

A dynamic splash of water in shades of blue, moving from the top right towards the center, set against a solid blue background.

The Adversarial System
vs.
The Inquisitorial System
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Different legal systems in different countries

The Adversarial System ----- common law countries

The Inquisitorial System ----- civil law countries

Globalization is the big issue in modern policy

The obvious consequence is that knowledge of the law of jurisdictions out of one's home is no longer reserved to comparative lawyers.

The less obvious consequence is that the role, the analysis, the legal ethics, a lot of things of the law are no longer tenable in their traditional forms.

Interesting and controversial



Concepts and the comparisons

Ethical foundations

“the role of attorney in adversarial system”

“the comparison with the inquisitorial system”

“a history of Chinese inquisitorial system”

Cases

Gideon v. Wainwright

The Simpson Murder Case

The Liu Kaili Case

Concepts and Comparisons

Concepts

The adversary system means a system arrives at a decision by having each side to a dispute present its best opinion and then permitting a neutral decision-maker to determine the facts and apply the law in light of the opposing presentations of the two sides.

An inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case.

Comparisons

legal premise

The adversary system: partisan advocacy by the two opposing sides will best lead to the determination of truth

The inquisitorial system: the truth is best discovered through a disinterested inquiry conducted by a magistrate

Judge

In adversarial system: referee between the defence and the prosecutor

In inquisitorial system: fact-finder, busy

declare verdict

In adversarial system: jury, half secret

In inquisitorial system: judge, open

Produce evidence

In adversarial system: the defendant and the prosecutor

In inquisitorial system: the judge

Pro-inquisitorial system

control lies more in the hands of the judges; reduces the disturbance of the attorneys

Pro-adversary system

equal opportunity to present opinion; fairness; maintain public confidence

Evitts v. Lucey (1985) “The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”

Ethical Foundation

Adversarial system: the role of the counsel

A brief history

- **The adversary system developed as England moved from a rural to a more urbanized society.**
- **When the jury system was initially established, jurors were usually persons who could decide disputes based on their first-hand knowledge.**
- **As English society became more urbanized, a method had to be developed for presenting the facts to the jury.**
- **The structure of the trial changed until the adversary system predominated.**

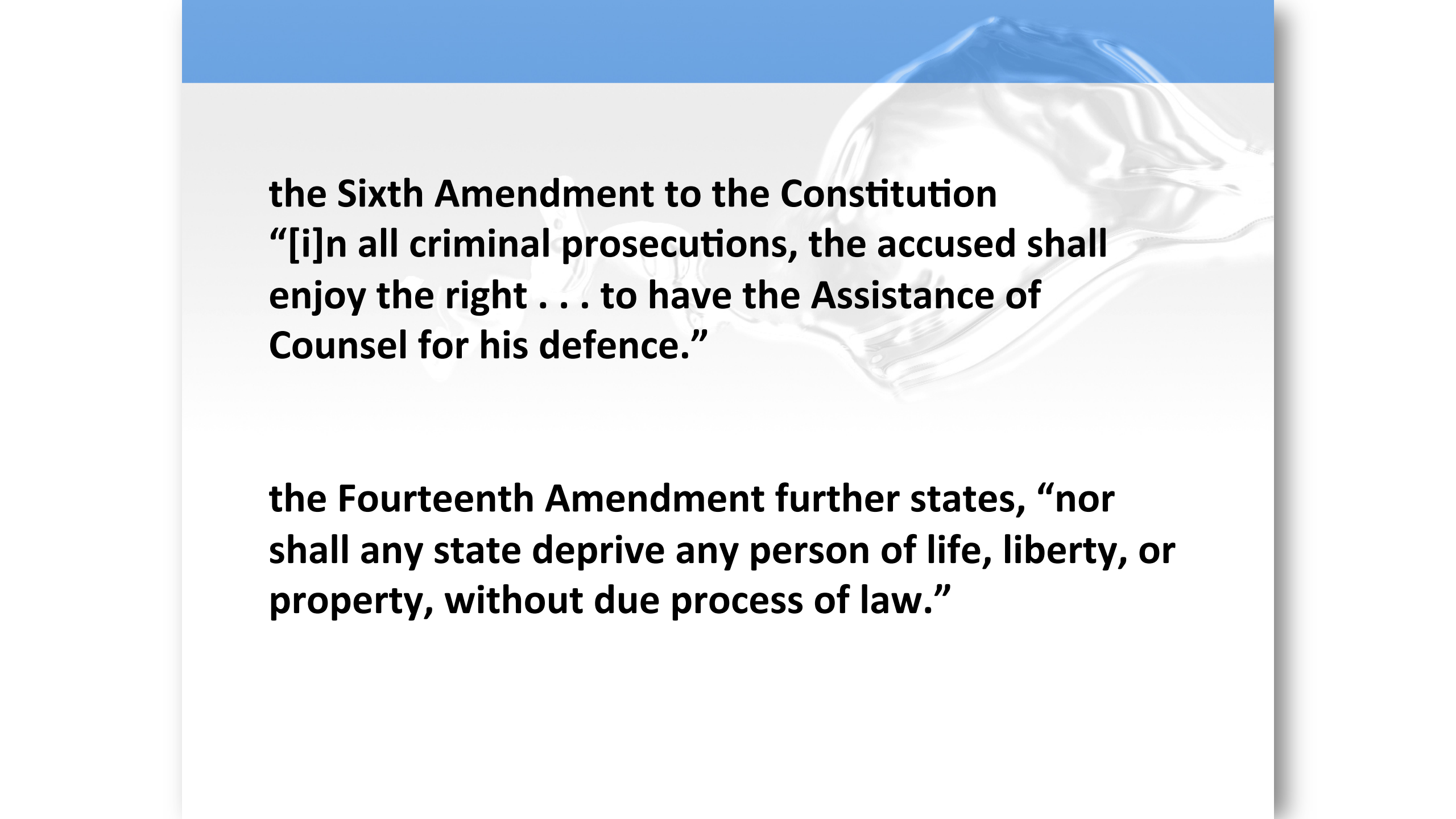
The role of the counsel

“the counsel’s duty leads to the exculpation of the guilty through the use of games” ----- Evan Whitton

Constitutional right to have the assistance of counsel.

the Sixth Amendment to the Constitution

the Fourteenth Amendment - Due Process Clause



the Sixth Amendment to the Constitution
“[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”

the Fourteenth Amendment further states, “nor shall any state deprive any person of life, liberty, or property, without due process of law.”

Betts v. Brady, 316 U.S. 455, (1942)

“In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be ‘allowed’ counsel or should have a right ‘to be heard by himself and his counsel’, or that he might be heard by ‘either or both’, at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant.”

Powell v. Alabama,, 287 U.S. 45, (1932)

“[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

Gideon v. Wainwright (1963)

The states have a duty to provide and pay for counsel for all indigent defendants charged with a felony.

- **In 1961**
- **Burglary**
- **Accusation: a formal charge of wrongdoing brought against a person**
- **too poor to afford counsel**
- **guilty verdict**
- **appeal to the United States Supreme Court**
- **I believe that each era finds a improvement in law.**



Gideon v. Wainwright (1963)

“in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”



Argersinger v. Hamlin

The state was required to provide counsel in any case in which the defendant might be given an active sentence.

Alabama v. Shelton

The defendant faced a suspended sentence of two years, which could have resulted in incarceration if activated. The Court held that the state was required to provide counsel in such cases.



Why there's even moral criticism to very useful lawyers?

In the United States, aggressively adversarial defense counsel is viewed by the ordinary citizen in many cases not as an aid to just outcomes, but rather as an impediment.

The adversarial defense attorney has situational ethics--the attorney's **first duty is to her client, not to society, or to truth.**

two overlapping roles

**the role of quality factfinder
institutional role of acting as an independent
check on legislative and executive power.**



**some of the procedures adopted in the American
system are well-suited to the first goal
("truthfinding"), but other procedures undermine
it in support of the second goal ("truth-
deflecting.")**

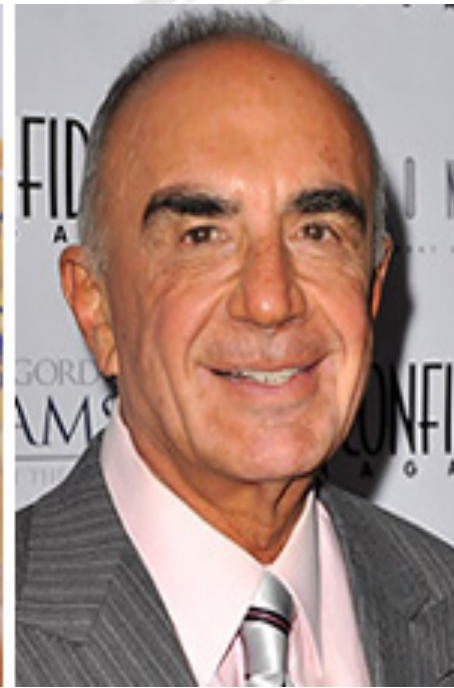
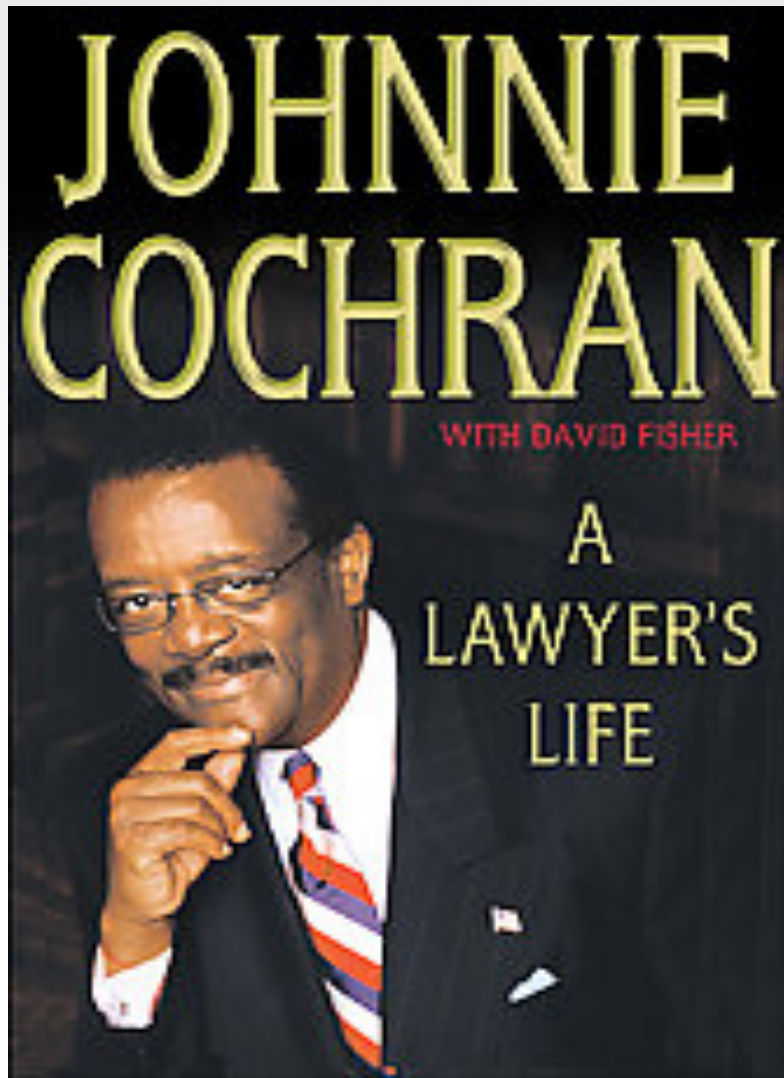
The Simpson Murder Case

- "O. J." Simpson
- June 12, 1994
- Nicole Brown Simpson: the ex-wife
- run away - the highway chase
- no murder weapon and no witnesses to the murders
- DNA evidence: blood, sock, glove
- high-profile lawyers
- the blood evidence: polluted
- star policeman Fuhrman: racist
- not guilty in October, 1995











Is the Simpson Murder Case a success of the adversarial system?

This system has been questioned because its lack of a clear moral standard, the system itself can't guarantee its operation conform with social moral demand, it could even stimulate lawyers practising within it to further blur boundaries of moral.

The Comparison with the Inquisitorial System

the contrasting philosophical foundations of each system

the inquisitorial system values more highly the community's gain through the proper conviction of those who are guilty of an offence, whereas the adversarial system values above this the protection of the accused individual's autonomy.



criminal procedure in inquisitorial system

initial investigation - the judicial police

Prosecutor – supervise

The right to silence - duty to reveal the truth

Lawyer – not present in interrogation

The judge – independent, search for the material truth

On trial – judge controls (process, witness, evidence...)



the judge controls the court

Everyone is bound to co-operate with the administration of justice with a view to revelation of the truth.

arrange and evaluate

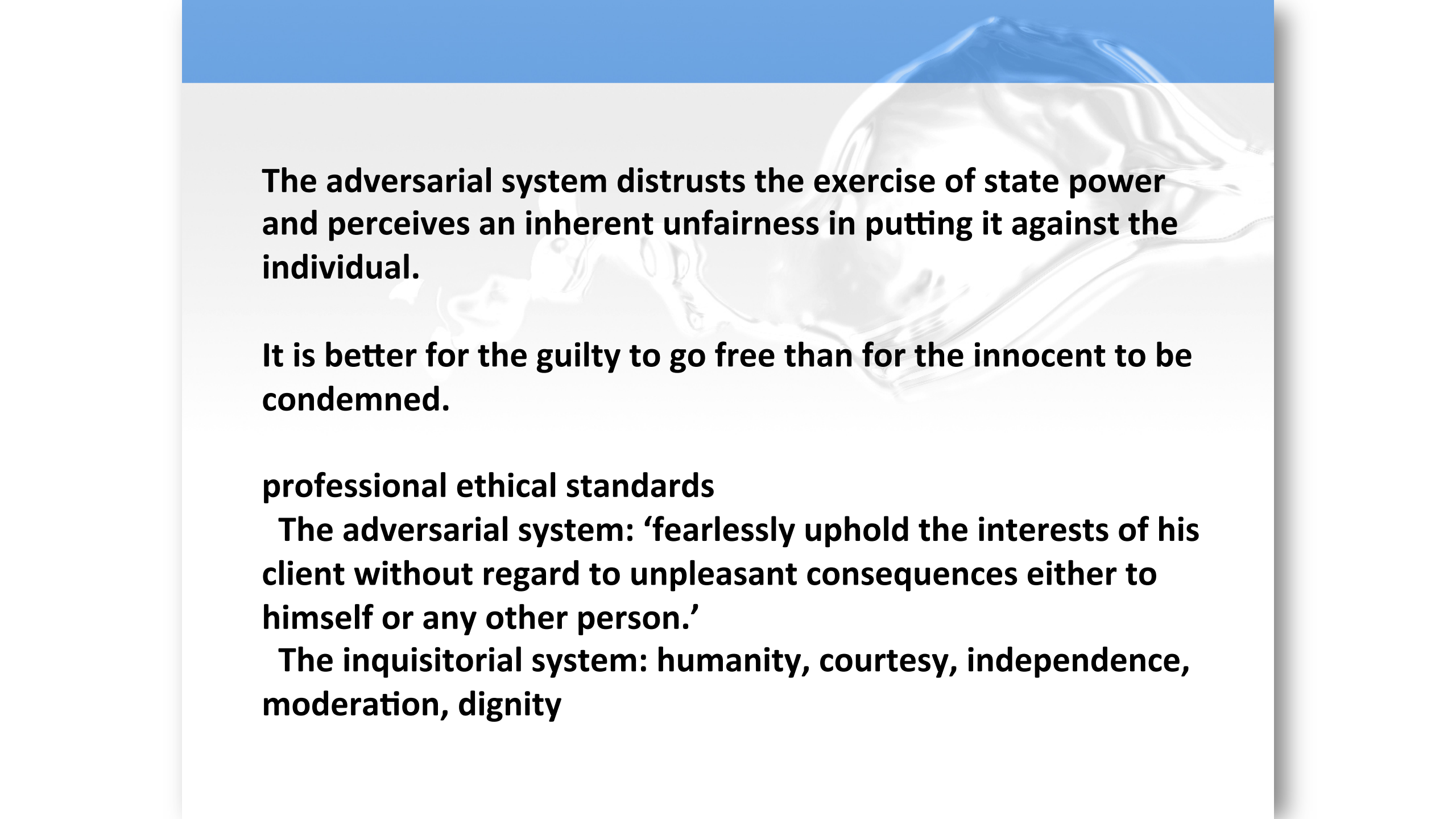
The control lies more in the hands of the judges who is theoretically well trained and impartial, and because the courts in inquisitorial system are said to have as their object the investigation of the truth.

The Philosophical Foundations of Inquisitorial and Adversarial Systems of Criminal Justice

At some level both criminal justice systems are designed to uncover the truth

-- the inquisitorial process places a higher value on the discovery of truth, whereas the adversarial process is only prepared to discover truth within strict evidential and procedural boundaries

The judge-led inquisitorial procedure allows greater interference in the life of an individual accused of a crime - the procedure is seen as being impartial rather than aimed at securing a conviction



The adversarial system distrusts the exercise of state power and perceives an inherent unfairness in putting it against the individual.

It is better for the guilty to go free than for the innocent to be condemned.

professional ethical standards

The adversarial system: ‘fearlessly uphold the interests of his client without regard to unpleasant consequences either to himself or any other person.’

The inquisitorial system: humanity, courtesy, independence, moderation, dignity

A background image showing a hand holding a scale of justice, symbolizing law and equity. The image is semi-transparent and serves as a backdrop for the text.

A History of Chinese Inquisitorial System -a history of Chinese legal culture

Law in China has been a complex mix of traditional Chinese approaches and Western influences.

- the Confucian philosophy and the Legalist philosophy**
- the Republic of China (1911), Western-style legal code in the civil law tradition**
- the People's Republic of China (1949), Soviet-influenced system of socialist law**



**"fair", "straight"
and "just"**

**standard,
measurement,
and model**

"The word 'law' in Western languages has four different interpretations in Chinese as in lǐ (理: "order"), lǐ (禮: "rites", "decorum"), fǎ (法: "human laws") and zhì (制: "control")."

——Yan Fu



Xing (刑) ---
decapitation
"five
penalties":
tattooing,
disfigurement
, castration,
mutilation,
and death



Confucianism and Legalism

Confucianism

the state should lead the people with virtue and thus create a sense of shame which will prevent bad conduct.

Legalism

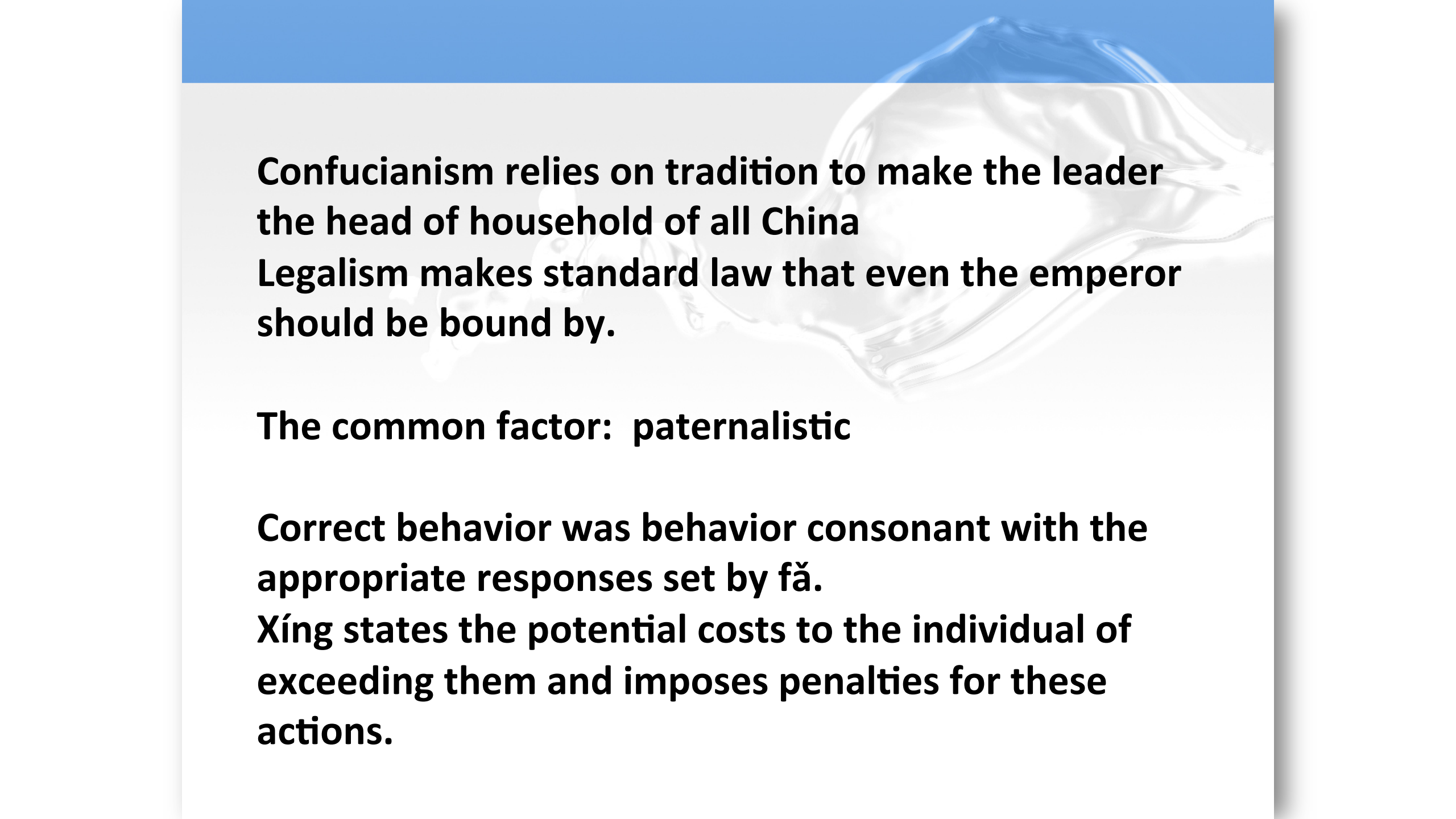
law is to be publicly issued standards of conduct backed by state coercion.



孔子 (Confucius)
(Han Fei Zi)



韩非子



Confucianism relies on tradition to make the leader the head of household of all China
Legalism makes standard law that even the emperor should be bound by.

The common factor: paternalistic

Correct behavior was behavior consonant with the appropriate responses set by fǎ.

Xíng states the potential costs to the individual of exceeding them and imposes penalties for these actions.



3 key words

Virtue —— Confucianism

Law —— Legalism

Paternalistic —— both

combine together in Chinese legal culture

Confucianism

- **basic premise: human beings are fundamentally good**
- **ruling through li (禮) : traditional customs, mores, and norms**
- **lead to a harmonious social order and provide the additional benefit of improving an individual's inner character and the overall quality of the society**
- **setting an example: the ruler**
- **The ruler needs only to make himself respectful, and the people will be induced and enlightened by his superior virtues to follow his example.**

Legalism

**utilization of codified laws and harsh punishment
to achieve social order**

all human beings are born evil and self-interested

**The ruler has the ultimate authority to decide
what the law should be.**

Abuse – Qin dynasty

Confucianism and Legalism

**Opposite: one advocating for and one against the
use of formal laws**

Common: the ultimate authority to the ruler

Han Dynasty - first combine

The Han dynasty retained the basic legal system established under the Qin but modified some of the harsher aspects in line with the Confucian philosophy of social control.

four sources of law: lü (律: "codified laws"), ling (令: "the emperor's order"), ke (科: "statutes inherited from previous dynasties") and bi (比: "precedents")

The Liu Kaili Case

- **17 years ago in 1996, 15 years old girl was murdered**
- **a suspect of theft**
- **the owner of the lost: Liu Kaili**
- **the only suspect**
- **no other evidence – confession**
- **Torture**
- **convicted of murder and sentenced to death with a two-year reprieve**
- **Acquitted last year**
- **without efficient supervision, the inquisitorial system would be more dangerous**





Thank You!