

Categories and Legal Reasoning in Early Imperial China: The Meaning of *Fa* in Recovered Texts

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Few terms in classical Chinese are so nettlesome as *fa* (法 or 灋), a word often rendered in English as law or penal law.¹ Its troublesome nature owes much to the pronounced multivalence it had acquired already in early times. Traditional sources show that the term *fa* had a variety of meanings,² including “penal law,”³ “standard,” “model,” “method,” and so forth. Hence it is unsurprising that scholarly opinion is divided about how to understand this term in various contexts, a situation reflected in the number of English translations currently in use. The newly recovered legal texts of Qin (221–207 BCE) and early Han (206 BCE – 220 CE) can help illuminate the sense of the word *fa*. Yet such materials have attracted little attention from Western scholars, whose discussions have focused on philosophical works such as the *Mozi* 墨子, or the text “Jingfa” 經法 discovered at Mawangdui (ca. 168 BCE).⁴

In this paper, we will clarify what *fa* means in certain, specific contexts. We argue that, although appearing in legal texts, counter-intuitively the term is often not best understood as law. In those situations *fa* refers concretely and specifically to sections of the statutes which delineate decision-making processes for use by officials. Our study does not encompass the entirety of the early Chinese textual corpus. Given the sheer number of occurrences of *fa* and the differences between genres, a comprehensive study would be neither feasible in the context of a single article nor especially useful. Instead, we tackle a smaller but still significant part of the puzzle: recovered legal statutes and other legal materials from the Qin and Han periods. We are going to assume what philosophers sometimes call the principle of charity.⁵ While we do not hold that the term *fa* can only be read in one way in all contexts, we believe that bureaucratic texts from Qin and Han times use the term *fa* in identifiable and relatively consistent ways. In this respect we follow scholars such as Hsing I-t'ien 邢義田 and Xu Shihong 徐世虹, whose work shows that authors of legal texts put great weight on the technical vocabulary they employed.⁶

The arguments of this essay also have larger implications, for the interpretation of *fa* is no trivial matter. Derk Bodde many years ago asserted that *fa* is “by far the most important

1 Both orthographies are correct and in many instances interchangeable. There has been much scholarship on the relationship between the two graphs in recent years, and on the meanings of *fa* that are involved; for review and discussion see Zhang Yonghe 2009.

2 See *Jingji zhuang*, s. v. “*fa*.”

3 Ames 2003, 247.

4 For examples of works that touch upon philosophical texts, see Hansen 1993; Fraser, “Mohism”.

5 Blackburn 1996, 62.

6 Hsing I-t'ien 1983, 52-54; Xu Shihong 1997, 66-67.

word in the Chinese legal vocabulary.”⁷ Whether or not this statement holds up under scrutiny in light of recent archaeological findings is a separate question. But at the very least, analysis of the usage of *fa* in early legal texts sheds needed light on the development of China’s long tradition of jurisprudence. The issue of what *fa* means moreover bears on discussions that extend beyond the field of legal studies. Its interpretation also touches upon the longstanding debate over early Chinese conceptions of nature. Joseph Needham, for example, argued that the early Chinese lacked a notion of law and so did not develop a corresponding notion of “laws of nature.”⁸ Needham’s critics, including legal scholars like Bodde, have resisted this assertion, pointing to the use of terms such as *fa* and *ze* 則 (rule, pattern) in a variety of philosophical works from the pre-imperial and early imperial periods.⁹ While the present article does not take an explicit position within this larger debate, it is our hope that by clarifying the legal usage of *fa* in materials unavailable to Needham and Bodde, we may pave the way for reevaluation of their arguments.

Our investigation will proceed in four stages. We begin by briefly introducing the sources to be used in this study. We then review three readings of the term as proposed in recent scholarship: *fa* as a synonym for law, especially penal law; *fa* as precedent; and *fa* as legal principle. Examining legal sources, we show that while these approaches have their virtues, they also suffer from explanatory limitations. We then move on to our proposal, which combines and builds upon the best aspects of the preceding three to interpret *fa* in the relevant contexts as “category.” This interpretation explains more occurrences of the term *fa* in recovered legal documents than the others, and helps illuminate the workings of the legal system of Qin and Han. In the final section, we examine one *fa*, so as to give readers a concrete sense of the workings of *fa* in ancient China. Taken as a whole, the evidence we gather reveals that *fa* referred to heuristic tools used by officials in judicial decision making, specifically, the process of matching situations encountered in real life with the paradigmatic situations and prototypical patterns described in the statutes and ordinances.

I Sources for this Study

Information about legal matters in early imperial China is found in two types of sources: received historical texts, and archaeologically-recovered materials. We draw from both sorts here, but give greater weight to the latter. Transmitted sources on legal matters for the early imperial period are sparse. Legal materials, references to legal discussions, and specific cases have been preserved in the dynastic histories like *Shi ji* 史記 and *Han shu* 漢書. Shen Jiaben 沈家本 (1840–1913) in *Lidai xingfa kao* 歷代刑罰考 and Cheng Shude 程樹德 (1877–1944) in *Jiu-*

7 Bodde 1963, 379.

8 Needham 1956, 518-583.

9 Bodde 1979. Bodde’s position has been supported more recently in Peerenboom 1993 and Richey 2006. Peerenboom, for example, claims that the Huanglao “Jingfa” manuscript “sponsors a natural law theory” (48-49, 61-62; quote from 19-20); he even goes so far as to argue that *fa* is “a possible functional equivalent of ‘laws of nature’” (48).

chao lü kao 九朝律考 gathered texts from those sources, and A. F. P. Hulswé translated much of the Han material in his *Remnants of Han Law*. Aside from these sources, some of the legal decisions attributed to the scholar-minister Dong Zhongshu 董仲舒 (ca. 179–104 BCE) were included in *Tongdian* 通典 by Du You 杜佑 (735–812) et al. and elsewhere, and have been translated and discussed by Michael Loewe, Gary Arbuckle, and others.¹⁰

Archaeologically-recovered documents from the Qin and Western Han are more plentiful and provide us with a picture of the early Chinese legal system that seems closer to actual practice. To date, two major sets of these have been published. The Shuihudi 睡虎地 manuscripts, which date to ca. 217 BCE, were excavated in 1975 from the tomb of a Qin official in modern-day Hubei province.¹¹ The materials discovered at Shuihudi include “Qin lü shiba zhong” 秦律十八種, “Xiaolü” 效律, “Qin lü zachao” 秦律雜抄, “Falü dawen” 法律答問, and “Fengzhen shi” 封診式. Another piece, called “Wei li zhi dao” 為吏之道, describes the conduct of the ideal official and may be considered a text concerned with legal matters. However, its focus on ethics and ideals contrasts with the statutes and other documents concerning the nitty-gritty aspects of applying the law. Most of these manuscripts have been translated into English by Hulswé in his *Remnants of Ch'in Law* and by Katrina C. D. McLeod and Robin D. S. Yates in a 1981 article on “Fengzhen shi.”¹²

The Zhangjiashan manuscripts contain two legal texts, “Ernian lüling” 二年律令 and “Zouyanshu” 奏讞書, both of which have received tremendous scholarly attention.¹³ “Ernian lüling” is a collection of statutes and one ordinance, and was copied out as a set in 186 BCE. “Zouyanshu” comprises reports on twenty-two cases in which reaching a legal decision was difficult. Although the “Zouyanshu” has been referred to as a collection of legal precedents, most scholars now believe that it set forth models for submitting ambiguous cases to higher levels of the bureaucracy for review.¹⁴

II Previous Interpretations

We will now turn to the main issue of this article, which is the meaning of *fa*. While this is the first article in English to take the meaning of *fa* in recovered legal texts as its main focus, a number of scholars have touched upon the issue previously. Considering those readings and their implications for our interpretation of the Qin and Han materials forms the next part of this paper.

10 Loewe 2009; Arbuckle 1983; see also Sanft (forthcoming).

11 *Shuihudi Qinmu zhujian*; we have also referred to *Zhongguo zhenxi falü dianji jicheng*, I-1, 375-769.

12 Hulswé 1985; McLeod and Yates 1981.

13 See the extensive bibliography of works related to the Zhangjiashan documents in Li Li 2009, 437-522.

14 A transcription of the Zhangjiashan texts can be found in *Zhangjiashan Han mu zhujian* first published 2001; we cite the revised transcription in the 2006 edition. We also refer to *Ernian lüling yu Zouyanshu*. Qin materials that were distributed for what appear to have been educational purposes suggest that may be the case for “Zouyanshu” as well; see Xu Shihong 1999, 215-216. For the view that “Zouyanshu” represents a collection of precedents, see Csikszentmihalyi 2006, 29-30.

Fa as Law

The most common interpretation has been that *fa* means something like law. In its original formulation, this tended to focus on *fa* as the equivalent of specifically penal law or code. This reading has been around a long time in legal studies as well as in the broader field of sinology, and finds support in historical texts for use in certain contexts. Han-era histories refer to the “three-foot laws” (三尺法), which denoted law generally by synecdoche, describing the materials upon which it was ideally written.¹⁵ And the Eastern Han lexicon *Shuowen jiezi* 說文解字 defines *fa* 灋 as “penal [law]” 刑.¹⁶ In his overview of the traditional legal system, Liang Zhiping argues that *fa* was used interchangeably in ancient times with *lü* 律 (statute) and *xing* 刑 (punishment; penalty).¹⁷ Cao Lüning 曹旅寧 makes similar observations in regard to Qin law, arguing that two offenses that were considered to be *tongfa* 同法 were to receive the same punishment.¹⁸ Received texts show the range of semantic overlap between *fa* and *lü* was not limited to the realm of jurisprudence.¹⁹

So understanding *fa* as “penal law” is indeed viable in some contexts and can explain some occurrences in legal texts. It fits with traditional wisdom about *fa*, too: by some accounts, the word *fa* was used for statutes and regulations in early times but was later supplanted by *lü*.²⁰ And it seems that some Zhanguo (ca. 453–221 BCE) states did use *fa* in the sense of a legal ordinance or statute. For example, in the Zhangjiashan texts we find:

異時魯法盜一錢到廿，罰金一兩。

In a different age, the *fa* of the Lu state mandated that if between one and twenty [strings of] cash were stolen, [the thief would] be fined one tael of gold.²¹

Another example begins similarly:

異時衛法曰〔…〕。

In a different age, the *fa* of Wei said [...].²²

In such cases, the use of *fa* comes close to the notion of a statute or regulation, that is, a rule about the legal course of action to be undertaken in a given circumstance. Indeed, it appears where we would normally expect the term *lü* to occur in Qin and Han manuscripts, and these excerpts may represent an archaic use of the term *fa*, one that might point to earlier origins.

15 E. g., *Han shu* 60.2659. This phrase later became a trope.

16 *Shuowen jiezi*, 202.

17 Liang Zhiping 1989, especially 61.

18 Cao Lüning 2002, 151.

19 Tomiya Itaru 2010, 42.

20 See *Tanglü shuyi* 1.13a-b. This shift is often posited to have occurred as part of changes to the law credited to Shang Yang 商鞅 (d. 338 B.C.), but that narrative has many questionable elements; see e.g. Jiang Bixin 1985. The dubious nature of the Shang Yang account, however, does not preclude the possibility of a general historical development from *fa* to *lü*.

21 *Zhangjiashan Han mu zhujian*, 107 (no. 174); *Ernian lüling yu Zouyanshu*, 372.

22 *Zhangjiashan Han mu zhujian*, 106 (“Zouyanshu,” no. 162); *Ernian lüling yu Zouyanshu*, 370.

Taking *fa* as law thus explains certain occurrences of the word. This understanding does not, however, help us make sense of contexts where *fa* is used to discuss non-criminal matters. Consider the following from “Zouyanshu”:

律，死置後之次，妻次父母；妻死歸寧，與父母同法。

According to the statutes, the sequence to be followed in establishing heirs is that the wife is secondary to the father and mother. If the wife dies, the husband is granted a leave of absence for burial according to the same *fa* that is used for parents.²³

Two statutes are mentioned in this brief passage: one regarding the inheritance of titles and property, and another on mourning leave granted to officials. The latter is germane to our discussion, and the actual text of this statute is preserved in the “Ernian lüling” section on establishing heirs (“Zhihou lü” 置後律). The statute stipulated a leave of absence for officials to bury close relatives, and the obligation to bury wives and parents was subsumed under a single statute.²⁴ And this statute was one that governed the conduct of officials, rather than a penal statute.

In addition, reading *fa* as penal law does not reflect certain analytic distinctions marked by differences in vocabulary within the body of legal texts. Arguing against the explanation of *fa* as punishments or statutes that prescribe punishment, Song Guohua 宋國華 proposes that legal manuscripts distinguished between offenses that were *tongfa* and those that were *tongzui* 同罪.²⁵ Consider these two passages, taken from the Shuihudi “Falü dawen” and Zhangjiashan “Ernian lüling,” respectively:

律曰與盜同法、有（又）曰與同罪、此二物其同居、典、伍當坐之。

The statutes speak of [crimes] that are *tongfa* and *tongzui* with theft. With respect to these two: those who share the same residence, who are in charge of the person, and who are members of the same five-household group [as the guilty party] will also be convicted.²⁶

告、告之不審、鞠之不直、故縱弗刑、若論而失之、及守將奴婢而亡之、篡遂縱之、及諸律令中曰同法、同罪 [...].

If there is a denunciation and the denunciation is not borne out by investigation; or if [an official] is not upright in interrogating; or if he deliberately releases [a guilty person] and does not punish [him/her]; or if he errs in a legal decision; as well as when he is charged with leading slaves and allows them to escape, or arbitrarily lets someone off; as well as when the statutes or edicts say, *tongfa* or *tongzui* [...].²⁷

The first of the passages is the more explicit of the two. There “Falü dawen” refers to *tongfa* and *tongzui* as two things, reflecting that the statutes differentiated between them. In both

23 Zhangjiashan Hanmu zhujian, 108 (“Zouyanshu,” no. 185) *Ernian lüling yu Zouyanshu*, 374.

24 Zhangjiashan Hanmu zhujian, 60 (“Zouyanshu,” no. 377); *Ernian lüling yu Zouyanshu*, 238; on mourning leave for officials, see also Brown 2007, 26.

25 See *Zhongguo zhenxi falü dianji jicheng*, I-1, 554 for a gloss of *tongfa* as “the same criminal penalty;” see Song Guohua 2008 and 2010.

26 Shuihudi Qinmu zhujian, 98-99 (“Falü dawen,” nos. 20-21).

27 Zhangjiashan Hanmu zhujian, 23 (no. 107); and *Ernian lüling yu Zouyanshu*, 135; on the translation of *cuan-sui* as “arbitrarily,” see Dai Shijun 2009.

examples we see *tongfa* and *tongzui* mentioned together, which suggests that they are not terms that were used interchangeably. One example that might seem to speak against this comes in “Jinguan ling” 津關令 which deems smuggling to be *tongzui* with *dao* 盜, illegal actions that a statute in “Ernian lüling” says are *tongfa* with *dao*.²⁸ Yet this difference is best explained as a revision of the law, in which the former records the edict promulgating the change, while the latter is the statute so superseded.²⁹

More recently, Zhu Honglin 朱紅林 has proposed a revision of the older view. Zhu argues that in legal contexts *fa* refers to some kind of broad legal rule and thus represents an equivalent to modern terms as *gongfa* 公法 (public law) or *zhengtiao* 正條 (legal clause).³⁰ Zhu makes his suggestion on the basis of an examination of excavated materials. Such a possibility is suggested, for example, by the text “Yu shu” 語書 found at Shuihudi, which mentions *fa* alongside *lü* and *ling* 令. That text observes,

凡良吏明法律令、事無不能毆〔也〕。

When good officers thoroughly understand the *fa*, statutes, and ordinances, there are no tasks of which they are incapable.³¹

Like the older iterations, this version of the traditional view also has its drawbacks. If *fa* referred to some kind of legal rule, then we would expect it to specify a course of action to be undertaken in response to a given situation. The reverse, however, was at least sometimes the case, as this example from the “Ernian lüling” shows:

謀遣人盜、若教人可〔何〕盜所〔...〕及智〔知〕人盜與分、皆與盜同法。

If one conspires to send someone to rob, or instructs someone about where to rob, or [...] or knowingly shares the proceeds of robbery, all of these cases are *tongfa* with theft.³²

At first glance, *fa* would seem to be a statute, and one is tempted to simply substitute statute or law for *fa* in the translation. Indeed, in his consideration of Han law concerning theft, Hulsewé rendered *fa* in a similar context as “rules.”³³ Yet in fact there is not one statute that applies to all cases of robbery, but rather a number of different statutes. Which specific statute applied in a given case of robbery depended upon what was stolen, how much it was worth, and who was doing the stealing.³⁴ In essence, *fa* referred to a class of offenses rather than those covered by any one statute.

28 *Zhangjiashan Hanmu zhujian*, 19, 83 (nos. 74-75, 489); *Ernian lüling yu Zouyanshu*, 119, 305.

29 See *Han shu*, 60.2659; Tomiya 2010, 38-43.

30 *Zhangjiashan Han jian “Ernian lüling” jishi*, 58, 80.

31 *Shuihudi Qin mu zhujian*, 15 (“Yu shu,” nos. 9-15).

32 *Zhangjiashan Han mu zhujian*, 16 (no. 57); *Ernian lüling yu Zouyanshu*, 112.

33 Hulsewé 1988, 170.

34 See the contents of the “Dao li” section of “Ernian lüling” in *Zhangjiashan Han mu zhujian*, 16-20; *Ernian lüling yu Zouyanshu*, 111-122. For the different statutes that applied to theft in Qin times, see *Shuihudi Qin mu zhujian*, 93 (“Falü dawan,” nos. 1-3); Song Guohua 2007.

Fa as precedent

The second alternative we will consider is the possibility that *fa* were legal precedents. This possibility is worth exploring, as scholars have discussed the importance of precedents in Chinese political and intellectual life.³⁵ For example, in his discussion of the Mohists, Chris Fraser argues that *fa* could represent the example or past policies of the sage kings, which served as quasi-historical “role models” that functioned like the carpenter’s square to facilitate reliable judgments.³⁶ “Zouyanshu” itself seems to provide more than a set of models for study and emulation, and might have also furnished the official with a virtual archive that suggested analogies that could guide the official in selecting the appropriate statutes.³⁷ Most importantly, the *Han shu* treatise “Xingfa zhi” 刑法志 indicates the existence of legal precedents. Criticizing the situation during the early empire, Ban Gu 班固 (32–92) said, “The Statutes and Ordinances contained in all 359 sections for the death penalty, 409 articles covering 1882 cases, and 13,472 cases of judicial precedents (決事比) for crimes deserving death.”³⁸

While this interpretation has some support, there are nevertheless several problems with it. To begin with, there is no evidence that previous cases served as *binding* precedents in legal decision-making. And if “Zouyanshu” provides any clue as to the actual legal practices of the early empire, precedents were rarely considered at all. Among the twenty-two summaries included in “Zouyanshu,” only one explicitly mentions an earlier case. In 197 BCE, a former prison official named Lan 闞 was prosecuted after attempting to leave the capital area with a woman. The nature of his offense was in doubt, and there was debate as to whether he was guilty of “luring” away a woman to the territory of a local lord, or if he should be punished for fornicating with her and hiding a criminal. In the context of this debate, some of the officials referred to what they believed was a similar example case:

人婢清助趙邯鄲城，已即亡，從兄趙地，以亡之諸侯論。今闞來送徙者，即誘南。吏議：闞與清同類。

There was the case of the slave, Qing, who was serving in the city of Handan and, when [that work] was done, fled, following her brother to somewhere in Zhao territory [...]. In the opinion of [some] of the officials, the offenses of Lan and Qing were of the same sort [...].³⁹

In drawing an analogy between the case of Qing and that of Lan, the term *tongfa* was not used. Instead, we hear that the cases of Qing and Lan were “of the same sort” (*tonglei* 同類). And there is no hint that this was a binding precedent; rather, it was a parallel case that might have suggested a particular interpretation. The precedent neither specifies the conditions of the crime in a general fashion, nor does the final decision – recorded only in the form of the punishment handed down – suggest any sort of adjustment to the law on the basis of the earlier case; the decision drew

35 Goldin 2008, 79-96.

36 Fraser, “Mohism”.

37 On the function of case histories, see Furth 2007, “Introduction,” esp. 12-13, 14; also see Will 2007, 67-68.

38 Hulsewé 1955, 338; *Han shu*, 23.1101.

39 *Zhangjiashan Hanmu zhujian*, 93 (“Zouyanshu,” nos. 23-25); *Ernian lilingyu Zouyanshu*, 339.

only from the statutes.⁴⁰ And in fact the argument based on the earlier example failed to persuade the higher authorities.

In the majority of the cases in “Zouyanshu,” decisions were made on the basis of statutes alone, and only sometimes in conjunction with hypothetical situations. The case of a woman denounced to the authorities by her mother-in-law for posthumous adultery provides a prime example of this. In challenging the view presented by some officials that the woman should be executed, one official reasoned in the following way:

又曰：有死父，不祠其冢三日，子當何論？
 廷尉轂等曰：不當論。
 有子不聽生父教，誰與不聽死父教罪重。
 轂等曰：不聽死父教，無罪。
 又曰：夫生而自嫁，罪誰與夫死而自嫁罪重？
 廷尉轂等曰：夫生而自嫁，及娶者，皆黥為城旦舂。
 夫死而妻自嫁，娶者無罪。

He said again, “If one’s father is dead and [the son] does not offer sacrifices at the grave mound for three days, how should the son be judged?”

Commandant of justice Gou and the others said, “The son should not be judged [guilty].”

“And if a son disobeys his father while the father was alive, is this a more serious crime than disobeying the instructions of a father who has died?”

Gou and the others replied, “Disobeying a father who has already died is not a crime.”

He said again, “And if the husband is still alive but his wife gives herself away in marriage to someone else, is that a more serious crime than if the husband is dead and she gives herself away in marriage?”

Commandant of justice Gou and the others said, “If a wife gives herself away in marriage while her husband is alive, she and the one who marries her will both be tattooed and sentenced to become a wall builder and a grain pounder [respectively]. But if her husband is dead and she gives herself away in marriage, the one who marries her is without crime.”⁴¹

In this exchange, the officials discussing the case did not cite any previous cases. In deciding the nature of the woman’s offense and assessing the appropriateness of proposed punishments, only hypothetical situations in which the decision would be unambiguous were considered.

Fa as Principle

Finally, we turn to an interpretation of *fa* that has been proposed more recently by Tomiya Itaru 富谷至. In a 2004 essay, Tomiya examines the meaning of *fa* in the “Ernian lüling,” arguing explicitly against received views of *fa* as penal law, instead proposing that the term refers to broader “legal principles” (*hōri* 法理), and not to specific statutes or punishments.

40 Cf. Cai Wanjin 2006, 69 and passim, who argues the opposite, saying “there is no reason to doubt” that the “Zouyanshu” cases acquired legal potency.

41 *Zhangjiashan Hanmu zhujian*, 108; *Ernian lüling yu Zouyanshu*, 374. For recent treatments of this case, see Nylan 2007; Hsing I-t’ien 2008.

In support of this view, Tomiya adduces evidence from excavated texts, particularly the “Ernian lüling,” and received works such as *Han shu*.⁴²

Tomiya’s suggestion presents a number of interpretative advantages, for it fits with most occurrences of *fa* in the compound *tongfa*. In this context, let us consider a couple of examples that support his reading from Shuihudi “Falü dawen” and Zhangjiashan “Ernian lüling”. The first is,

府中公金錢私賁用之、與盜同法。

If one illicitly borrows public money contained in a government treasury, this is of the same *fa* as stealing.⁴³

The second says,

謀賊殺、傷人、與賊同法。

Plotting to murder or criminally harm someone belongs to the same *fa* as [actually committing the crime].⁴⁴

These passages are concerned with scenarios not covered by the statutes and ordinances.⁴⁵ The original statutes, for example, tell us what to do with a man who has committed murder, but they do not provide specific directions about what to do with accessories and co-conspirators. Yet differences in circumstances notwithstanding, the other offenders can be treated in the same manner as the murderer or robber.

This reading is a substantial improvement over earlier interpretations of *fa*, and our understanding builds upon it. However, it has two limitations. First, it does not sufficiently differentiate between a more general use of the term *fa* and the apparently technical and specific one in the formula *tongfa*, which appears in the two examples quoted just above. In the received literature, *tongfa* does refer in some cases to general patterns or underlying principles. For example, *Han shu* quotes a memorial in the biography of Zhai Feng 翟奉, which discusses the sighting of a white crane, which represented a portent of disaster

與前地震同法。

[...] that fell into the same pattern as the earlier earthquake.⁴⁶

Yet, as we argue above, in legal manuscripts, *tongfa* does not refer to general standards or patterns, but is used to assign one set of circumstances to a specific legal category.

There are also certain occurrences of *fa* as a standalone term in “Ernian lüling” that glossing *fa* as “legal principle” does not sufficiently explain. For example, officials were enjoined to “adjudicate according to the *fa*” (*yi fa lun* 以法論). And “Ernian lüling” makes a reference to *fa* that cannot be reconciled with the interpretation of principle:

42 Tomiya Itaru 2004, 222-228.

43 *Shuihudi Qin mu zhuhian*, 101 (“Falü dawen,” no. 32); *Zhongguo zhenxi falü dianji jicheng*, I-1, 553-554.

44 *Zhangjiashan Hanmu zhujian*, 12 (“Ernian lüling,” no. 26).

45 *Tongfa* is not the only term that is used in discussing situations not covered by the statutes. “Falü dawen” uses the term *bi* 比 in a similar way; see *Shuihudi Qin mu zhujian*, 93 (“Falü dawen,” nos. 1-2).

46 *Han shu*, 75.3175.

有罪當耐、其法不名耐者、庶人以上耐爲司寇、司寇耐爲隸臣妾。

In cases where someone ought to be punished by being shaved [and made into a convict laborer], but the *fa* does not specify shaving as the punishment, those with the status of commoner and above will be made robber-guards.⁴⁷ Those who are already robber-guards will be shaved and made bondservants.⁴⁸

Zhu Honglin argues this passage in “Ernian lüling” deals with situations where there is no statute to cover a specific offense.⁴⁹ Although it is not clear what the *fa* exactly represents here, the translation of principle or patterns does not fit: The text does not refer to a general or underlying pattern; instead, it points to a concrete referent, a tool or set of guidelines that were to be used in deciding punishments.

In the preceding, we have reviewed three readings of *fa*, which have been suggested by previous scholars, arguing that while all three of these have their strong points and may apply in certain contexts, they also suffer from explanatory limitations, above all in the context of “Ernian lüling.” The first explanation, which treats *fa* as the equivalent to a penal law or statute, overlooks the distinction between *tongfa* and *tongzui*, and fails to account for how *tongfa* was actually used in Qin and Han legal writings. The second reading, which takes *fa* as precedent, does not consider the actual practice of legal culture in early imperial China. For while the early Chinese legal system made use of model cases, there is no evidence of a system of binding precedents. Model cases like those in “Zouyanshu” served the pedagogical purpose of illustrating the proper workings of the system through hypothetical situations. Legal reasoning in early China was largely based on statutes and edicts, which were in turn based on what were effectively hypothetical situations. Finally, the interpretation of *fa* as legal principle explains some examples of *tongfa* and other usages, but give insufficient attention to the differences between technical and more commonplace usages, and does not account for all occurrences of *fa* as a standalone term.

III The Technical Use of *Fa* as Legal Category

We argue that in “Ernian lüling” and “Zouyanshu” *fa* refers to categories intended to guide the official to the relevant statutes. It is important to note that such categories were not organized on the basis of essential or necessary attributes of members of the class. The “Ernian lüling” suggests as much, for the text does not provide a set of standards or criteria with which to determine whether a particular kind of crime had occurred. Instead, *fa* were organized around representative examples or “prototypes” of each category. In legal contexts, the prototype should be thought of as the paradigmatic case of a particular class of offense or legally-applicable situation.⁵⁰ “Ernian lüling” provides a list of prototypical situations associ-

47 On the translation of *sikou* 司寇 as “robber guards,” see Hulsewé 1985, 15.

48 *Zhangjiashan Hanmu zhujian*, 21 (“Ernian lüling,” no. 90); *Ernian lüling yu Zouyanshu*, 127.

49 *Zhangjiashan Han jian* “Ernian lüling” *jishi*, 78.

50 For an exposition of the notion of prototypes, see Rosch 1999, esp. 63. On this point, see Furth 2007, “Introduction,” 4-5; Forrester 1996, 8.

ated with each category: murder, destruction of city walls or temples, harming or killing parents, and so forth.⁵¹ The prototypes provided a link between the larger categories and the statutes. As we will demonstrate below, our reading accounts for many occurrences of *fa* in the legal corpus, particularly references to three common phrases: *tongfa*, *youfa* 有法, *yi fa lun*. In addition, it elucidates the underlying logic of legal reasoning in early imperial China.

While our precise reading is less common in the broader textual corpus, premodern commentaries, lexica, and usage support interpreting *fa* as category. Our understanding relates to established, non-legal understandings of the word as a verb meaning, “to resemble, to take as model.”

This is widely attested in early texts such as *Xunzi* 荀子, which says,

畏法流俗。

One should fear imitating (*fa*) dissipated customs.

The explanation added to this passage by the commentator Yang Liang 楊諒 (8th–9th c.) is as follows:

法，效也。

Fa means imitate.⁵²

Dictionaries like *Guang ya* 廣雅 and the Han dynasty dialect lexicon *Fang yan* 方言 use *fa* to define terms for “to resemble.”⁵³ Legal *fa* were centered around prototypes, which they resembled intrinsically and procedurally.

Erya 爾雅 placed *fa* in a broad range of terms related, to various degrees, to the idea of legal categories:

典、彝、法、則、刑、範、矩、庸、恆、律、夏、職、秩，常也。

Classic, the constant way, *fa*, principle, penal [law], model, standard, norm, eternal, statute, regular, common, ordered, constant.⁵⁴

Use of the word *fa* as a noun in a manner similar to ours can be found in a non-legal context in *Han shu*. For example, Yi Feng 翼奉 (1st c. BCE) once argued that a natural disaster arose from construction projects that disturbed the balance of yin and yang energies, saying,

其法大水。

Its *fa* is a great flood.

He goes on to trace the process as he understood it. Later Yi Feng asserted of an earthquake,

與前地震同法。

It was of the same *fa* (*tongfa*) as previous earthquakes.⁵⁵

51 *Zhangjiashan Han mu zhujian*, 8, 13 (“Ernian lüling,” nos. 4-5, 34-37); *Ernian lüling yu Zouyanshu*, 91, 103-104.

52 See *Xunzi* 2.5b.

53 *Guang ya shuzheng*, 9-10; *Fang yan jiaojian* 7/47/5, 13/82/46; *Yang Xiong Fang yan jiaoshi huizheng*, 501-502, 900.

54 *Erya zhushu* 1.12b [8], 1.13a [9].

Yi Feng used the phrase *tongfa* to assert the existence of a category that guided interpretation – the same phrase in the statutes employed when creating categories to guide official decision-making. For us, *fa* in the sense of “category” refers to sets of delicts centered around prototypes, which brought constancy, regularity, and clarity to the process of legal decision-making, helping to order it.

Before leaving behind the meaning of *fa*, we want to make a couple of final, general observations. It may seem possible to understand *fa* as “class” or “kind,” rather than category. We use the word category to highlight the nominalist dimension of the *fa*, thereby avoiding the implications of natural kinds, perceived as having an independent ontological status. Indeed, legal thinkers were aware of the conventional dimension of *fa*: *fa* were created as tools that both guided and constrained legal decision-making. By stripping situations of unwieldy or irrelevant particulars, the categories allowed the official to apply shared standards to a given situation.⁵⁶ Yet as with any tool, *fa* had limitations; the fit between the infinite variety of situations encountered by the official and a relatively small number of *fa* could be imperfect. In some cases, it was unclear which of the *fa* provided the best match for the facts at hand. Furthermore, *fa* were provisional; they could be amended or, in some cases where no existing *fa* fit the situation, created from scratch.

Having defined our terms, we will next show how our understanding of *fa* as category works in concrete contexts. For a start, this reading helps us understand the legal phrase *youfa*. “Zouyanshu,” for example, records a case from the Qin dynasty in which an official was interrogated after unrest in a county. The rebellion had rapidly escalated, and some of those who went to suppress it had been killed. When the rebellion was finally put down, higher authorities investigated whether the county officials had been remiss in their duty. One condemned the conduct of an official named Tui 廞:

廞擊反群盜憊〔：憊〕乏不鬪論之有法。

When attacking a group of rebellious robbers, [Tui] was frightened powerless and did not fight. So there is a *fa* according to which he can be judged.

The final decision cites the relevant statute:

憊〔：憊〕乏不鬪、斬。

Being frightened powerless and not fighting warrants decapitation.

Fortunately for Tui, he was found guilty of a lesser offense, shaved and made into a convict laborer.⁵⁷

Our reading of *fa* also fits well with phrases such as “using the *fa* to judge,” or “upholding the *fa*” (*fengfa* 奉法). The case of Tui is also illustrative in this respect: In addition to succumbing to fear, Tui had failed to prosecute peasant rebels he had in custody, and instead allowed them to flee. According to the complaint, Tui was guilty of “not using the legal cate-

55 *Han shu*, 75.3174-3175.

56 On this point, see Scott 1998, 11-52.

57 *Zhangjiashan Han mu zhujian*, 103-106; *Ernian lüling yu Zouyanshu*, 363-365.

gories to judge.” The implication is that if the facts matched the prototypical situations associated with the *fa*, he was obligated to prosecute, and failure to do so was in itself an offense.⁵⁸ In another case from “Zouyanshu,” a similar charge was lodged against a magistrate, Xin 信, who had ordered one of his former underlings to murder another official named Wu 武. In the words of the magistrates deciding the case, Xin was guilty of

不謹奉法以治。

[...] not strictly upholding the *fa* in governing

Instead, Xin exercised his power in an arbitrary fashion: he killed Wu without determining whether Wu’s conduct could be subsumed under one of the *fa* by matching Wu’s conduct to it and then assigning a punishment according to the relevant statute. Xin took matters into his own hands.⁵⁹

Moreover, our reading can explain the frequently-seen phrase *tongfa*. As we have mentioned above, the *fa* and the statutes were finite and so could not cover every circumstance. However, it was not practical to create a new *fa* every time an official encountered an unfamiliar pattern or set of circumstances. As the *Han shu* “Xingfa zhi” hints, the longer the list of laws, the more cumbersome and less usable the system of justice.⁶⁰ In order to bridge the gap, legal writers employed the notion of *tongfa*. What this meant in practice was that the authorities would specify an extension of an existing statute by equating a new set of circumstances and subsuming it under an existing legal category.⁶¹ The formula was: “X and Y are *tongfa*,” or “X belongs to the category Y.” In these cases, X represents the atypical case – a set of circumstances that fall outside of the representative or prototypical examples, and which are associated with the *fa* and covered by the statutes. In contrast, Y provides a general category for which there are already relevant statutes.

Aside from explaining individual occurrences of *fa*, our reading of the term has another virtue: it is consistent with the notion of the “hung decision” (*xuanlun* 縣論). As we saw above, the chief difficulty of using the statute-based legal system of early China involved matching the facts at hand to an existing legal category, from which the penalty could be calculated, rather than deciding upon the appropriate punishment. Once the legal category was determined, the rest of the decision-making was automatic: The officials had only to identify the right prototype to find the relevant statutes, which in turn would allow them to calculate the penalty. The difficulty lay in finding the relevant *fa*, particularly when the situations encountered by the official were too different from the scenarios described in the statutes, or alternatively, where extenuating circumstances seemed to change the tenor of the case. In some cases, no relevant *fa* could be found, a situation that could result in the hung

58 *Zhangjiashan Han mu zhujian*, 103-106; *Ernian liling yu Zouyanshu*, 363-365.

59 *Zhangjiashan Han mu zhujian*, 98-99; *Ernian liling yu Zouyanshu*, 354-355.

60 Hsing I-t’ien 1983, 53.

61 See e. g., *Zhangjiashan Han mu zhujian*, 12 (no. 26); *Ernian liling yu Zouyanshu*, 100, and numerous examples in the discussion below.

decision. In some cases, the officials at the county or commandery level would arrive at different conclusions, which would necessitate review at higher levels.

The case of a certain Jie 解 serves as a good example; even though the term *fa* is not used, the case is one in which the category, in our sense, seems to have been at issue. The facts of the case are as follows: Jie was arrested after it came to light that his wife was a runaway slave. Apparently, Jie did not know about his wife's background, believing her to have been the former bondservant of another man, who was named Ming 明. The woman lied to Jie about her status, and Ming also told Jie that she was his servant and that he "gave" her away in marriage to Jie. According to the statutes, however, a man who married a runaway was to have his foot amputated. Some of the officials thought the penalty to be too harsh, with some of them even debating whether Jie's offense should be treated as a case of marrying a runaway slave, particularly given that Jie had been the victim of a ruse. Many crimes as defined in Qin and Han jurisprudence required a criminal intent, but *mens rea* was clearly absent in this case.⁶² So the problem was not whether the punishment fit the crime, but whether there was an appropriate *fa* that matched the situation. Unable to reach a consensus, the officials submitted the case to their superiors for judgment, calling attention to the man's ignorance of the woman's actual status. Unfortunately for Jie, however, the decision from above was unfavorable. The higher authorities declared,

取〔：娶〕亡人爲妻論之。

He should be convicted as someone who had married a runaway.

They also scolded the local officials, writing,

律白、不當獻〔：獻〕。

The statute is clear, and this should not have been submitted for review.⁶³

The case of a former slave named Wu 武 is also illustrative. Wu had been reported – incorrectly, as it turned out – as an escaped slave, so an official was ordered to apprehend him. When the official approached him to make the arrest, Wu resisted and injured the official with a sword. Wu was nevertheless taken into custody, whereupon it became clear that he had been a slave under the Chu 楚 regime during the civil war after the fall of Qin. But Wu had escaped and joined the Han before the Han takeover, negating his former slave status, and after the takeover, he had legally registered himself as a commoner. Hence Wu was not an escaped slave and his arrest had been without basis. But in resisting arrest Wu had injured an official, and the question was whether this constituted a criminal act. Because Wu's arrest had been unwarranted, some of the local officials argued that Wu's reaction should not be categorized as a crime, and so the case was forwarded to higher authorities for adjudication.⁶⁴ Unfortunately for Wu, the decision from above was that Wu's initial blamelessness was immaterial. The circumstances provided enough of a fit to the prototypes associated with

62 On the importance of intent in Qin-Han law, see Sanft (forthcoming).

63 *Zhangjiashan Hanmu zhujian*, 94; *Ernian liling yu Zouyanshu*, 341.

64 *Zhangjiashan Hanmu zhujian*, 94-95.

criminal assault to be classified as such. The history of Wu, like that of Jie, seems to exemplify what Pierre-Étienne Will has called the central tension in Chinese traditions of law, that is, the challenge of “reconciling the rigidity and limitation of written law with the variety of situations occurring in real life.”⁶⁵

IV Anatomy of a Category

In the following we take up one particular *fa* and use it to illustrate the function and implications of understanding *fa* as *category*. Among other things, this will permit us to show that a category in our sense did not result from applying essentializing definitions to forbidden actions, but rather created classes of offenses focused around prototypical or paradigmatic examples.

We use *dao* 盜, typically understood as “theft, larceny; to steal,” as our example category. *Dao* is illustrative because the excavated texts from Zhangjiashan contain a number of instances of the various functions of this word – both in general, and in the specific sense of category. Using these examples allows us to better delineate the outlines of the category. In addition, previous work by Hulswé on received sources and Qin paleographical materials has noted the broad semantic range of *dao* and identified some difficulties with it.⁶⁶ We expand on this work, and our analysis allows us to explain at least one point that Hulswé could not.

Analysis of the category *dao* also allows us to show how our understanding of *fa* brings out an important aspect of legal reasoning. This is because *dao* was not only a category, but also a label for a section of statutes. The two were not contiguous, and it is instructive to contrast them.

“Ernian lüling” is divided into twenty-eight rubrics, which group the statutes under specific headings, such as “Statutes on sending documents” (“Xing shu lü” 行書律), “Statutes on fields” (“Tian lü” 田律), and so on. These labels are recorded in transmitted histories and found in the Zhangjiashan and Shuihudi documents. One of these headings is “Statutes on *dao* (theft)” (“Dao lü” 盜律). Although these labels are found within the text of “Ernian lüling” and so at some level reflect contemporary understanding of the statutes, care needs to be taken with the text as we have it: manuscripts written on bamboo or wooden strips in early China were bound together with twine, which in nearly all cases has since rotted away, leaving the strips separate and usually jumbled. The published sequence of the strips in “Ernian lüling” is the result of scholarly reconstruction. It is perforce a matter of interpretation and inference, and we cannot assume that the current sequence of the text necessarily corresponds entirely to its original form.⁶⁷ Yet even if we accept that the sequence is more or less correct, it is clear that the category *dao* did not coincide with the rubric “Statutes on *dao*,” for we find offenses deemed to belong to the category *dao* but which evidently appeared under other headings, such as “Statutes on fields.”⁶⁸ The category *dao* thus represents a higher-level structure that overlay the internal structure of the statutes comprising “Ernian lüling.”

65 Will 2007, 66.

66 Hulswé 1988.

67 See discussion in Miyake Kiyoshi 2011, 13-17, and Tomiya Itaru 2006, 6-7.

68 For this and other examples, see *Zhangjiashan Han mu zhujian*, 11, 15, 32, 45 (nos. 20, 49, 180, 261-262); *Ernian lüling yu Zouyanshu*, 98, 109, 161, 196.

We noted above that the formula “X and Y are *tongfa*” defines X as a part of the category Y. Designating something as *tongfa* with something else made it part of a single category that grouped members of a set around a prototype. And there are many examples in the Zhangjiashan texts of the formula, “X belongs to the category *dao*” (與盜同法) (see below). We concentrate here on statutes that use this formula in order to prevent error.

“Ernian lüling” never defines *dao*, so presumably the core sense of the term was self-evident. Other texts record the usual understandings: A passage in *Zuozhuan* 左傳 attributes to the Duke of Zhou 周公 the assertion that,

竊賄為盜。

To pilfer property is *dao*.

Guliang zhuan 穀梁傳 says,

非其所取而取之謂之盜。

To take something that should not be taken is called *dao*.

Shuowen jiezi defines *dao* as “to illicitly derive benefit from things” (私利物).⁶⁹ This conception of theft constituted the prototype – the paradigmatic case – of the category *dao*, the one that gave it its name. There is, of course, no statute that makes theft a component of the category *dao*. But the definitions cited do not delineate the legal category *dao*, either. For understanding *dao* as a category and considering the various members of that set indicates that *dao* denoted a range of actions resulting in the unlawful deprivation of property.⁷⁰ Theft was the prototype – the best example.

According to “Ernian lüling,” the category *dao* included various kinds of connivance with theft:

謀遣人盜、若教人可(何)盜所[...]及智(知)人盜與分，皆與盜同法

To plot to send someone else to steal, or to tell another of a place that can be robbed [...] as when as to knowingly share in [the profits of] theft are all in the category of *dao*.⁷¹

Although no actual stealing is involved, it is easy to understand why this sort of active collusion was assigned to the same category as the paradigmatic case of theft. So it does not necessarily challenge commonplace understandings. However, other statutes from Zhangjiashan include in the category *dao* crimes that evince little relationship to theft. For example:

以財物私自假{貸},假{貸}人罰金二兩。其錢金、布帛、粟米、馬牛毆(知也),與盜同法。

[Those officials who] illicitly borrow [official] goods, or loan them to another, will be fined two taels of gold. If it is money or gold, cloth or silk, grain or rice, or horse or ox, it is in the same category as *dao* [...].⁷²

This statute forbids engaging in or permitting improper use of government assets, and makes no mention of stealing. Especially relevant for our discussion is the fact that the statute pun-

69 *Chunqiu Zuozhuan zhengyi* 20.13b [352]; *Chunqiu Guliang zhuan zhushu* 19.12a [191]; *Shuowen jiezi* 8B.12a [181]; see also Hulsewé 1988, 167.

70 Cf. Hulsewé 1988, 183, whose definition of *dao* ends up in a similar place.

71 *Zhangjiashan Han mu zhujian*, 15 (“Ernian lüling,” no. 57); *Ernian lüling yu Zouyanshu*, 112.

72 *Zhangjiashan Han mu zhujian*, 19 (“Ernian lüling,” no. 77); *Ernian lüling yu Zouyanshu*, 121.

ishes certain, unspecified examples with a fine, yet declares that the same actions with regard to cloth, grain, oxen, or horses belong to the category *dao*. There is no penalty specified for the latter set, showing that inclusion in that category implied a punishment structure. This distinction between *dao* and non-*dao* examples, although arbitrary, was probably made on practical grounds because of the amenability of money and so on to fraud and other abuses. Such offenses were defined within the category *dao*, while the same acts in regard to other items were treated as misdemeanors. And in fact fraud in other situations was explicitly forbidden and defined as belonging to the category *dao*:

諸{詐}給人以有取,及有販賣買而{詐}給人,皆坐臧(贓),與盜同法。

Those who use fraud to take things from others, as well as those involved in sale or trade and defraud others, shall be convicted according to [the value of] the loot, and such actions are in the same category as *dao*.⁷³

There is a close connection between stealing and fraud; after all, the latter accomplishes the same end as the former, only by means of deception instead of stealth or violence. Thus fraud could be considered a form of theft, not evidence of a category.

Yet still other statutes show that the category *dao* cannot be conflated with stealing: some offenses that had nothing to do with theft were classified as *dao*. A statute preserved in “Ernian lüling” banning traps from particular areas says:

諸馬牛到所,皆毋敢穿窬及〔置它機〕,穿窬及置它機能害人、馬牛者,雖未有殺傷也,耐為隸臣妾。殺傷馬牛、與盜同法。殺人,棄市。傷人、完為城旦舂。

In all places where horses and oxen go, one may not dig pitfalls or set up other mechanisms (i.e., traps). If someone digs a pitfall or sets up a mechanism which can harm a person, horse, or ox, even if no one has died or been harmed, [the guilty party] will be shaved and become a bondservant. If it kills or harms a horse or ox, it is in the same category as *dao*. If it kills a person, [the guilty party] will be [executed and the corpse] exposed in the marketplace. If it harms a person, [the guilty party] will be left intact and made a wall-builder or rice-pounder.⁷⁴

There is no indication that the proscribed courses of action were objectively forms of cattle- or horse-rustling. Nevertheless, if a trap harmed or killed an ox or horse, the act of setting it fell into the category *dao*. Another statute concerning animals does something similar:

賊殺傷人畜產、與盜同法。

If someone deliberately kills or harms another’s livestock, it is in the same category as *dao*.⁷⁵

Again, there is no direct relationship to stealing, but the actions did result in deprivation of property, and we suggest that was the sense of the category *dao*.

A statute on smuggling provides the best evidence of how the scope of *dao* went beyond the paradigmatic case of theft:

盜出財物于邊關徼,及吏部主智(知)而出者,皆與盜同法。

73 *Zhangjiashan Han mu zhujian*, 45 (“Ernian lüling,” no. 261); *Ernian lüling yu Zouyanshu*, 196.

74 *Zhangjiashan Han mu zhujian*, 43 (“Ernian lüling,” nos. 251-252); *Ernian lüling yu Zouyanshu*, 192.

75 *Zhangjiashan Han mu zhujian*, 15 (“Ernian lüling,” no. 49); *Ernian lüling yu Zouyanshu*, 109.

To illegally (*dao*) send goods beyond the border passes, as well as for any officer or division chief who knows about [the smuggling] to permit [the goods] to go, both belong to the category *dao*.⁷⁶

To be sure, the adverbial use of the word *dao* in the general and often-seen sense of “illegal” in the opening line of this example does not help clarify matters. But beyond that, the equivalence of smuggling with *dao* is obscure if one understands *dao* as theft. Thinking in terms of the category *dao* resolves the difficulty by recasting the situation: this was a legal assertion of government jurisdiction over goods within the borders equivalent, at some level, to ownership; illegally exporting them violated this and so fell within the category of unlawful deprivation of property.

One could perhaps suspect, based on the foregoing, that *fa* referred only to a structure for sentencing: after all, the “Statutes on *dao*” specifies punishments graded according to the value of the ill-begotten gains.⁷⁷ The following statute on bribery shows this was not the case:

受賂以枉法、及行賂者、皆坐其贓(贓)爲盜。罪重於盜者、以重者論之。

One who takes a bribe to twist the *fa*, as well as the person who makes the bribe, are both to be convicted [according to the statutes on] theft (*dao*), [treating for the value of the bribe] as loot. If the crime [at issue in the case] is more severe than theft, judge them according to the heavier [statutes].⁷⁸

Bribery received the same punishment as theft or a more serious crime, and was judged according to the value of the bribe following the structure in place for theft. But bribery was not put into the category of *dao* or any other offense – even though one could easily explain a bribe as deriving illicit benefit from an official position, which would fall within the definition of the word *dao* attested in *Shuowen jiezi*. In this specific case the status of bribery may have derived in part from the anomalous position of giving gifts to officials in early China, a practice that Tomiya shows had its origins in ritual courtesy shown to superiors. Although later restricted, in early times giving a gift to an official, or for an official to accept such a gift, was forbidden only when it influenced the magistrate’s decision. The moment such influence occurred, it transformed courtesy into a crime, which was illegal because it meant official malfeasance or instigation thereto.⁷⁹ Yet the act did not belong to the category of *dao*, as it had nothing to do with depriving another of property.

Aside from illuminating the process of legal reasoning in Qin and Han law, our reading of *dao* as a category for offenses that led to the unlawful deprivation of property resolves an apparent paradox in Qin law. In his examination of the Shuihudi strips, Hulsewé noted that

76 *Zhangjiashan Han mu zhujian*, 18 (“Ernian liling,” nos. 74-75); *Ernian liling yu Zouyanshu*, 119.

77 *Zhangjiashan Han mu zhujian*, 16 (“Ernian liling,” nos. 55-56); *Ernian liling yu Zouyanshu*, 112.

78 *Zhangjiashan Han mu zhujian*, 16 (“Ernian liling,” no. 60); *Ernian liling yu Zouyanshu*, 113.

79 On the relationship between bribery and ritual gift-giving, and its ramifications, see Tomiya Itaru 2007, 34-68. Hulsewé (1988, 174-175) misinterprets law referring to the misappropriation of goods under one’s supervision, believing them to be against bribery; see the discussion of the relevant materials in *Lidai xingfa kao*, 1404-1405, which clarifies this point.

it was not considered theft for a father to steal from his son under Qin law, something he called “a remarkable exception” to the definition of stealing.⁸⁰

We know this from the “Falü dawen,” which tells us,

父盜子，不為盜。

For a father to steal (*dao*) from the son is not *dao*.⁸¹

What might appear to be an internally-contradictory statement is neither paradox nor wordplay; nor is it particularly exceptional. Such an utterance simply describes the situation: for a father to steal from his son was an act that did not fall into the category *dao*. This is because, as Yu Zongfa 余宗發 has argued, all property within the household ultimately belonged to the householder.⁸² It was part of the phenomenon of what Ulrich Lau calls “private jurisdiction,” which set crimes within the household outside the purview of public law.⁸³ But saying that such theft was not *dao* goes one step further. Rather than just setting such an act beyond prosecution, the statute defined stealing from a son as being distinct from *dao* since there was no change or attempted change in ownership, ergo there was no deprivation of property and so no membership in the category *dao*.

V Discussion and Conclusion

This paper has concentrated on a relatively small problem: the meaning of *fa* in the Qin and Han legal corpus. Previous interpretations illuminated some aspects of the term, but all left many occurrences of *fa* unexplained. We have argued that *fa* referred to legal categories, categories organized not in terms of definitions but rather around paradigmatic cases or prototypes.

The relationship of the Qin and Han legal system to those of later periods also deserves mention. Compared to the Ming and Qing, the early imperial system seems relatively crude. Yet as Jiang Yonglin and Wu Yanhong have pointed out, the system of Ming and Qing was heterogeneous. They characterize the system of late imperial China as largely constituted by legal rules, which represents continuity with the early tradition. At the same time, Jiang and Wu point to the important role played by other modes of thinking. For example, the late imperial system made use of deductive reasoning, and in arriving at their decisions, late Ming magistrates could always resort to the general principle of avoiding injustices.⁸⁴ The application of legal precedents also became more common in the Qing dynasty. Certainly, legal precedents still did not have the binding power found in the Anglo-American world, but as Randal Edwards shows, previous legal cases were frequently used to make decisions.⁸⁵

80 Hulsewé 1988, 167.

81 *Shuohudi Qinmu zhujian*, 98 (“Falü dawen,” no. 19).

82 Yu Zongfa 1992, 211-213.

83 See Lau 2005; and Yu Zhenbo 2005, 39-44.

84 Jiang and Wu 2007, 50; cf. Chen 1970, 213.

85 Edwards 2003, esp. 186-194.

Given the wide range of options in Ming or Qing, it would seem that the magistrate of late imperial China had far more discretion than his counterparts in Qin and Han. In other words, the later system seems less mechanical than its earlier incarnations. How do we explain the significant differences between the early and late imperial systems of law? Of course, increasing complexity over time should be expected. The architects of the Qin and early Han legal systems were no doubt pioneers, whereas Ming and Qing authorities had the benefit of centuries of trial and error. As a result, we would expect the late imperial Chinese to have arrived at a more robust system of justice. Yet we would argue that there was more than the accumulation of experience at work, particularly in terms of moving towards giving the magistrate greater discretion. In this regard, the backgrounds of officials should be considered. The magistrates of Ming and Qing were highly educated and had spent years studying the classics and preparing for a series of rigorous exams. The subject of these exams ranged widely from the Neo-Confucian canon to more mundane subjects as flood control to government policy. In contrast, the local officials of Qin and Han represented something quite different.⁸⁶ Generally chosen on the basis of their virtue, family connections, or ability to meet certain financial requirements, early officials often did not have the benefit of classical education, and had not necessarily undergone extensive training and testing.⁸⁷ Thus, the legal systems of Qin and Han was a good match for their users: local officers of the Qin and Han could not be trusted to display the high degree of refined judgment and discretion of which the officials of later periods were capable. On the contrary, such early officials required a system that was easy to use, a system that could translate an otherwise complicated process into a few computations – or better still, one that could mechanize the process of judicial decision-making.

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⁸⁶ Elman 2000, 473, 482, 523.

⁸⁷ For the youth of new recruits into the Han bureaucracy Han, see Wang Zijin 2006, 41-70; for the educational levels of local officials in Han, see Nylan 2000, esp. 238-239; see also Crespigny 2008; for financial requirements, see Takamura Takeyuki 2008, 22-48.

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