen Feilong, *Xunzi lixue zhi yanjiu* (Study of Xun Zi’s ritual theory) (Taipei: Wenshizhe Chubanshe, 1979), p. 152.

<sup>55</sup> Mei Zhongxie, *Faxue zhulun* (Selected works in legal theory) (Taipei: Zhongguo Wenhua Daxue [Chinese Cultural University], 1989), p. 83. See also Yang and Yu, *Confucius’ Legal Thought*, p. 59: “Government by rites is a kind of legal thought,” wherein rites are moral laws. Most Chinese histories of legal thought in China begin with a discussion of the “rule of ritual” and the relationship between *li* and *fa* during the pre-Qin period. For example, Zhang Guohua, *Zhongguo falü sixiangshi xinbian* (History of Chinese legal thought, new ed.) (Beijing: Peking University Press, 1991), Lecture 1 and Lecture 2, secs. 1 and 2; Ma Xiao-hong, ed., *Zhongguo falü sixiang fazhan jianshi* (Simplified history of development of

Chinese legal thought) (Beijing: Zhongguo Zhengfa Daxue, 1995), chaps. 2 and 3.

<sup>56</sup> Roberto M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976), pp. 49, 101–103.

<sup>57</sup> Alford, “The Inscrutable Occidental?” p. 930.

<sup>58</sup> *Analects* 3.9.

<sup>59</sup> Ch’ü T’ung-tsu, *Law and Society in Traditional China* (Paris: Mouton, 1961) (English version of a Chinese work published in 1947, *Chinese Law and Chinese Society*). See also MacCormack, *Spirit of Traditional Chinese Law*.

<sup>60</sup> Ainsworth, “Categories and Culture,” pp. 35, 36.

<sup>61</sup> Wm. Theodore de Bary, *Asian Values and Human Rights* (Cambridge, MA: Harvard University Press, 1998), pp. 30, 32.

Even this difference disappeared when it became a common practice to punish transgressors of *li*. However, viewing *li* as a legal concept does not mean minimizing the differences between traditional Chinese society and Western societies, as the failure to develop civil society in China discussed in de Bary's work was due at least in part to the inadequacy of the ritual form of "basic constitutional order" in restraining the despotic power of the emperor.<sup>62</sup>

The Confucian tendency to treat *li* as imposing moral constraints on statutory laws led to views, such as Joseph Needham's, that *li*—which were believed to be created by sages based on human nature and cosmic

order—were the equivalent of natural laws in Western thought.<sup>63</sup> According to Dewey, the natural-law tradition in the West, which referred to an ultimate source that is supposed

edly higher and more fixed than experience and therefore a suitable "ground for genuinely philosophic evaluation of law,"<sup>64</sup> is an attempt at justification and/or criticism

of existing rules and practice. As a pragmatist, Dewey rejected such attempts and treated law as "through and through a social phenomenon."<sup>65</sup> However, Dewey did not have to worry about the arbitrary will of the monarch; he was concerned with how well the law, as a relatively permanent institution enacted by democratic communities, could

**Dewey's general concept of law is "a statement or relation of order which is employed as an effective method of procedure in further dealings with phenomena."**

<sup>62</sup> For an example of rituals providing such restraint, see Ron Guey Chu, "Rites and Rights in Ming China," in de Bary and Tu, *Confucianism and Human Rights*, pp. 169–178. On whether laws are necessarily more effective than rites in empowering the people, see Sor-hoon Tan, *Confucian Democracy: A Deweyan Reconstruction* (Albany: State University of New York Press, 2004), p. 184.

<sup>63</sup> Joseph Needham, *Science and Civilisation in China* (Cambridge: Cambridge University Press, 1956), vol. 2, p. 519, pp. 530–532. Bodde also treated the distinction between ritual and law as one between morality and law, parallel to that between natural law and positive law (Derk Bodde, *Essays on Chinese Civilization* [Princeton: Princeton University Press, 1981], pp. 179–180).

<sup>64</sup> L14: 116.

<sup>65</sup> L14: 117. In discussing Dewey's views about law, I deliberately have not used the term "legal pragmatism." Undoubtedly Dewey's views in the area of law were influenced by Oliver Wendell Holmes, himself identified as a Pragmatist philosopher and whose work *The Common Law* (1881) is seen as a classic of legal pragmatism.

However, there is no consensus about the subsequent development of legal pragmatism or the current role of pragmatism in law. Richard Warner presents legal pragmatism as adopting a non-foundationalist approach to justification: "Legal pragmatism urges us to understand the law by focusing on the practices that comprise our actually-in-use norms, on the pattern of actual conflict and conflict resolution that we find displayed in the judicial decision making" (Richard Warner, "Legal Pragmatism," in *A Companion to Philosophy of Law and Legal Theory* [Cambridge: Blackwell, 1996], pp. 385–393, at p. 393). In contrast, Richard Posner argues that philosophical pragmatism has little influence in legal circles; legal pragmatism, which best describes America's legal ethos, is based on everyday pragmatism, which supports a Schumpeterian elite democracy rather than a Deweyan deliberative democracy (Richard Posner, *Law Pragmatism, and Democracy* [Cambridge, MA: Harvard University Press, 2003]; see also Michael Brint and William Weaver, eds., *Pragmatism in Law and Society* [Boulder: Westview Press, 1991]).

track the dynamic desires and interests of the people as it should. What is obsolete for Dewey—an appeal to a higher, nonhuman authority to criticize de facto human authorities—might have necessitated some kind of functional equivalent to natural laws in the undemocratic Chinese context.

Dewey's general concept of law is “a statement or relation of order which is employed as an effective method of procedure in further dealings with phenomena.”<sup>66</sup> Laws dealing with activities of human beings in relation to one another, that is, laws in the jural sense, were the first to emerge into conscious recognition; “natural law” was conceived “after the analogy of jural law.”

Dewey also criticized the Austinian theory of law, even though it locates the source of law within social activities and relations, for failing to give a persuasive or coherent account of the role played by custom.<sup>67</sup> Dewey maintained that the development of law as an institution began with rules that were first imposed in the form of customs, which makes customs the source of law.<sup>68</sup> On one occasion, he actually asserted that “all laws except those which regulate technical procedures are registrations of existing social customs and their attendant moral habits and purposes.”<sup>69</sup> However, on other occasions, Dewey maintained a distinction between custom and law, insisting that when a custom becomes a law, it gains a new status. Customs become laws only when authoritatively formulated and stated by a competent authority.<sup>70</sup>

It was noted earlier that Dewey's “customs,” if not exactly equivalent to *li*, are akin to or at least overlap with them. The trend of writing many ritual rules into the dynastic statutes, beginning at least with the Han dynasty, might then parallel Dewey's understanding of the relationship between customs and laws.<sup>71</sup> However, I propose that we would arrive at a more nuanced understanding of the relationship between customs, *li*, and law by focusing on how they work on individuals who comply with them, and thereby achieve social order.

To Dewey, customs arose from the need to shape and control the behavior of members in a social group; they are social norms embodying the group's judgment that certain rules are to be followed for the sake of the group's welfare. Transgression is met with the group's disapproval and sometimes by punishment; the young are trained to observe the rules so that they become social habits.<sup>72</sup>

A custom is thus a norm of voluntary action. It is intermediate between morality, properly speaking, and law—akin to morals in having at disposal a subjective disposition in the individual to conform, and akin to law in using objective means of compulsion.<sup>73</sup>

Using this spectrum between the use of objective means of compulsion and the subjective disposition to conform, law overlaps with customs in using objective means of compulsion, while Confucian *li* overlaps with customs in requiring the subjective disposition to conform. When *li* descends to

<sup>66</sup> M7: 269.

<sup>67</sup> E4: 81–89.

<sup>68</sup> E4: 40; L14: 118.

<sup>69</sup> L5: 73.

<sup>70</sup> L3: 327.

<sup>71</sup> On this Confucianization of law, see Bodde and Morris, *Law in Imperial China*, pp. 27–43; Ch'u, *Law and Society in Traditional China*, pp. 267–279.

<sup>72</sup> M5: 54–55.

<sup>73</sup> L3: 16.

using objective means of compulsion, it degenerates from ethical ideal or virtue to custom or even law.

Law could be obeyed without the use of objective means of compulsion because it is rooted in or has engendered a corresponding custom, and if the practice becomes more than about external compliance, bringing about moral transformation of character and social harmony, it ascends to the ethical ideal of *li*.

## Confucian and Pragmatic Tools of Government

In Dewey's view, "Politics and law are closely tied together; they cannot ultimately be severed."<sup>74</sup>

Dewey maintains that, as statements or relations of order between events or actions, "laws are the general methods by which we introduce continuity and order in experiences otherwise discrepant and mixed up. They are instrumentalities of reducing seeming conflicts to harmony."<sup>75</sup> By stating clearly the relation between certain actions and specific consequences, and promising that the courts of the land will ensure that the stated relation between the two will obtain, laws introduce predictability into social life. Laws "are in fact the institution of conditions under which persons make their arrangements with one another. They are structures which canalize action."<sup>76</sup>

By setting out and making predictable the relations between specific conditions/actions and their consequences, law helps to regulate social interaction, where there is potential for conflict. Dewey

suggested that the occasion for a custom to become law by being authoritatively formulated by a competent authority is always a dispute.<sup>77</sup> For example, the custom of only the eldest son inheriting might have existed in a society but became law in the common-law tradition, when some conflict that arose over a particular case (perhaps the other siblings insisted that their father had wanted all to have a share) was brought before a magistrate who ruled in favor of the customary inheritance rights of the eldest son. In other legal traditions, some different process of legislation by the appropriate institution might be required before a law came into being, but the trigger for legislation in such cases would be some dispute over preexisting customs. It should be noted that Dewey's observation does not preclude that laws could also have their source in the resolution of certain conflicts even when no custom exists.

The law is a tool of government because of its function in preventing and resolving conflicts. By clearly delineating boundaries of permissible behavior in specific circumstances, laws enable people to avoid conflicts, and when they do arise, resolve them according to principles known to and accepted by the community. By determining what is right in each case, the law makes it possible for people not to settle conflicts through arbitrary might. In Dewey's view, "law is the sole alternative to resort to force, individual and collective, as a method for arranging disputes due to conflict of interests."<sup>78</sup>

We should probably read "force" in the quoted passage from Dewey as "violence," the wasteful and destructive use of force, to render it consistent with other statements

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<sup>74</sup> M15:105.

<sup>75</sup> M4:199.

<sup>76</sup> L2: 269.

<sup>77</sup> L3:327.

<sup>78</sup> M15:107.

recognizing the use of force to enforce laws. There is some evidence for this reading of Dewey's conception of law: "law is essentially a formulation of the use of force;"<sup>79</sup> it describes "a method for employing force economically, efficiently, so as to get results with the least waste."<sup>80</sup>

Dewey seems to move from a conception of law involving what H.L.A. Hart calls "rules of recognition," secondary rules setting out the criteria of legal validity—"customs do not become law

in any juridical sense until they are authoritatively stated or formulated"<sup>81</sup>—to one closer to the conception of law found in German thought, which views coercion as a necessary part of law.<sup>82</sup> Whether or not coercion is included in its definition, the ability of law to settle disputes, when other means such as negotiation fail, is nevertheless due to the presence of a coercive element.

From a Confucian perspective, *li* are also "structures which canalize action," which introduce continuity and order into experience, and predictability and stability into social life, and prevent and resolve conflicts. However, both treating China as "a society without litigation" at one extreme, and reducing *li* to a form of laws at the other extreme, oversimplify the issues and distort the understanding of actual experience.

<sup>79</sup> M10: 251.

<sup>80</sup> M10:212.

<sup>81</sup> L3: 327.

<sup>82</sup> H.L.A. Hart, *The Concept of Law* (1961; Oxford: Oxford University Press, 1994), 2nd ed., pp. 100–110. Dewey does not have a systematic philosophy of law, and the discussions about law scattered in short essays throughout his works cannot really be

*Li* and laws are not related as moral ideal to the practice of realpolitik. They have co-existed in actual practice, and both legal and ritual practices have fallen short of their respective ideals. As ideas, law and *li* overlap and share certain similarities, but they also differ significantly in their functioning vis-à-vis the goal of good government. All governments, East or West, need to contend with the problem of conflicts arising from differences in

beliefs, desires, needs, and interests, and attempt

**In Dewey's view, "law is the sole alternative to resort to force, individual and collective, as a method for arranging disputes due to conflict of interests."**

to serve the common good with limited resources. How could something common be created from differences? How do we coordinate different pursuits to avoid or resolve harmful conflicts? By offering different answers to these questions, law and *li* serve as different kinds of tools of government.

*Li* and law are complementary rather than mutually exclusive alternatives even in the Confucian worldview. Both build social consensus and facilitate social coordination and cooperation by establishing and maintaining social norms. Whether we rub noses or bow to each other, sharing a common ritual norm of greeting ensures that an encounter begins on a positive note, increasing the chances of harmonious and mutually satisfying interaction.

compared with a carefully worked-out theory such as Hart's. Given that the mention of law requiring authoritative statement and formulation was made as a possible challenge to a position adopted in a book he was reviewing, it carries less weight than the other statements that place him closer to the German conception of law.

Whether we drive on the right or on the left, following the norms of a single set of traffic laws together ensures that we do not kill each other simply for lack of coordination. Confucians recognize both laws and *li* as tools of government because both could be employed to elicit certain kinds of behavior and prevent others, but assess their desirability differently.

One may either comply with a norm of behavior voluntarily as per ritual practice or be ordered to do so by the authorities as the result of an aggrieved party bringing the dispute to the relevant officials. The latter indicates a failure of virtuous self-regulation and cooperation on the part of those concerned. Confucians prefer that people regulate themselves through virtue so that government authorities need not resort to force.

Confucians believe that while the effect on behavior in the short term may be the same, different tools of government have diverging results in the longer run. Those who obey laws “will stay out of trouble, but will have no sense of shame,” whereas those who follow rituals “will, besides having a sense of shame, reform themselves.”<sup>83</sup> Whether criminal or civil, laws, by judging actions and dealing with disputes according to public rules, will direct people’s attention to winning the adversarial contests before the adjudicating authorities, even at the expense of moral considerations of the situation.

Apart from encouraging the kind of morally suspect verbal glibness (*ning* 佞) that

Confucius disapproved of, the tendency to separate law from morality means that using the law as the primary tool of government (let alone the only tool) may lead to the kind

of society where even social and political leaders publicly excuse or justify their acts in terms of “What I did was immoral, but it was not illegal.”<sup>84</sup> Moreover, given that there is usually a winner and a loser in litigations, an increase in litigiousness is likely to reduce the overall harmony of a commu-

nity. Indeed, resorting to litigation is in itself a failure in harmony since it means that the parties could not voluntarily come to a mutual agreement.

Confucians see the social norms of *li*, unlike statutory laws, as inherently ethical, which sets them apart from mere convention. *Li* embody virtues and realize harmony in the community. As an idea, Confucian *li* eschew coercion. Dewey’s *Ethics* conceives of ritual in terms of noncoercive custom embodying social if not moral consensus. Dewey recognizes that it is not force that brings about consensus, but the existence of consensus that enables laws or customs to be enforced.

The context for Dewey’s emphasis on consensus is Dewey’s social conception of self as a critique of America’s rugged individualism. This brings Dewey’s understanding of the value of customs and rituals closer to that of Confucian *li*, which imply a relational concept of self, and as a virtue bring the value of harmony to social interaction. However, *li* have a higher ethical status in Confucianism compared with customs and

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<sup>83</sup> *Analects* 2.3.

<sup>84</sup> Hansen, “*Fa* (Standards: Laws) and Meaning Changes,” p. 463.

rituals in Dewey's *Ethics*. From the Confucian perspective, when both elicit voluntary compliance and embody consensus, *li* still differ from customs in introducing the possibility of excellence or virtue into a practice.

The issue of coercion is central to the Confucian preference for *li* over laws. By resorting to punishment or threat of force, the reasons offered by laws for action are external; they make a particular act more or less attractive by manipulating the external preconditions or consequences. Once the laws are removed or if a person believes she could avoid these external deterrents, she will return to her original preference. In this way, laws work only as long as there is effective enforcement.

In contrast, *li* work through habituation that results in spontaneous compliance based on emotive-cognitive transformation. It is this transformation internalizing the ethical-social norm that develops a sense of

shame in a person. One reforms oneself through *li* so that, even if no one is watching or no one would know if one transgresses, one would still follow the ritual norms.<sup>85</sup>

How valid is this Confucian contrast between laws and *li*? The claim that laws always coerce or threaten and never educate or reform those who obey seems too sweeping. Han Fei mentioned “using laws to rectify the mind,” intending that laws bring about changes in those who obey them, going beyond external compliance.<sup>86</sup> One might start obeying a law to avoid penalties, but if the norm gives satisfaction, it could very well bring about the kind of transformation Confucians associate only with *li*.

For example, by repeatedly obeying a law against littering, a person may develop a habit of not littering as well as come to appreciate the consequently clean environment so much that she voluntarily will not litter even in a country without such a law.<sup>87</sup>

<sup>85</sup> Cf. Martha Nussbaum's discussion of the complex nature of shame and its role in law; she warns that shame poses dangers antithetical to a liberal society, and at its most primitive involves “hiding from our humanity” (Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* [Princeton: Princeton University Press, 2004]). Discussions of shame in connection with law have a tendency to treat it as social sanction, even legal punishment, treating it as an emotion that results from others' reactions to one's own actions (Richard Posner, *Law and Social Norms* [Cambridge, MA: Harvard University Press, 2000], chap. 6). It is important to stress that “the sense of shame” that translates *chi* refers to an emotion based on one's evaluation of oneself rather than others' treatment; in his discussion of Mencius' philosophy, Kwong-loi Shun contrasted *chi* with *ru* in the sense of disgrace, and remarked about the former's “more reflective concern with self” (Kwong-loi Shun, *Mencius and Early Chinese Thought* [Stanford: Stanford University Press, 1997], pp. 58–62). Western conceptions of shame that come close to *chi* include that of Bernard Williams, who maintains that

“Shame can transcend both an assertive egoism and a conventional concern for public opinion” (Bernard Williams, *Shame and Necessity* [Berkeley: University of California Press, 1993], p. 88). For more recent discussions of shame, see Johann A. Klaasen, “The Taint of Shame: Failure, Self-Distress, and Moral Growth,” *Journal of Social Philosophy* 32 (2001): 174–196; Bryan Van Norden, “The Emotion of Shame and the Virtue of Righteousness in Mencius,” *Dao* 2 (2002): 45–78.

<sup>86</sup> Wang Xianshen, *Hanfeizi jijie*, p. 205. The phrase *yi fa jiao xin* (using laws to rectify the mind) may also be translated as “educate heart-mind with laws.” The commentary refers to *jiao* (educate) as an error, and W. K. Liao substituted *jiao* 矯 (rectify) for *jiao* 教 (educate) in Liao, *The Complete Works of Han Fei Tzu*, 1:271. In either case, the resulting change goes beyond external behavior. Confucians will object that Han Fei's idea of reform is one of harsh conditioning and hardly the same thing as Confucian education.

<sup>87</sup> Cf. discussion in Joel J. Kupperman, “Xunzi: Morality as Psychological Constraint,” in *Virtue, Nature, and Moral Agency in the Xunzi*, ed. T.C.

Conversely, compliance with ritual norms may also be due to external factors, such as a fear of disapproval or a desire for praise from those around us. It is because external factors could also play a part in eliciting ritual behavior that historically *li* came to be enforced through coercive means in China. Even if no such external factors are involved, there is no guarantee that habituation will develop a sense of shame rather than result in blind and mechanical following of the ritual norms that will maintain order only in fairly static conditions.

Performances that are forced, mechanical, or done for some external reasons are not exemplary *li* and are meaningless. Unless the performance comes from the heart-mind, with the recognition that something is the appropriate thing to do, and, moreover, is an embodiment of excellence to which one commits one's entire person, there is no Confucian *li*.

Although it might overlap with Dewey's concept of custom, the Confucian concept of *li* is not merely about customary morality, which Dewey contrasts with reflective moral-

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One could argue that Confucius was quite aware of how *li* could degenerate into no more than mechanical habit or compliance for external reasons, and that he would rather have people ignore *li* than follow them only for form's sake or for the wrong reasons. His rhetorical question, "Are rites no more than gifts of jade and silk?", is an implied criticism of the mechanical following of ritual forms that already must have been a problem during his time.<sup>88</sup> He told Zai Wo to ignore the three-year ritual mourning period if "[you would] be able to enjoy eating your rice and wearing your finery" against the ritual norms,<sup>89</sup> although to other students he criticized Zai Wo's lack of feeling, making it clear that *li* is ethically important even though it defeats the purpose to force people to conform.

ity. In reflective morality, customs are still present, but "the individual has to grasp the meaning of these customs over and above the bare fact of their existence, and has to guide himself by their meaning and not by the mere fact noted."<sup>90</sup> Adequate performance of Confucian *li* must rise to the level of reflective morality, even though over-intellectualizing will get in the way of effective practice.

The Confucian *li* is closely related to *yi* 義—understood as what is meaningful or appropriate. According to the *Book of Rites*, "*li* is the actualization of *yi*. If an observance stands the test of being judged by what is *yi*, even though the ancient kings may not have done it, it should be adopted for its *yi*."<sup>91</sup> Grasping and embodying the meaning—and not mere compliance with observed forms—is critical to effective ritual performance. Performances of Confucian *li* are subject to

Kline III and Philip J. Ivanhoe (Indianapolis and Cambridge: Hackett Publishing, 2000), pp. 89–102, at pp. 95–96.

<sup>88</sup> *Analects* 17.11.

<sup>89</sup> *Analects* 17.21.

<sup>90</sup> M5:167.

<sup>91</sup> Sun Xidan, *Liji jijie*, p. 618. Cf. translation in James Legge, *The Li Ki*, in *Sacred Books of the East* series (1885), vol. 27, p. 390. For more detailed discussion of the relation between *li* and *yi*, see Tan, *Confucian Democracy*, pp. 83–88. Cf. Antonio Cua, *Ethical Argumentation* (Honolulu: University of Hawai'i Press, 1983), pp. 160–163.

evaluation, by the criterion of *yi*, or what is appropriate to a situation. This introduces a critical reflective element to *li* that is important to any effort to reform *li* to meet changing social and historical circumstances.

The idea of *li* in Confucianism does not merely describe customary mores; it is associated with “leading the people with *de* 德 (excellence or virtue).”<sup>92</sup> For Confucians, good government is a government of virtue. Such a government must achieve more than social order based only on prudential actions elicited by threats or incentives. It must bring about social harmony based on ethical transformation of the people into virtuous ritual participants. Where actual practices are concerned, whether we apply the term law or *li*, what is important is to identify what kind of social norms are at work and how they work, so that we may determine whether they will bring about the kind of social harmony Confucian good government aims for.

What should governments do before that ideal of harmonious ritual community is achieved? Voluntary compliance is undoubtedly superior to coerced obedience, but until the ethical transformation of the entire populace is complete, threats and incentives remain necessary. Governments must deal with the problems of an imperfect society here and now, rather than act as if they are already living in a utopia of virtue. This recognition is also present in the *Analects*, wherein one of the purposes of Confucius’ “rectification of names” (*zhengming*) is to ensure that “punishments will fit the crimes” so that “the people will know where to put hand and foot.”<sup>93</sup> It becomes much

more pronounced in the *Xunzi*, which advocates that “those who come forward with good intentions should be treated with full ritual courtesy; those who come forward without good intentions should be handled with punishments.”<sup>94</sup>

A flourishing, well-governed state must get both punishments and penalties (*xingfa* 刑罰) as well as rituals and music (*liyue* 禮樂) right, implying that they are complementary. In practical terms, rituals do not offer a complete alternative to laws as the tool of government—they are both needed, together with other means, such as education and non-official agencies that resolve disputes and contribute to social order.

Neither is law alone sufficient for good government. The “rule by law” that Confucians must reject is a vision of government that focuses only on the minimal requirement of eliciting external compliance and ignores completely the quest for social order that is not maintained by coercive threats and incentives.

## Deweyan Democracy and the Art of Community

Dewey believed that Chinese empires were so “interwoven with local customs as to be part of the established order of nature and able to dispense with military support.”<sup>95</sup> This resulted, in China, in “a scheme of remarkable static equilibrium—the most stable known to history.”<sup>96</sup>

In the nineteenth century, this equilibrium was disrupted by external forces, and what had once been a strength became a weakness.<sup>97</sup>

<sup>92</sup> *Analects* 2.3.

<sup>93</sup> *Analects* 13.3.

<sup>94</sup> *Xunzi* 9.2.

<sup>95</sup> M11: 219.

<sup>96</sup> M11: 219.

<sup>97</sup> Dewey’s critique agrees with the view of Confucianism as advocating obedience to an obsolete tradition, a view popular among Dewey’s

Entrenched customs prevented intelligent solutions to new problems.<sup>98</sup> For customs lack adaptability, and those whose lives are governed by customs tend to dislike change. Even in civilized societies, custom “has the greatest inertia” and tends to persist even through social revolutions that dismantle the visible structures of institutions.<sup>99</sup> In contrast, laws pragmatically understood as serving a social function “assure the introduction on a large scale of the rational factor into concrete evaluations of legal arrangements.”<sup>100</sup> Pragmatic laws are amenable to, indeed demand, social inquiry and intelligent change to ensure that they live up to their function.

Dewey seems to imply that custom on its own is an inferior tool compared with law (which implies custom) because the former is not amenable to intelligent change. Noting that some appeal to reason as the “fount and origin” of laws, Dewey himself considers law to be “embodied reason” in the sense of “a formulated generalization of means and procedures in behavior which are adapted to secure what is wanted.”<sup>101</sup> Formulation, application, and critique of laws as prescriptive rules or universal propositions all require what is commonly recognized as reason. To be irrational or unreasonable would render a law seriously flawed if not totally disqualify a proposition from being a law.

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close associates in China, many of whom saw Confucianism as the albatross around China’s neck as China entered the twentieth century. Against this, one could point out that *Analects* 9.3 explicitly advocates change in a ritual practice even as it resisted another, which indicates that ideally *li* 禮 should rise above mere custom, even though in practice it has been difficult to do so.

<sup>98</sup> M11: 213.

<sup>99</sup> M14: 76–77.

<sup>100</sup> L14: 122.

Insofar as deliberate, controlled social change requires the use of reason (broadly construed), the Confucian *li* also needs the use of reason if it is to be amenable to reform and conscious improvement. For example, when later Confucians such as Zhu Xi formulated “family rituals,” probably on the basis of previous practices, reason is involved in reflective selection and modification. This does not contradict the fact that ritual performances are not primarily exercises in reasoning, but embodied experiences better understood as aesthetic, concerned with perception, appreciation, and enjoyment.<sup>102</sup>

*Analects* 8.8 associates *li* with arts such as poetry and music: “Be stimulated by the *Odes*, take your stand on the rites and be perfected by music.” The *Book of Rites* has chapters on music, and on *li* and music, which are often mentioned together as *liyue* in early Chinese texts. The association of *li* with music also implies the importance of enjoyment in ritual practice, as the same character 樂 is used for both music and joy, a fact that Xun Zi’s discussion of music made much of.<sup>103</sup> Robert Eno captures the centrality of the aesthetic dimension in Confucian (*ru* 儒) ritual mastery most aptly by describing the Ruists as “masters of dance.”<sup>104</sup>

<sup>101</sup> L2: 271. See also Dewey’s “Nature and Reason in Law” (M7:56–63), first published in *International Journal of Ethics* 25 (1914): 25–32.

<sup>102</sup> See Dewey’s definition of the aesthetic in L10: 53, and the contrast between rational and aesthetic orders in David Hall and Roger Ames, *Anticipating China: Thinking Through the Narratives of Chinese and Western Cultures* (Albany: State University of New York Press, 1995), pp. 116–117.

<sup>103</sup> Book 20 in Knoblock, *Xunzi*, vol. 3.

<sup>104</sup> Robert Eno, *The Confucian Creation of Heaven: Philosophy and the Defense of Ritual Mastery* (Albany: State University of New York Press, 1989), chap. 2.

The aesthetic emphasis of *li* may be obscured or deliberately suppressed by viewing it as a rigid set of prescriptive rules of behavior imposed from above in order to entrench hierarchical class distinctions. Only a small minority agrees with Hansen that the ancient Chinese thinkers “never characterized the *li* 禮 as rules, as oughts, or as prescriptive sentences.”<sup>105</sup> The latter legalization of Confucianism overshadows the origin of *li* as customary practices wherein, “far from universally applicable principles, they are particular mores, values and guidelines for human interaction of a particular society at a particular time.”<sup>106</sup>

**The rules may attempt to articulate the ritual forms, but to reduce *li* to rules is to mistake the sacrificial vessel for the actual sacrifice.**

The Chinese tradition does not offer any detailed account of the origin of rituals that matches the Pragmatists’ account of the connection between personal habits and social customs, and how these emerge in the process of individuals interacting to bring order to their lives, simplifying practices, and preparing the way for evaluating habits and customs.<sup>107</sup> In general, the Chinese traditional discourse on *li* paid more attention to intentional “top-down” propagation and training to observe the rituals properly than to the spontaneous emergence of rituals as personal aesthetic practices. The *Analects*

considers the institution of *li* the province of the “son of heaven.”<sup>108</sup> The treatise on *li* in the *Xunzi* and other early Chinese texts attributed them to the legendary sage-kings.<sup>109</sup>

Traditional accounts notwithstanding, the concept of Confucian *li* could be reconstructed to better appreciate its aesthetic element, which is crucial to its capacity to bring about harmony. A ritual performance should be a dynamic process of “nourishing the emotions,”<sup>110</sup> conveying the fitting emotions and meanings in social interactions. The rules of *li* are elicited from exemplary performances. They emerge out of an aesthetic process and should be treated as secondary rather than definitive. They may guide the beginner, but the ritual virtuoso has no need for them. The rules may attempt to articulate the ritual forms, but to reduce *li* to rules is to mistake the sacrificial vessel for the actual sacrifice.

How inadequate the rule-conception of rites is may be seen by how little importance the *Analects* attaches to the tangible forms, that part of rites which could be formulated as enforceable “rules of behavior”:

The Master said, “Surely when one says ‘The rites, the rites,’ it is not enough merely to mean presents of jade and silk. Surely when one says ‘Music, music,’ it is not enough to mean bells and drums.”<sup>111</sup>

Confucian *li* are performances wherein the particular is more the focus than the universal; quality and content in a unique performance outweigh form and technique in

<sup>105</sup> Hansen, “*Fa* (Standards: Laws) and Meaning Changes,” p. 461; David L. Hall, and Roger T. Ames, *Democracy of the Dead: Dewey, Confucius, and the Hope for Democracy in China* (La Salle: Open Court, 1999), p. 204.

<sup>106</sup> Peerenboom, *Law and Morality in Ancient China*, p. 125.

<sup>107</sup> I thank the anonymous reviewer for suggesting comparison on this point.

<sup>108</sup> *Analects* 16.2.

<sup>109</sup> See chapter 19.

<sup>110</sup> *Xunzi* 19.1d.

<sup>111</sup> *Analects* 17.11.

importance. Observing all the correct ritual forms is worthless if reverence is missing from the performance.<sup>112</sup> “In mourning, it is better to err on the side of grief than on the side of formality.”<sup>113</sup> In Confucianism, *li* embody the ways of living harmoniously together. Governing through *li* is to conduct politics as the art of making community.

that the aesthetic emphasis of one does not preclude the use of reason, and the rational emphasis of the other should not neglect the aesthetic. The success of reforming laws to meet the needs and desires of individuals and communities requires the keen “aesthetic apprehension of quality” mentioned above as much as rigorous reasoning. While

**Studying the way Confucian *li* work could illuminate the aesthetic side of political life and enhance our understanding of how to achieve Deweyan democracy as a way of life.**

Studying the way Confucian *li* work could illuminate the aesthetic side of political life and enhance our understanding of how to achieve Deweyan democracy as a way of life. Studying how laws could promote democratic life and how they could be continuously reformed to meet the people’s changing needs yields clues for democratizing Confucian rituals through social inquiry and reflection. The contrast and complementarity of *li* as primarily aesthetic and laws as primarily rational give us a clue to how to introduce flexibility and responsiveness into the task of government.

As with all pragmatic contrasts, this should not be reified into a dualism. It must be stressed that Dewey believed that reason requires the guidance of feeling (the aesthetic apprehension of quality), and feeling requires continual reflective (rational) scrutiny.<sup>114</sup> Part of appreciating the contrast and complementarity of *li* and laws is to realize

the aesthetic is emphasized in particular performances themselves, that *li* could be formulated and evaluated indicates the applicability of reason to a needed process of improvement as human communities and individuals change.

Dewey himself understood the task of achieving democracy as both art and science; he refused to separate the rational and the aesthetic, although the aesthetic element in Dewey’s political philosophy has been relatively neglected.<sup>115</sup> The tendency to emphasize one at the expense of the other—and, worse, to oppose them in a dualism—is the cause of many social problems. To be more than a political system, more than the “political democracy” that Dewey found “the least inspiring,” democracy as “the idea of community life itself” must avoid a reified separation of the rational and the aesthetic, and achieve a balance between them.<sup>116</sup>

<sup>112</sup> *Analects* 3.26.

<sup>113</sup> *Analects* 3.4.

<sup>114</sup> I thank the anonymous reviewer for pointing this out to me and observing that a previous draft gave the impression of foisting a dualism of the rational and aesthetic, which Dewey tried his best to repudiate—an impression that is definitely against my intention as I agree completely

with the reviewer about Dewey’s deliberate undermining of such dualism.

<sup>115</sup> For an exception to this general trend, see Thomas Alexander, *John Dewey’s Theory of Art, Experience, and Nature: Horizons of Feeling* (Albany: State University of New York Press, 1987).

<sup>116</sup> L2:328.

The rational and the aesthetic, science and art, are inseparable in bringing “an organized, articulate public” into being:

The highest and most difficult kind of inquiry and a subtle, delicate, vivid and responsive art of communication must take possession of the physical machinery of transmission and circulation and breathe life into it . . . for democracy is the name for a life of free and enriching communion. It had its seer in Walt Whitman. It will have its consummation when free social inquiry is indissolubly wedded to the art of free and moving communication.<sup>117</sup>

Democracy as a way of life is guided by democracy as a regulative idea;<sup>118</sup> its meaning has to be envisioned imaginatively and emotionally, as well as understood conceptually and analyzed rationally; its functioning must be investigated empirically. Achieving the democratic way of life is at the same time an art and a science.

In *Nature and Experience*, Dewey points out that:

science is an art, that art is practice ... that art—the mode of activity that is charged with meanings capable of immediately enjoyed possession—is the complete culmination of nature, and that “science” is properly a handmaiden that conducts events to this happy issue.<sup>119</sup>

In Thomas Alexander’s view, “the art of life is the goal behind Dewey’s ethics, his philosophy of democracy, and his theory of education.” Furthermore, the key to this art of

life is to develop a “creative-critical culture,” a culture understood as “that organized body of activities by which human beings are meaningfully present to each other” and “a culture that is consciously aware of itself as a shaping and shapeable power.”<sup>120</sup>

According to Dewey,

The problem of freedom and democratic institutions is tied up with what kind of culture exists. The struggle for democracy has to be maintained on as many fronts as culture has aspects: political, economic, international, educational, scientific and artistic, [and] religious.<sup>121</sup>

This cultural approach to the pursuit of democracy indicates the area of most fertile engagement between Dewey’s philosophy and Confucianism. *Li* constitute an important part of culture: they are norms of excellence selected through the experience of a community from what Dewey calls “the habitudes which lie below the level of reflection which have been formed in the constant give and take of our relationship with others.”<sup>122</sup> While reasoning is required to solve problems in social inquiry, *li* shape the tacit environment, which has an impact on how we participate in the inquiry and the outcome.<sup>123</sup>

In an aesthetic experience, we move from a precognitive, inchoate feeling of a situation to a cognitive, communicative, process of understanding its meaning and value in the wider, continuous context of shared experience, and return to an appreciation of the whole, a sense—which is a fusion of feeling and thinking—of its meaning and value

<sup>117</sup> L2: 350.

<sup>118</sup> L2: 328.

<sup>119</sup> L1: 268–269.

<sup>120</sup> *Ibid.*, pp. 269–272.

<sup>121</sup> L13: 186.

<sup>122</sup> M9: 22.

<sup>123</sup> For more on the role of *li* in social inquiry, see Sor-hoon Tan, “Democracy as Communities of Friends,” in Ewing Chinn and Henry Rosemont, Jr., eds., *Metaphilosophy and Chinese Thought* (New York: Global Scholars, 2005), pp. 95–114.

as immediately embodied in the situation. According to Dewey, “all communication is like art,” and communication is central to the building of community as democratic processes.<sup>124</sup>

***Li* constitute an important part of culture: they are norms of excellence selected through the experience of a community.**

Reasoning in social inquiry is instrumental in solving the problems of the general public in a democracy. However, thinking alone does not determine the outcome; the attitudes and feelings that participants bring to the inquiry also affect the results. If one enters an inquiry feeling hostile toward fellow participants, obstinately believing that one alone is right and entitled to what one wants, differences of opinion are unlikely to be resolved to the mutual benefit of all. The effect of rituals on emotions, especially the emphasis of Confucian *li* on respect and deference or “yielding to others,” means that they could be useful in guiding social inquiry in the direction of social harmony.

To appreciate how *li* could be an important complement to laws in government, we should recognize them as “tacit models of exemplary conduct” without reducing them to “customary or interactional law.” Confucians believe that acting and governing appropriately cannot be achieved by merely applying universal rules in an exercise of reason; they also require aesthetic sensitivity to the unique circumstances of each particular situation. Rather than rules that anyone could comprehend, authoritative performances of *li* by exemplary individuals

provide the standards of behavior. This is why a Confucian government of *li* also asserts rule by virtuous persons over rule by law alone.

However, it is important to remember that de facto governments are not necessarily the people who should rule. As long as we do not have the most virtuous in government, then laws can be very useful in constraining such imperfect government. Just as laws have to be applied to subjects who are not virtuous enough to follow good examples, governments who are not virtuous enough to govern through *li* should be curbed by laws as well. Besides recognizing that *li* and laws are more complementary than mutually exclusive alternatives in currently possible government, we must also realize that there cannot be an absolute rule as to which is the more appropriate in a particular situation.

Ultimately it is a matter of judgment requiring humanity and wisdom.

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<sup>124</sup> M9:9.