

MORAL WRONGFULNESS AND CARTEL CRIMINALIZATION IN EAST ASIA

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TABLE OF CONTENTS

I. INTRODUCTION	378
II. LEGALISM AND THE CONCEPT OF LAW IN ANCIENT CHINA	389
A. The Concepts of Law and Penal Law in Ancient China	391
B. <i>Fa Jia</i> and Legalism	393
C. Penalties	396
D. The Instrumental Use of Law	399
III. MORAL AND PENAL LAW	401
A. The Confucianization of the Law	405
B. Defining Moral Wrongfulness	406
C. A Different Context for Moral Action	407
IV. THE IMPACT OF CONFUCIANISM AND LEGALISM ON LEGAL CULTURE IN EAST ASIA.....	408
A. China	409
B. Japan	412
C. Korea	415
V. IMPLICATIONS FOR THE CRIMINALIZATION OF CARTELS IN EAST ASIA	417
A. The Criminalization of Cartels, or paucity thereof, in China, Japan, and Korea	417
B. Defining Moral Wrongfulness of Cartels	426
C. Moral Wrongfulness and Penal Law	430
D. Prospects for Criminal Enforcement in East Asia	431
VI. CONCLUSION.....	433

Abstract: *The global trend toward formal criminalization of cartel conduct is typically justified by reference to deterrence theory and the economic incentives that influence behavior. Other factors have often been treated with benign neglect. Some scholars have helpfully begun to highlight links between the likely effectiveness of criminal sanctions for cartel practices on the one hand, and on the other, a social norm that recognizes such behavior as deserving punishment that goes beyond administrative sanctions and possible private remedies. Where social acceptance of the need for criminal sanctions to fight cartels is absent or underdeveloped, there may be a wide gap between the formal adoption of a criminal*

regime and its effective implementation. This article discusses the subject of the criminalization of cartels in the context of China, Japan, and Korea. It suggests that criminalizing cartels is less likely to be effective in the absence of moral condemnation, and further suggests that an understanding of moral norms in East Asian countries is aided by a thorough investigation of the history of ancient Chinese jurisprudence. Underpinned by the foundation of a communal natural order, Confucian moral thought is distinct from the “Western” moral philosophy. Condemning cartel conduct and characterizing it as morally wrongful thus requires a conception that goes beyond individualist assumptions and calculations. To explore the intertwined roots of criminality and morality in East Asia, we trace a legal history in which Confucian ethics were incorporated into the criminal codes of ancient China. Such an exercise suggests inter alia the possibility of stigmatizing cartel conduct on the moral ground that it constitutes improper profit-making in violation of the Confucian principle of righteousness. The article thus submits that debates concerning the morality of cartel conduct and the legal prohibitions of cartels in East Asia are properly informed by an understanding of norms derived from Confucian principles—which include not only the rules and norms that allow an actor to achieve virtue internally but also those associated with one’s status and the maintenance of harmonious social order externally. The article proposes that, in the East Asian context, the likely effectiveness of criminal sanctions targeting cartel behavior can be enhanced if the moral wrongfulness of such behavior has been properly defined, and if its immoral character has become widely recognized and accepted within the society concerned.

I. INTRODUCTION

The criminalization of cartel conduct (i.e. price-fixing, market-sharing, bid-rigging, etc.) has historically and primarily been an “American” phenomenon.¹ Under the influence of US antitrust law—though not necessarily without reservations—some countries in the last fifteen to twenty years have introduced the possibility to prosecute and sanction individuals and corporations under national

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¹ As Hofstadter claimed in the 1960s: “The antitrust movement and its legislation are characteristically American. . . . In America competition was more than a theory: it was a way of life and a creed.” Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS* 20, (E. Thomas Sullivan ed., 1991). For an overview of the criminalization of cartels in the U.S., see generally Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 *GEO. WASH. L. REV.* 693 (2001) [hereinafter Baker, *The Use of Criminal Law Remedies*].

criminal provisions for engaging in cartel behavior; the turn to criminal sanctions is now said to be a gradual and uneven but nonetheless discernible global trend.² While most countries have not adopted criminal laws to punish classic cartel conduct, it appears that such laws have indeed gained some degree of acceptance by lawmakers in over thirty jurisdictions across North America, Europe, and Asia.³ However, this process of “transplanting” criminal regimes for cartels has faced important challenges, in particular due to tensions between the benefits generated from the deterrent effect of criminal sanctions on the one hand, and on the other, the economic, legal, and moral ambiguity of cartel conduct.⁴

Regarding the first aspect of these tensions (i.e. the deterrent effect of criminal sanctions) the predominant utilitarian view on deterrence⁵ derives from the

² See Gregory C. Shaffer et al., *Criminalizing cartels: A global trend?*, in COMPARATIVE COMPETITION LAW 301–02 (John Duns et al. eds., 2015) [hereinafter Shaffer et al., *Criminalizing Cartels*] (indicating that the fight against cartels is a point of global convergence within an emerging “transnational legal order” of competition law while acknowledging that moves toward criminalization are not uniform, and that implementation of formally adopted criminal rules poses challenges). For further discussion of the criminalization of cartel conduct beyond the U.S., see, e.g., Scott D. Hammond, *From Hollywood to Hong Kong - Criminal Antitrust Enforcement is Coming to a City Near You*, 14 LOY. CONSUMER L. REV. 567, 573–75 (2002) [hereinafter Hammond, *From Hollywood to Hong Kong*]; see generally Florian Wagner-von Papp, *What If All Bid-Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany*, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 157 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011) [hereinafter Wagner-von Papp, *What If All Bid-Riggers Went to Prison*]; see generally Florian Wagner-von Papp et al., *Individual sanctions for competition law infringements: Pros, cons and challenges*, 2 CONCURRENCES COMPETITION L. REV. 14 (2016).

³ For example, criminal sanctions for cartels have been applied in Austria, Canada, France, Germany, Greece, Ireland, Israel, Japan, Norway, the Slovak Republic, South Korea, Switzerland and, most prominently of course, the United States. See, e.g., Hammond, *From Hollywood to Hong Kong*, *supra* note 2, at 575; Baker, *The Use of Criminal Law Remedies*, *supra* note 1, at 696; Wagner-von Papp, *What If All Bid-Riggers Went to Prison*, *supra* note 2; Shaffer et al., *Criminalizing Cartels*, *supra* note 2. For an overview of the unbalanced development of cartel criminalization in some countries versus others, see Ariel Ezrachi & Jiri Kindl, *Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus*, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 419 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

⁴ See generally Caron Beaton-Wells & Fiona Haines, *Making Cartel Conduct Criminal: A Case Study of Ambiguity in Controlling Business Behavior*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 218 (2009)

⁵ For seminal contributions on utilitarianism, see generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1907); see generally JOHN STUART MILL, UTILITARIANISM (1861). For discussion of the deterrence goal of law enforcement, see, e.g., Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, 1 J. LEGAL STUD. 259, 259–61 (1972). For critiques of deterrence theory, see, e.g., Kirk R.

famous model of Gary Becker, according to which criminal sanctions are justified when the expected benefits of misconduct surpass the corresponding risks (i.e. when the benefits exceed the level of sanction discounted by the rate of probability that the sanction will be imposed).⁶ A core proposition of this model, which assumes that a prospective cartel is a rational profit maximizer, is that deterrence depends on the existence of criminal penalties serious enough to offset the low probability of detection of the contemplated (secret) cartel.⁷ Empirical evidence suggests that expected benefits from overcharges tend to be high,⁸ and the detection rate is rather low.⁹ In these circumstances, criminal sanctions are justified when applying the Beckerian model, especially since the risks (to liberty, career, and personal life) of individual criminal penalties are more likely to be internalized by corporate employees compared to penalties (and/or orders to pay civil damages) imposed on (abstract) corporate entities. Whereas many economists have opined that imposing (custodial) criminal sanctions are necessary¹⁰ to offset the insufficient deterrent

Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC. REV. 545, 545 (1986); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949, 950–51 (2003).

⁶ See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (establishing the economic predicates for deterrence of crimes by means of punishment under the law); see also William Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983) (applying optimal deterrence theory, as pioneered by Becker, to the field of antitrust).

⁷ The debate concerning the deterrent effect of criminal punishment, and how perceived severity and certainty impact the effectiveness of criminal sanctions, has been sustained for long periods of time. See, e.g., Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of The Evidence and Issues*, 4 JUST. Q. 173, 174 (1987).

⁸ According to research conducted by Connor and Lande based on two data sets, the average cartel overcharges are 49% and 31%, and the median cartel overcharges are 25% and 22%. See John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 513 (2005).

⁹ Several authors have offered estimates as to the probability that a cartel will be detected. For example, Connor and Miller concluded that, in the U.S., the probability of detection was about 15 % before the leniency program was implemented in the 1990s; thereafter, the probability increased to 27.5 %. John M. Connor & Douglas J. Miller, *Determinants of EC Antitrust Fines for Members of Global Cartels* 13 (Mar. 6, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229358; see generally Peter G. Bryant & E. Woodrow Eckard, *Price-fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 531 (1991) (discussing the probability of cartel detection). The model used by Combe et al. showed that the probability of detecting cartels in Europe was between 12.9 % and 13.3 %. See Emmanuel Combe et al., *Cartels: The Probability of Getting Caught in the European Union*, BRUGES EUROPEAN ECONOMIC RESEARCH PAPERS No. 12, 2008, at 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061.

¹⁰ See, e.g., Gregory J. Werden & Marilyn J. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917, 933 (1987) [hereinafter Werden & Simon, *Why Price Fixers Should Go to Prison*]. Although the empirical evidence on the deterrent effect of

effect of monetary sanctions,¹¹ some have argued that policies aiming to achieve optimal deterrence should be informed by the risks of both over-deterrence and under-deterrence.¹² In general, the justifications invoked by policy makers for the introduction of criminal sanctions have been utilitarian in character, since “optimal deterrence” is derived from the expected consequences of punishments and illegal rewards; and these utilitarian justifications have been accepted as a normative foundation for such sanctions.¹³

criminal sanctions is still rather limited, the view that criminalizing cartels is vital to achieving the goal of deterrence has been supported by prominent federal prosecutors in the U.S. As Scott Hammond, then the Deputy Assistant Attorney General of the Antitrust Division of the DOJ once said, “[i]ndividual accountability through the imposition of jail sentences is the single greatest deterrent [to cartel conduct].” Scott Hammond, Deputy Assistant Att’y Gen., U.S. Dep’t of Just., Antitrust Div., *Ten Strategies for Winning the Fight against Hardcore Cartels* 3 (Oct. 18, 2005), <https://www.justice.gov/atr/file/517851/download>. Thomas Barnett, when he served as the Assistant Attorney General for Antitrust, expressed a similar view, stating that “[t]he ultimate goal of cartel enforcement is deterrence, and deterrence only works when consequences are real. To effectively deter cartels, antitrust enforcers must aggressively and predictably prosecute cartelists and use the full range of weapons in the enforcement arsenal, from fines to jail time to restrictions on international movement.” Thomas O. Barnett, *Seven Steps to Better Cartel Enforcement*, in *EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS* 141, 151 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2007).

¹¹ See generally Werden & Simon, *Why Price Fixers Should Go to Prison*, *supra* note 10; Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 *YALE L. J.* 1, 47–56 (1980).

¹² See generally Paolo Buccirossi et al., *Deterrence in Competition Law*, Discussion Paper No. 285, GOVERNANCE & EFFICIENCY ECON. SYS. (2009), <https://pdfs.semanticscholar.org/b7bd/197aeb3863247b307aba98225d60a0c5e312.pdf> (identifying a variety of features that influence the deterrence environment, and emphasizing the incompleteness of theoretical and empirical research on the issue of tailoring institutional design to a particular jurisdiction’s needs to avoid both over-deterrence and under-deterrence).

¹³ Thus, for example, in 2001 when Allan Fels, the Chairman at that time of the Australian Competition and Consumer Commission, called for criminal sanctions for cartels in Australia (a move that culminated in the 2009 amendment of the Competition and Consumer Act to introduce such sanctions), the justification given for criminalization was greater deterrence in order to rebalance the punishment-reward tradeoff. See Caron Beaton-Wells, *Capturing the Criminality of Hard Core Cartels: The Australian Proposal*, 31 *MELB. U. L. REV.* 675, 681 (2007) [hereinafter Beaton-Wells, *Capturing the Criminality of Hard Core Cartels*]; see also Scott D. Hammond, Deputy Assistant Attorney Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep’t of Just., *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades* 11 (Feb. 25, 2010), <https://www.justice.gov/atr/speech/evolution-criminal-antitrust-enforcement-over-last-two-decades> (“The Antitrust Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.”); Abbott B. Lipsky,

Although this utilitarian (Beckerian) approach provides a coherent theoretical foundation for cartel criminalization,¹⁴ it can be criticized for painting an incomplete picture of the problem of the legal control of socially harmful cartel conduct. In particular, the missing element in optimal deterrence theory is the moral dimension of the legal proscription; this has become clear from a worldwide debate in which several commentators have highlighted the difficulty of transposing the US approach to cartels (an “antitrust delinquency” approach¹⁵) in places such as continental Europe,¹⁶ the United Kingdom,¹⁷ and Australia.¹⁸ In these other contexts, it has been shown that moral condemnation by society is a key prerequisite for the success of cartel criminalization, and differences in perceptions regarding moral wrongfulness, as measured by surveys and interviews among the business community, have been identified as an important factor in the cleavage between the United States and other parts of the world.¹⁹ In essence, this research suggests that

Jr., *Detering Cartel Behavior: Harmonies and Disharmonies, Problems and Solutions*, 60 ANTITRUST L. J. 563, 567–69 (1991).

¹⁴ As Whelan has noted, “[m]ost of those legal commentators who advocate the imposition of personal criminal sanctions on individuals for engaging in cartel activity find inspiration for their arguments in the theory of deterrence.” Peter Whelan, *Cartel Criminalization and the Challenge of ‘Moral Wrongfulness’*, 33 OXFORD J. LEGAL STUD. 535, 537 (2013) [hereinafter Whelan, *Cartel Criminalization*].

¹⁵ See Beaton-Wells, *Capturing the Criminality of Hard Core Cartels*, *supra* note 13, at 676 (arguing that justifying criminalization on moral grounds and establishing delinquency is the real challenge).

¹⁶ For a long time in Europe, there was no question of criminalizing cartels; to the contrary, historically speaking, cartels were “well embedded in European culture.” See Christopher Harding, *Business Cartels as a Criminal Activity: Reconciling North American and European Models of Regulation*, 9 MAASTRICHT J. EUR. & COMP. L. 393, 409 (2002). See also CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE 53 (2d ed. 2010) (“As a matter of economic and legal policy, [cartels] were for the most part tolerated or even sometimes encouraged in most European countries.”).

¹⁷ See generally Alison Jones & Rebecca Williams, *The UK response to the global effort against cartels: Is criminalization really the solution?*, 2 J. ANTITRUST ENF’T. 100 (2014) (discussing the UK’s severe difficulty, under the cartel offense as it was formulated in the Enterprise Act of 2002, to imprison individuals involved in cartel conduct).

¹⁸ See, e.g., Beaton-Wells, *Capturing the Criminality of Hard Core Cartels*, *supra* note 13, at 676.

¹⁹ See generally Whelan, *Cartel Criminalization*, *supra* note 14, at 535 (discussing that the issue of moral wrongfulness in the context of the debate on cartel criminalization). In a revealing survey conducted by Stephan, only 11 % of people interviewed in the UK believed that cartel behavior should be sanctioned by imprisonment. See Andreas Stephan, *Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain* 11 (Ctr. for Competition Pol’y, Working Paper No. 07–12, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=993407. In Australia, Parker and Platania-Phung showed that, a year after criminal penalties were introduced there to sanction cartels, less than half of the businessmen and women surveyed were aware of these penalties, and the perceived likelihood of misconduct being caught was low. See Christine Parker & Chris Platania-Phung, *The Deterrent Impact of Cartel Criminalization: Supplementary Report on a Survey of Australian*

criminalizing cartels is unlikely to be effective if moral condemnation is absent, and that corporate misconduct may occur when moral constraints are not sufficiently internalized to prevent business managers from engaging in unethical and illegal conduct. Criminal enforcement may face particularly steep obstacles where employees are obedient to authority and where wrongdoing is actively encouraged or required by superiors.²⁰

Considering the ambiguous results of the research regarding the deterrent effect of criminal penalties and the degree of their acceptance and effectiveness outside the United States (and a small handful of other countries such as Canada and Israel, which still pale beside the United States in this regard), the adoption and active enforcement of criminal laws to punish cartels has been discussed by several academics in the West.²¹ Part of the challenge in this debate is that the relationship between the “moral wrongfulness” perspective and the utilitarian perspective in the context of criminal law is something of a puzzle, or a “chicken and the egg” problem: as Peter Whelan has observed, “one wishes to have criminal prosecutions in order to harden attitudes to cartel activity, but, by arguing that cartel activity is dishonest (according to the standards of ordinary people), one in effect presupposes the existence of such hardened attitudes.”²² At the same time, the utilitarian perspective and the moral ethics perspective are mutually independent: the utilitarian view does not take moral issues into account (and the deterrence goal is

Public Opinion Regarding Business People’s Views on Anti-Cartel Laws and Enforcement, U. MELB. CARTEL PROJECT, Jan. 12, 2012, at 32, <http://ssrn.com/abstract=2026725>. Parker also found that businesspeople often refused to admit that they act according to economic rationality, and they would not agree that a one-dimensional (risk-reward) economic argument could make anti-cartel law legitimate. See Christine Parker, *Economic Rationalities of Governance and Ambiguity in the Criminalization of Cartels*, 52 BRITISH J. CRIM. 974, 990 (2012). For further discussion, see generally Caron Beaton-Wells, *Criminalising Cartels: Australia’s Slow Conversion*, 31 WORLD COMPETITION 205 (2008) (discussing Australia’s decision to follow U.S. practice by criminalizing cartel conduct); see generally Caron Beaton-Wells & Christine Parker, *Justifying Criminal Sanctions for Cartel Conduct: A Hard Case*, 1 J. ANITRUST ENF’T 198 (2013) (examining the reasons typically advanced for the criminalization of cartel conduct).

²⁰ See N. Craig Smith et al., *Why Managers Fail to Do the Right Thing: An Empirical Study of Unethical and Illegal Conduct*, 17 BUS. ETHICS Q. 633 (2007) (finding that the likelihood of corporate wrongdoing was not directly affected by the threat of formal legal sanctions; while formal sanctions were capable of indirect effect, the ethical tone set by superiors as well as the degree of obedience of subordinates were more directly relevant factors).

²¹ See generally Fiona Haines & Caron Beaton-Wells, *Ambiguities in Criminalizing Cartels - A Political Economy*, 52 BRIT. J. CRIM. 953 (2012) (discussing the 2010 reform which criminalized cartel conduct in Australia); Beaton-Wells & Haines, *supra* note 4; see generally CRIMINALIZING CARTELS: CRITICAL STUDIES OF AN INTERDISCIPLINARY REGULATORY MOVEMENT, *supra* note 2.

²² Peter Whelan, *Improving Criminal Cartel Enforcement in the UK: The Case for the Adoption of BIS’s “Option 4”*, 8 EUR. COMP. J. 589, 592 (2012).

not bound by a prerequisite of perceived moral wrongfulness), while the morally condemnable nature of the wrongdoing does not depend on an instrumental balancing of costs and benefits but on principles that transcend such tradeoffs.

In this article, we discuss the debate on morality and criminal law in the context of the competition law regimes in East Asia (i.e. those in China, Japan, and Korea). We argue that the criminal punishment theory that is employed as the normative justification for the criminalization of cartel behavior²³ ought to reflect the applicable legal culture,²⁴ which is largely a local (country-specific) dimension. We accept that criminal sanctions would be unjust if a sufficient foundation of moral opprobrium has not been established, and we underline that the determination of moral norms requires a careful investigation of particular cultures—a purportedly universal definition of morality aiming at a universal crime of cartel conduct would likely fail to capture material variations across different societies.²⁵ We submit that debates concerning the morality of cartel conduct and the legal prohibitions of cartels in East Asia should be informed by an understanding of norms derived from Confucian principles—which include not only the rules and norms that allow an actor to achieve virtue internally, but also those associated with one’s status and the maintenance of harmonious social order externally. Throughout the history of ancient Chinese law, morality and ethics were thoroughly integrated into the criminal penal code, as we shall see, and they provided the infrastructure for a legal

²³ As observed above, deterrence theory is the mainstream justification for the criminalization of cartels. See, e.g., Whelan, *Cartel Criminalization*, *supra* note 14.

²⁴ Lawrence Friedman has defined legal culture as a system of social forces through which law is produced, and through which legal changes occur. According to Friedman, there are two relevant types of social forces that should be considered: the external legal culture—i.e. the general culture such as customs and opinions that affect the function of law; and the internal legal culture—the legal professionals who administer, shape and refine the legal system. See LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 223 (1975); see also Malcolm Feeley & Setsuo Miyazawa, *Legal Culture and the State in Modern Japan: Continuity and Change*, in *LAW, SOCIETY AND HISTORY: THEMES OF THE LEGAL SOCIOLOGY AND LEGAL HISTORY OF LAWRENCE M. FRIEDMAN* 169, 169 (Robert Gordon & Morton J. Horwitz eds., 2011). We suggest that the traditional legal culture in East Asian countries has affected both of these social forces (external legal culture as well as the behavior of legal professionals) as they pertain to competition-related issues and their legal treatment.

²⁵ Attempts to define morality have of course been made. For example, according to Stucke, morality can be defined as “rules of conduct associated with certain distinctive psychological and social attributes, such that a person complies with the conduct to achieve virtue and avoid vices.” Maurice E. Stucke, *Morality and Antitrust*, 3 *COLUM. BUS. L. REV.* 443, 489 (2006). With regard to cartel conduct in particular, Green has argued that such behavior is morally wrong because it violates the moral norm according to which stealing, deception, and cheating should be prohibited. See Stuart P. Green, *Why It’s a Crime to Tear a Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offences*, 46 *EMORY L. J.* 1533, 1537 (1997) [hereinafter Green, *Why It’s a Crime to Tear a Tag Off a Mattress*].

philosophy that is broadly shared by East Asian countries.²⁶ The history that we will discuss suggests that, while deterrence theory and the application of concepts of economic efficiency are relevant for a system of penalties in all competition regimes, in the case of East Asian countries it is particularly important to buttress deterrence and efficiency justifications by stigmatizing and morally condemning the proscribed conduct. To better understand the reasons why it is necessary to take moral considerations into account, we explore the legal–cultural explanations for the relatively underdeveloped state of cartel criminalization in East Asia; and we propose that this slow development is not due to an unawareness of the deterrence goal. Rather, since the moral character of cartel conduct may be ambiguous in the eyes of the general public—and in the eyes of the courts that reflect publicly embraced values—the imprisonment of individuals as a tool to enforce anti-monopoly law may face staunch resistance. Despite the influence of a gradual and global (although uneven) trend toward cartel criminalization (on the books) and despite active legislative efforts to prescribe ever-stricter sanctions, the use of criminal provisions in East Asia to enforce cartel prohibitions can only be strengthened if the moral wrongfulness of the illegal behavior becomes widely recognized and accepted.

We argue that, when addressing (i) the arguably weak, and in any case sporadic enforcement of criminal penalties for standard cartel behavior²⁷ in Japan²⁸

²⁶ See Liang Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 88 (1989) [hereinafter, Liang, *Explicating “Law”*] (“The legalization of morality and the moralization of law is a fundamental essence of ancient Chinese law.”); Marie Seong-Hak Kim, *Law and Custom under the Chosŏn dynasty and Colonial Korea: A Comparative Perspective*, 66 J. ASIAN STUD. 1067, 1074 (2007).

²⁷ We refer to “standard” cartels in the sense that we do not refer to the special case of bid-rigging. Authorities are more apt to seek criminal penalties in this special context, where not just competition issues but also budgetary and corruption issues often arise. Bid-rigging cartels are especially prone to recidivism, and there is reason to believe they may be particularly stable over time. For these reasons it is perhaps unsurprising that several jurisdictions (e.g., Germany and Italy) make bid-rigging a criminal law offense but stop short of criminalizing cartels of the “standard” variety. For discussion of some of the special economic features of cartels, see Alberto Heimler, *Cartels in Public Procurement*, 8 J. COMPETITION L. & ECON. 849, 860–61 (pointing out *inter alia* that, in procurement scenarios, quantities are fixed by the contracting authority; this substantially reduces the incentive to defect from a conspiracy to manipulate bidding processes). We will mention bid-rigging incidentally, but unless otherwise indicated our references to cartels should be understood as references to “standard” cartels.

²⁸ In Japan, if a cartel case is fully prosecuted by the Public Prosecutor’s Office, the Anti-Monopoly Act provides that a convicted individual may be incarcerated for up to five years or they may be obliged to pay a criminal fine of up to five million yen. However, no individual has actually served jail time yet, and criminal cartel cases have traditionally been rare. Since the 1990s, the average number of cartel cases referred by the Japan Fair Trade Commission to the Public Prosecutor’s Office and subsequently prosecuted has been less than one per year. In general, first-time offenders in white collar crime cases in Japan (and

and Korea,²⁹ and (ii) the absence of such a criminal prohibition in China, particular attention should be given to the unclear linkages between moral culpability and the penal law. Earlier discussions of the unrecognized benefits of cartel criminal sanctions, or the underdevelopment of legal instruments for cartel criminalization,³⁰

not just in anti-monopoly cases) are given suspended sentences. See Mel Marquis, *Competition Law in Japan, Malaysia and the Philippines: An Overview*, in HANDBOOK OF RESEARCH METHODS IN COMPETITION LAW (Michael Jacobs & Deborah Healey eds., forthcoming) (“The courts have been reluctant to send natural persons to jail. Instead, the two dozen or so fully prosecuted cases (about one per year) have resulted in suspended sentences. The stigma attached to cartel conduct is still insufficient.”).

²⁹ Korean law contemplates prison terms of up to three years or a criminal fine of up to 200 million won, or both, for individuals found guilty of a cartel offense. Of the cases that have proceeded to an indictment, most have terminated in fines rather than imprisonment. In the rarer cases where the Korean courts have imposed prison terms—and in all of those originating from a referral to the Prosecutor’s Office by the Korea Fair Trade Commission (KFTC) under the Korean competition statute—those sentences have been suspended, and in most cases no prison term has been served. For the first time in 2014, a District Court in Busan imposed (non-suspended) prison sentences on three corporate executives of six months each for bid-rigging activities in the market for cables used in nuclear plants; and in the same year, a District Court in Seoul sentenced an executive to two years in prison for bid-rigging in the construction industry. These cases were not triggered by the KFTC; they were investigated independently by the Prosecutor’s Office under, respectively, Article 315 of the Korean Criminal Code (interference with tenders) and the sector-specific Framework Act on the Construction Industry. See Jae Young Kim & Chul Ho Kim, *Korean court imposes first prison sentence on executives for bid-rigging*, LEXOLOGY (Feb. 26, 2014), <https://www.lexology.com/library/detail.aspx?g=d17a6804-f68b-4635-908a-b8d2e0e5da94> [hereinafter Kim & Kim, *Korean Court Imposes First Prison Sentence*].

As for the KFTC, in recent years it has ramped up its corporate fining practice considerably, and it has referred a number of enterprises to the Prosecutor’s Office, thus potentially initiating criminal proceedings (from 1981 to 2014, roughly 75% of referrals led to indictments). Nevertheless, as noted above, prosecution of natural persons in these referred cases has only resulted in suspended sentences, and the proportion of cartel cases leading to criminal referrals has been relatively small. From 1981 to 2010, the KFTC made referrals in 44 cartel cases out of a total of 504 cartel cases, a rate of 11% and an average of 2.2 cases per year. See Hee-Eun Kim, *Developments in Criminal Enforcement of Competition Law in Korea*, COMPETITION POL’Y INT’L, Jan. 23, 2013, at 5, <https://www.competitionpolicyinternational.com/assets/Uploads/Asia1-22-2013-2.pdf> [hereinafter Kim, *Developments in Criminal Enforcement*]. Recent statistics appear to suggest an uptick in referrals, which likely reflects an enhancement of the KFTC’s referral power that took effect in 2014. Although the figures for 2015 were broadly in line with those reported by Kim (of the 88 cartel cases handled by the KFTC in 2015, nine involved prosecutions, implying a referral rate of about 10%—see FAIR TRADE COMM’N REPUBLIC OF KOREA, 2016 ANNUAL REPORT 129 (2016)), the number of referrals were higher in 2014 (36, up from 12 in 2013) and in 2016 (22), with 21 referrals made in the first seven months of 2017. For the recent statistics on referrals, see Hoil Yoon et al., *Korea*, in GETTING THE DEAL THROUGH: CARTEL REGULATION 2018 182, 185 (A. Neil Campbell et al. eds., 2017).

³⁰ See generally John M. Connor, *Global Antitrust Prosecutions of International Cartels: Focus on Asia* (May 13, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id

are not entirely satisfactory. Even in the United States, which has the richest antitrust experience in the world, more than seventy years passed before the imposition of criminal penalties for illegal cartel conduct started to emerge as an active and routine part of law enforcement.³¹ This long period of quiet gestation suggests that “latitudinal” comparisons between the United States and other regimes may be misleading.

We emphasize that, given the influence of a strong punitive legal culture, the instrumental view of penal law in ancient China, and the regional heritage descending from that tradition, it is not the formal legal power of an authority or the exact design of a criminal sanction, but rather the ambiguity between moral wrongfulness and the penalty that is the most formidable challenge for more effective enforcement of cartel criminal law in East Asia. With regard to the history and heritage of China’s legal culture, it is worth recalling that Confucian moral thought is distinct from “Western” moral philosophy since its foundation is not individualism, but a communal natural order.³² Human behavior, and the shaping and control of it, thus rest on concepts that go beyond individualistic calculations. We therefore endeavor to shed light on the strands of legal philosophy which together underlie the laws of East Asian systems. Doing so will underscore the importance of defining cartel conduct as morally wrongful in order to achieve more effective enforcement of criminal prohibitions and sanctions, which in turn will enhance competitive market conditions and produce associated benefits. To be clear, while we focus on moral wrongfulness, we do not dismiss the importance of factors such as, for example, the support of governments and regulators; the effectiveness of the investigatory tools of competition authorities; the empowering and encouraging of prosecutors to carry out the criminal enforcement of cartel laws.³³ However, in the context of the laws of East Asia, it is necessary to broaden

=1027949 (noting the aggressive administrative enforcement of the cartel offense in Korea but less vigorous enforcement against (non-bid rigging) cartels in Japan and Taiwan).

³¹ Although the Sherman Act introduced criminal penalties for antitrust violations in 1890, criminal incarceration for cartelists was practically non-existent between 1921 and 1959. See Joseph C. Gallo et al., *Criminal Penalties under the Sherman Act: A Study of Law and Economics*, 16 RES. L. & ECON. 25, 39–40 (1994); see also Baker, *The Use of Criminal Law Remedies*, *supra* note 1, at 712 (explaining that, even for the United States, where antitrust enjoyed the most political support, it took a long time to prosecute individuals).

³² See, e.g., Karyn Lai, *Confucian Moral Thinking*, 45 PHIL. E. & W. 249, 252–53 (1995) (“For Confucius, this moral theory [i.e. the ‘rectification of names’, which implied role-based functions and duties within a social structure] is rooted in the natural order of a community. . . . The symbiotic relation between individual and communal good is predicated upon the Confucian belief that, as human beings, we share the one common human nature, which has its locus essentially and thus meaningfully only within the communal context; *jen* is this shared human nature.”).

³³ With reference to Australia (which introduced a criminal cartel offense) and Sweden (which elected not to do so), see generally Caron Beaton-Wells, *The Politics of Cartel Criminalisation: A Pessimistic View from Australia*, 29 EUR. COMPETITION L. REV.

the discussion beyond these factors and to put front and center, as it were, the question of the perceived morality of proscribed behavior.

From the perspective of legal culture, and considering the long process of introducing Confucianism into ancient Chinese law, we propose that in order to reach the desired deterrent effect of criminal sanctions for cartels, a moral foundation will first have to be clearly established as the philosophical basis for criminal punishment. Understanding the particular characteristics of the legal system and its historical development is a first step toward understanding the prevailing perception of corporate delinquency and the “moral wrongfulness” of cartels in a given country. Under the current situation, to successfully enforce cartel criminal sanctions, the recognition of moral wrongfulness should be regarded as a prerequisite for the successful criminalization of cartels, yet this recognition is still lacking in the business and social communities of these countries. With specific reference to East Asian competition law regimes, we argue the following. First, as suggested above, in order to effectively apply criminal cartel sanctions, it is crucial to redefine cartels explicitly in terms of their moral wrongfulness, rather than relying solely on a deterrence theory grounded in economics; as we will see, the Confucian ethical system provides a clear basis and vocabulary for linking cartel conduct and immorality. Second, due to a long history of industrial policy which has favored public enterprises and has sometimes tolerated or even promoted cartels as a tacit form of price control,³⁴ the moral condemnation of cartels involving such enterprises is currently weak or ambivalent. Third, the successful criminalization of cartels depends on moral condemnation that is broadly accepted and socially recognized; that is, the appropriate moral message must be widely disseminated and internalized.

This article is divided into six sections. After the introduction, the second section introduces the concepts of legalism and the “law” in ancient China. The third section discusses the relationship between morality and the penal law. The fourth section breaks down the way Confucian moral concepts and Legalism have influenced the legal traditions in China, Japan, and Korea respectively. The fifth section analyzes the implications of the points discussed for the criminalization of cartels in East Asia. Finally, the sixth section concludes.

185 (2008); see also Sang-Seung Yi & Youngjin Jun, *A New Kid on the Block: Korean Competition Law, Policy, and Economics*, 3 COMPETITION POL’Y INT’L 153, 180 (2007).

³⁴ As Zheng explains, “[t]he government’s attitudes towards cartels, not surprisingly, have been ambivalent at best . . . [and] [t]his tolerance or promotion of cartels is in essence a disguised effort to reinstate some sort of price control in an economy where incomplete price reforms have led to widespread structural distortions.” Wenton Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT’L L. 643, 690–91 (2010).

II. LEGALISM AND THE CONCEPT OF LAW IN ANCIENT CHINA

The ancient proponents of China's "Legalist" tradition are associated with the Chinese term *Fa Jia*, which was first coined by historian Sima Tan and later incorporated into the first general history of China (*Shi Ji*), written by his son, Sima Qian.³⁵ However, the representative scholars of the Legalist school were not identified until a collection of writings was incorporated by Ban Gu (32–92 A.D.) into a History of the Former Han (*Han Shu*).³⁶ Along with *Ru Jia* (Confucianism) and *Tao Jia* (Taoism), *Fa Jia* was one of the six schools of thinkers identified in the pre-Han period of Chinese history.³⁷ No consensus has been reached on whether the Chinese character 法 (*fa*) has the same meaning as the English word "law,"³⁸ or whether *Jia* means "school of thought," or whether the ideas and doctrines of well-known representatives of *Fa Jia* such as Shang Yang, Han Fei, Shen Buhai, and

³⁵ See Kidder Smith, *Sima Tan and the Invention of Daoism, "Legalism," et cetera*, 62 J. ASIAN STUD. 129, 130 (2003) [hereinafter *Sima Tan and the Invention*].

³⁶ See Geoffrey MacCormack, *The Legalist School and Its Influence upon Traditional Chinese Law*, 92 ARCHIVES PHIL. L. & SOC. PHIL. 59, 59–60 (2006) [hereinafter MacCormack, *The Legalist School*].

³⁷ See Aat Vervoorn, *Taoism, Legalism and the Quest for Order in Warring States China*, 8 J. CHINESE PHIL. 303, 320–21 (1981).

³⁸ See JEAN ESCARRA, *LE DROIT CHINOIS: CONCEPTION GÉNÉRALE, APERÇU HISTORIQUE* [CHINESE LAW: GENERAL CONCEPTION, HISTORICAL OUTLINE] 7–8 (1936) (reflecting the difficulty of using the term "law" in such different contexts: "nowhere is the traditionally established opposition between East and West met more clearly than in the domain of the law. The peoples of the western civilization all live, in varying degrees, within a Greco-Roman conception of the law. . . . There, in greater or lesser degrees, the law is revered as something sacrosanct . . . like a categorical imperative binding everyone and abstractly defining and regulating the conditions and effects of every form of social activity These tendencies vanish as one approaches the East. At the far reaches of Asia, China, in the potent bundle of spiritual and moral values that it created and has long projected in so many neighboring nations (Korea, Japan, Annam, Siam, Burma) give the law a merely inferior place. . . . With a purely penal and very severe essence, sanctions have served above all to intimidate."). [... l'opposition traditionnellement établie entre l'Orient et l'Occident ne se rencontre nulle part plus nette que dans le domaine du droit. Les peuples dits de civilisation occidentale vivent tous, à des degrés variables, sur une conception gréco-romaine de la loi . . . Là, à un degré plus ou moins élevé, la loi est révérée comme une chose sacrosainte . . . comme un impératif catégorique s'imposant à tous, définissant et réglant, d'une manière abstraite, les conditions et les effets de toute forme d'activité sociale. . . . Ces caractères s'effacent à mesure que l'on s'avance vers l'est. Aux extrémités de l'Asie, la Chine, dans le puissant faisceau de valeurs spirituelles et morales qu'elle a créé et qu'elle a longtemps projeté sur tant de nations voisines: Corée, Japon, Annam, Siam, Birmanie, n'a fait à la loi et au droit qu'une place inférieure. . . . D'essence uniquement pénale, et très sévères, les sanctions ont eu surtout un rôle d'intimidation.] (Authors' translation; citations omitted.) For further discussion, see generally Liang, *Explicating "Law"*, *supra* note 26, at 90; see also Karen Turner, *Rule of Law Ideals in Early China?* 6 J. CHINESE L. 1, 12 (1992).

Shen Tao are properly characterized as “Legalist.”³⁹ However, few would disagree that the legal code developed across the dynasties of ancient China was a transformation of Legalist thought in two ways: first, the legal code enforced by the Imperial Government was essentially a criminal code, stressing severe punishment and its strict application to morally unacceptable conduct;⁴⁰ second, the law and its penal elements were a governing tool to be applied to individuals in order to achieve particular social or political goals, of which the pre-eminent aim was to maintain social order.⁴¹

Since many countries have pondered whether to emulate the “American model” of cartel criminalization with its focus on achieving maximum deterrence,⁴² and since many countries continue to weigh their options in this regard,⁴³ it is useful to consider this global conversation by reexamining the influence of the underlying

³⁹ See Paul R. Goldin, *Persistent Misconceptions about Chinese “Legalism”*, 38 J. CHINESE PHIL. 88, 90–93 (2011) [hereinafter Goldin, *Persistent Misconceptions about Chinese “Legalism”*] (emphasizing the differences between the term *fa* and “law,” and arguing that the term “Legalism” is linguistically misleading and should be abandoned). See also H. G. CREEL, *SHEN PU-HAI: A CHINESE POLITICAL PHILOSOPHER OF THE FOURTH CENTURY BC* 144–62 (1974); MacCormack, *The Legalist School*, *supra* note 36, at 60 (noting that the ancient historian Ban Gu (32–92 A.D.) listed the representatives of the Legalist School and collected some of their writings in his book, the HAN SHU [HISTORY OF THE FORMER HAN]); Peter R. Moody, *Han Fei in his Context: Legalism on the Eve of the Qin Conquest*, 38 J. CHINESE PHIL. 14 (2011) (discussing Shen Buhai). Western scholars proposed alternative translations of *fa jia*, such as “Realists,” “Amoralists,” “Administrateurs” and “Staatsphilosophen.” See Eirik Lang Harris, *Legalism: Introducing a Concept and Analyzing Aspects of Han Fei’s Political Philosophy*, 9 PHIL. COMP. 155, 156 (2014) [hereinafter Harris, *Legalism: Introducing a Concept*].

⁴⁰ Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 124, 126 (1962); see BENJAMIN I. SCHWARTZ, *THE WORLD OF THOUGHT IN ANCIENT CHINA* 322–23 (1985).

⁴¹ See Liang, *Explicating “Law”*, *supra* note 26, at 84.

⁴² Sweden, for instance, considered the desirability and feasibility of a criminal cartel offense but ultimately declined to introduce such a reform. See Org. for Econ. Co-operation and Dev. [OECD], *Sweden – The Role of Competition Policy in Regulatory Reform*, at 53 (2007), <http://www.oecd.org/sweden/38898675.pdf> (“Sweden has seriously considered criminal sanctions for competition law infringements, but found that such a step would make the leniency system inoperative. Full amnesty from criminal sanctions, like the Anglo-Saxon crown witness model, would be incompatible with the Swedish legal system. Criminalization of competition offences would also reduce the efficiency of enforcement because of the higher burden of proof and the need to refer competition cases to the general prosecutors.”).

⁴³ For example, New Zealand originally included criminal provisions in a legislative draft before deleting those provisions in the final version of the legislation adopted in 2017. However, in February 2018 new proposals for criminal sanctions were again tabled as part of the Commerce (Criminalisation of Cartels) Amendment Bill, which is currently under discussion. For the cabinet paper describing the proposed amendments, see KRIS FAAFOI, OFF. OF THE MINISTER OF COM. & CONSUMER AFF., *AMENDING THE COMMERCE ACT TO CRIMINALISE CARTEL CONDUCT* 3–5 (2018), <http://www.mbie.govt.nz/publications-research/publications/business-law/cabinet-paper-recommending-criminalisation.pdf>.

legal culture. Without a strong understanding of the cultural roots that run deep in China and elsewhere in the region, the transplantation of criminal sanctions for cartels has little chance, we submit, of becoming successful and sustainable. To illuminate China's legal culture, we will consider the normative question of cartel criminalization from a Legalist perspective, and we will discuss whether there is justification for imposing severe punishment on persons that infringe prohibitions against cartel conduct.

In the first two sub-sections below, the text summarizes the concepts of *fa* and Legalism and explains the Legalist perspective on the functions of law. The following two sub-sections focus on the two main arguments of Legalism. The first argument is that severe punishment is the appropriate response to morally unacceptable conduct. In this connection we discuss why, from a Legalist perspective, the use of heavy penalties is necessary. Another issue discussed in this context is how to define the scope of criminal law—that is, which conduct should properly be the target of criminal law. The second argument of Legalism is that criminal law is by nature instrumental—it is a tool for governing. In this regard, and assuming that the justification for criminal law is the maintenance of social order, we discuss whether cartel activities should be severely punished to achieve this goal.

A. The Concepts of Law and Penal Law in Ancient China

In ancient China, law (*fa*) was first developed under the name of *xing* (刑), which means “punishment.”⁴⁴ *Xing* was used as China's official legal code for

⁴⁴ The character *fa* (法) in simplified form means “method” or “model,” and when the word is used in short phrases it means “an objective structure or form for achieving a value.” Chung-Ying Cheng, *Legalism Versus Confucianism: A Philosophical Appraisal*, 8 J. CHINESE PHIL. 271, 275 (1981) [hereinafter Cheng, *Legalism Versus Confucianism*]. The term “law” was written as 灋 in ancient Chinese, and a narrow meaning of this character refers to punishment. The character was composed of two parts: the right part, 廌, means “punishing delinquent persons,” and the left side, 灃, means “law enforcers should be as just as level water.” See Xianyi Zeng & Xiaohong Ma, *A Dialectic Study of the Structure and Basic Concepts of Traditional Chinese Law and an Analysis of the Relationship between li (ceremony) and fa (law)*, 1 FRONTIERS L. CHINA 34, 37 (2006) [hereinafter Zeng & Ma, *A Dialectic Study*]. The term *xing* may specifically refer to “corporal punishment” because the character at that time conveyed the meaning of “knife.” The undoubtedly unpleasant sanctions included “nose-cutting,” “leg-cutting,” and “castration.” See Derk Bodde, *Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China*, 107 PROC. AM. PHIL. SOC'Y 375, 379 (1963) [hereinafter Bodde, *Basic Concepts of Chinese Law*]. When *fa* is used in combination with *xing*—thus becoming *Xing Fa* (刑法)—the phrase can mean either “a method of punishment” or “codified punishment”; thus, it is also the

nearly two thousand years, a period spanning the first three dynasties (i.e. the Xia, 2205–1766 B.C., the Shang, 1765–1123 B.C., and the Zhou, 1122–256 B.C.). The earliest (unwritten) customary law, called *Yu Xing* (禹刑), was developed over a period of around five centuries (2033–1502 B.C.); and the first statutory law, published in 536 B.C. on bronze vessels during the Spring and Autumn Period (770–476 B.C.), was called *Xing Ding* (刑鼎).⁴⁵ In this context, it is important to underline that the term *xing* has the specific meaning of “corporal punishment.”⁴⁶ During the Spring and Autumn Period and the Warring States Period (403–222 B.C.), a system of *fa* was developed which sought to link punishments with particular types of misconduct.⁴⁷ Developed from this tradition, the word *fa* has been used interchangeably with *xing*, and the meaning of *fa* may be more accurately translated as “penal law” as opposed to simply “law.”⁴⁸ China’s legal institutions were established primarily to deal with the imposition of punishment, and until 1906, the highest administrative organ responsible for handling cases and dealing with other legal issues was named the “Ministry of Punishments” (*Xing Bu*); there was no Ministry of Law or Ministry of Justice.⁴⁹

Starting in the Xia dynasty, ancient emperors in China made efforts to codify legal sanctions and punishments, culminating in a penal code of 502 articles, which took effect in 653 A.D. during the Tang dynasty (618–907 A.D.). The latter code was subsequently improved during the Song, Yuan, Ming, and Qing Dynasties.⁵⁰ The Qing Code entered into force in 1740 during the Qing dynasty (1644–1912), by which time the penal code had grown to a corpus of 436 statutes and 1,800 sub-statutes.⁵¹

Since the Chinese concept of “law” was developed on the basis of *xing*, scholars and officials in ancient China writing and speaking about “law” often focused specifically on the proper uses of “punishment.”⁵² The Legalists in the pre-

translation for “criminal law.” See also Cheng, *Legalism Versus Confucianism*, *supra* note 44, at 276.

⁴⁵ Yujun Feng, *Legal Culture in China: A Comparison to Western Law*, 16 POLYNESIAN LEGAL REV. 115, 115 (2010).

⁴⁶ See Liang, *Explicating “Law”*, *supra* note 26, at 61 n.15.

⁴⁷ See *id.* at 62.

⁴⁸ See Bodde, *Basic Concepts of Chinese Law*, *supra* note 44.

⁴⁹ See *id.*

⁵⁰ See Guo Baogang, *Virtue, Law and Chinese Political Tradition: Can the Past Predict the Future?*, 19 J. CHINESE POL. SCI. 267, 268 (2014) [hereinafter Guo, *Virtue, Law and Chinese Political Tradition*].

⁵¹ For an English translation of the Qing Code, see generally GEORGE THOMAS STAUNTON, TA TSING LEU LEE; BEING THE FUNDAMENTAL LAWS [OF THE PENAL CODE OF CHINA], AND A SELECTION FROM THE SUPPLEMENTARY STATUTES (1810).

⁵² See, e.g., DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 17 (2004) [hereinafter CAO, A LANGUAGE PERSPECTIVE] (noting that *xing*, corporal punishment, was used in ancient China as a generic term for law and was later superseded by the term *fa*); see also JINFAN ZHANG, THE TRADITION AND MODERN TRANSITION OF CHINESE LAW 106 (2014) [hereinafter ZHANG, THE TRADITION AND MODERN TRANSITION] (“In ancient China, law was

Qin period (before 221 B.C.) were scholars and officials who rejected the views of Confucians, opposing those who advocated voluntary compliance with moral codes and ethical rules.⁵³ The Legalists' arguments for a heavy use of "law" (*fa*) specifically emphasized the importance of punishment.⁵⁴ *Fa Jia* was developed by Han Feizi (280–233 B.C.), a member of the royal family in the State of Han⁵⁵ and officially introduced by Shang Yang (361–338 B.C.), who was a state councilor (akin to a prime minister) of the Qin dynasty during its legal reform.⁵⁶ Adherents of *Fa Jia* advocated the use of punishment as prescribed in legal codes so that individuals throughout the empire would be anxious to comply with the "law."⁵⁷

B. *Fa Jia* and Legalism

Just as translating the Chinese character *fa* as "law" (in the western sense) is problematic since it is apt to be misconstrued, it is also problematic—in the context of traditional legal and political thought on the function of law—to translate the Chinese terms *Ru Jia* and *Fa Jia* as "Confucianism" and "Legalism."⁵⁸ First, it

punishment, and punishment was law, and the two were not only synonymous in concept, but similar in connotation.")

⁵³ See MacCormack, *The Legalist School*, *supra* note 36, at 76–77.

⁵⁴ See, e.g., Xiuhua Zhang et al., *Crime and Punishment in Ancient China and its Relevance Today*, 76 AM. J. ECON. & SOC. 1191, 1192 (2017). The authors explain that Legalism "used law and extreme punishments to mold the people to the will of the emperor." *Id.* Strict laws and harsh punishments were deemed "preferable to the centuries of civil war that marked the end of the Zhou Dynasty." *Id.* at 1205.

⁵⁵ See K.L. Alex Lau & Angus Young, *In Search of Traditional Chinese Jurisprudence: Does Chinese Legal Tradition Have a Place in China's Future?*, 20 INT'L CO. & COMM. L. R. 155, 164 (2009).

⁵⁶ See Mingjun Lu, *Implications of Han Fei's Philosophy for China's Legal and Institutional Reforms*, 21 J. CHINESE POL. SCI. 339, 343 (2016). For an interpretive discussion of Han Feizi's works, see WEJEN CHANG, *IN SEARCH OF THE WAY: LEGAL PHILOSOPHY OF THE CLASSIC CHINESE THINKERS* 412–58 (2016) [hereinafter CHANG, *IN SEARCH OF THE WAY*].

⁵⁷ See MacCormack, *The Legalist School*, *supra* note 36, at 72. ("The Legalist conception of punishment, itself the touchstone of the legal system, was dominantly deterrent, as can be seen from three particular features assigned to it: severity, extension to relatives of the offender, and the exclusion of status, virtue, or personal merit as grounds of mitigation. . . . Particularly associated with Lord Shang is the view that even light offences should be punished severely, the idea being that in the end there would be no need for punishment at all. Later Legalists perhaps thought the same.")

⁵⁸ In general, there is a lack of precision and a lack of generally accepted criteria with regard to whether the English translations of "isms"—such as Confucianism, Taoism, Legalism and Buddhism—refer to any particular thinker, texts or ideas. Although these terms are common translations of expressions used in Sima Tan's discourse on the "six schools" (*Liu Jia*), the representative thinkers and their ideas for each school were not entirely clear

is better to translate the term *Ru Jia* as “the tradition of the literati” rather than “Confucianism”; the latter term, apart from being a western invention, can be applied variously to a broad range of ideas and ideologies, including diverse philosophical strains as well as the distinct official ideology of the ancient Chinese State as expressed and perpetuated by the imperial examination system.⁵⁹ The second term, *Fa Jia*, was first developed by the ancient Chinese historian Sima Tan (110 B.C.) in his essay *Liu Jia*, which summarizes the six main schools of thought in the pre-imperial period.⁶⁰ Sima Tan used the term *Jia* to denote “people with expertise in something,” and *Fa Jia* refers to scholars who advocate the “rule by *fa*.”⁶¹ Sima Tan’s six schools, each with representative scholars, texts, and affiliations, served as the categories of political thought for the “six schools” of the Warring States.⁶²

Philosophers of the *Fa Jia* tradition thus distinguished themselves from scholars of other systems of thought such as Confucianism and Daoism by advocating the use of *fa*.⁶³ The term *fa* here does not coincide with the English term

even to Sima Tan himself. See Willard J. Peterson, *Squares and Circles: Mapping the History of Chinese Thought*, 49 J. HIST. IDEAS 47, 47 (1988) (“The difficulty is that the terms *ju-chia*, *tao-chia*, *chia* and *fo-chia* were not used distinctively and clearly . . .”).

⁵⁹ See Teemu Ruskola, *The East Asian Legal Tradition*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 262, n.14 (Mauro Bussani & Ugo Mattei eds., 2012) (“The Chinese term *rujia* is more accurately translated as ‘the tradition of the literati’, rather than ‘Confucianism.’ In any event, the range of ideas, ideologies, and dynasties that have travelled under the banner of Confucianism (or *rujia*, for that matter) is so impossibly wide that it defies historical generalization. In this chapter, I use the generic term ‘Confucianism’ to refer to the state ideology perpetuated by the imperial civil service examination system. This ideology was related to, yet distinct from, the philosophical Confucianism in which it originated.”). As reported by Loewe, *Ru Jia* was translated as “Confucianism” by missionaries in the nineteenth century, see Michael Loewe, “Confucian” Values and Practices in Han China, 98 INT’L J. CHINESE STUD. 1, 2 (2012) [hereinafter Loewe, “Confucian” Values and Practices]; and the term “Confucianism” itself is attributed to Jesuit missionaries of the late sixteenth and seventeenth centuries such as Matteo Ricci and others. See generally LIONEL JENSEN, MANUFACTURING CONFUCIANISM: CHINESE TRADITIONS AND UNIVERSAL CIVILIZATION 78 (1997).

⁶⁰ See Goldin, *Persistent Misconceptions about Chinese “Legalism”*, *supra* note 39, at 88.

⁶¹ See Sima Tan and the Invention, *supra* note 35, at 130.

⁶² See *id.* at 131.

⁶³ Confucianism is a virtue-based ethical philosophy in which virtuous behavior, effectively practiced, ultimately makes *fa* redundant—even if, in a practical sense, Confucians recognize that *fa* may be a practical necessity where virtue fails (see *infra* note 117). Daoism is concerned with a mystical ‘Way’ that governs and constitutes nature. Daoism has little to do with *fa*: it does not prescribe or sanction particular rules of human conduct; rather, it promotes the wisdom of following the ‘Way,’ i.e. of practicing *wuwei* by doing nothing contrary to nature. When men live according to the Dao, they avoid perversion and corruption, and there is no need for the positive or negative incentives that are typically imposed by human government. As Zhuangzi wrote, if the natural predisposition of men “be

“law”; rather, it is closer in meaning to the terms “method,” “instrument,” or “standard.”⁶⁴ Punishments and rewards were categorized as administrative methods that had to be fairly applied by those who governed the State.⁶⁵ Thus, for the pre-imperial Legalists, the proper use of sanctions was associated with political governance.⁶⁶ Furthermore, in employing *fa* as a tool of governance, the ruler was supposed to have *shu*, that is, shrewd political skills and statecraft enabling him to control his ministers and his people.⁶⁷ *Shu* has been portrayed by analogy to Machiavelli’s *virtu* (mastery of personal, military, and political matters)⁶⁸ and to Machiavelli’s emphasis on political technique.⁶⁹ Such a conception, whereby the

not perverted, nor their character corrupted, what need is there left for government? . . . From the Three Dynasties downwards, the world has lived in a helter-skelter of promotions and punishments. What chance have the people left for living the even tenor of their lives?” KEVIN BURNS, *EASTERN PHILOSOPHY* 145 (2006).

⁶⁴ See Chad Hansen, *Fa (Standards: Laws) and Meaning Changes in Chinese Philosophy*, 44 *PHIL. E. & W.* 435, 475 (1994).

⁶⁵ For most Legalist scholars, punishment and reward were two important administrative methods under the concept of “law.” For example, Shang Yang (390–338 B.C.) said that “[p]unishments and executions are the means whereby wickedness is stopped, and office and rank are the means whereby merit is encouraged.” *THE BOOK OF LORD SHANG* 224 (J.J.L. Duyvendak trans., 1928), quoted in Liang, *Explicating “Law”*, *supra* note 26, at 81. Liang also cites an ancient text called the *Guanzi*, attributed to Guan Zhong (720–645 B.C.), where it is explained that the three instruments for governing the states of China were commands, axes, and official pay. 管子《心术》 *id.* at 81.

⁶⁶ See MacCormack, *The Legalist School*, *supra* note 36, at 75 (“For more than two thousand years the political and legal structure of the Chinese state resembled that advocated by the Legalists. Political power vested in the emperor who was the sole source of law. The administration of the country was [conducted] through a bureaucracy appointed by and accountable to the ruler. The laws promulgated by the ruler for the government of the country were fundamentally penal or administrative, that is, they defined offences and proscribed punishments, or they regulated the duties of officials.”).

⁶⁷ See Roger Boesche, *Han Feizi’s Legalism Versus Kautilya’s Arthashastra*, 15 *ASIAN PHIL.* 157, 158 (2005); see also CHANG, *IN SEARCH OF THE WAY*, *supra* note 56, at 458 (“Han Fei was, at best, a legal tactician who would use law as a tool to enable the ruler to control the people.”).

⁶⁸ Boesche, *supra* note 67, at 159.

⁶⁹ See Peter R. Moody, Jr., *The Legalism of Han Fei-tzu and its Affinities with Modern Political Thought*, 19 *INT’L PHIL. Q.* 317, 326 (1979) (noting similarities between Han Feizi’s amoral and autocratic style of leadership and the political philosophies developed much later by Machiavelli and Hobbes). Han Feizi made clear that *fa* is to be employed by the ruler: “So an enlightened ruler employs *fa* to pick his men; he does not select them himself. He employs *fa* to weigh their merit; he does not fathom it himself. In this way, ability cannot be obscured nor failure prettified. If those who are [falsely] glorified cannot advance, and likewise those who are maligned cannot be set back, then there will be clear distinctions between lord and subject, and order will be easily [attained]. In this way the ruler can only use *fa*.” 韩非子《有度》《韩非子新校注》2.6. 92, translation adopted in HAN FEIZI: BASIC WRITINGS 24

empire was governed by *fa* in accordance with the *political* acumen of the ruler, provided a philosophical foundation for the later development of an imperial penal code. As this background makes quite clear, the Legalists' conception of "law" in no way sought to define individual rights,⁷⁰ nor was it intended to indicate any early legal consciousness in the ancient Chinese State.⁷¹

C. Penalties

According to the Legalists, the "law" is enforced to achieve the goal of deterrence (social and political control); to achieve this goal, punishment of offenders must be severe.⁷² The following characteristics of this approach were believed to ensure the effectiveness of penalties. Punishments must be severe, even for light offenses; they must be applied lavishly so that even the relatives of the offender are punished (collective responsibility as opposed to individualized guilt); and they must be equally applied to everyone, including even (in theory) loyal ministers and their sons.⁷³ According to this austere conception, total deterrence can only be achieved when punishments are extremely severe and widely enforced; however, when achieved, this condition of total deterrence by definition implies that the imposition of penalties will rarely if ever be needed.⁷⁴

(Burton Watson trans., 2003); THE COMPLETE WORKS OF HAN FEI TZU: A CLASSIC OF CHINESE LEGALISM 59 (W.K. Liao trans., 1939) (cited by Goldin, *Persistent Misconceptions about Chinese "Legalism"*, *supra* note 39, at 93).

⁷⁰ The question of whether there are concepts of rights in the classical Chinese philosophical context has been the subject of debate. *See generally* Seung-Hwan Lee, *Was here a Concept of Rights in Confucian Virtue-based Morality?*, 19 J. CHINESE PHIL. 241 (1992).

⁷¹ *See* Goldin, *Persistent Misconceptions about Chinese "Legalism"*, *supra* note 39, at 88, 94 (arguing that the term "Legalism" itself is "useless," "flawed" and "misleading," and that treating *fa* and the English term "law" as equivalent concepts is inappropriate; as a rule of thumb, *fa* is about all kinds of administrative methods providing reward and punishment, and its meaning is much broader than "law.")

⁷² *See* MacCormack, *The Legalist School*, *supra* note 36, at 72. (noting the illustrative view of Lord Shang according to which even minor offenses were properly sanctioned by harsh penalties).

⁷³ *Id.* at 73.

⁷⁴ In the words of Han Feizi: "The law of the intelligent sovereign is not disciplining only those who are being suppressed, for to discipline only the suppressed is the same as to discipline dead men only For the heavily punished are robbers, but the terrified and trembling are good people. Therefore, why should those who want order doubt the efficacy of heaven's penalties Do I say that if there are severe penalties that extend to the whole family, people will not dare to [see] (how far they can go), and as they dare not try, no punishments will be necessary." Quoted in GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 191–92 (1996) [hereinafter MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW].

The practice of using heavy punishments was widely accepted by rulers in ancient China, and the governing legal text in imperial China took the form, continuously across numerous dynasties, of a penal code.⁷⁵ During the Three Dynasties in the pre-Qin period, the penal code of Yu specified five levels of punishments and three places for convicting 3,000 types of crimes.⁷⁶ Since the Tang dynasty, a centralized imperial law code with statutes and sub-statutes was developed, and this code was still being implemented during Qing dynasty (1644–1912).⁷⁷ Under the Qing law code, the statutory sections dealing with punishments constituted 62% of the total complex of statutes, which covered criminal, administrative, and civil offenses ranging from theft, forgeries, and counterfeiting to public disorder, homicide, and the possession of illegally obtained property.⁷⁸ The law code specified punishments for each conviction in a formula according to which whoever commits offense A will be punished by B.⁷⁹ Penalties were specified in two parts. The first part consisted of the Five Punishments, which provided a scheme whereby particular criminal acts were matched with punishments of five degrees of severity: “beating with the light stick, beating with the heavy stick, penal servitude, exile, and death.”⁸⁰ The other part, called the Ten Abominations, specified the punishments, including execution, to be administered for the most serious crimes that may lead to the disorder of the State, such as rebellion, treason or invasion, incest, subversion of the rule of filial piety in kinship structures, or subversion of the established hierarchies between subordinates and seniors along the social ladder.⁸¹ Such punishments were imposed for crimes but they were also used to sanction violations of statutes (called *lii*, written as 律) and ordinances (*ling*, 令) regarding agriculture, granaries, labor, and other economic transactions.⁸²

Influenced by Legalism, the enforcement of law in ancient China had distinct characteristics. Impartiality was considered to be the primary standard and pre-condition for law enforcement.⁸³ Clear, certain, and detailed rules of punishment applied to both criminal and civil offenses under the penal code throughout all the succeeding dynasties after the Qin—with the most precise,

⁷⁵ See ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 108–13.

⁷⁶ See Liang, *Explicating “Law”*, *supra* note 26, at 76–77.

⁷⁷ See Robert M. Marsh, *Weber’s Misunderstanding of Traditional Chinese Law*, 106 AM. J. SOC. 281, 285 (2000) [hereinafter *Weber’s Misunderstanding*].

⁷⁸ See *id.*

⁷⁹ See DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA: EXEMPLIFIED BY 190 CH’ING DYNASTY CASES 101 (1967) [hereinafter BODDE & MORRIS, LAW IN IMPERIAL CHINA].

⁸⁰ See Barrington Moore Jr., *Cruel and Unusual Punishment in the Roman Empire and Dynastic China*, 14 INT’L J. POL. CULT. & SOC. 729, 752 (2001).

⁸¹ See *id.* at 746–56 (providing details regarding the five degrees of punishments).

⁸² See *id.*

⁸³ See, e.g., ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 85–86.

complex, and technical piece of penal legislation emerging in the Tang (618–907 A.D.) and Qing Dynasties (1644–1912 A.D.).⁸⁴ Criminal punishments were liberally imposed for all types of offenses, with no distinction between criminal and civil.⁸⁵ Civil cases concerning marriage, inheritance, property, lending, and creditor rights were thus resolved under the same system of punishments with various degrees under the penal code; and all violations of laws, statutes, and administrative regulations were subject to punishment.⁸⁶ Consequently, “law” in China has traditionally been understood as a penal system with punishments, and more fundamentally as an instrument to deter behavior deemed noxious to the State.⁸⁷

In addition, as the ruler was granted the legislative power to implement the law and to impose penalties, laws enforced throughout the empire became “fundamentally penal or administrative” because legal instruments were administered through a top-down bureaucracy established by and accountable to the ruler.⁸⁸ Local officials, who were selected through the centralized civil servant examination system and had no professional legal training, had strong incentives to

⁸⁴ See MacCormack, *The Legalist School*, *supra* note 36, at 76.

⁸⁵ The idea that proportionality or some variant of it might militate against uniformly harsh punishments, without regard for the seriousness of an offense, was absent from the Legalist ideology. Rather, the Legalist preference for indiscriminate severity incorporated a “gateway” argument: if even minor offenses are punished severely, then minor offenses will not occur and at the same time major offenses will not arise. See ROGER T. AMES, *THE ART OF RULERSHIP: A STUDY OF ANCIENT CHINESE POLITICAL THOUGHT* 129 (1994) (discussing the Legalist tradition as exemplified by Shang Yang and noting the Legalist concern that minor offenses may be a “breeding ground” for more serious violations). Since the legal systems of the pre-modern empires had fundamentally penal characteristics, with corporal punishment applying in principle to civil as well as criminal matters, legal historians have claimed that the western notion of civil law did not exist in China. See, e.g., Jérôme Bourgon, *Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing*, 23 *LATE IMPER. CHINA* 50, 50 (2002) (“For at least half a century the dominant thesis in European as well as Asian historiography has been that the Chinese empire had no notion of a separate ‘civil law.’”). However, in practice, law enforcers separated civil disputes and criminal cases, and preferred to mediate civil disputes out of court. County magistrates tended to perceive civil cases as “non-punishable” and preferred to uphold civil principles to resolve cases, rather than strictly applying the code. See Xiangyu Hu, *Drawing the Line between the Civil and the Criminal: A Study of Civil Cases Handled by the Board of Punishment in Qing China*, 40 *MOD. CHINA* 74, 76 (2014).

⁸⁶ See Liang, *Explicating “Law”*, *supra* note 26, at 86.

⁸⁷ The equivalence between “law” and criminal law in this context has been noted by many. See, e.g., Attila Kormány, “*To Enter a Court is to Enter a Tiger’s Mouth*”: *The Role of Law in China*, 50 *ANNALES U. SCI. BUDAPESTINENSIS ROLANDO EOTVOS NOMINATAE* 349, 350 (2009) (“The ‘law’ was considered identical with criminal law.”). The Legalists’ conception of law as an instrument of social control has likewise been widely recognized. See Peng He, *The Difference of Chinese Legalism and Western Legalism*, 6 *FRONTIERS L. CHINA* 645, 649 (2011) (“Chinese legalism put an emphasis on the function of law as an effective social control mechanism.”).

⁸⁸ See MacCormack, *The Legalist School*, *supra* note 36, at 75.

carefully comply with the law when handling legal disputes to avoid committing faults themselves; their discretionary power to interpret the statutes was thus limited, and decisions were reviewed by officials at a higher level.⁸⁹

D. The Instrumental Use of Law

Legalists perceive law as a type of method, or an instrument, to induce compliance and to stabilize the prevailing regime. Clear, predictable, and enforceable laws are designed to impose restrictions on human behavior, and in particular to punish those who “do wrong.”⁹⁰ The fact that Legalists were thinking of law from the perspective of the fundamental question of “what works” for governing the State—a far cry from a conception based on the basic rights and duties of each individual⁹¹—reveals their strong focus on the instrumental function of law. As the guiding legal philosophy, Legalism provided the intellectual basis for legal pragmatism in China, with particular features such as: separating legal doctrine from practice; emphasizing the instrumental function of law; and treating policy as superior to law.⁹² Laws are justified and legislated in order to implement

⁸⁹ See Weber’s *Misunderstanding*, *supra* note 77, at 293. Such local officials often paid private legal secretaries to assist them when handling cases, by, for example, preparing cases for trial, proving advice regarding sentences, and writing legal reports.

⁹⁰ See Henrique Schneider, *Legalism: Chinese-Style Constitutionalism*, 38 J. CHINESE PHIL. 46, 54 (2011) [hereinafter Schneider, *Legalism: Chinese-Style Constitutionalism*]. In the words of Han Feizi: “If you wait for people to be good in deference to you, you will find that there are no more than ten good people within the borders of your state. But if you create a situation in which people find it impossible to do wrong, the entire state can be brought into compliance. In governing, one must use what works in most cases and abandon what works in only a few cases. Therefore, the sage does not work on his virtue, he works on his laws.” Eric L. Hutton, *Han Feizi’s Criticism of Confucianism and its Implications for Virtue Ethics*, in *ETHICS AND MORAL PHILOSOPHY* 173, 178 (Thom Brooks ed., 2011).

⁹¹ Schneider, *Legalism: Chinese-Style Constitutionalism*, *supra* note 90 (“These basic laws seem to concern the mechanisms necessary for running a state rather than some basic rights and duties; indeed, the major concern seems to be with ‘what works’”). Shang Yang has argued that “[t]he sage kings were law makers and that rulers should not be afraid to abolish old laws and promulgate new ones to accord with times.” And further: “When the ruler and officials are lax in executing the laws and allow private interests to take over, there will be chaos. Therefore, establishing laws and clarify duties, and do not allow private views to infringe the laws. Then you will have good government.” See Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 STAN. J. INT’L L. 101, 107 (2008) [hereinafter Fang & Des Forges, *Were Chinese Rulers Above the Law?*] (citing GONGSUN YANG, *THE BOOK OF LORD SHANG* 260 (J.J.L. Duyvendak trans., 1963)).

⁹² See Xingzhong Yu, *Legal Pragmatism in the People’s Republic of China*, 3 J. CHINESE L. 29, 30 (1989) [hereinafter Yu, *Legal Pragmatism in the People’s Republic of China*] (arguing that Chinese legal pragmatism has almost no relation with Western, or

policy, and even the content of law is a replication of policy.⁹³ Insofar as this mode of governance gives law a purely instrumental function, it is also called, for good reason, “rule by law”—a formula in vivid contrast to the English term “rule of law.”⁹⁴

The heavy emphasis on the practical use of law should also be seen as a function of their role as senior-level officials and statesmen of the empire;⁹⁵ they were not pure academics searching for independent meaning or edifying ethical properties within the “law,” or searching for a higher truth. The tenets of their legal philosophy were shaped primarily to provide the ruler with an effective strategy for governing the State.⁹⁶ Since they viewed the “law” as being merely instrumental and subservient to the politics of the State,⁹⁷ laws were subject to strategic and malleable interpretation according to the needs of political leaders and officials. It is therefore not surprising that, while the criminal code in theory applied equally to all, government officials (not to mention the emperor and his family members) often benefited from immunities, privileges, and exemptions.⁹⁸

The Legalist tradition described above is not merely of historical interest. Indeed, the instrumental-political function of law developed by the Legalists, according to which the “law” is viewed pragmatically not as an end in itself but as a means to establish and maintain social order, continues to exert a strong influence today.⁹⁹

American legal pragmatism: indeed, the current legal system in China bears distinct such as “the resort to ad hoc legal measures, the separation of legal doctrine from practice, the overemphasis on instrumental facets of law, and the placement of policy before law.”)

⁹³ See *id.* at 40.

⁹⁴ See RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 8 (2002) [hereinafter PEERENBOOM, *CHINA’S LONG MARCH*] (distinguishing between the liberal conception of the rule of law, and the quite different notion of a rule by law, in which commands may constitute binding law but the commander himself is not bound by the law).

⁹⁵ For example, Shang Yang was a minister of the Qin dynasty; Li Si (280–208 B.C.) was the prime minister of the Qin; and Shen Pu-hai (400–337 B.C.) was the chancellor of the Han dynasty. Another prominent Legalist, Li Su, helped the Qin to unite the State and subsequently became a minister of the Qin. See MacCormack, *The Legalist School*, *supra* note 36, at 60–61.

⁹⁶ See *id.* at 62.

⁹⁷ See Harris, *Legalism: Introducing a Concept*, *supra* note 39, at 157.

⁹⁸ See Guo, *Virtue, Law and Chinese Political Tradition*, *supra* note 50, at 268.

⁹⁹ Benedict Sheehy, *Fundamentally Conflicting Views of the Rule of Law in China and the West and Implications for Commercial Disputes*, 26 *NW. J. INT’L L. & BUS.* 225, 243 (2006) (“Ultimately, the Chinese view of what Westerners call law is pragmatic. Law is valued as a means to accomplish some . . . particular end not as a value in itself contributing to the social order.”); see generally BODDE & MORRIS, *LAW IN IMPERIAL CHINA*, *supra* note 79.

III. MORAL AND PENAL LAW

The development of legal culture in ancient China was determined in part by the Legalist views on punishment described above, but also in part by Confucianist views on ethics, moral cultivation, and the architecture of a good society. The Qin dynasty's excessive use of penal law was constrained when Confucian philosophy and ideology were adopted in the Western Han—a development depicted in the 1930s by Otto Franke and Homer Dubs as the “victory of Confucianism.”¹⁰⁰ Whereas the Legalists focused on the effectiveness of penal rules, Confucius (551–476 B.C.) held that compliance with the law should be achieved through self-cultivation, and that only moral rules could prevent or correct wrongful conduct;¹⁰¹ compliance led by punishment itself is, from a Confucian point of view, insincere and futile.¹⁰² Moral values should be developed internally (within the self) through education, and wrongful conduct should be addressed through rehabilitation.¹⁰³ Major pre-Qin Confucian scholars, including Confucius himself, as well as Mencius (372–279 B.C.) and Xunzi (313–238 B.C.), all shared the view that *li* (rites: i.e. the established norms and practices already ancient in the era of those scholars) should be promoted; and that punishment, where warranted, should be administered prudently (*Ming De Shen Fa*). State governance should be conducted through the rule of *li* (*Li Zhi*), the rule of man (*Ren Zhi*), and the rule of virtue (*De Zhi*).¹⁰⁴ In the view of these Confucian scholars, the “rule by law” (*Fa*

¹⁰⁰ See generally Homer H. Dubs, *The Victory of Han Confucianism*, 58 J. AM. ORIENTAL SOC. 435 (1938); Loewe, “Confucian” Values and Practices, *supra* note 59, at 2.

¹⁰¹ See PEERENBOOM, CHINA’S LONG MARCH, *supra* note 94, at 28; see CAO, A LANGUAGE PERSPECTIVE, *supra* note 52, at 23.

¹⁰² See Angus Young, Retracing the Roots and Ideals of Confucian Principles of Governance: the Art of Regulating Governance without Legal Rules in Chinese Societies 6 (2011) (unpublished working paper), <https://eprints.qut.edu.au/40091/1/40091.pdf>.

¹⁰³ *Id.* at 9.

¹⁰⁴ See ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 24; see also PEERENBOOM, CHINA’S LONG MARCH, *supra* note 94 (noting the distinction between the rule of law and the rule by law).

Zhi)¹⁰⁵ improperly neglected the importance of choosing the right man—someone wise and just—to rule the State as emperor.¹⁰⁶

For a while, Confucian principles were eclipsed as the ascendant ideas of Han Feizi and Legalist school took Confucianism's place.¹⁰⁷ It was the first Emperor of Qin (Qin Shi Huang) who, having united the country and formed the first feudal State in 221 B.C., made Legalism the dominant paradigm of imperial control.¹⁰⁸ But just a decade after unification, Qin Shi Huang died and the dynasty crumbled by 207 B.C.¹⁰⁹ The short but pivotal history of the Qin dynasty reflects its fragility and to some extent reflects a failure of the new system of "law," the oppressiveness of which led to popular unrest,¹¹⁰ although other factors also contributed to the Qin's downfall.¹¹¹ During the Han dynasty (206 B.C. to 220

¹⁰⁵ *Fa zhi* is written in two forms: 法治 and 法制. The first refers to the rule of law, while the latter refers to rule by law. For the references on the meaning of these two concepts, see, e.g., Fang & Des Forges, *Were Chinese Rulers Above the Law?*, *supra* note 91, at 102–03. In a "rule by law" paradigm, law is used for instrumental purposes; whereas, in a system that respects the rule of law, law is itself a fundamental value for the society (and in principle, no citizen or ruler is exempt from it). Similarly, there are differences between "rule of men/virtue/li" and "rule by men/virtue/li." The most common discussion in scientific literature and in political contexts is the debate on "rule of/by law" versus "rule of/by men." See generally Dean Spader, *Rule of Law v. Rule of Man: The Search of the Golden Zigzag between Conflicting Fundamental Values*, 12 J. CRIM. JUST. 379 (1984).

¹⁰⁶ See ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 25.

¹⁰⁷ See XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 70 (2000) [hereinafter YAO, AN INTRODUCTION] (Legalism "overwhelmed all other schools by helping the First Emperor of the Qin dynasty [Shi Huang] to unify the whole of China."). See also Wejen Chang, *Classical Chinese Jurisprudence and the Development of the Chinese Legal System*, 2 TSINGHUA CHINA L. REV. 207, 262–63 (2010) [hereinafter Chang, *Classical Chinese Jurisprudence*] (noting that the state of Qin implemented Shang Yang's Legalist policies, and that, following the establishment of the unified and ill-fated Qin empire, Shang Yang was a principal drafter of the Qin laws).

¹⁰⁸ YAO, AN INTRODUCTION, *supra* note 107, at 70.

¹⁰⁹ See CAO DAWEI & SUN YANJING, CHINA'S HISTORY 57 (2010) (recalling the Dazexiang peasant uprising in 209 B.C., led by Chen Sheng and Wu Guang; and the defeat of the Qin in 207 B.C. at the hands of Xiang Yu, Liu Bang and others, thus paving the way for the establishment by Liu Bang (Gaozu) of the Western Han dynasty in 202 B.C. in Chang'an, modern-day Xian).

¹¹⁰ For example, the Dazexiang described in the foregoing footnote arose from an incident in which army officers faced the penalty of execution for reporting late to their posts notwithstanding the physical impossibility of arriving punctually due to flood conditions. Rather than submitting to execution, Chen and Wu mobilized 900 villagers in a revolt against the government which spread across the empire. While they were soon killed by their own followers when the superior Qin forces began to crush the rebels, the uprising set the stage for the downfall of the Qin. See J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA 25–27 (1999).

¹¹¹ See MORRIS ROSSABI, A HISTORY OF CHINA 68 (2014) (noting the continued loyalist attachment to the displaced Zhou nobility, which fueled a "ready-made opposition," and emphasizing the Qin's over-ambitious public works projects, which put enormous strains

A.D.), there was a rehabilitation of Confucian principles, including in particular the notion that the State should be governed on the basis of virtue and *li*.¹¹² For example, Jia Yi (200–169 B.C.), a scholar and high-ranking palace official (until he was exiled), argued that *li* was the only foundation that could consolidate the country, stabilize society, and win hearts and minds.¹¹³ By specifying appropriate behavior in accordance with one's roles and status, *li* makes it possible to evaluate behavior contextually by reference to "a sense of moral appropriateness."¹¹⁴ According to Jia Yi, if the law was properly applied to punish those who fail to comply *li*, the State and the people would be under control, and a "perfect ruling system" would be maintained for long-term stability.¹¹⁵

Since the Han dynasty, Confucianist views on the governing state by *li* (rites), *ren* (benevolence), and *de* (virtue), as well as Legalist views on the severe and broad application of *fa*, were integrated by the feudal monarchy.¹¹⁶ The two different (and in some respects difficult to reconcile)¹¹⁷ philosophies were thus integrated, as the hierarchical governance system adopted Confucian principles of ceremony and morality as the guiding value-orientation for the "law" (*fa*).¹¹⁸ The broad and inclusive concept of *li* became the central value underpinning the Chinese

on the capacities of the State and on the tax burdens and livelihood of the peasants drafted to carry out the work under harsh conditions).

¹¹² See ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 24–28.

¹¹³ *Id.* at 26–27.

¹¹⁴ See Lai, *supra* note 32, at 254–56.

¹¹⁵ See ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 27.

¹¹⁶ *Id.* at 25.

¹¹⁷ Zhaojie Li describes the Confucian attitude toward Legalism and *fa* in the following terms. "[L]aw in the eye of Confucianism was not deemed a major social achievement and a symbol of rectitude. Instead, it was regarded as a rather regrettable necessity, principally employed by the state as the last resort to maintain social order. When society was functioning peacefully and harmoniously, law was something to be avoided, because resort to law was seen as essentially an admission of the loss of virtue and failure in human and communal relations. More laws did not make for a better or more peaceful and harmonious society." Li Zhaojie, *Traditional Chinese World Order*, 1 CHINESE J. INT'L LAW 20, 40 (2002) [hereinafter Li, *Traditional Chinese World Order*]. Furthermore, the Confucian foundation for proper conduct differs from that of the Legalists in that it is based primarily on virtue and morality rather than coercive sanctions. "The ruled," Li explains, "should be taught what was right and wrong [in accordance] with the *li* so that they would behave properly according to their conscience and not merely because of the threat of punishment." *Id.* at 40.

¹¹⁸ See Zeng & Ma, *A Dialectic Study*, *supra* note 44, at 42.

legal system;¹¹⁹ and the objectives of punishment were to “facilitate a rule of virtue” and to ensure the integrity of *li* within the empire.¹²⁰

Weaving *li* and *fa* together was a lengthy process. It began with the use of classic Confucian texts as guidelines for drafting and interpreting legislation, and later these classic texts—especially the *Chun Qiu* (Spring and Autumn Annals)—were used as a basis for legal judgments.¹²¹ Through this process, *li* and *fa* were integrated. *Li* assumed the force of law; laws were written under the guidance of moral codes; and an essential principle of *li*—the rule of *San Gang* (regulating the hierarchical relationships between ruler and subject, father and son, and husband and wife)—became the most basic principle of law.¹²² Through the combined application of *li* and *fa*, ethical rules, moral imperatives, and Confucian rites permeated society, and the Confucian ethical system of relationship-based social hierarchy was implemented over time through the succession of many dynasties.¹²³ This combination of Confucianist rites and Legalist punishments produced both the “moralization” of ancient Chinese law¹²⁴ and a strong punitive legal culture.¹²⁵ Legalism prescribed a pragmatic institutional function for the use of law—ultimately, the maintenance of social control—while Confucianism served as the moral basis for the law.¹²⁶ At the same time, Confucian ethics served as a social norm guiding social, economic, and other types of transactions between private parties, while the imperial criminal code allocated punishments to various forms of morally unacceptable and socially undesirable conduct.¹²⁷

¹¹⁹ Thus, for example, the Tang Code of the 7th century served to implement the established norms of *li* by subjecting deviations to the discipline of legal penalties. See Luke T. Lee & Whalen W. Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L. J. 1307, 1309 (1978) (describing the relationship between *li* and *fa*).

¹²⁰ See Zeng & Ma, *A Dialectic Study*, *supra* note 44, at 49 (quoting POSTHUMOUS WRITINGS BY WANG GUOWEI, VOLUME X (1983)).

¹²¹ ZHANG, THE TRADITION AND MODERN TRANSITION, *supra* note 52, at 26.

¹²² *Id.*

¹²³ See *id.* at 32–40.

¹²⁴ See Liang, *Explicating “Law”*, *supra* note 26, at 87–88.

¹²⁵ See *id.* (“[T]he theory that ‘Confucianism and legalism flowed together’ (*ru fa he liu*) has an important limitation, since the legalism inherited by later generations was not the legalism of the uniform application of the law, but the legalism that viewed law as punishment. Punishments based on suppression and fear succumbed to the ritual which emphasizes the hierarchical order of family and society, forming the distinctive shape of ancient Chinese law.”).

¹²⁶ See *id.*

¹²⁷ In this article (see in particular Part II), the term “Legalism” is used as a reference to the classic Chinese legal philosophy developed by *Fa Jia*. As commentators such as Goldin have pointed out, the English term “Legalism” may be an awkward and indeed misleading translation. See Goldin, *Persistent Misconceptions about Chinese “Legalism”*, *supra* note 39.

A. The Confucianization of the Law

From the time the country was unified by the above-mentioned Qin Shi Huang, the law in China was developed as an instrument often used for imperial tyranny and oppression.¹²⁸ There was no civil law independent from criminal law; in civil cases, the applicable law was defined by the principles of Confucian ethics,¹²⁹ and those who disobeyed Confucian role-based ethical rules were often punished by criminal sanctions.¹³⁰ Confucian ethics and the law shared the common goal of maintaining social order and strengthening the stability of the State.¹³¹ Serious violations against the State order, including acts of disobeying public and family authorities and refusing to perform family relation-based duties, had to be severely punished by criminal sanctions.¹³² When Confucianism and Legalism are integrated, a unified ideology can be manipulated to serve as the guiding feudal rules for the monarchy, and each can fill the other's "gaps."¹³³ As the term "applying Legalism inside and Confucianism outside" implies, the advantages of each could be strategically combined: the authorities appealed at least rhetorically to lenient and humane Confucian theories, thereby securing the support of the people, while applying the more severe Legalist instruments to obtain efficient and quick results.¹³⁴

It follows from the discussions above that the underlying function of law in ancient China was neither to define civil rights between one group relative to another, nor to establish individual liberties that could be claimed against the State.¹³⁵ Instead, as we have seen, the law prescribed punishments in order to

¹²⁸ See John Alan Lehman, *Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundations*, 69 J. BUS. ETHICS 1, 2 (2006).

¹²⁹ See, e.g., MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW*, *supra* note 74. Where civil disputes arose, Confucian ethics strongly favored mediation, a means of restoring harmony, over litigation. See Shen Deyong, *Chinese Judicial Culture: From Tradition to Modernity*, 25 B.Y.U. J. PUB. L. 131, 136–38 (2011) (discussing the merits of mediation and noting the Confucian ideal of avoiding litigation altogether).

¹³⁰ See ZHANG, *THE TRADITION AND MODERN TRANSITION*, *supra* note 52, at 24–26.

¹³¹ See *id.* at 11, 20 (explaining that the Confucian principle of *li* laid a stable social foundation for the ancient patriarchal system, and noting the centrality of the principles of *li* (rites) and *xing* (punishment) as applied by the ruler to govern the state.).

¹³² See *id.* at 14–15.

¹³³ See ZHANG, *THE TRADITION AND MODERN TRANSITION*, *supra* note 52, at 25.

¹³⁴ See *id.* (explaining the "Confucianism outside/Legalism inside" governance approach); see also Chang, *Chinese Classical Jurisprudence*, *supra* note 107, at 263 (noting that the Han emperors outwardly honored the Confucians but maintained Legalists in key positions that had enduring substantive influence on China's policies).

¹³⁵ See Li, *Traditional Chinese World Order*, *supra* note 117, at 41–42 (noting that there was "no conception of individual rights enforceable against the state or other authorities" and that, from a legal point of view, "the emperor had an absolute power to rule and the people were under an absolute obligation to obey.").

maintain social order; and since the time of the Han dynasty, this also implied the maintenance of hierarchy-based Confucian ethics and ideology.¹³⁶ This fusion of Confucianism and Legalism has been called “the Confucianization of the law.”¹³⁷

The Confucianization of the law can also be seen in the literal terms of the Tang Code of 653 A.D. This Code, which also influenced the development of law in Japan, Korea, and Vietnam, explicitly endorsed Confucian ethics by enshrining moral instructions and specifying responsibilities that ensured filial piety and proper behavior in the home.¹³⁸

It is worth pointing out that little progress was made in developing a private legal profession, as it was the local government official (who lacked legal training but had passed the imperial examinations based on the Confucian classics) that played the role of bureaucrat as well as prosecutor, judge, and jury when complaints were brought before him.¹³⁹ The judgments of this many-hatted official were based not on legal reasoning, but rather on his interpretation of Confucian moral principles and the written imperial criminal code.¹⁴⁰ Rooted in internal moral ethics, and in the concept of *ren* (benevolence), human behavior could be shaped so that it complied with objectified principles and norms; and a societal and governmental order could be developed through rules of propriety and established norms (*li*).¹⁴¹ To the law enforcers, civil cases were regarded as “minor matters”—such cases were best settled through mediation, thus restoring harmony in human relations without resorting to litigation, consistent with Confucian precepts.¹⁴²

B. Defining Moral Wrongfulness

Confucian principles pertaining to moral correctness clarify the norms that should dictate a person’s behavior according to the hierarchical social order and the

¹³⁶ See Bodde, *Basic Concepts of Chinese Law*, *supra* note 44, at 375.

¹³⁷ See Norman Ho, *Chinese Legal Thought in the Han-Tang Transition: Liu Song’s (d. 300) Theory of Adjudication*, 35 UCLA PAC. BASIN L J. 155, 156 (recounting the emergence and development of this concept); see also MacCormack, *The Legalist School*, *supra* note 36, at 76. As Zhang wrote, “[t]he assimilation and integration of ‘Li’ (rites) and law have constituted the most essential characteristics of the Chinese legal system and the peculiar Chinese legal culture.” ZHANG, *THE TRADITION AND MODERN TRANSITION*, *supra* note 52, at 3.

¹³⁸ See Wallace Johnson, *Status and Liability for Punishment in the T’ang Code*, 71 CHI.-KENT L. REV. 217, 217 (1995).

¹³⁹ See Bodde, *Basic Concepts of Chinese Law*, *supra* note 44, at 376.

¹⁴⁰ See generally Mel Marquis & Jingyuan Ma, *Confucian Bureaucracy and the Administrative Enforcement of Competition Law in East Asia*, 43 N.C. J. INT’L L. 1 [hereinafter, Marquis & Ma, *Confucian Bureaucracy*].

¹⁴¹ See Cheng, *Legalism Versus Confucianism*, *supra* note 44, at 282, 285.

¹⁴² See Li, *Traditional Chinese World Order*, *supra* note 117, at 41 (“In a society where people were governed by *li* . . . disputes and conflicts easily would be resolved through friendly negotiation, mediation and mutual compromise.”).

role that person plays; a violation of such norms is a violation of *li* (礼).¹⁴³ The term *li* is often translated as “rites,” “ritual norms,” “rules of propriety,” or “ceremonies,” and it refers to notions and norms of conduct that are aligned with Confucian ethics.¹⁴⁴ It specifies the behavioral rules to be followed in interactions with superiors, parents, and elders; and it prescribes behavioral norms according to social status, which even regulate the types of vehicles, clothing, houses, and food that are appropriate for different people, as well as ceremonial rules governing marriages, funerals, mourning, and communal festivities.¹⁴⁵ As mentioned earlier, the relevant behavioral norms are constructed according to particular relationships, such as those between father and son, superior and subordinate, and ruler and subject. Thus, *li* formulates the cultural and moral norms that determine how individuals engage in social interaction, and establishes a “social infrastructure” for Confucian society.¹⁴⁶

Within this social-ethical framework, moral righteousness is defined contextually according to each category of relationship; a crucial implication of this conception is that self-interested action is to be avoided, and gain and profit-driven impulses should be resisted.¹⁴⁷ And while individual rights have no place in Legalist philosophy because they clash with the notion of “rule by law” (see above), individual rights and rights-based morality are equally absent in Confucian ethical thought, but in this case, because Confucian morality is virtue-based, each member of the community contributes to the common good and thereby acts according to the rule of virtue (the above-mentioned *De Zhi*).¹⁴⁸ Furthermore, the particular idea of universal equal rights would directly contradict the fundamental Confucian notion that natural hierarchies based on social relationships are not to be disturbed.

C. A Different Context for Moral Action

A predominant feature of the Confucian conception of moral duties and responsibilities that is distinct from ideas found in Western moral philosophy is the

¹⁴³ See, e.g., Kwang-Kuo Hwang, *The Deep Structure of Confucianism: A Social Psychological Approach*, 11 *ASIAN PHIL.* 179, 187 (“acting according to the social norms is propriety (*li*)”).

¹⁴⁴ See A.S. Cua, *The Conceptual Framework of Confucian Ethical Thought*, 23 *J. CHINESE PHIL.* 153, 162 (1996).

¹⁴⁵ See *id.* at 164. The Book of Rites (*Li Ji*) states: “‘Li’ is the rule of propriety, which furnishes the means of determining [duties to] relatives . . . of settling doubts or [suspicions]; of judging the similarities and differences; and of distinguishing what is right and what is wrong.” ZHANG, *THE TRADITION AND MODERN TRANSITION*, *supra* note 52, at 6.

¹⁴⁶ See Karyn Lai, *Learning from the Confucians: Learning from the Past*, *J. CHINESE PHIL.* 97, 101 (2008).

¹⁴⁷ See *id.* at 103.

¹⁴⁸ See Seung-Hwan Lee, *Was There a Concept of Rights in Confucian Virtue-based Morality?* 19 *J. CHINESE PHIL.* 241, 241 (1992).

absence of a notion of autonomy.¹⁴⁹ In western philosophy, the ability to act morally depends on one's capacity to govern the self; by contrast, Confucian moral responsibility is contingent on external, non-autonomous sources outside of one's self-control or reflexive deliberation.¹⁵⁰ Thus, moral action is not fully self-contained; a moral agent and the diverse external conditions that constitute her complex environment are deeply interactive.¹⁵¹

IV. THE IMPACT OF CONFUCIANISM AND LEGALISM ON LEGAL CULTURE IN EAST ASIA

Today, more than a century since the fall of the Qing Empire in 1912, we observe little evidence in individual legal decisions that either Confucian ritual norms or Legalist criminal instruments are explicitly applied in particular cases. Yet that does not mean that Confucianism and Legalism no longer influence contemporary law.¹⁵² Indeed, these cultural roots are, as it were, genetically embedded—and they remain highly relevant for understanding the legal systems and broader social dynamics of East Asian countries.

This section discusses how Confucianism and Legalism have influenced legal culture in China, Japan, and Korea. The background to this discussion is that the use of the character *fa* to express the idea of “law” (法, now simplified as 法) spread from China to Japan and Korea—and the punishment-oriented meaning of “law” described above traveled with it, leading to a common traditional understanding of law in East Asia.¹⁵³ However, China's influence was not limited to Legalist concepts; Confucianism had an incalculable impact, although in distinct ways, on Korea and Japan.¹⁵⁴ When the Neo-Confucianism of China's Sung dynasty was received in Korea and became the dominant ideology of the Chosŏn (a.k.a. Joseon) dynasty (1392–1897), the essential principles of Confucian ritual rules and moral codes were thoroughly disseminated in schools across the country.¹⁵⁵ The Confucian rules of propriety (*li*) provided the connection between

¹⁴⁹ See generally Bongrae Seok, *Moral Agency, Autonomy, and Heteronomy in Early Confucian Philosophy*, 12 PHIL. COMPASS 1, 2 (2017).

¹⁵⁰ See *id.* at 2–4.

¹⁵¹ See *id.*

¹⁵² See Chongko Choi, *Traditional Legal Thoughts in Korea*, 3 J. KOR. L. 75, 77 (2003) [hereinafter Choi, *Traditional Legal Thoughts*] (arguing that one should observe the continuity between traditional and contemporary law; values and elements derived from traditional Korean law can be “positively applied” to contemporary lawmaking).

¹⁵³ See Choi, *Traditional Legal Thoughts*, *supra* note 152, at 79–80.

¹⁵⁴ See generally CONFUCIAN TRADITIONS IN EAST ASIAN MODERNITY (Tu Wei-ming ed., 1996) (discussing Confucianism's impact on the rise of industrial East Asia.)

¹⁵⁵ The influence of Neo-Confucianism in Korea grew during the late *Koryŏ* (a.k.a. Goryeo) and early *Chosŏn* dynasties, thus dislodging Buddhism as the dominant ideological paradigm. See, e.g., Koh Young-Jin, *Neo-Confucianism as the Dominant Ideology in Joseon*, 43 KOR. J. 59, 62–63 (2003) (noting the rise of Neo-Confucianism and the shift away from

morality and law.¹⁵⁶ Japan too was deeply influenced by Neo-Confucianism, which was imported from Korea episodically, and via the abduction of Korean scholars, in 1597 (with Hideyoshi's second invasion of Korea) and in 1603 as the Tokugawa era began.¹⁵⁷ These instances of cultural "inheritance" were critical junctures for Korea and Japan, as Confucianism "conditioned the soil" and later transplanted European law in these countries.¹⁵⁸ The following subsections provide further details regarding these intellectual influences on the development of East Asian legal culture.

A. China

Many have debated the pattern of contemporary Chinese law. Nevertheless, the continuing influence of China's ancient legal culture is undeniable.¹⁵⁹ Unlike Western nations, where the connection between ancient and contemporary legal practice generally seems attenuated, legal culture in ancient China has had a clear and direct impact on the development of the modern legal system.¹⁶⁰ In particular, the Confucianist value of "rule by (virtuous) men" and the Legalist value of "rule by law" have both influenced the Chinese understanding of the creation and use of law.¹⁶¹ Indeed, Confucianism and Legalism were the enduring cornerstones of the Chinese idea of law, and they shared the common purpose of strengthening the imperial hierarchies.¹⁶² The ancient law of China

Buddhism as reformers struggled against aristocratic families in medieval Korea); for further background, see generally John Duncan, *Confucianism in the Late Koryŏ and Early Chosŏn*, 18 KOR. STUD. 77 (1994). Toward the end of the 17th century, Neo-Confucianism declined as a new paradigm, and *Silhak* ("practical learning" that draws on interpretative skills as opposed to rote or literal learning) became increasingly popular; however, it has been argued that the shift from Neo-Confucianism to *Silhak* was characterized more by continuity than by rupture. See Sun Kwan Song, *Intellectuals and the State: The Resilience and Decline of Neo-Confucianism as State Ideology in Joseon Korea 259* (2013) (unpublished Ph.D thesis, University of London), http://eprints.soas.ac.uk/20305/1/Song_3631.pdf ("To contemporary Neo-Confucian scholars *Silhak* thought was neither heterodox nor something new but one of the fruits of Neo-Confucianism.").

¹⁵⁶ See Choi, *Traditional Legal Thoughts*, *supra* note 152, at 95.

¹⁵⁷ See Woo-Jung Jon, *The Influence of Confucianism on the Criminal Laws of Korea and Japan*, 9 KOR. U. L. REV. 21, 25 (2011) [hereinafter W.-J. Jon, *The Influence of Confucianism*].

¹⁵⁸ See *id.* at 27.

¹⁵⁹ See generally Clive Ansley, *Chinese Criminal Law under Manchus and Marxists*, 20 U.B.C. L. REV. 165 (1986) [hereinafter Ansley, *Chinese Criminal Law*].

¹⁶⁰ See *id.* at 166.

¹⁶¹ Fang & Des Forges, *Were Chinese Rulers Above the Law?*, *supra* note 91, at 103.

¹⁶² See generally MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW*, *supra* note 74; Jialue Charles Li, *China, a Sui Generis Case for the Western Rule-of-Law Model*, 41 GEO. J. INT'L L. 711, 733–35 (2010) (referring to Legalism and Confucianism, at page

developed continuously from the Tang Code to the Qing Code, and in the early twentieth century, it continued to impact the drafting and understanding of modern legal codes and court systems that developed in China during the years 1911 to 1949.¹⁶³ Especially from 1912 to 1931, Western-trained Chinese scholars—drawing from the model of the European codes—drafted six legal codes: the Organic Law of the Courts; the Commercial, Civil, and Criminal Codes; and the Civil and Criminal Codes of Procedure.¹⁶⁴

With the development of the contemporary legal system in China after 1949, traditional legal culture was transformed into a socialist law model, and the particular legal texts promulgated today cannot properly be said to descend *directly* from traditional Chinese law.¹⁶⁵ Indeed, after 1949, Soviet-type people's courts, people's procuracies, the constitution, and legal codes were established, and laws and regulations of a new and different tenor were enacted in order to govern economic, social, and political activities.¹⁶⁶ As the revolutionary changes based on Communist political philosophy were implemented in the 1950s, the law was used as a "political tool"¹⁶⁷ to establish the new "socialist legality."¹⁶⁸ The development of the legal system was guided by the Soviet model, while elements of "Western" legal thought, as well as the entire feudal legal order and traditions, were criticized and abandoned through continuous social movements.¹⁶⁹ Once the Cultural Revolution ended in 1976, judicial systems and formal legal education were re-established to form a market-oriented economic order with "socialist legality" as

734, as the "twin pillars of Chinese jurisprudence"). With the rise of the Han dynasty, beginning in 202 B.C., Taoism (and its *laissez-faire* tenets) became a third major influence on Chinese society and co-existed with the Legalist administrative apparatus of the State; while Taoism has not had the same fundamental and lasting impact on Chinese law that Legalism and Confucianism have had, it clearly played a significant role in China's cultural development. *See id.* at 733–34; *see also* Weng Li, *Philosophical Influences on Contemporary Chinese Law*, 6 *IND. INT'L & COMP. L. REV.* 327, 332 (1996) [hereinafter Li, *Philosophical Influences*].

¹⁶³ *See* Ansley, *Chinese Criminal Law*, *supra* note 159, at 166.

¹⁶⁴ *See* Alice Erh-Soon Tay, *The Struggle for Law in China*, 21 *U.B.C. L. REV.* 561, 564 (1987); *see also* Percy R. Luney, Jr., *Traditions and Foreign Influences: Systems of Law in China and Japan*, 52 *L. & CONTEMP. PROB.* 129, 130 (1989) [hereinafter Luney, *Traditions and Foreign Influences*].

¹⁶⁵ *See* Bo Yin & Peter Duff, *Criminal Procedure in Contemporary China: Socialist, Civilian or Traditional?*, 59 *INT'L & COMP. L. Q.* 1099, 1109 (2010) [hereinafter Yin & Duff, *Criminal Procedure in Contemporary China*].

¹⁶⁶ *See* Tao-Tai Hsia & Wendy Zeldin, *Recent Developments in the People's Republic of China*, 28 *HARV. INT'L L. J.* 249, 253–57 (1987); *see also* Luney, *Traditions and Foreign Influences*, *supra* note 164, at 132.

¹⁶⁷ *See* Li, *Philosophical Influences*, *supra* note 162, at 328.

¹⁶⁸ *See* Yu Xingzhong, *supra* note 92, at 36.

¹⁶⁹ *See id.* at 29; Yin & Duff, *Criminal Procedure in Contemporary China*, *supra* note 165, at 1123.

the fundamental strategy.¹⁷⁰ A system of lawyers was reconstituted,¹⁷¹ and government officials became willing to learn and borrow concepts from foreign legal experiences in order to construct the new legal environment.¹⁷²

Despite the profound changes that reshaped Chinese law in the twentieth century, the Legalist tradition, in particular, is still an important referent that illuminates the instrumental function of modern Chinese law.¹⁷³ Legalist thought lent much to China's post-1949 (Soviet) legal model, and both emphasize the importance of systemized rules culminating in an ultimate, centralized ruling.¹⁷⁴ In this model, the political will of the State has predominated criminal law in particular, but also public law and administrative law in general.¹⁷⁵ Clearly, Chinese political leaders can and do use law as a managing tool to maintain social order¹⁷⁶ and to generate *ad hoc* policies for market reform and economic developments.¹⁷⁷ From this perspective, it is not the function of law to define individual rights and remedies to be enforced against the State or State organs.¹⁷⁸ One may thus discern, the emergence of a Chinese “legal pragmatism” in the twentieth century, which perceives law—like the Legalists perceived it—as an instrument administered by State power to implement public policy;¹⁷⁹ whereas private disputes are often resolved through various informal and unofficial channels.¹⁸⁰ Within this instrumentalist-Legalist frame of pragmatism, the public

¹⁷⁰ Yin & Duff, *Criminal Procedure in Contemporary China*, *supra* note 165, at 1123.

¹⁷¹ See Jianfu Chen, *The Transformation of Chinese Law – From Formal to Substantial*, 37 H.K.L.J. 689, 695 (2007) [hereinafter Chen, *The Transformation of Chinese Law*].

¹⁷² See Luney, *Traditions and Foreign Influences*, *supra* note 164, at 132.

¹⁷³ See generally Li, *Philosophical Influences*, *supra* note 162 (noting the enduring importance of both Legalism, which has certain affinities with Taoist thought, and Confucianism).

¹⁷⁴ See Yin & Duff, *Criminal Procedure in Contemporary China*, *supra* note 165, at 1124.

¹⁷⁵ See *id.*

¹⁷⁶ It was also argued that law's function is to foster economic development. See generally Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 375 (Loren Brandt & Thomas G. Rawski eds., 2008). See also Susan Trevaskes, *The Shifting Sands of Punishment in China in the Era of “Harmonious Society”*, 32 L. & POL'Y 332, 332–33 (2010).

¹⁷⁷ See, e.g., Chen, *The Transformation of Chinese Law*, *supra* note 171, at 718.

¹⁷⁸ See Yin & Duff, *Criminal Procedure in Contemporary China*, *supra* note 165, at 1126.

¹⁷⁹ See Yu, *Legal Pragmatism in the People's Republic of China*, *supra* note 92, at 39–40.

¹⁸⁰ See generally DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 52–53 (2003); see also Yun-Hsien Diana Lin, *Civil Mediation in Taiwan: Legal Culture and the Process of Legal Modernization*, 6 U. PA. E. ASIA L. REV. 191, 199–200 (2011) (expressing a similar view in relation to the Taiwan region).

interest is still the primary goal when the State defines the function and role of law, and public law—in particular, administrative law, as frequently promulgated and amended—plays a dominant role in regulating social life.¹⁸¹

B. Japan

Japan adopted the early Chinese legal codes in the seventh and eighth centuries, and early instances of Confucian influence appeared in, for example, a “Constitution” authored by Prince Shōtoku (574–622) and adopted in 604 by Empress Suiko (554–628).¹⁸² Shōtoku’s text rationalized and justified the imperial order by appeal to the idea that such an order produces social harmony.¹⁸³ Japan also adopted a number of legal codes in the seventh century that were based on Confucian-oriented Chinese models.¹⁸⁴ The *Yōrō* Code (*Yōrō-ritsuryō*) adopted during the Nara period (eighth century) essentially mimicked the Code of the Tang dynasty.¹⁸⁵ Later, in the fourteenth century, elements of Confucian philosophy and ethics were disseminated throughout Japan.¹⁸⁶ And in the Tokugawa period, as noted above, Neo-Confucianism (in part due to its proponent Fujiwara Seika, 1561–1619) was a major influence: the Shogun officially adopted Confucian philosophy as an ideological instrument to promote (feudal) political stability and social harmony; by 1790, the Kansei Edict required that all teaching be based on the Neo-Confucianism of Zhu Xi.¹⁸⁷ For the Shogunate, the law—consisting mainly of

¹⁸¹ See Yin & Duff, *Criminal Procedure in Contemporary China*, *supra* note 165, at 1106; see also Thomas H. Reynolds, *Socialist Legal Systems: Reflections on Their Emergence and Demise*, 20 INT’L J. LEGAL INFO. 215, 236–37 (1992).

¹⁸² R.H.P. MASON & J.G. CAIGER, A HISTORY OF JAPAN 41 (revised ed. 1997).

¹⁸³ *Id.*

¹⁸⁴ Luney, *Traditions and Foreign Influences*, *supra* note 164, at 145.

¹⁸⁵ See Woo-Jung Jon, *The Influence of Confucianism on the Criminal Laws of Korea and Japan*, 9 KOR. U. L. REV. 21, 23 (2011) (“the *Yoro* Code of Japan, which was promulgated in AD 702, was almost a direct copy of the *Tang* Code.”) (citing LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 30 (John O. Haley ed., 1988)).

¹⁸⁶ See Luney, *Traditions and Foreign Influences*, *supra* note 164, at 129.

¹⁸⁷ See, e.g., Robert L. Backus, *The Kansei Prohibition of Heterodoxy and Its Effect on Education*, 39 HARV. J. ASIATIC STUD. 55, 57 (1979) (reproducing the Kansei Edict in English and translating “edict” as “directive”). On the adoption of Neo-Confucianism as an official doctrine in Japan, and Fujiwara’s role in this regard, see David A. Funk, *Traditional Japanese Jurisprudence: Justifying Loyalty and Law*, 17 S.U. L. REV. 171, 185–86 (1990) (“Tokugawa Ieyasu (Iyeyasu) (1542–1616), who became the first Tokugawa *shōgun* in 1603, was receptive to the Chu Hsi form of NeoConfucianism which emphasized one principle (*li* in Chinese; *ri* in Japanese) governing the universe and man in all his social relationships. Fujiwara Seika (1561–1619) and his student, Hayashi Razan (1583–1657), were successful in getting Chu Hsi (*Shushi* in Japanese) Neo-Confucianism adopted as the official doctrine of Tokugawa Japan. A generation later, the Japanese Neo-Confucian scholar Yamazaki Ansai (1618–82), used Confucian ethics to justify loyalty to the Emperor.” (footnotes omitted)). When the Meiji Restoration took hold in 1868, the ethos changed to one of

administrative and criminal rules—was a “necessary instrument” to implement the Confucian moral code.¹⁸⁸ Private law was not well-developed during the Tokugawa era, and private disputes were resolved through administrative organs at the local or central level.¹⁸⁹ Given the heritage just described, there is no doubt that Confucian values are embedded within Japanese law, although the Japanese conception of law has also been informed by Buddhism as well as Japan’s geographic isolation and the distinctive currents of Japanese (non-Aristotelian) psychology and mental frames.¹⁹⁰

Although there is little direct evidence that Chinese Legalist thought was propagated in Japan, Japanese scholars nevertheless tend to explain the traditional views on “law” in essentially the same manner as the Legalists had done. For example, the renowned civil law scholar Takeyoshi Kawashima (1909–1992) opined in the 1960s that, although Japan completed the process of modernizing its legal system in the Meiji years (1868–1912) and during the post-WWII Occupation (1945–1952), the modernization of citizens’ legal consciousness was still underway.¹⁹¹ In the mentality of the Japanese people, as Kawashima observed,

modernization, and by 1870, textbooks based on Confucian ethics began to be replaced by books with a Western bent. However, this was not the end of the Confucian influence in Japanese education: twenty years later, as a conservative reaction to reforms fueled a resurgence of Confucian and Shinto values, the Meiji Emperor adopted the Imperial Rescript of 1890. See Mark E. Lincicome, *Nationalism, Imperialism, and the International Education Movement in Early Twentieth Century Japan*, 58 J. ASIAN STUD. 338, 340 (1999) (“Having ushered in a hasty program of Westernization during the first decade after the Meiji Restoration—including the establishment of Asia’s first system of universal, compulsory schooling, in which Neo-Confucian metaphysics gave way to Western positivism and utilitarianism—the Meiji oligarchs, we are told, were persuaded by conservative elites that the pendulum had swung too far. This prompted a ‘conservative counterattack’ (Passin 1965) that culminated in such measures as: promulgation of the Imperial Rescript on Education; a stronger emphasis on moral education, and the reintroduction of Confucian ethics into the curriculum.”). The Rescript, though brief, was clearly inspired by ideas such as benevolence, filial piety, harmony between husband and wife, self-sacrifice in service to the State when needed, and so on. Its nationalistic sentiment has also been cited as a factor in the 20th century development of Japanese imperialism and colonialism. See *id.* at 338.

¹⁸⁸ A.J.G.M. Sanders, *The reception of Western law in Japan*, 28 COMP. & INT’L L. J. S. AFR. 280, 282 (1995) [hereinafter Sanders, *The Reception of Western Law*].

¹⁸⁹ See Sanders, *The Reception of Western Law*, supra note 188.

¹⁹⁰ YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 160, 170–71 (1976) (explaining how, in the syncretic Japanese mind, different influences such as Confucian or Buddhist ideas, or French, German or Anglo-Saxon legal concepts, can co-exist without strict need for mutual coherence; such influences are used to solve problems according to “fluctuant” pragmatism and fashion, whereas the constraints of logic that would be familiar in the west are of less importance).

¹⁹¹ See generally Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur T. von Mehren ed., 1963).

informal social norms were too resilient to be displaced by formal legal institutions as a primary means of regulating behavior.¹⁹² Another civil law scholar, Ei'ichi Hoshino, argued that the Civil Code imported from the West scarcely impacted the regulation of social relations, and that the "living law" (*ikeru hō*) of Japanese society still consisted of spontaneous social norms.¹⁹³ Hoshino's claim can be explained by the different conception of "law" in the Japanese legal tradition compared to the way law is commonly understood in the West.¹⁹⁴ This is not unlike the distinction already discussed in relation to China. According to Yoshiyuki Noda, Japanese people generally regarded the law as "an instrument of constraint that the state uses when it wishes to impose its will," and, in the same vein as the writings of China's Legalists, the law is "synonymous with pain or penalty."¹⁹⁵ Similar to the Chinese tradition, the law does not serve the vindication of rights, and the neologism used for the term "subjective right," *kenri*, is construed as an egoistic concept.¹⁹⁶ Courts are thus said to be a place not to enforce rights but to "petition" the "ruler."¹⁹⁷ Meanwhile, as explained by Hoshino, informal institutions such as "living law" or "natural law" are determined according to social norms that

¹⁹² See *id.*; see also Takeyoshi Kawashima, *The Status of the Individual in the Notion of Law, Right and Social Order in Japan*, in THE JAPANESE MIND—ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE 262 (Charles A. Moore ed., 1967); Seigo Hirowatari, *Post-war Japan and the Law: Mapping Discourses of Legalization and Modernization*, 3 SOC. SCI. JAPAN J. 155, 156–57 (2000) [hereinafter Hirowatari, *Post-war Japan and the Law*].

¹⁹³ See Hirowatari, *Post-war Japan and the Law*, *supra* note 192, at 159 (Hoshino "explained the failure of civil law norms to regulate social relations on the grounds that the Civil Code, having been received from the West, was not rooted in Japanese society. He argued that the oft-mentioned distaste of the Japanese for law was merely a reaction against statutory law transplanted from the West, and by no means an aversion to all forms of law. Hoshino asserted that Japanese society had its own 'living law' (*ikeru hō*), or Japan-specific 'natural law' (*shizen-hō*), and that legal studies should pay more attention to that 'living' or 'natural' law (Hoshino 1986: 297, 357). By 'natural law' Hoshino meant spontaneous social norms peculiar to Japanese society, as opposed to the norms of transplanted Western law.") (footnote omitted)

¹⁹⁴ See Ei'ichi Hoshino, *Minpō Ronshū* [Collected Papers on the Civil Code], Vol. 5 (1986), translated in Hirowatari, *Post-war Japan and the Law*, *supra* note 192, at 159.

¹⁹⁵ See NODA, INTRODUCTION TO JAPANESE LAW, *supra* note 190, at 159.

¹⁹⁶ See *id.* at n.2 ("For the average Japanese this word [*kenri*] conjures up something related to egoism." In a collectivist and shame-oriented society such as Japan, egoism is particularly unseemly.).

¹⁹⁷ See Ichiro Kitamura, *The Role of Law in Contemporary Japanese Society*, 34 VICT. U. WELL. L. REV. 729, 735 (2003) ("[T]he notion of *uttae* (litigation) also corresponds to this idea of protection. Etymologically it signifies the act of making a prayer, of imploring aid from one's superior. Even if this conforms with the idea of administrative challenge or of the accusation of criminals, it is much less in line with the idea of vindication of a right, or of a verbal duel before an arbitrator. In short, the courts appear as a 'place of petition' addressed to the ruler.").

are “peculiar to Japan.”¹⁹⁸ This is not natural law as generally understood in legal philosophy. While the expression “natural law” filtered into Japanese legal discourse, it was imbued with local notions such as the Confucian principle of disparate treatment according to status—a far cry from the western sense of the term.¹⁹⁹ Today, the Japanese people reject the excesses of Tokugawa-era feudal norms, although castes and social stratification are still apparent.²⁰⁰ But the norms and scripts that spread across the country in the Neo-Confucian heyday have left their mark.²⁰¹ The Confucian influence on Japanese legal culture is further reflected, as scholars have underlined in a significant niche literature, in the traditional view that filing a lawsuit in Japan was “shameful” because using the law was “undesirable” and best avoided.²⁰²

C. Korea

When comparatists speak of the traditional legal culture in Korea and Japan, a commonly accepted view is that the concept of “law” may have negative connotations and generally refers to the specific notion that we have seen above: “criminal law” or “punishment.”²⁰³ Furthermore, traditionalists may be apt to

¹⁹⁸ Hirowatari, *Post-war Japan and the Law*, *supra* note 192, at 159 (citing EI'ICHI HOSHINO, *MINPŌ NO SUSUME (AN INTRODUCTION TO THE CIVIL CODE)* 236–37 (1998)).

¹⁹⁹ See W.-J. Jon, *The Influence of Confucianism*, *supra* note 157, at 28.

²⁰⁰ See Eugene Ruyle, *Capitalism and Caste in Japan*, in *NEW DIRECTIONS IN POLITICAL ECONOMY: AN APPROACH FROM ANTHROPOLOGY* 208, 212 (Madeline Barbara Léons & Frances Rothstein eds., 1979) (suggesting that capitalist forces have reinforced residual social divisions from feudalism); see also Alistair McLaughlan, *Japan's Burakumin: An Introduction*, 4 *ASIA-PAC. J.* 1, 1 (describing the enduring Tokugawa legacy of caste-like discrimination against people linked to certain professions such as leather and butchery work).

²⁰¹ See Takahiro Nakajima, *Confucianism in Modern Japan*, in *THE BLOOMSBURY RESEARCH HANDBOOK OF CONTEMPORARY JAPANESE PHILOSOPHY* 43 (Michiko Yusa, ed., 2017) (casting the Confucian influence in Japan not as a regressive conservative system but as social device that accommodates Japanese modernity).

²⁰² See Sanders, *The Reception of Western Law*, *supra* note 189, at 287; but see John O. Haley, *The Myth of the Reluctant Litigant*, 4 *SOC'Y JAPANESE STUD.* 359, 365 (1978) (“The orthodox view of Japanese ‘litigiousness,’ however, relates to a reluctance to litigate, not simply the amount of litigation. . . . [T]raditional moral censure of litigation is arguably as Christian as it is Confucian.”); see generally John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8 *J. JAPANESE. STUD.* 265 (1982) (discussing the cultural and social factors that impact Japanese law).

²⁰³ See generally WILLIAM SHAW, *LEGAL NORMS IN A CONFUCIAN STATE* (1981) (detailing judicial procedures and discussing numerous prosecuted cases during the Chosŏn dynasty and focusing on the strong influence of neo-Confucian conception of a complementary relationship between the Ming-based system of “Five Punishments” and the cultivation of Confucian virtue).

regard modern conceptions of law as, to a large extent, culturally irrelevant because modern legal theories and philosophies originated far away from these local societies.²⁰⁴ Historically and broadly speaking (and certainly with their own variations), Korea and Japan developed their legal cultures and traditions following a trajectory similar to that of ancient China.

The Legalist School of ancient China has shaped legal concepts in Korea, and provided theoretical foundations for Korea's first united State.²⁰⁵ When law first developed in the tribal states such as the Old Chosŏn and Puyo, it was "simple" and "severe," and its purpose was to establish a social order with patriarchal authority.²⁰⁶ A more systemized legal code called Yullyoung was established in 373 A.D. during the Koguryo dynasty in (37 B.C. to 668 A.D.).²⁰⁷ In later developments, Korean law in the Koryo dynasty (918 to 1392 A.D.) was significantly influenced by the legal codes in the Tang and Sung dynasties of China,²⁰⁸ and the first codification of Korean law, the Six Codes of Governance, was influenced by the Great Ming Code and was completed in 1485 during the Chosŏn dynasty.²⁰⁹ In the early twentieth century (1910–1945), while colonized by Japan, Korea introduced a new legal system that was influenced by Western law but bereft of fundamental liberal concepts such as the rule of law and liberalism, resulting in a "distorted" version of the original source.²¹⁰ As in ancient China, the law was not a check on the arbitrary use of government power but a tool to enforce ideology and obedience; this distorted reception of Western law thus produced the "exact opposite" of the beliefs at the core of the liberal paradigm.²¹¹ Following World War II, certain values of American democracy (and the anti-communist imperative) filtered into or were imposed upon South Korea while the United States

²⁰⁴ See Frank K. Upham, *The Place of Japanese Legal Studies in American Comparative Law*, 1997 UTAH L. REV. 639, 639 (1997).

²⁰⁵ Eric Yong Joong Lee, *Evolving Concept of Law in Korea: A Historical and Comparative Perspective*, 21 ASIA PAC. L. REV. 77, 78 (2013) [hereinafter Lee, *Evolving Concept of Law*].

²⁰⁶ See *id.* at 87.

²⁰⁷ See *id.* at 88.

²⁰⁸ See *id.*, at 90.

²⁰⁹ See *id.* at 91.

²¹⁰ See Sangdon Yi & Sung Su Hong, *The legal development of Korea: juridification and proceduralization*, in LAW AND SOCIETY IN KOREA 108, 112–13 (Hyunah Yang ed., 2013) [hereinafter Yi & Hong, *The legal development in Korea*] ("In fact, the rule of law was not presented as a principle to check the arbitrary power of the state but as an ideology to force people to accept and obey the existing legal system. This means that the totalitarian aspect of dominance was simultaneously reinforced by the introduction of the liberal paradigm.").

²¹¹ See Yi & Hong, *The legal development in Korea*, *supra* note 211, at 113 (describing Korea's reception of continental European law in the context of Japanese imperialism).

Military Government in Korea (USAMGIK) operated there.²¹² But USAMGIK failed to replace the Japanese legal system with American law, and the influence of Japanese criminal law and public law remains significant.²¹³

Traditional social norms in Korea, as determined particularly by the predominance of Confucian ethics, have been continuously reflected in law throughout Japan's colonization and through the many subsequent societal reforms.²¹⁴ "Good morals," "public policy," "public welfare," "faith and sincerity," and even concepts such as "circumstances," which require a high level of judicial discretion, are written as "general clauses."²¹⁵ The understanding and practice of moral rectitude by legal professionals are of great importance when exercising discretionary powers or making judgments on the legality of acts and practices.

V. IMPLICATIONS FOR THE CRIMINALIZATION OF CARTELS IN EAST ASIA

A. The Criminalization of Cartels, or paucity thereof, in China, Japan, and Korea

As previously noted, both Japan and Korea have made criminal sanctions possible for serious anticompetitive conduct. However, in each of these countries the enforcement architecture is complicated by the fact that, in most cases, there is: (i) an investigation by an administrative agency, which may lead to (ii) a prosecution by a separate government body, the Office of the Public Prosecutor, which may in turn lead to (iii) criminal sanctions imposed by a court. Partly because public prosecutors may have priorities very different from those of competition authorities, the number of cases actually referred to the prosecutor is relatively limited, and referrals are markedly less frequent when there is no element of public tenders being manipulated by bid-rigging tactics.²¹⁶ In contrast with Japan and

²¹² See, e.g., SUNHYUK KIM, *THE POLITICS OF DEMOCRATIZATION IN KOREA: THE ROLE OF CIVIL SOCIETY* 28 (2000) (noting that American democracy was a political model that Korean governments were "pressured to emulate").

²¹³ Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L. J. 71, 72–73 (1997); see Yi & Hong, *The legal development in Korea*, *supra* note 210, at 113 (noting that the legacy of an illiberal conception of law persisted through the period of military government by U.S. forces and through Korea's period of dictatorship; and that it became "the dominant problem in Korean legal practice and scholarship.").

²¹⁴ See Dai-Kwon Choi, *Western Law in a Traditional Society Korea*, 8 KOREAN J. COMP. L. 177, 185 (1980).

²¹⁵ *Id.* at 191.

²¹⁶ See, e.g., Sang-Seung Yi & Youngjin Jung, *A New Kid on the Block: Korean Competition Law, Policy, and Economics*, 3 COMPETITION POL'Y INT'L 153, 159 (2007) (explaining that the KFTC has primary responsibility, and a quasi-monopoly enforcement power, with respect to competition cases. Traditionally, referrals to the Prosecutor's Office

Korea, China has not adopted criminal law sanctions to punish standard cartel conduct.²¹⁷ Regarding standard cartels, a joint reading of Article 46 and Article 52 of China's Anti-Monopoly Law makes clear that only a refusal to cooperate with the investigating authority, and not the underlying conduct, can trigger criminal liability.²¹⁸

In Korea, the Korean Fair Trade Commission (KFTC) was—historically—reluctant to endorse criminal penalties as a means to deter cartel behavior; indeed, when the Monopoly Regulation and Fair Trade Act (MRFTA) was enacted in 1980, the KFTC made it clear that competition cases differed from other types of criminal violations because of their “distinguishable characteristics.”²¹⁹ In 1995, moreover, the Constitutional Court of Korea refused to impose criminal sanctions on cartel activities on the ground that doing so could “chill business activity” and could damage the promotion of “fair and free competition.”²²⁰ However, the situation in Korea today is quite different. The current version of Korea's competition law now allows for criminal sanctions in cases involving abuse of dominance or restrictive agreements; and the KFTC's enthusiasm for cartel-busting, most evident in its aggressive administrative enforcement, extends to a readiness to file several criminal cases each year with the Prosecutor General.²²¹ Nonetheless, in the thirty-five-year span from 1981 until 2016, only 302 competition cases were referred to the Prosecutor's office, accounting for just 2.16% of the total competition cases that led the KFTC to impose corrective sanctions (see Table 1 below).²²² Overall,

were limited, and courts generally upheld the KFTC's decisions.); *see also* Marquis, *supra* note 28 (discussing the role of Japan's Public Prosecutor's office in cartel-related cases).

²¹⁷ In contrast with standard cartels, bid-rigging—a specialized form of cartel behavior with distinct characteristics—may be subject to criminal prosecution under other laws, i.e. the Criminal Law and Bid Rigging Law. *See* Heimler, *supra* note 27, at 860; *see also* Sanchit Lai, *Bid Rigging, a Faintly Discernible Enumeration under Article 13 of the Anti-Monopoly Law in China*, 12 U. PA. ASIAN L. REV. 244, 258 (2016).

²¹⁸ Zhōnghuá rénmín gònghéguó fǎn lǒngduàn fǎ (中华人民共和国反垄断法) [Anti-monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 7, 2007, effective Aug. 1, 2008), art. 46, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter AML] (providing that violations in the form of a “monopoly agreement” (including cartel agreements) will normally be subject to an administrative fine of between one and ten percent of the offender's sales achieved in the previous year, and in addition the competition enforcer confiscates any ill-gotten gains resulting from the misconduct); AML, art. 52 is different in that it allows for the possibility of criminal penalties if there is a serious refusal to cooperate with the authority (e.g. false statements, concealment or destruction of evidence, or other forms of obstruction of justice).

²¹⁹ *See* Kim, *Developments in Criminal Enforcement*, *supra* note 29, at 3.

²²⁰ Constitutional Court [Const. Ct.], 94 HeonMa 136, July 21, 1995 (S. Kor.); *see* Kim, *Developments in Criminal Enforcement*, *supra* note 29, at 4 (translating the text).

²²¹ *See* Kim, *Developments in Criminal Enforcement*, *supra* note 29, at 3–5.

²²² When the total numbers are disaggregated it appears that, in the same time period, “improper concerted act” cases were referred to the Prosecutor 133 times, a higher rate of 11.33%. *See* KOREA FAIR TRADE COMM'N, STATISTICAL YEARBOOK OF 2016 6 (2017), <http://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=523&bbsId=BBSMSTR>

therefore, it appears that the KFTC has not been eager to trigger criminal investigations.²²³ It was not until February 5, 2014, that the first individual prison term was reported.²²⁴ In that case, the Busan Eastern District Court sentenced three executives for rigging bids to obtain contracts for cables in nuclear power plants.²²⁵ Each defendant received a six-month imprisonment, subject to a two-year suspension before the sentence was served.²²⁶

With regard to Korea's competition law, the MRFTA, a key provision is Article 66, which states that up to three years of imprisonment or a fine up to 200 million won (approximately USD 186,000) will be imposed on individuals engaged in serious violations of the Act, including by way of illegal collusion.²²⁷ In addition, Article 67 stipulates that a sanction of no more than two years of imprisonment, or a fine not exceeding 150 million won (USD 140,000), will be imposed on those who violate the Act through practices related to unfair trade, resale price maintenance, or anticompetitive international contracts, or who refuse to comply with the "corrective measures" imposed by the KFTC.²²⁸ In cases where criminal sanctions are deemed appropriate, in particular due to the "obvious" and "serious" nature of the infringement, Article 71 requires the KFTC to file a complaint with the Prosecutor General.²²⁹ Apart from the exceptional cases (limited to certain instances of bid-rigging) in which the Prosecutor has autonomous power to initiate criminal prosecutions,²³⁰ criminal prosecutions traditionally could only be initiated once the KFTC had filed such a complaint.²³¹ However, following amendments that were approved on July 16, 2013, and took effect on January 17, 2014, Article 71 requires the KFTC to refer a case to the Prosecutor's Office if requested to do so by the Chief Prosecutor, the Chair of the Board of Audit and Inspection, the Chair of the Public Procurement Service, or the Chair of the Small and Medium-Sized

_00000002405&bbsTyCode=BBST11 [hereinafter KOREA FAIR TRADE COMM'N, STATISTICAL YEARBOOK OF 2016].

²²³ See KOREA FAIR TRADE COMM'N, KOREA'S DEVELOPMENTAL EXPERIENCES IN OPERATING COMPETITION POLICIES FOR LASTING ECONOMIC DEVELOPMENT 80 (2014).

²²⁴ Kim & Kim, *Korean Court Imposes First Prison Sentence*, *supra* note 29.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Dogjeomgyuje Mich Gongjeong-Geolae Gwanhan Beoblyul [Monopoly Regulation and Fair Trade Act], Act No. 3320, Dec. 31, 1980, *amended by* Act No. 14137, Mar. 29, 2016, art. 66 (S. Kor.) [hereinafter, MRFTA].

²²⁸ MRFTA, art. 67.

²²⁹ *Id.* art. 71.

²³⁰ See Kim & Kim, *Korean Court Imposes First Prison Sentence*, *supra* note 29.

²³¹ See Org. for Econ. Co-operation and Dev. [OECD], *Sanctions in Antitrust Cases: Korea*, at 7, DAF/COMP/GF/WD(2016) 57 (Oct. 27, 2016), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)57/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)57/en/pdf) (noting a slight relaxation in 2014 to the previous rule that essentially reserved to the KFTC the initiative to file a complaint with the Prosecutor); see also Ohseung Kwon, *Retrospect and Prospect on Korean Antitrust Law*, 4 J. KOREAN. L. 1, 10 (2005).

Business Administration.²³² The opportunities for criminal referrals have thus been amplified. For its part, Korea’s Prosecutor’s Office has established a separate department specifically dealing with cartel cases (particularly bid-rigging).²³³ Soon after the establishment of this department, a request was sent to the KFTC asking it to refer a construction company for prosecution.²³⁴

Type of Violation		Reference to Prosecutor’s Office	Total number of cases received sanctions	The Percentage of Prosecutor’s referral
MRFTA	Abuse of market dominance	6	93	0.0645
	M&A	1	826	0.0012
	Repression of economic power concentration	11	1228	0.0089
	Improper concerted act	133	1173	0.1133
	Prohibited act of enterprises organization	53	1909	0.0277
	Unfair business practice	98	8734	0.0112
	Sub total	302	13963	0.0216
Consumer protection related Acts	FLAA	40	5856	0.0068
	ACPEC	5	3276	0.0015
	DSA	78	681	0.1145

²³² See Youngjin Jung & Gina Choi, *Recent Developments in Korean Competition Law Enforcement*, COMP. POL’Y INT’L, Sept. 2015, at 2, <https://www.competitionpolicyinternational.com/assets/Asia-Column-September-Full.pdf> [hereinafter Jung & Choi, *Recent Developments*].

²³³ See Kim & Kim, *Korean Court Imposes First Prison Sentence*, *supra* note 29.

²³⁴ See Jung & Choi, *Recent Developments*, *supra* note 232, at 3.

	RACA	1	3348	0.0002
	ITA	32	267	0.1198
	Sub total	156	13428	0.0116

Table 1: KFTC Referrals to the Prosecutor's Office by Type of Violation (1981–2016)²³⁵

Turning to Japan: since the Anti-Monopoly Act (AMA) was adopted by the Diet in 1947 at a time when legislation was being overseen and essentially dictated by the Americans during the post-War occupation, it is no surprise that the AMA contained many elements of the main US antitrust statutes (indeed, the AMA was stricter overall than the US provisions until Japan amended the AMA in 1949 and 1953).²³⁶ Following the model established by the Sherman Act, the Japanese provisions included the possibility of criminal penalties for serious violations.²³⁷ In particular, Articles 89 and 95 of the AMA make it possible for the Japanese courts to impose criminal penalties on individuals (up to a maximum five years imprisonment and/or maximum of five million JPY criminal fines, approximately USD 47,000) or on companies and other entities (maximum of 500 million JPY criminal fines) engaged in two types of conduct: private monopolization and, more

²³⁵ KOREA FAIR TRADE COMM'N, STATISTICAL YEARBOOK OF 2016, *supra* note 222. For each type of violation, the following corrective measures could be imposed: reference to prosecutor's office; surcharge; corrective order; request for correction; corrective recommendation; warning; and voluntary correction. *See* KOREA FAIR TRADE COMM'N, *supra* note 223.

²³⁶ *See, e.g.,* Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM LAW & POL'Y J. 59, 66–67 (1995) [hereinafter Iyori, *A Comparison of U.S.-Japan Antitrust Law*] (reviewing Japan's "inherited" antitrust law and describing the successive relaxation of its harshest provisions in 1949 and 1953).

²³⁷ Technically, criminal sanctions have always been available under the Sherman Act. Prior to the 1960s, however, criminal enforcement was unlikely to result in severe criminal penalties. In the period of 1890 to 1959, the 729 criminal cases that had been pursued by the DOJ led to just 48 jail sentences, most of which led not to incarceration but to suspended sentences with probation. *See* John Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1303–06 (1967) (concluding at 1306, in the light of these findings, that the Sherman Act was "something less than an essentially criminal statute in practice."). As is well known, the intensity of federal criminal enforcement in the U.S. has increased considerably due to a succession of legislative amendments since the 1970s. *See, e.g.,* Glenn Harrison & Matthew Bell, *Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUS. BUS. & TAX L. J. 206, 209–22 (2006) (reviewing significant amendments increasing the severity of criminal sanctions under the Sherman Act from the 1970s to the 1990s and again notably in 2004).

importantly, agreements constituting unreasonable restraints of trade.²³⁸ “Private monopolization,” which in practice does not trigger criminal prosecutions (just as monopolization does not in practice trigger criminal prosecutions under the Sherman Act), refers to misconduct by which a powerful enterprise excludes or controls the business activities of other firms;²³⁹ an “unreasonable restraint of trade” refers to concerted conduct by enterprises that jointly impose restrictions on business activities such as fixing prices or production, engaging in bid-rigging behavior, or limiting technology, products, or facilities.²⁴⁰

Japan’s Public Prosecutor’s Office normally only prosecutes a cartel if it has received from the Japan Fair Trade Commission (JFTC) a referral in the form of an “accusation” (*kokuhatu*).²⁴¹ Where the JFTC files such an accusation, the Prosecutor can (but is not strictly obliged to) issue an indictment (*kiso*) and seek a conviction before a Japanese District Court.²⁴² In practice, almost all criminal prosecutions in Japan, not just in the field of antitrust but across the board, result in convictions.²⁴³ However, following the first two criminal accusations filed by the JFTC in 1974, the agency for nearly twenty years thereafter made no further

²³⁸ According to Article 89 of The Antimonopoly Act, “Any person who falls under any of the following items are punished by imprisonment with work for not more than five years or by a fine of not more than five million yen . . . a person who, in violation of the provisions of Section 3, has effected private monopolization or unreasonable restraint of trade.” [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Act No. 54 of 1947, art. 89 (Japan) [hereinafter AMA].

²³⁹ See Takayuki Suzuki, *The Function of Criminal Punishment under the Antimonopoly Act of Japan*, 2 NEW J. EUR. CRIM. L. 45, 50 (2011) [hereinafter Suzuki, *The Function of Criminal Punishment*].

²⁴⁰ In short: for practical purposes, criminal sanctions may be sought and imposed in cases involving cartels, although the JFTC is more liable simply to impose significant fines (“surcharges”) without making a referral to the Public Prosecutor unless there is bid-rigging involved. For the definitions of private monopolization and unreasonable restraints of trade, see Mel Marquis & Tadashi Shiraishi, *Japanese Cartel Control in Transition* 12 (U. Inst. Eur. Stud., San Pablo Univ., Working Paper No. 47, 2014), <https://ssrn.com/abstract=2407825>.

²⁴¹ See, e.g., Suzuki, *The Function of Criminal Punishment*, *supra* note 239, at 57 (noting that an indictment is only possible after the JFTC files an accusation with the Prosecutor).

²⁴² See Simon Vande Walle & Tadashi Shiraishi, *Competition Law in Japan*, in COMPARATIVE COMPETITION LAW 415, 438 (John Duns et al. eds., 2015) [hereinafter Vande Walle & Shiraishi, *Competition Law in Japan*]. Although the Prosecutor can decline to prosecute in spite of a referral from the JFTC, in such a case it owes an explanation to the Prime Minister. See Mel Marquis, *Firebird Suite: cartel suppression reborn in Japan*, 4 J. ANTITRUST ENF’T. 84, 103 (2016) (describing the Prosecutor’s discretion and its duty to justify a decision not to prosecute).

²⁴³ The conviction rate of prosecutors when cases go to trial in Japan has been nearly one hundred percent. See Vande Walle & Shiraishi, *Competition Law in Japan*, *supra* note 242; see also Mark D. West, *Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 691 (1992).

referrals.²⁴⁴ Indeed, the total number of cases referred by the JFTC to the Public Prosecutor's Office in the sixty-six years from 1947 until August 2013 was just 16.²⁴⁵ According to the annual reports of the JFTC from 2000 to 2012, the number of accusations filed was still very low, and the type of the violation related exclusively to bid-rigging (see Table 2 below); also, as explained earlier, Japanese judges nearly always order suspended sentences for first-time offenders, and in the last twenty years no individual has been sent to jail in a competition case.²⁴⁶

The first major criminal cartel case in Japan, alluded to above, was initiated by the JFTC in 1974 against a number of oil industry producers in order to respond to the general public protest against oil cartels.²⁴⁷ After many years of litigation and appeals, criminal convictions were upheld in that case.²⁴⁸ Nevertheless, in the 1980s, the AMA's criminal provisions laid dormant, and no criminal cases were filed.²⁴⁹ In the 1990s there was renewed interest in the possibility of criminal sanctions (largely due to international pressure);²⁵⁰ yet only around one criminal case per year, on average, has been pursued by the Public Prosecutor's Office since that time.²⁵¹

The generally low level of criminal punishment of cartels in Japan, and the reluctance of Japanese judges to imprison wrongdoers participating in price-fixing and similar conduct—which reflects the ambiguous attitudes of the general public regarding criminal sanctions for cartels—has drawn criticism.²⁵² Part of the

²⁴⁴ See Douglas E. Rosenthal & Mitsuo Matsushita, *Competition in Japan and the West: Can the Approaches Be Reconciled?*, in GLOBAL COMPETITION POLICY 313, 323 (Edward M. Graham & J. David Richardson eds., 1997) (noting that, until 1993, there had been no criminal anti-monopoly enforcement in Japan for nearly two decades).

²⁴⁵ ATSUSHI YAMADA, A BRIEF OVERVIEW OF CRIMINAL CARTEL ENFORCEMENT IN JAPAN 3 (2013), http://www.nysba.org/Sections/International/Seasonal_Meetings/Vietnam/Program_16/Cartel_Enforcement.html.

²⁴⁶ See *id.* at 4 (observing that all prison sentences for cartelists and bid-riggers handed down in Japan from 1991 to 2012 were suspended sentences, and incarceration therefore could be avoided so long as the convicted person refrained from committing another crime during the period of suspension); see also Vande Walle & Shiraishi, *Competition Law in Japan*, *supra* note 242. The dazzling 99.9% conviction rate across all types of criminal cases that go to trial in Japan is explained by the fact that prosecutors in Japan only bring criminal actions when they feel certain of success. See *id.* (citing HIROSHI ODA, *JAPANESE LAW* 439 (3d ed. 2009)).

²⁴⁷ MICHAEL L. BEEMAN, PUBLIC POLICY AND ECONOMIC COMPETITION IN JAPAN: CHANGE AND CONTINUITY IN ANTIMONOPOLY POLICY, 1973–1995 48 (2002) [hereinafter BEEMAN, PUBLIC POLICY].

²⁴⁸ See *id.* at 48–51.

²⁴⁹ See Iyori, *A Comparison of U.S.-Japan Antitrust Law*, *supra* note 236, at 84.

²⁵⁰ The JFTC thus announced, in June 1990, that it would be more active in referring cases for criminal prosecution. See *id.*

²⁵¹ Vande Walle & Shiraishi, *Competition Law in Japan*, *supra* note 242.

²⁵² See Shigeki Kusunoki, *Shaping an Anti-monopoly Law Sanction Regime against Cartels or Bid Collusion: A Perspective on Japan's Choice*, 79 U. DET. MERCY L. REV. 399,

problem is attributed to the fact that many JFTC officials are not trained lawyers, and therefore prior coordination between the JFTC and the Public Prosecutor's Office is a practical necessity before a criminal referral is made.²⁵³ To secure the necessary buy-in from prosecutors, the JFTC must provide the prosecutors with sufficient evidence to convince the judge that the defendant is guilty beyond a reasonable doubt.²⁵⁴ On this point the two authorities must achieve sufficient consensus.²⁵⁵ However, in light of the relative disuse of the criminal referral process, the Japanese legislature sought to enhance the profile of criminal enforcement, specifically by way of amendment in 2009 that increased the maximum prison sentence under the AMA from three to five years.²⁵⁶ Such legislative tweaking seems unlikely to trigger a turn toward aggressive criminal enforcement, and (with the exception of bid-rigging cases) it is currently difficult to conclude that the criminal cartel offense in Japan is truly effective.

406 (2002) (noting criticism of the Japanese system due to the low levels of criminal fines for corporations, and due to the fact that judges only order suspended sentences, possibly because they are hesitant to recognize competition as a “protected value” and because violations of the AMA are considered “morally neutral” in Japan). Of course, the risk of underenforcement (type 2 errors) should not lead to over-correction through over-enforcement (type 1 errors); *see generally* Suzuki, *The Function of Criminal Punishment*, *supra* note 239 (discussing the risk of over-enforcement, which in turn might chill desirable entrepreneurial initiative). Suzuki concludes that individuals should only be prosecuted if they have played a “significant role” in the relevant anticompetitive conduct, and if the means of their participation go “beyond the pale of ordinary business practice.” *Id.* at 50. In our view, significant participation in a cartel is by its very nature beyond the pale; there should be no need to carry out an independent analysis of whether colluding with competitors constitutes ordinary business practice. To the extent that it is ordinary practice in the industry concerned, the law endeavors to rectify this and to change the culture of the industry—including by way of individual criminal sanctions.

²⁵³ *See* David Boling, *The Role of Prosecutors in Japanese Antimonopoly Law Criminal Cases*, 17 ANTITRUST 90, 92–93 (2003) [hereinafter Boling, *The Role of Prosecutors in Japanese Antimonopoly Law Criminal Cases*] (noting that prosecutors normally expect the JFTC to produce compelling evidence before a referral will be accepted).

²⁵⁴ *See id.* at 92.

²⁵⁵ *See id.*

²⁵⁶ MARIANELA LÓPEZ-GALDOS & GARGI YADAV, COMPETITION AUTHORITIES: PROSECUTORIAL/NON-PROSECUTORIAL SYSTEMS AND THE FIGHT AGAINST CARTELS 19 n.47 (2016), <http://ssrn.com/abstract=2757880>.

	Number of Accusations	Type of Violation
2000	0	
2001	0	
2002	0	
2003	1	Bid-rigging
2004	0	
2005	2	Bid-rigging
2006	1	Bid-rigging
2007	2	Bid-rigging
2008	1	Bid-rigging
2009	0	
2010	0	
2011	0	
2012	1	Bid-rigging

Table 2: The number of “accusations” filed by the JFTC with the Public Prosecutor’s Office²⁵⁷

²⁵⁷ JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2000), https://www.jftc.go.jp/en/about_jftc/annual_reports/2000_index_files/japan2000.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 7 (2001), https://www.jftc.go.jp/en/about_jftc/annual_reports/2001index_files/Japan01.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 6 (2002), https://www.jftc.go.jp/en/about_jftc/annual_reports/2002index_files/Japan02.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2003), https://www.jftc.go.jp/en/about_jftc/annual_reports/2003index_files/japan03.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 3 (2004), https://www.jftc.go.jp/en/about_jftc/annual_reports/2004index_files/japan04.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 4 (2005), https://www.jftc.go.jp/en/about_jftc/annual_reports/2005index_files/japan05.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2006), https://www.jftc.go.jp/en/about_jftc/annual_reports/2006index_files/japan06.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2007), https://www.jftc.go.jp/en/about_jftc/annual_reports/2007_index_files/japan07.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 4 (2008), https://www.jftc.go.jp/en/about_jftc/annual_reports/2008index_files/japan08.pdf; JAPAN FAIR TRADE COMM’N, ANNUAL REPORT ON

Summarizing sections A and B briefly, while criminal sanctions are on the books in Japan, these sanctions are not systematically enforced, and even in the uncommon cases that proceed to a conviction, individuals do not serve time in jail. This is a criminal law regime that is too weak, we submit, to achieve satisfactory deterrence. In Korea, while the KFTC is a remarkably active investigator of cartels, and while it regularly refers (mostly bid-rigging) cases to the prosecutor (especially since the 2013 amendment of the MRFTA), here again it is rare for individual cartelists in Korea to be incarcerated. In China, there is simply no criminal regime for standard cartels under the Anti-Monopoly Law.

B. Defining Moral Wrongfulness of Cartels

As a general matter, the vitality of criminal provisions aimed at putting individual wrongdoers in prison largely depends on whether the society in the relevant jurisdiction (as reflected by the attitudes of judges) accepts that cartel conduct is sufficiently odious.²⁵⁸ The same is true of East Asian countries. The adoption of statutory provisions prescribing severe consequences for bad behavior says little about their actual effectiveness; such provisions must be perceived as legitimate and appropriate means of pursuing goals of ex-ante prevention and ex-post punishment.²⁵⁹ That is not to say that legal provisions cannot precede a generally agreed norm or set of norms; the United States again provides an example of a country where the public perception of a rough equivalence between price-fixers and thieves in business garb did not emerge until many decades after criminal sanctions were formalized by the Sherman Act. In our view, the critical issue is not whether criminal sanctions precede or follow the development of public acceptance of the moral wrongfulness of cartels; the point, rather, is that this acceptance is indispensable if such sanctions are to be, in the long run, effective and sustainable.

According to Stuart Green, moral wrongfulness is a norm-based concept in the sense that a given act or practice is morally wrongful if it violates a moral

COMPETITION POLICY DEVELOPMENTS IN JAPAN 6 (2009), https://www.jftc.go.jp/en/about_jftc/annual_reports/2009index_files/japan09.pdf; JAPAN FAIR TRADE COMM'N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 4 (2010), https://www.jftc.go.jp/en/about_jftc/annual_reports/2010index_files/japan10.pdf; JAPAN FAIR TRADE COMM'N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2011), https://www.jftc.go.jp/en/about_jftc/annual_reports/2011index_files/OECDAnnualReport2011.pdf; JAPAN FAIR TRADE COMM'N, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN JAPAN 5 (2012), https://www.jftc.go.jp/en/topics/topics131024_files/AnnualReportOECD2012.pdf.

²⁵⁸ See generally *supra* note 19 and accompanying text.

²⁵⁹ Many authors have emphasized that the adoption of formal provisions in a given jurisdiction is inconclusive as concerns the more meaningful question of whether those provisions are accepted within a society and effectively enforced. See, e.g., Mel Marquis, *Competition Law in the Philippines: Economic, Legal and Institutional Context*, 6 J. ANTITRUST ENF'T 79 (2018).

norm or standard.²⁶⁰ If the ultimate goal of applying criminal penalties in cartel cases is to deter future infringements (thereby preventing social harms such as diminished consumer welfare or diminished investment and innovation), it would not be sufficient to identify the harmful effects of cartels as being limited strictly to economic harm: one can at least contend, as Whelan has, that if cartels are not also defined as being “morally wrong” in nature, the use of criminal law will be unjust.²⁶¹ In this regard, from a Confucian perspective, it is not difficult to argue that cartel behavior is contrary to the principle of “righteousness” (*yi*) because it is a devious and duplicitous path to artificial profits and because righteousness would lead a virtuous person to shun profits derived in such a manner.²⁶² Competition authorities, in recognition of the need for public acceptance of their efforts to fight cartels, try to tap into the public’s sense of moral right and wrong by comparing abstract notions such as “collusion” or “market sharing” to the common crimes of theft and fraud, which are generally easier to understand.²⁶³

In view of the above, the role of political will is of great importance: if there is enough political will to define cartels as crimes, and if the government matches solemn pronouncements with the concrete resources needed to suppress such crimes, then this message of condemnation and stigma may well rebalance incentives and transform commercial behavior.²⁶⁴ However, establishing political will can be tricky since, if central and/or local bureaucrats are guided at least partly by private interests (i.e. in dereliction of their public interest duties), they may

²⁶⁰ See Green, *Why It’s a Crime to Tear a Tag Off a Mattress*, *supra* note 25, at 1551 (citing the clear cases of killing, raping, and stealing, and suggesting that contempt of court also belongs to the category of moral wrongfulness).

²⁶¹ See Whelan, *Cartel Criminalization*, *supra* note 14, at 541–42.

²⁶² As reported in the *Analecets (Lun yu Zhu Shu)*, Confucius holds that “[w]ealth and high social status are what men desire, but unless they acquire them in a morally righteous way, these riches should not be kept. Poverty and low social status are what men dislike, but if this is a morally righteous path, one should not try to avoid [them].” 《论语注疏》（富与贵是人之所以欲也，不以其道得之，不处也；贫与贱是人之所以恶也，不以其道得之，不去也。） ALEX C.K. CHAN & ANGUS YOUNG, *CONFUCIAN PRINCIPLES OF GOVERNANCE: PATERNALISTIC ORDER AND RELATIONAL OBLIGATIONS WITHOUT LEGAL RULES* 11 (2012), <https://ssrn.com/abstract=1986716> (providing translation).

²⁶³ For example—and despite the fact that EU competition law has no criminal law component *stricto sensu*—former EU Competition Commissioner Kroes explained plainly and succinctly that “cartels rip-off consumers.” European Commission Press Release Speech/09/54, *Tackling cartels – a never-ending task* (Oct. 8, 2009).

²⁶⁴ Our reference here to the social message communicated by criminal sanctions recalls the “expressive function” of such sanctions. See Laetitia Mulder, *When sanctions convey moral norms*, *EUR. J. L. & ECON.* 1, 2 (2016) (“[A] sanction may more generally signal that the group or larger society disapproves of the sanctioned behavior. As such, sanctions provide social validation for rules and may actually foster the moral conviction that the sanctioned behavior is ‘bad’ This expressive function of sanctions may partly explain why sanctions steer behavior.” (citations omitted)).

benefit economically or politically from cartels and may thus refuse to take action against them, or they may find ways to prohibit them while preserving exemption mechanisms that may be manipulated.²⁶⁵ On the other hand, even if bureaucrats are “good” in the sense that they act according to the priorities of the public, they may be reticent to criminalize cartels if public awareness of the harm caused by cartels is limited.²⁶⁶ For example, and as noted earlier, KFTC officials as well as judges in Korea were traditionally reluctant to favor criminal prosecution and punishment in cartel cases, and this “under-enforcement” was partly due to the fact that the general public was unaware of the harm caused by cartels.²⁶⁷ At the same time, it has also been observed that under-enforcement is itself a factor that contributes to the lack of awareness of that harm (*e.g.*, since enforcement draws attention from the media); and this leads to a vicious circle that impedes desirable moves toward greater accountability for socially harmful conduct.²⁶⁸

As is clear from our earlier discussion of the “Confucianization” of the (penal) law, the justification for criminal punishment is not exactly based on “harm to others”—a western concept expressed well by John Stuart Mill, for example²⁶⁹—rather, it is based on the violation of the established moral rules and ritual norms that govern society.²⁷⁰ Thus, the moral wrongfulness of price-fixing (or market-sharing, etc.) is derived from the unethical means employed to make a profit (a violation of *yi*, 义). Confucian scholars, including Mencius in particular, strictly rejected the pursuit of profit as a principle of good governance, as in his view profit-

²⁶⁵ Where exemptions are granted liberally, the effect of a prohibition is watered down substantially. In Japan, for example, in the period from 1963 to 1972, a thousand cartels were exempted. See Iyori Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES* 56, 79 (Gary Saxonhouse & Kozo Yamamura eds., 1986).

²⁶⁶ Many commentators have argued that one of the most important factors that should be taken into account when considering whether to criminalize cartel conduct is whether criminalization is supported by public opinion. See *e.g.*, Julie Clarke, *The increasing criminalization of economic law - a competition law perspective*, 19 *J. FIN. CRIME* 76, 77 (2012); see also Maurice Stucke, *Morality and Antitrust*, 2006 *COLUM. BUS. L. REV.* 443, 543 (2006); Christine Parker, *The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 *L. & SOC. REV.* 591, 598 (2006).

²⁶⁷ See Sanghyun Lee, *Using Action in Damages to Improve Criminal Penalties Against Cartels: Comparative Analysis of Competition Law of United States and South Korea*, 16 *CURRENTS: INT’L TRADE L. J.* 55, 58–60 (2007) (noting that civil actions were likewise rare).

²⁶⁸ See Lee, *supra* note 267, at 60.

²⁶⁹ See JOHN STUART MILL, *ON LIBERTY* 29 (2d ed. 1863); see generally JOEL FEINBERG, *HARM TO OTHERS* (1987) (discussing the harm principle, the common sense view that prevention of harm to persons other than the perpetrator is a legitimate purpose of criminal legislation).

²⁷⁰ See *supra* Part II, Section A.

making may cause social disorder.²⁷¹ Furthermore, Confucian constitutionalism links moral virtue with the rule of ritual and propriety (*li*): a virtuous ruler who believes and practices *li* will be trusted to morally transform the people and to create an ideal social order.²⁷² Thus, the meaning of moral virtue can be affected by the way in which *li* is interpreted. When monopolies are created through state support during a process of “state-led economic development,” the existence of such enterprises, and the rents they enjoy, appear to be justified by the Confucian constitutional order.²⁷³ In Japan, when the Oil Cartel case was appealed to the Supreme Court in the 1980s, the Court upheld some of the convictions but found that certain defendants lacked the criminal intent (*kōi*) necessary for conviction because those defendants had acted in accordance with the administrative guidance of the Ministry of International Trade and Industry (MITI).²⁷⁴ The lack of criminal intent was explained by the lower court, the Tokyo High Court, in the same case:

“[T]he defendants mistakenly believed that their own acts were immunized from illegality and therefore that they lacked any consciousness of illegality, and . . . therefore there is sufficient ground to find that the defendants acted without intention. Accordingly, there is no proof of a crime and we find the defendants not guilty.”²⁷⁵

However, the Oil Cartel episode suggested an emerging recognition of the damage caused by cartels, and in 1991 the JFTC adopted guidelines which contemplated a greater willingness to refer cases to the Public Prosecutor’s Office for criminal action.²⁷⁶ Between 1991 and 1995, the JFTC made criminal referrals against cartels in the polyvinyl chloride stretch film market, the privacy seal market, and in certain markets for electrical equipment.²⁷⁷ The JFTC guidelines and the new interest in seeking criminal sanctions reflected a shifting zeitgeist, and they

²⁷¹ Instead, good governance should be based on righteousness (*yi*, 义). Cheng, *Legalism Versus Confucianism*, *supra* note 44, at 286–87.

²⁷² See Sungmoon Kim, *Confucian Constitutionalism: Mencius and Xunzi on Virtue, Ritual, and Royal Transmission*, 73 REV. POL. 371, 374 (2011).

²⁷³ See Marquis & Ma, *Confucian Bureaucracy*, *supra* note 140, at 42–43.

²⁷⁴ Yoichiro Hamabe, *Changing Antimonopoly Policy in the Japanese Legal System—An International Perspective*, 28 INT’L L. 903, 912 (1994) [hereinafter Hamabe, *Changing Antimonopoly Policy*].

²⁷⁵ Lawrence Repeta, *The Limits of Administrative Authority in Japan: The Oil Cartel Criminal Cases and the Reaction of MITI and the FTC*, 15 L. JAPAN 24, 50 (1982).

²⁷⁶ See Hamabe, *Changing Antimonopoly Policy*, *supra* note 274; AKIRA INOUE, ANTITRUST ENFORCEMENT IN JAPAN: HISTORY, RHETORIC AND LAW OF THE ANTIMONOPOLY ACT 279–80 (2012) [hereinafter INOUE, ANTITRUST ENFORCEMENT] (explaining that the JFTC intended to make criminal accusations in cases where cartels affected the national economy and in cases involving repeat offenses).

²⁷⁷ See INOUE, ANTITRUST ENFORCEMENT, *supra* note 276, at 280.

show how the culpability of cartel activities can be affected by the active involvement of a state organ: whereas Japan had traditionally been known as a “cartel archipelago,”²⁷⁸ the possibility of criminal sanctions and stigma is today taken more seriously.²⁷⁹

C. Moral Wrongfulness and Penal Law

Characterizing cartel behavior as morally wrongful may be a crucial step toward more active enforcement of criminal sanctions in this field—whether in the case of China, where a legal basis would be necessary; or in the case of Japan and Korea, where convictions and prison sentences are a formal reality, but where wrongdoers generally do not in fact go to prison.²⁸⁰ From a Confucian perspective, as suggested above, cartel conduct could be defined as morally wrongful on the ground that cartelists pursue profit in a manner offensive to righteousness.²⁸¹ They act unethically, for example, by concealing from consumers the artificially high nature of their prices.²⁸² Yet in general, this message of morality, stigma, and social condemnation has not been ardently and systematically conveyed to and absorbed by the public in East Asian countries—notwithstanding the fact that, as administrative agencies, the competition authorities in Japan and Korea actively and continuously investigate cartel cases.²⁸³ There still seems to be a lack of consensual understanding among the public (as reflected in public policies) that cartels are incompatible with righteous conduct and hence merit the kind of moral censure that is typical of traditional criminal conduct.²⁸⁴ This lack of clarity, and the insufficient

²⁷⁸ See BEEMAN, PUBLIC POLICY, *supra* note 247, at 40 (alluding to Japan’s reputation as a “cartel archipelago”).

²⁷⁹ See Marquis & Shiraishi, *supra* note 240, at 92–97 (describing the evolution of Japan’s fight against cartels from long periods of dormancy to the more aggressive efforts of the last two decades, although administrative enforcement continues to surpass criminal enforcement by far, particularly where the cartel in question does not involve bid-rigging).

²⁸⁰ See *supra* Part V, Section A.

²⁸¹ See Chen, *The Transformation of Chinese Law*, *supra* note 171; see also CHAN & YOUNG, *supra* note 262.

²⁸² In large part, of course, the effectiveness of a cartel depends on its capacity to exploit unsuspecting victims and to avoid being exposed (including by outside rivals and by defecting members of the cartel itself) so as not to trigger public and/or private enforcement actions. See Org. for Econ. Co-operation and Dev. [OECD], *Prosecuting Cartels without Direct Evidence of Agreement*, at 18, DAF/COMP/GF(2006)7 (Sept. 11, 2006), <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf> (“Cartels pose a special problem for enforcers because they operate in secret . . .”).

²⁸³ See *supra* Part V, Section A.

²⁸⁴ For example, in Japan, hard core cartels are not subject to *per se* illegality, as they are in many other jurisdictions. Instead, a substantial restraint of competition in the relevant market must be shown. As Kameoka explains, this flexibility “may partially reflect the traditional idea of Japanese business that a cartel is a necessary evil that has positive features,

stigma attached to cartel behavior, may also help to explain the lack of momentum toward a criminal prohibition of cartels in China. On the other hand, if future efforts can nudge the public toward a broad social norm that ties cartels to immorality and makes them clear offenses against the community, as opposed to mere welfare-detrimental price manipulations, there will be better prospects for an effective and sustainable criminal law regime with a strong deterrent impact.

D. Prospects for Criminal Enforcement in East Asia

Especially since the 1990s, there has been a clear global trend according to which antitrust laws are “getting tougher”; fines have increased dramatically in cases involving cartels and some abuse of dominance cases,²⁸⁵ and in the specific context of cartel cases, leniency is often a major enforcement tool.²⁸⁶ Adopting and effectively implementing criminal sanctions in cartel cases, including imprisonment for culpable individuals, represents another step toward vigorous enforcement.²⁸⁷ With the historic influence of US antitrust law dealing with socially harmful cartels, there is little doubt that the economic benefits of criminal sanctions for cartels is

for example because it is perceived as yielding greater stability and enhanced certainty.” ETSUKO KAMEOKA, *COMPETITION LAW AND POLICY IN JAPAN AND THE EU* 42 (2014). With respect to China, Zheng has underlined an ambivalent attitude toward cartels which stems from a perception that industrial price-fixing can “reinstate” a *de facto* form of price regulation that was to some extent lost as a consequence of China’s price reforms. See Wenton Zheng, *State Capitalism and the Regulation of Competition in China*, in *ASIAN CAPITALISM AND THE REGULATION OF COMPETITION* 144, 154–56 (Michael Dowdle et al. eds., 2013). As Zheng remarks: “The tension between the need for market pricing and the need for addressing structural distortions has led to a wide gap between how cartels are treated under formal laws and how cartels are treated in practice. On the one hand, there are laws and regulations that strictly prohibit cartels. On the other hand, there are public, widespread attempts at [forming] cartels, so public and widespread that the media routinely reports them with a sense of resignation and even normalcy.” *Id.* at 154.

²⁸⁵ On the use of corporate fines (and on their weakness compared to sanctions that effectively target individuals), see generally Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 *COMPETITION POL’Y INT’L* 3 (2010).

²⁸⁶ See generally ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: THE LENIENCY RELIGION (Caron Beaton-Wells & Christopher Tran eds., 2015) (collecting various essays demonstrating the heavy emphasis typically placed on leniency as a detection tool and highlighting dubious assumptions as well as practical issues that may limit the practical success of leniency policies in several jurisdictions).

²⁸⁷ See Christopher Harding, *Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalization of Cartels*, 14 *CRITICAL CRIMINOLOGY* 181, 182 (2006); see also Terry Calvani & Torello H. Calvani, *Cartel Sanctions and Deterrence*, 56 *ANTITRUST BULL.* 185, 199 (2011).

recognized by competition authorities in East Asia.²⁸⁸ As we have seen, criminal cartel laws do exist in Japan and Korea, and to some extent they are enforced.²⁸⁹ However, especially in the case of normal cartels that do not involve bid-rigging (where the victims are public entities, where the incentives for prosecution are greater, and where there are more criminal legal provisions beyond the antitrust statute), these laws are far from reaching their potential. In particular, their existence does not translate into cartelists actually serving time in prison.²⁹⁰ As we have argued, those laws are not employed to their full capacity because in the countries concerned there is not yet a thorough understanding and public acknowledgment of the moral wrongfulness of cartels, and local social norms have not yet caught up to the “enlightened” policies developing in an arcane sphere of economic law.

At the institutional level there is another issue to be managed carefully. Under the current administrative enforcement model in East Asia, the competition agency generally (subject to exceptions) has the exclusive power to initiate a criminal case, and it is the competition agency—not the prosecutor (though the prosecutor may provide assistance)—that is empowered to collect evidence.²⁹¹ In these circumstances, it is important to avoid over-reliance on the administrative agency, in particular if there are deficiencies in investigatory expertise and if the agency—whether due to its own practice or due to broader national laws and traditions—does not comply fully with appropriate due process standards in criminal cases.²⁹² Furthermore, successful prosecution normally requires relatively smooth cooperation between the competition authority and the prosecutor; however, miscues, miscommunication, and friction may potentially arise since each authority is independent of the other, each has different priorities, and each is subject to different standards of proof (the prosecutor being required to prove her case beyond reasonable doubt).²⁹³

²⁸⁸ See, e.g., Akinori Uesugi, *How Japan is Tackling Enforcement Activities Against Cartels*, 13 GEO. MASON L. REV. 349, 359–62 (2005) (describing the impetus behind reforms that bolstered Japan’s surcharge system and introduced a leniency program in order to enhance cartel enforcement).

²⁸⁹ See *supra* Part V, Section A.

²⁹⁰ See *id.*

²⁹¹ See Simon Vande Walle, *The Saitama Saturday Club Case: Political Meddling, Public Opinion, and Antitrust Enforcement in Japan at a Turning Point*, 18 J. JAPANESE L. 143, 160 (2013).

²⁹² See *id.*

²⁹³ See Marquis & Shiraishi, *supra* note 240, at 103 (in order to try to facilitate coordination between the two authorities, “the Prosecutor established a system of the Meeting on Criminal Referral with the JFTC. The Meeting is said to be the forum for choosing those cases where the Prosecutor feels it is most likely to win in court: in other words, the Meeting seems to have the effect of ensuring that the JFTC does not bring difficult cases with inadequate probative evidence. On the other hand, the relationship between the JFTC and the Prosecutor has been at times a rocky one, and the tensions between these institutions may perhaps dampen the JFTC’s enthusiasm to refer cases even where it could put forward a solid case.” (footnotes omitted)).

VI. CONCLUSION

In light of the global debate on whether to apply criminal law to anti-competitive activity, and if so, how aggressively and through which modalities, it is important to consider the particularities and traditions of local legal culture. Focusing on East Asia in this article, we have argued that in many respects the Legalist school of ancient China and the long process of the Confucianization of criminal law are vital philosophical underpinnings of China's legal system, and they have also influenced, albeit to a lesser extent, the legal systems of Korea and Japan. We have suggested a historical-cultural explanation for the relatively limited extent to which individual wrongdoers are prosecuted and actually punished (suspended sentences notwithstanding) for cartel behavior in the countries concerned; and we have emphasized the importance of going beyond deterrence-based justifications for criminal sanctions and developing the moral foundations for such sanctions. We conclude by briefly summarizing the following points.

First, we have argued that, when discussing the criminalization of cartel conduct in East Asian countries, it may be of limited value to dwell on optimal deterrence theory; more important, and frequently overlooked, is the need to appreciate the role of moral wrongfulness and need to tie this stigma, in the public consciousness, to cartels. Our historical review of the Legalist tradition and the punitive legal culture in East Asia suggests that enforcers in this region are already embedded within a culture that places heavy emphasis on strict individual sanctions and deterrence. It is therefore unnecessary to educate these officials about how criminal sanctions may enhance deterrence of cartels, and in China, which has not introduced criminal penalties for standard cartel conduct, the institutional barriers to doing so may not be insurmountable.

Second, we have suggested that criminal sanctions in East Asia would come closer to realizing their potential if the public understanding of cartels—which are too often seen as strictly economic misconduct—shifts to a morally charged conception whereby cartels violate not just the law but society's deeply ingrained norms. A shift of this kind would reduce a perceived dissonance between the severity of criminal sanctions and a type of conduct whose perniciousness is underappreciated and generally not framed in terms of immorality. In short, a message of the moral wrongfulness of cartels is essential. Such a message could usefully draw on the traditional Confucianist system of ethics. We have therefore recounted the historical fusing of the Confucianist and Legalist traditions in ancient China, which provided a more meaningful foundation for the law and a more edifying basis for compliance with the law's requirements. In particular, cartel behavior offends Confucian ethics because it constitutes improper profit-making in violation of righteousness (*yi*); it would be wise policy to define cartels as being morally wrongful in these terms. Doing so will help to establish and maintain better conditions for a system of individual sanctions that is effective and in tune with local norms and values.

Third, Confucian moral thinking perceives moral norms as a system of contextual actions in accordance with one's role and status within a system of social hierarchy. In contrast with Western philosophy, morality in the classical Confucian texts is not an individualistic concept; it is rooted instead in social context and established norms. From this perspective, it may not be adequate to define a commercial act as illicit through a lens that focuses solely on the act itself. The act should be evaluated and defined with reference to the will and needs of the State (which itself must adhere to good governance in accordance with Confucian doctrine). Moreover, the tradition of institutionalizing policies through law and applying legal methods to promote public (often political) goals may pose challenges for arriving at a consistent understanding of moral wrongfulness. Calculating private damages or the economic loss of "harm to others" would be insufficient to justify criminalization. Since modern economic laws in East Asian countries are derived in part from the Legalists' tradition of legal pragmatism, the promulgation and enforcement of such laws are expected, to some extent, to be consistent with political purposes. Thus, a more active use of criminal penalties faces the difficulty of striking the balance between punishing wrongdoers and preventing the abuse of power while at the same time avoiding or minimizing decision errors.

Finally, in societies where bureaucratic systems have been shaped by the Confucian tradition, the administrative enforcement of competition may be more readily accepted compared to criminal enforcement. When legal professionals, and in particular prosecutors and judges, are themselves educated in the legal-cultural environment that does not traditionally attach the same opprobrium to cartel conduct that applies to more established forms of crime, prosecutors and courts may be reluctant to accept individual imprisonment as an enforcement tool in the field of competition law. They may be more comfortable with administrative enforcement by an agency that applies, where appropriate, administrative fines (or surcharges) and administrative remedies.²⁹⁴ This suggests that formal developments at the level of legislation—which may express the State's support for criminal sanctions by making penalties more severe and/or by expanding the possibilities for administrative agencies to make criminal referrals—are more likely to make a meaningful impact on local norms and behavior if they are supported by a change of perception within the bureaucratic culture as well as among the broader public.



²⁹⁴ See Boling, *The Role of Prosecutors in Japanese Antimonopoly Law Criminal Cases*, *supra* note 253, at 93 ("From the prosecutor's perspective, if an administrative enforcement action has already been taken (or is contemplated) by the JFTC, the need for additional criminal prosecution is arguably lessened. From the JFTC's view point, if it has already accomplished its main objective by successfully bringing an administrative action against the cartel, why should it devote limited resources and time trying to persuade skeptical prosecutors to accept the referral?").