

Jia Yi on the Law

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Gegen Könige ist jede Sache ungerecht.
-Novalis

Jia Yi 賈誼 (200–168 BC) was probably the most important philosopher in the first half century of the Han 漢 dynasty (206 BC–AD 220). As a thinker, Jia Yi was primarily interested in political matters: the role of the emperor as head of the realm, the structure of government, and the proper methods of rule all receive sustained attention in his *Xin shu* 新書. Law was naturally a part of this, and a number of scholars have previously treated Jia Yi's thinking on this topic. More than two centuries ago, Zhang Xuecheng 章學誠 (1738–1801) discussed Jia Yi's interest in ritual and punishment as complementary tools of rule.¹ Yang Hegao 楊鶴皋 focused on the role of the law in conjunction with ritual in Jia Yi's broader political theories, including Jia Yi's interest in a clearly defined hierarchy and a government centered on the emperor.² Wang Xingguo 王興國 considered Jia Yi's political ideas, emphasizing the importance of ritual for social stability, while acknowledging that Jia Yi's conception would always have place for law.³ Most recently, Tang Xiongshan 唐雄山 has taken up a similar theme. He focuses on the joint applicability of both law and ritual, but asserts that Jia Yi gives superior importance to ritual.⁴ This is surely correct—at least at the theoretical level. Indeed Jia Yi comes out and says as much, and the importance of ritual to his thinking cannot be denied.⁵

In addition to the interest in law and ritual, the studies I mention share another characteristic: they concentrate on the idealized and essentially abstract level of Jia Yi's thinking

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¹ Zhang Xuecheng, *Jiaochou tongyi* 校讎通義, *Sibu beiyao* 四部備要 edition, 3.7a–8b.

² Yang Hegao, *Jia Yi de falü sixiang* 賈誼的法律思想 (Beijing: Qunzhong chubanshe, 1985).

³ Wang Xingguo, *Jia Yi ping zhuan* 賈誼評傳 (Nanjing: Nanjing daxue chubanshe, 1992).

⁴ Tang Xiongshan 唐雄山, *Jia Yi lizhi sixiang yanjiu* 賈誼禮治思想研究 (Guangzhou: Zhongshan daxue chubanshe, 2005), especially 237–59.

⁵ This is clearly expressed in a passage commonly referred to as “Li cha” 禮察, found in Jia Yi's biography in Ban Gu 班固 (32–92), *Han shu* 漢書 (Beijing: Zhonghua shuju, 1962), 48.2252–53.

about the law. This is entirely understandable, as most of Jia Yi's extant writings take just this tack. But here I am going to turn my attention to something a bit different, namely how Jia Yi understood the law to function concretely—either as it actually was, or as he envisioned it could be, more or less immediately. This is theory of a different sort and it gives a different picture than what comes from analysis based mainly on abstractions. It will show that for Jia Yi, the law represents the actual power of the emperor and the imperial government, its existence and its vulnerability, and so can take precedence over ritual. He portrayed this as reality, and acknowledged did not always accord with theoretical conceptualization.

I begin with a brief sketch of Jia Yi's life, then move on to discuss law and punishment in Jia Yi's thought. This article has three main themes: the theoretical supremacy of the Han emperor over all aspects of the law, the actual limitations on law and imperial power in practice, and Jia Yi's conception of a highly personalized expression of the emperor's power.

Biography

Jia Yi was a native of Luoyang 洛陽 (mod. Henan)⁶. We know nothing of him or his background before he attracted notice for his skills in writing and recitation of the classics at age eighteen.⁷ Because of Jia Yi's talents, the administrator of Henan 河南 (mod. Henan), known to history only as the Honorable Wu 吳公, summoned him to join his retinue.

The young man won Wu's esteem. When Emperor Wen 文 (Liu Heng 劉恆, reg. 179–57 BC) ascended to the throne in 179 BC, he called the Honorable Wu to court and appointed him commandant of justice (*tingwei* 廷尉). Wu praised Jia Yi to the emperor, noting his thorough familiarity with the writings of the various masters. As a result, the emperor appointed Jia Yi erudite (*boshi* 博士).

So while still in his twenties, Jia Yi joined official court discussions. Though the youngest present, he not only answered faster than the elder statesmen who filled the court, he also managed to make his listeners feel he said what they had intended to say. In this way, Jia Yi gained a reputation for ability. We may speculate that the resentment among his seniors that would later hamper his career began at this time, as well. Emperor Wen, at any rate, was pleased with Jia Yi. Within the year, he promoted Jia Yi out of order to become grand palace grandee (*taizhong dafu* 太中大夫). Emboldened by his success, Jia Yi made a number

⁶ The following sketch is based on Ban Gu 班固 (32–92), *Han shu* 漢書 (Beijing: Zhonghua shuju, 1962), 48. 2221–65.

⁷ However, a Tang-era burial inscription for a man with the surname Jia traces his lineage through Jia Yi, and says that Jia Yi's father's name was Hui 回. There is no other evidence for this, so its reliability is questionable. Even if correct, it is of limited value, as no records of Jia Hui exist. See Li Xianqi 李獻奇 and Zhao Huijun 趙會軍, "You guan Jia Yi shixi ji Luoyang jiyi de ji fang mu zhi" 有關賈誼世系及洛陽饑疫的幾方墓志, *Wenwu* 5 (1987): 42–45.

of proposals, including changing the calendar, along with the official color, official number, and titles, as well as for encouraging ritual and music. The emperor declined to carry out these changes, but Jia Yi remained important at court, and is known to have composed the explanations for a number of changes made to the law.

The emperor was impressed, but when he began to talk about promoting Jia Yi to really high office, a coalition of enemies arose. Some of the most influential members of the government, including Zhou Bo 周勃 (d. 169 BC) and Feng Jing 馮敬 (d. 142 BC), criticized Jia Yi as inexperienced and interested only in using his position to disrupt things. Emperor Wen sent Jia Yi away to be tutor (*taifu* 太傅) to the king of Changsha 長沙 (mod. Hunan). Changsha was far from the capital, and Jia Yi was understandably depressed by this transfer away from the court. But beyond the melancholy rhapsody “Diao Qu Yuan” 弔屈原, in which Jia Yi compared himself to the famous poet Qu Yuan, we do not have much record of his time there.

More than a year after the transfer, Emperor Wen summoned Jia Yi back to the court. Jia Yi went to see the emperor, who happened to be receiving the meat from sacrifices. The observance roused the emperor’s interest about spirits, and he asked Jia Yi about their origins. This led to a long conversation that lasted late into the night. As their talk drew to an end, the emperor confessed that he was not Jia Yi’s equal in learning. Then he appointed Jia Yi tutor to King Huai of Liang 梁懷王 (Liu Yi 劉揖, d. 169 BC). Though this Jia Yi held the same title as in his previous post in Changsha, the change reflected Emperor Wen’s esteem: King Huai was both the emperor’s beloved son and a keen student.

While tutor to King Huai, Jia Yi submitted answers to imperial queries and proposals for addressing various problems in the empire. Many of the most important parts of these are combined into a digest that forms the core of Jia Yi’s biography in the *Han shu* 漢書. But then disaster struck, and King Huai died in a horseback riding accident. Jia Yi blamed himself for failing to keep his charge safe. After a year and more of depression, Jia Yi himself died.

Although Jia Yi never reached high office or held a position of real influence at court, his heart was in politics and political matters. The *Xin shu* contains his collected writings, mostly material related to politics, and touches on the law and punishment at many points. Although we have no indication about which laws Jia Yi directly influenced, the *Xin shu* provides ample material for an examination of his legal thought.⁸

Background on Law and Government in the Han

Jia Yi does not give a definition of law (*fa* 法), but his use of the term and related con-

⁸ Shen Jiaben 沈家本 (1840–1913), *Lidai xingfa kao* 歷代刑法考 (Beijing: Zhonghua shuju, 1985), 852.

cepts does not demand anything but the usual understanding. And although Jia Yi's biographies in the standard histories tell us he was involved in drafting the texts of statutes (*li* 律), this term comes into the *Xin shu* only in a musical context.⁹ Nevertheless, we can derive a clear idea of Jia Yi's notions about the law from his writings.

For Jia Yi, the law as defines the scope of imperial power, a power that ideally should encompass the entire realm. By power in this context, I mean the actual ability to project authority. The equivocation of power and law may seem self-evident, as it is compatible with some modern conceptions of how states function. But in the times that Jia Yi lived, it was not, as consideration of a few additional factors will make clear.

First is the broader historical context. Over the years of the Warring States period, there was a great deal of lip service given to the Zhou dynasty, which had long been without real power. The Zhou rulers had ritual position, and received ritual respect, but had no actual ability to project their authority—no real power.¹⁰

And when Jia Yi wrote, both the Han legal system and imperial rule itself were fairly new. Although the idea of a unified realm under a single ruler had long existed,¹¹ it had been realized only in 221 BC—some 50 years before Jia Yi wrote. The First Emperor of Qin was the first ruler in Chinese history to have the kind of power Emperor Wen held, and it was by no means certain that the Han dynasty rulers would—or would be able to—rule their realm as the Qin had, more or less directly from a central authority.¹²

A final point concerns the nature of the early Han system of governance. The Qin system had replaced the former system of hereditary rule with a bureaucratic administration. But when the founder of the Han established the new dynasty and his own rule, he partially re-instituted the pre-Qin system by establishing a small number of his underlings as local rulers in some territories, leaving the Qin system in place elsewhere. He called these rulers *zhuhou* 諸侯, the same title held by the rulers of the ancient quasi-feudal system. As a result of this arrangement, the system of rule in the first decades of the Han dynasty was a mixture of hereditary investiture and bureaucratic government. A number of these local rulers rebelled in the early years of the Han dynasty, but those remaining (either the original rulers or their inheritors), controlled their territories with a great deal of lassitude. They posed a seri-

⁹ In a musical context, *li* means “pitch(es).” For a discussion of this in a work of legal scholarship, see Ma Xiaohong 馬小紅, *Li yu fa: fa de lishi lianjie* 禮與法: 法的歷史連接 (Beijing: Beijing daxue chubanshe, 2004), 72–73. Cf. Tang, 238–43, who offers a definition of law derived from the “Dao shu” 道術 chapter of the *Xin shu*.

¹⁰ Yuri Pines, “The Question of Interpretation: Qin History in Light of New Epigraphic Sources,” *Early China* 29 (2004): 19–20.

¹¹ See Yuri Pines, “Envisioning Empire: Chinese Political Thought of the Warring States Period (453–221 B.C.E.)” (unpublished manuscript, 2006).

¹² Lü Simian 呂思勉, *Qin Han shi* 秦漢史 (1947; reprinted Hong Kong: Taiping shuju, 1962), 54.

ous danger to Han rule, a threat that culminated in the Revolt of the Seven Kingdoms (Qiguo zhi luan 七國之亂) in 154 BC.¹³ Jia Yi described this situation in terms clear and strong: “The strategic situation of the local rulers suffices for them to exclusively control the systems [in their territories], and their strength is sufficient to carry out rebellion” 諸侯勢足以專制，力足以行逆。¹⁴

Indeed, Jia Yi’s insistence on the universal applicability of Han law was in many ways a direct response to this threat, as the discussion below will reflect. Jia Yi’s vociferous argumentation indicates it was far from reality, and suggests the notions were not the mainstream, either. It appears that many accepted that the emperor’s authority was less than thoroughgoing. Yet this was something Jia Yi remonstrated against many times, pointing to local rulers who took advantage of their relative independence and freedom from central authority to plot rebellion.¹⁵

In summary, the imperial system of governance was still new at the time Jia Yi wrote. Its final form was not certain—nor was the continuation of this system. And the present situation was one in which the emperor’s power did not cover the entire realm equally. It is conceivable that Jia Yi could have accepted the status quo, or developed another alternative. Instead, he advocated an approach that essentially matched that of the Qin: a strong central government governing the entire realm and enforcing a single law—though Jia Yi tempered his approach with lessons learned from Qin mistakes.

Law and Imperial Power

Jia Yi’s equivocation of the law with imperial power is most evident when he points out where it does not reach, portraying places where Han law is not enforced as outside of imperial power. At the highest level, Jia Yi believed the territory of the emperor—the Son of Heaven—included everywhere in the knowable world:

The *Odes* say, “All under heaven, / There is nowhere not the king’s territory. / To the ends of the

¹³ Many scholars have discussed this. For a concise summary, see Lao Gan 勞幹, *Qin Han shi* 秦漢史 (Taipei: Wenhua daxue chubanshe, 1980), 29–35; for the Revolt of the Seven Kingdoms and its roots, see Reinhard Emmerich, “Die Rebellion der Sieben Könige, 154 v.Chr.,” in *Und folge nun dem, was mein Herz begehrt: Festschrift für Ulrich Unger zum 70. Geburtstag*, ed. Reinhard Emmerich and Hans Stumpfeldt, 397–497 (Hamburg: Hamburger Sinologische Gesellschaft, 2002).

¹⁴ From “Quan zhong” 權重, in Qi Yuzhang 祁玉章, *Xin shu* 賈子新書校釋 (Taipei: Zhongguo wenhua zazhishe, 1974) [hereafter *Xin shu*], 2.189.

¹⁵ As reflected, e.g., in the “Yi tong” 壹通 chapter of the *Xin shu*, in which Jia Yi put his finger on the problem, even if his proposals as enacted proved a failure; *Xin shu*, 3.357–65; see also “Yi rang” 益壤, *Xin shu*, 1.165–87, etc.

earth, / There is none not the king's vassal."¹⁶ The king [in the poem] is the Son of Heaven. And anywhere that boat or chariot can reach, or human tracks can attain—even among the barbarians: who is not Son of Heaven's? 詩曰：『普天之下，莫非王土。率土之濱，莫非王臣。』王者天子也，苟舟車之所至，人跡之所及，雖蠻夷戎狄，孰非天子之所哉。¹⁷

But Jia Yi knew there were places where imperial rule did not reach. He explicitly pointed out such places, noting that their existence did not accord with idealized conceptions of imperial rule:

In the proper, ancient sense: when to east and west, north and south, anywhere a boat or cart could attain, anywhere human tracks could reach, there were none who did not submit, and only then was [the ruler] called Son of Heaven. ... Yet [now] it is only a few hundred miles, and your authoritative edicts are not extended! 古之正義，東西南北。苟舟車之所達，人跡之所至，莫不率服，而後云天子。... 而特捫然數百里而威令不信。¹⁸

Jia Yi equates the failure to accept imperial edicts, which bore the force of law,¹⁹ with imperiousness to the emperor's authority. The tension between the theory of universal imperial rule and the reality of actually limited power is clear: Jia Yi as much as says that Emperor Wen was not fulfilling his role. Ideal and reality were not in accord, and they divided upon the fault line of the law. Despite the fact that Emperor Wen's edicts should be in effect everywhere, there were places which did not submit to the emperor, and these places were not just known, they were only a few hundred *li* away.

In the above quotation, the specific people who did not heed the emperor's rule were Xiongnu 匈奴 nomads, and Jia Yi is complaining about Emperor Wen's failure to extend his power over those outside Han territory. Jia Yi also noted something similar within the realm:

Although the local lords are vassals in name ... in general, there is no one of them who does not

¹⁶ From "Beishan" 北山 (Mao #205), *Maoshi zhengyi* 毛詩正義, 13-1.19b [444], in *Shisanjing zhu shu* 十三經注疏, ed. by Ruan Yuan 阮元 (1764-1849) (Taipei: Yiwen yinshuguan, 2001).

¹⁷ "Xiongnu" 匈奴, *Xin shu*, 4.482.

¹⁸ "Wei bu shen" 威不信, *Xin shu*, 3.417-18. Note that *xin* 信 here is a phonetic borrowing for *shen* 伸, "to extend"; see Gao Heng 高亨, *Guzi tongjia huidian* 古自通假會典 (Ji'nan: Qi Lu shushe, 1989), 82-83.

¹⁹ See Xing Yitian 邢義田, "Qin Han de lüling xue" 秦漢的律令學, in *Qin Han shi lun gao* 秦漢史論稿 (Taipei: Dongda tushu gongsi, 1987), 249-52 and *passim*.

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govern as if he himself were Son of Heaven. They ennoble people on their own authority, pardon capital crimes—and the most extreme cases, they sometimes bear a yellow canopy [on their chariots].²⁰ Han law is not established and Han edicts are not put into effect [in their territories]. 諸侯王雖名爲人臣…慮無不宰制而天子自爲者。擅爵人，赦死罪，甚者或戴黃屋。漢法非立，漢令非行也。²¹

Law was the nexus of conflict between local rule and the central government. Local rulers who set aside Han law and the edicts that constituted the enacted authority of the emperor blocked the power of the Han government. This created a vacuum of rule in the area of their jurisdiction, which they filled by taking onto themselves powers properly the province of the emperor: granting noble title, remitting death sentences, etc. And when Jia Yi says, “Han law is not established and Han edicts are not put into effect,” his point is not that common crime is going unpunished in those places more than elsewhere—and there is no reason to think it was. Jia Yi stresses it was *Han* law that were not in force, leaving open the possibility that another system functioned. But the refusal to implement specifically *Han* law was a rebellious act against the emperor’s power.

Local rulers’ enforcement of the law was also problematic: by arrogating to themselves legal privileges like canceling punishment, and by refusing to support imperial law, they put themselves above their station and usurped the emperor’s authority. The ritual system of privileges—embodied in the “yellow canopy” affected by the upstarts—also figures in. But in contrast to Jia Yi’s theoretical writings, where ritual has precedence (as noted above), here ritual is clearly second in importance to the concrete expression of power that was the law.

Along similar lines, Jia Yi argues that these rulers were following or enforcing laws properly the province of the emperor, which also was usurpation and, ultimately, rebellion.

In the palaces where the feudatory kings reside, the guards wear shoes of woven dyed silk and squat,²² and are judged according to the laws for the palace where the emperor lives.²³ The gentle-

²⁰ A privilege reserved for the emperor.

²¹ “Qinshu weiluan” 親疏危亂, *Xin shu*, 3.383.

²² Squatting is a trope for arrogant and uncivilized behavior.

²³ The “Yu zao” 玉藻 chapter of the *Li ji* says, “The clerisy does not wear clothes of woven silk (*zhi* 織);” in his commentary, Zheng Xuan explains, “*Zhi* is woven of dyed silk thread. The clerisy wears clothes of silk cloth that is dyed [after weaving].” As Kong Yingda explains in his sub-commentary, cloth woven of dyed thread requires more labor than that dyed after weaving. As such, its wearing was supposed to be restricted to those of high rank; *Li ji zhu shu*, 29.19b–21a [552–53]. Here, the offense is certainly exacerbated by using this cloth for shoes. I follow Qi to understand *lun* 論 in this line in the legal sense of “to judge, sentence.”

men of the palace and the internuncios receive name slips²⁴ [of those come for audience] and take leave according to the laws for those that serve as officials to the emperor.²⁵ If someone serving a local king is not incorrupt and upright, they punish him according to the laws for those serving the emperor. They say that since all use Han law, serving a feudatory king is nothing other than serving the emperor. 諸侯王所在之宮，衛織履蹲夷，以皇帝在所宮法論之。郎中謁者受謁取告，以官皇帝之法予之。事諸侯王或不廉潔平端，以事皇帝之法罪之。曰一用漢法，事諸侯王，乃事皇帝也。²⁶

This passage reinforces the close connection between law and ritual practices. But it also shows that when concrete practice is at issue, it is the law that matters: “They say that since all use Han law, serving a local king is nothing other than serving the emperor.” This reflects that “using Han law” was the definition of “service”—i.e., obedience—to the emperor. It also reflects that borrowing the legal powers of the emperor was arrogation of his authority and essentially a form of rebellion.

Probably the most famous culprit of this sort was Liu Chang 劉長 (d. 174 BC), member of the imperial clan and king of Huainan 淮南 (mod. Jiangsu and Anhui), who, according to Jia Yi, “Trampled the Son of Heaven’s laws and did not follow them, pushed aside imperial commands and did not enact them” 天子之法屣蹂促而弗用也，皇帝之令，屣批傾而不行。²⁷ But Liu Chang was far from the only subordinate ruler to block Han power:

The local lords, to a man, are going to become unruly and disorderly,²⁸ reaching the point that our relations with them will only be maintained by using strategists’²⁹ covenants to keep close. And Han law will not be implemented. 諸侯猶且人恣而不制，至其相與，特以縱

²⁴ Inscribed slips were the Han-time equivalent of visiting cards.

²⁵ In his commentary at *Han shu*, 90.3671, Yan Shigu 顏師古 (581–645) explains *qu gao* 取告 as “to take leave,” giving this translation. *Guan* 官, “official,” is used as a verb in this line, “to serve as an official [to].”

²⁶ “Deng qi” 等齊, *Xin shu*, 1.137.

²⁷ “Huai nan” 淮難, *Xin shu*, 4.498. *Zhi* 屣 in this line is a subordinating particle like *ze* 則; Wang Yinshi 王引之 (1766–1834), *Jing zhuan shi ci* 經傳釋詞 (Nanjing: Jiangsu guji chubanshe, 1985), 9.11b–12a.

²⁸ In his commentary at Sima Guang 司馬光 (1019–1086), *Zizhi tongjian* 資治通鑑 (Beijing: Zhonghua shuju, 1956), 15.483, Hu Sanxing 胡三省 (1230–1302) explains this line, “Each man [was becoming] wanton and could not be controlled.”

²⁹ “Strategists” (*zongheng* 縱橫) refers to the Warring States’ period persuaders who fostered north-south (“vertical,” *zong* 縱) and east-west (“horizontal,” *heng* 橫) alliances in opposition to the Qin expansion.

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橫之約相親耳。漢法令不可得行矣。³⁰

Putting the law into practice is once more the main question. And again, the breakdown of the law is not a problem because it results in an outbreak of robbery or other such crime. Indeed, Jia Yi repeats that *Han* law would have no effect, so *some* legal system would presumably still be functioning in these places. But such a system would not be Han, and would mean the end of imperial power there.

At another place, Jia Yi argues that natural disaster—which he recognized as part of the natural order—could result in a different sort of failure of the legal system, one that could lead to fall of the Han dynasty:

That a generation should encounter famine is a constant of the realm ... And if we should unfortunately have a drought over two or three thousand *li*, how will the state care for [the people there]? And if suddenly there were a crisis on the border [requiring] a force of tens of millions, how would the state feed them? Army and drought would exacerbate each other and the realm would be in great difficulty. The bold and strong would gather forces and attack wildly; exhausted men and feeble old people would trade children and grandchildren and gnaw their bones. The legal system would not reach everywhere, and pretenders in distant places would rise up together and contend in rebellion. 世之有饑荒，天下之常也... 即不幸有方二三千之旱，國何以相恤？卒然邊境有急，數十百萬之眾，國何以餽之矣？兵旱相乘，天下大屈，勇力者聚徒而橫擊，罷夫羸老，易子孫而齧其骨，政法未畢通也，遠方之疑者並舉而爭起矣。³¹

The progression here starts with a natural disaster that would lead to a breakdown of social order, which would result in the inability of the Han central government to enforce its legal system in the affected areas. Since the law is the authority of the emperor, its failure guarantees the rebellion that would follow. This shows authority's vulnerability in the face of events outside human control and emphasizes the actual limits of the emperor's power.

For Jia Yi, law is most important as enacted and enactable government power, not simply as a preventative to crime. This is not to say that Jia Yi rejects the idea that law and punishment serve to control undesirable behavior. He criticized the topsy-turvy moral sense of his times, bemoaning the fact that, "Those who dare to break legal prohibition and commit great wrongs are thought to understand proper principle" 敢犯法禁昧大奸者爲識理,³²

³⁰ "Yi rang," *Xin shu*, 1.165.

³¹ "Wu chu" 無蓄, *Xin shu*, 4.521. Note that *yi* 疑 is borrowed for *ni* 擬, "to imitate," thus, *nizhe* 疑者, "imitator, pretender"; see Yan Shigu's commentary at *Han shu*, 24A.1130 and Gao Heng, *Guzi tongjia huidian*, 376.

indicating that the law works against crime. But for Jia Yi, it was broader and deeper than protecting life and property from commonplace crime.

Law and Order

The role of law as reflecting and constituting imperial power is reinforced by its role in ensuring social order, which is actually secondary in Jia Yi's portrayal. For Jia Yi the existence of a functioning legal system is as much a result of proper governance as it is a cause. It helps comprise imperial power, but does not alone create it; nor can it alone create a properly ordered society. The idea of law as reflecting rather than producing social order contrasts with commonplace modern conceptions that take the law to be something that creates order within a society by forbidding anti-social behavior; thus compelling the pro-social.

Jia Yi's explanation of a system of uniforms and insignia of rank shows how he envisions such a system could work:

As the esteemed and the low have their grades, so do clothing and position have their grades. Once grades and levels are properly established, each person would keep to standard and the people would adhere to proper measure ... We should establish the law in order to inure [the people with these standards] and establish officials in order to shepherd them. By this, when the realm saw someone's clothes, it would know whether he is esteemed or low; and when it looked upon someone's emblem, it would know his situation. This would cause people to settle their hearts... 貴賤有級，服位有等，等級既設，各處其檢，人循其度... 建法以習之，設官以牧之，是以天下見其服而知貴賤，望其章而知其勢。使人定其心 ...³²

The law does not create this (distinctly ritual) system; nor does it alone enforce compliance. Rather, it should serve to accustom the people to the system. In day-to-day terms, the law is the way these things are put into practice, and so is the most concrete part of the ritual system. However, adherence follows from the system itself, not from compulsion. It is not that there is no coercive force behind these observances,³⁴ but this is subordinate to the law's essentially instructive character.

That is why Jia Yi argues that punishment should be motivating rather than retributive, and should be pursued with deliberate laxity rather than a zeal for prosecution. It should

³² "Gui wei" 瑰瑋, *Xin shu*, 3.332.

³³ "Fu ni" 服疑, *Xin shu*, 1.161–62.

³⁴ "Fu ni," *Xin shu*, 1.162: "If [someone] declines [a privilege] on his own authority, he should be blamed; if he usurps those above his station, he should be executed" 擅退則讓, 上僭則誅.

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focus on encouraging proper behavior rather than punishing. Jia Yi's description of idealized ancient times reflects this:

Thus, when they set up punishments in ancient times, it was in order to control the incompetent and rouse lazy people. For this reason, if a crime was doubted, they did not pursue and punish it. Thus, the incompetent were able to change. 故古之立刑也，以禁不肖，以起怠惰之民也。是以一罪疑，則弗遂誅也，故不肖得改也。³⁵

Jia Yi argued this because he recognized the limitations of punishment at building a good relationship with the people, which he believed was necessary for successful rule.

Someone easy to make happy and hard to make angry is fit to be lord; someone who recognizes others' merit and forgets others' crimes is fit to be esteemed. Thus I say, punishment cannot be used to be kind to the people, and the arrogant cannot become *shi*. It follows that if you want to use punishment to be kind to the people, it is like using a whip to become familiar with a dog: even after a long time, you won't get close to it. 易使喜，難使怒者，宜爲君。識人之功，而忘人之罪者，宜爲貴。故曰：「刑罰不可以慈民，簡泄不可以得士。」故欲以刑罰慈民，辟其猶以鞭狎狗也，雖久弗親矣。³⁶

These arguments are clearly intended to refute Shang Yang 商鞅 (d. 338 BC), who had argued that punishment was the way to nurture the common people and earn their devotion, saying, "If there are heavy punishments and light rewards, then the ruler cares for the people" 重罰輕賞，則上愛民。³⁷

For Jia Yi, punishment was significant as the expression of the ruler's will and personality, so he links it with connected qualities like being easy to please. And if punishment is taken as a personal expression of the emperor, then it follows naturally that its harshness can hardly create a good relationship. Just as whipping will drive off a dog, so the common people will become estranged and hostile from being punished.

The notion that punishment is best avoided if possible is also reflected in a tale Jia Yi relates in the "Lianyu" 連語 chapter of the *Xin shu*, where a willingness to forgo punishment in doubtful legal cases directly reflects a ruler's generosity of spirit and caring for his people—and, not coincidentally, leads to his success in governance.³⁸

³⁵ "Da zheng shang" 大政上, *Xin shu*, 9.989.

³⁶ "Da zheng xia" 大政下, *Xin shu*, 9.1003.

³⁷ From the "Qu qiang" 去彊 chapter of the *Shang jun shu* 商君書, in Jiang Lihong 蔣禮鴻, *Shang jun shu zhuizhi* 商君書椎指 (Beijing: Zhonghua shuju, 1986), 1.30.

In the end, Jia Yi foresees a government without punishment or reward.³⁹ The system, properly established by the emperor, would work without external addition: “You would not reward, and yet the people would strive; you would not punish, and yet the people would be ordered” 故不賞而民勸，不罰而民治。⁴⁰ Criminal law should be just a way to inculcate a system that is established by the emperor—a system that need only be set up correctly to function of itself.

If a sage ruler is above, then the lords increase in humaneness, the officers increase their caring, and the people increase their obedience; then punishment will be discarded, and the people would not receive premature death by execution. 聖王在上，則君積於仁，而吏積於愛，而民積於順，則刑罰廢矣，而民無夭遏之誅。⁴¹

In this context, it important to note that Jia Yi speaks of ending punishment—not of ending law. The two are closely related, but they are not identical: the best situation is of strategic circumstances (*shi* 勢) that preserve and perpetuate the emperor’s power without relying on force.⁴² It was not the end of order.

I mentioned above that there is no doubt law and ritual were closely connected in Jia Yi’s theories, and it is often suggested that ritual was more important than law for him. But although Jia Yi believed the ritual system was one way to create social order and avoid using punishment, it is not the only one. Jia Yi argued that other kinds of system had the same power to create circumstances in which the law is obeyed. A good example is the system of government in the subordinate states—the “land system” governing the relationship between local rulers and the central government:

Once a proper land system was in place, then the way of emperorship would return to enlightenment. Laws would be established and not broken, edicts put into practice and not violated ... The lowly people would turn toward good, and the great vassals would model obedience. And it would be your majesty that made it so. 地制一定，則帝道還明，而臣心還正，法立而不犯，令行而不逆 ... 細民鄉善，大臣效順，上使然也。⁴³

³⁸ *Xin shu*, 5.637–38.

³⁹ It may well be noted that in the respects discussed here, Jia Yi’s concept of an ideal system is not all that far removed from Shang Yang’s; see the discussion of Shang Yang’s ideas in Zhou Mi 周密, *Shang Yang xingfa sixiang ji bianfa shijian* 商鞅刑法思想及變法實踐 (Beijing: Beijing daxue chubanshe, 2002), 75–77.

⁴⁰ “Xiu zheng yu shang” 脩政語上, *Xin shu*, 9.1044.

⁴¹ “Xiu zheng yu xia” 脩政語下, 9.1079.

⁴² For a study of *shi*, see Roger Ames, *The Art of Rulership* (Albany: State University of New York Press, 1994).

Here again, the establishment of a proper system is supposed to bring about a situation in which, "Laws would be established and not broken, edicts put into practice and not violated." A properly functioning legal system comes from proper system, and does not bring it about.

The above has shown how Jia Yi conceived of the law as comprising the power of the emperor personally, and his government: to reject or to block *Han* law equaled blocking the power of the emperor and his state. The enforcement and enforceability of the law directly reflected the emperor's power, his ability to control what happened at the local level. This was not the ability of the Han government to extend its military power, or of the emperor to fulfill his ritual roles in the capital. It was the law that delineated the actual power of the emperor: his ability to enforce his authority at all levels of society. And although the emperor theoretically possessed unquestioned and nearly unconstrained power,⁴⁴ we can see that law in practice reflected the reality that this power was in fact often constrained.

As Jia Yi conceived of it, the law is the power of the emperor and his government in practice; the breakdown of social order connects directly to the same. It is not that the emperor had a moral obligation to ensure moral order. Rather, that order (or its absence) reflected the success of the emperor's government.

At the same time, Jia Yi recognized that the law is tool that must be applied carefully. If badly designed, even the best-intentioned law could actually create more problems that it solved: "There are matters that summon calamity, and laws that create wrong" 夫事有召禍，而法有起奸。⁴⁵ This can happen because the system of government—including the law—makes some act simultaneously tempting and culpable. Jia Yi said this was the case for laws concerning minting money.

The law permits the public of the realm to hire workers and mint money. The punishment for those that dare to mix in lead or iron, or use other tricks, is tattooing. Yet the situation of minting money is that if you do not adulterate the copper by mixing in lead, iron, or rock, you cannot make a profit. And adulterating it by the smallest amount is easy to do—as easy as salting a stew—yet the benefit is great ... We call it the law on hiring workers and publicly minting, but the reality is penal tattooing. With laws like this, what is your majesty going to rely on? 法使天下公得顧租鑄錢，(敢雜以鉛鐵爲他巧者，其罪黥，)⁴⁶ 然鑄錢之情，非

⁴³ "Wu mei" 五美, *Xin shu*, 2.202.

⁴⁴ See also Liu Zehua 劉澤華, Wang Maohe 汪茂和, and Wang Lanzhong 王蘭仲, *Zhuanzhi quanli yu Zhongguo shehui* 專制權力與中國社會 (1988; rpt. Tianjin: Tianjin guji chubanshe, 2005); Xu Lianda 徐連達 and Zhu Ziyang 朱子彥, *Zhongguo huangdi zhidu* 中國皇帝制度 (Guangzhou: Guangdong jiaoyu chubanshe, 1996), etc.

⁴⁵ "Zhu qian" 鑄錢, *Xin shu*, 4.534.

⁴⁶ These twelve graphs are inserted following the Lu edition.

殽鉛鐵及石雜銅也，不可得贏，而殽之甚微，又易爲，無異鹽羹之易，而其利甚厚…名曰顧租公鑄法也，而實皆黥罪也。有法若此，上將何賴焉？⁴⁷

Here Jia Yi offers a very rationalistic view of the law as something that must be properly designed. Otherwise, as in the case of minting, “The wrongs will not be overcome, and legal prohibitions will be repeatedly destroyed” 姦不勝而法禁數潰.⁴⁸ A badly designed law would often be broken, bringing on the one hand to disrespect for the law, and on the other, overuse of punishments, which will lead to a reputation for cruelty. Essentially, it would constitute a trap to catch and punish people, instead of a tool of governance.⁴⁹ That in turn would threaten the emperor directly. This recognition owes much to the experience of the Qin dynasty, whose errors Jia Yi describes as being in great part failures of their legal system. Instead of more and harsher penalties, Jia Yi wants a better system and better law.

The Lessons of the Qin

The precipitous rise and fall of the Qin dynasty was a common theme among Han dynasty political writers, many of whom vilified the Qin as brutal and barbarous. Some modern scholars have suggested that this negative view traces to Jia Yi, whose most famous prose work, the “Guo Qin lun” 過秦論, was a meditation on the mistakes of the Qin rulers.⁵⁰ Although other writers criticized the Qin around the time Jia Yi did, his critique is by far the most famous, perhaps because of its author’s undeniable literary talent.⁵¹

As Jia Yi portrays the Qin state in the time before unification, improvements in law coincided with expansion of its rulers’ power: “Lord Shang (Shang Yang) assisted them; within the state they established laws and standards, strove at cultivation and weaving, and maintained the equipment for defensive warfare” 商君佐之，內立法度，務耕織，

⁴⁷ “Zhu qian,” *Xin shu*, 4.531.

⁴⁸ “Zhu qian,” *Xin shu*, 4.543.

⁴⁹ See “Zhu qian,” *Xin shu*, 4.541.

⁵⁰ Li Yu-ning, “Introduction,” *The First Emperor of China* (White Plains: International Arts and Sciences Press, 1975), xv–xvii suggests Jia Yi inaugurated this tradition. For the complete text of the “Guo Qin lun,” see Qi Yuzhang *Xin shu*, 1.1–74, but note that the *Xin shu* mentions the Qin and their errors at many places.

⁵¹ Others who criticized the Qin around that time include Lu Jia 陸賈 (ca. 216–ca. 172 BC), whom Emperor Gaozu 高祖 (reg. 206–195 BC) commanded to discuss the fall of Qin and rise of Han (a theme found in the *Xinyu* 新語 attributed to him), and Zhang Shizhi 張釋之 (ca. 2nd c. BC), who attracted Emperor Wen’s notice by his analysis of the same; see *Shi ji*, 97.2699 and 102.2751, and *Han shu*, 43.2113 and 50.2307.

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脩守戰之具。⁵² So far so good. This reinforces Jia Yi's idea that the ruler's power and the law were coterminous. But Jia Yi paints a very different picture of law after unification, when the Qin reached the height of their power:

Thus, when the Qin flourished, they multiplied laws and made punishments harsh, and the realm shook. When they declined, the common people were resentful and the whole world rebelled ... The Qin botched both root and branch (i.e., important and unimportant), and so could not last long. 故秦之盛也，繁法嚴刑而天下震。及其衰也，百姓怨而海內叛矣 ... 秦本末並失，故不能長。⁵³

This suggests that the fall of the Qin was a result of the overuse of punishment, harsh punishment that broke down the relationship between ruler and vassal and constituted an abuse of imperial power.

The failures of the Qin state centered around their destruction of traditional culture and its ideals of rulership, which included limitations on the exercise of power: "They discarded the way of proper rulers and established self-interest; they burned the books and writings [of the past] and made punishment and law harsh" 廢王道而立私愛，焚文書而酷刑法。⁵⁴ The harshness of Qin law was not simply a part of their failure, it was a *main* part. Thus, when Jia Yi depicts the breakdown in social order Qin misgovernment caused, it is the sufferings of the convicts (and not the victims of crime) that most catch his eye and epitomize the condition of the realm.⁵⁵

And then wrong and artifice rose up together, and superior and subordinate deceived each other. Those that bore punishment were many, and those to be punished and those to be executed gazed at each other in the road. And the realm suffered from it. 然後姦僞並起，而上下相遁，蒙罪者眾，刑僇相望於道，而天下苦之。⁵⁶

Jia Yi says that the Second Emperor (Huhai 胡亥, reg. 209–7 BC) of Qin could have saved the Qin dynasty, and one of the things he should have changed first was the legal system—not doing away with law, but rather shifting to a softer and simpler penal regime.⁵⁷ He

⁵² "Guo Qin shang" 過秦上, *Xin shu*, 1.1.

⁵³ "Guo Qin xia" 過秦下, *Xin shu*, 1.70.

⁵⁴ "Guo Qin zhong" 過秦中, *Xin shu*, 1.41.

⁵⁵ This contrasts with his portrayal of his own times, where he shows no sympathy for convicted criminals, only victims; see, e.g., the "Su ji" 俗激 chapter of the *Xin shu*; *Xin shu*, 3.283–302.

⁵⁶ "Guo Qin zhong," *Xin shu*, 1.50.

⁵⁷ See "Guo Qin zhong," *Xin shu*, 1.45, where proper laws are part of the good government Jia Yi says would have been possible under the Second Emperor.

could have, “Simplified the law and reduced punishments, in order to preserve [the people’s] descendents” 輕賦少事，以佐百姓之急，約法省刑，以持其後； but he did not. Instead, he instead made the situation worse, “Multiplying punishments and making executions harsh; their officers’ handling [of legal cases] was extremely cruel, reward and punishment were improper, and taxes lacked proper system” 繁刑嚴誅，吏治刻深，賞罰不當，賦斂無度.⁵⁸ The reason for this was the Second Emperor’s education, itself an outgrowth of Qin culture:

Their customs definitely did not esteem respectful deference; what they elevated was reporting crimes. They definitely did not esteem ritual and duty; what they elevated was punishment. [The First Emperor] made Zhao Gao 趙高 (d. 207 BC) tutor to Huhai, and he taught him criminal cases; what they practiced—if not cutting people in two or amputation of the nose—was executing people’s families to three generations. 其俗固非貴辭讓也，所上者告訐也；固非貴禮義也，所上者刑罰也。使趙高傳胡亥而教之獄，所習者非斬劓人，則夷人之三族也。⁵⁹

Indeed, Jia Yi recommends that educating the future emperor about proper punishment should explicitly be the task of officials. One of these was the “grand tutor” (*taifu* 太傅)⁶⁰—a position Jia Yi held himself, albeit to a king and not an heir designate—and the “adjuster censor” (*tiaoxun* 調訊).⁶¹ Proper oversight of the law was one of the skills necessary for a successful emperor.

Jia Yi argued that the law represented the power of the emperor and the state centered on him, so its application reflects the emperor directly to the people. By the same token, its misapplication threatened him directly. Thus the law was a matter of highest urgency and importance. This causal chain is never clearer than when the law takes effect through punishment, as the example of the Qin showed.

Imperial Power and Its Restraint

The most important lesson Jia Yi derives from the Qin case is that although the emperor theoretically possesses total power in the realm, reality dictates that he must be careful about exercising that power. And when reality and theory come into conflict, it is inevitably reality that wins out. The harshness of law and punishment has its place, to be sure:

⁵⁸ “Guo Qin zhong,” *Xin shu*, 1.45.

⁵⁹ “Bao fu” 保傅, *Xin shu*, 5.621.

⁶⁰ See “Fu zhi” 傅職, *Xin shu*, 5.559–60.

⁶¹ “Fu zuo,” *Xin shu*, 5.656.

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Humaneness, duty, benevolence, and generosity—these are the sharp blades of the lord of men. Power, circumstance, law, and system—these are the axes of the lord of men. Once circumstances are established and power sufficient, then you can use humaneness, duty benevolence, and generosity and be merciful to them... 仁義恩厚，此人主之芒刃也；權勢法制，此人主之斤斧也。勢已定權已足矣，乃以仁義恩厚因而澤之，故德布而天下有慕志。⁶²

But all the theoretical power in the world will not protect a ruler who misuses this power, as the Qin did: in such a case, the common people will rise up and overthrow him, even if they lack good leadership, equipment, etc.⁶³

Jia Yi is also interested in the ways the law itself channels or even limits the emperor's power. This is clearly reflected in a quasi-historical tale included in the "Chunqiu" 春秋 chapter of the *Xin shu*. The story tells of King Hui of Chu 楚惠王, who finds a leech in his pickles, and inexplicably—at least at first—swallows it, which leads to stomach troubles. When questioned by his chancellor about the cause of his illness, the king confesses that he knowingly ate the leech. His reason is telling. The people responsible for his food would be punished with death for such a lapse. And the king says he could not bear to see that. So he ate the leech rather than draw attention to it and bring condemnation upon his servants. The chancellor predicts that an act of disinterested self-sacrifice cannot but be repaid with recovery, which indeed came to pass.⁶⁴

The implication of the story is that the king could not simply choose to not apply the law, even though it would have been an act of mercy: public knowledge of the failure on the part of the cook and others must result in their death. The law constrained the ruler, and he could not override it, even when it called for what he did not want—though, interestingly enough, he apparently had no moral responsibility to ensure the law was enforced, either. But he was not above the law; nor could he cancel it at whim.

However, Jia Yi elsewhere says the emperor could arrange systemic mercy for entire groups. He offers this as a way for the emperor to secure his own position, in the case of the law by making selective mercy for those closest and most important to him a part of the law, a theme to which he gives considerable attention.⁶⁵ For although Jia Yi conceived of the law as belonging exclusively to the emperor, he knew well that those under him—especially the bureaucrats and other cogs in the state system—had considerable power to affect the work-

⁶² "Zhi bu ding" 制不定, *Xin shu*, 2.213–14.

⁶³ See, e.g., "Guo Qin lun shang," *Xin shu*, 1.24–30, etc.

⁶⁴ "Chunqiu," *Xin shu*, 6.769.

⁶⁵ See Charles Sanft, "Rituals that Don't Reach, Punishments that Don't Impugn: Jia Yi on the Exclusions from Punishment and Ritual," *Journal of the American Oriental Society* 125.1 (2005): 31–44.

ing of the system, and thus its outcome:

Subordinates are extremely numerous, but the ruler is limited in number [to just one]. Those who are entrusted with material goods and official positions are all among the subordinates. If they only lack shame and seek ease, then the lord will become exhausted and sick. 羣下至衆，而主至少也。所託財器職業者，率於羣下也。但無恥，但苟安，則主（最）[罷]病。⁶⁶

The fact was that the emperor's power was limited, and this was as clear from the reality of the day as it was (and is) from common sense: Jia Yi believed that the limits he portrayed as voluntary were necessary to preserve the emperor in his position. Yet Jia Yi does not show the emperor as ultimately compelled by the law: although the emperor must follow the law as established, he can change it. But Jia Yi argues that as the emperor does so, he is not free to make any changes he wishes. Rather, Jia Yi argues from a conception of the intrinsic qualities of human beings, which compels a particular course of action and certain kinds of law.

Conclusion

In the examples I have looked at here, Jia Yi's rhetoric takes its form from the tension between theory and reality. Jia Yi walked a veritable tightrope in his discussions of rule, of law and punishment. The theory was unlimited imperial power, and one of the ways this was expressed was through law and edict. This made it tantamount to rebellion for any local ruler—or even a foreign one—to block Han law, or to enforce laws properly the province of the emperor. The reality was an essentially bureaucratic system that needed officials in order to function. It was the duty of every person to obey the emperor, but the Han had a limited ability to *make* that happen. Add to this Jia Yi's consideration of unruly and disobedient vassals, difficulties with foreign powers, the threat of natural disasters, and other problems—all forces limiting the emperor's actual power—and you have a hardheaded and realistic picture of rule in early Han China. Jia Yi also believed adherence to the law followed in large part from the system of governance itself, and he never tired of offering suggestions for improvement to that system. He used the reality of a legal system that did not always work ideally to argue for a better one.

⁶⁶ "Jie ji," *Xin shu*, 2.262.