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The Compatibility of Confucianism and Law

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The Compatibility of Confucianism and Law

Sophia Gao¹ and Aaron J. Walayat²

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Abstract

It is initially odd to ask whether Confucianism is compatible with systems of law. Confucian thought has co-existed with Chinese legal systems throughout the various dynasties of China's long history. Nevertheless, despite the extensive laws that China has boasted, traditional Chinese legal thought is not typically recognized as a genuine rule-of-law system, given its focus on moral development and the "rule of man." In this essay, we argue that Confucianism, specifically Pre-Qin Confucianism, is compatible with the rule-of-law. We examine the different models of compatibility, including "soft compatibilism" in which we examine whether abstract concepts between Confucianism and legal systems are compatible, as well as co-existing and integrating compatibilism. Co-existing compatibilism sees Confucianism and the law occupying different spheres within the same legal system while integrating compatibilism sees Confucianism and the law coming together into a new system. In this way, Confucianism offers China an alternative to liberal democratic and Marxist theories of law.

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I. INTRODUCTION

To the Twentieth Century Chinese lawyer and legal philosopher John C. H. Wu, Chinese legal thought was dominated by a “backward and stagnant” conception of law caused by a devotion to the limited moral philosophy of Confucianism.³ Law, for Dr. Wu, at least at that time, could not sprout from morality. Therefore, the Confucian model for the law was inferior to the Legalist school of Shang Yang and Han Fei, which advocated clear laws and strict punishments. Following his friend, the Supreme Court Justice and champion of Twentieth Century American legal realism Oliver Wendell Holmes, Jr., Dr. Wu argued that the law could not be limited in its concern for the virtuous few, but must be designed to take into account the unvirtuous many.⁴ With the introduction of Western influences at the end of the Nineteenth Century, the Chinese legal tradition began to move away from the Confucian “strait-jacket” which had left China with a stagnant and moralistic view of the law.⁵ Confucianism, for all of its qualities, was not helpful in Dr. Wu’s early project of “Holmesianiz[ing] the Law of China!”⁶

Dr. Wu maintained a prevalent role in the development of the law in the Republic of China, the political entity in which he lived. He received degrees in the United States and Europe, published articles in American and Chinese law reviews, held teaching positions at the Comparative Law School of China in Shanghai and Northwestern University in Chicago, and served as a judge for the Provisional Court of Shanghai.⁷ He also maintained extensive correspondences with some of the legal luminaries of his time, including Felix Frankfurter, Roscoe Pound, and Justice Holmes.⁸ Dr. Wu went on to be the principal

3. Note, *Dr. Wu’s Constitution*, 132 HARV. L. REV. 2300, 2318 (2019).

4. See John C. H. Wu, *The Struggle Between Government of Laws and Government of Men in the History of China*, 5 CHINA L. REV. 53, 62 (1932).

5. *Id.* at 68.

6. JOHN C. H. WU, BEYOND EAST & WEST 206 (2018). Professor Teemu Ruskola, however, notes that reception of Chinese law in the West was not wholly negative. See TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW (2013). He notes, for example, that American statesman Benjamin Franklin admired the Qing legal code. *Id.* at 44.

7. *Dr. Wu’s Constitution*, *supra* note 3, at 2300.

8. *Id.* at 2300–11.

author of the first draft of the Permanent Constitution of the Republic of China, a constitution that was eventually ratified in 1946 and continues in some form in Taiwan.⁹ His many roles in China serves as an example of the Chinese legal mind of that period: a Western-educated individual that sought to modernize China by making the country more Western. Democracy, fundamental rights, and the rule-of-law were the key principles of the era, with only a minimized, or even privatized, place for Confucius.

Later in life, Dr. Wu would express gratitude to the ancient Chinese philosophies of Confucianism, Daoism, and Buddhism, describing himself as being born in their “milieu.”¹⁰ His thankfulness for these native traditions of China came from their role as his pedagogues for his eventual conversion to Catholicism, and though he never shakes his condescension for some of the more superstitious aspects of these traditions, he acknowledges how he was shaped by them.¹¹ For all of his attempts to modernize his country through the Western legal theory which he had spent his life studying, Dr. Wu could never truly rid his country, and himself, of the Confucianism that permeated his world.

Nor has China ever been able to shake its “indigenous resources” in its recent project of renewing Chinese law.¹² Many contemporary thinkers have drawn from Confucianism, as well as other traditional Chinese philosophies, in constructing alternative ways to address China’s current controversies. This includes the New Confucianism (新儒家), a contemporary movement represented by Mou Zongsan, Xu Fuguan, and Tang Junyi.¹³ Outside of the New Confucians, there have been many contemporary philosophers who have included interpretations of Confucianism in relation to Western philosophical traditions. The contemporary engagement of Confucianism is influential among philosophy departments in China and abroad.¹⁴

9. *Id.* at 2307.

10. WU, *supra* note 6, at 44.

11. *Id.*

12. RUSKOLA, *supra* note 6, at 227.

13. *See* NEW CONFUCIANISM: A CRITICAL EXAMINATION 1–42 (John Makeham, ed., 2003).

14. *See* TONGDONG BAI, AGAINST POLITICAL EQUALITY: THE CONFUCIAN CASE (2020); DANIEL A. BELL, THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY (2015); Baogang He, *Four Models of the Relationship*

Nevertheless, Western notions of the rule-of-law and democratic theory still remain influential, and even the most unconventional contemporary Confucian thinkers still conceive of a political system with elements of democratic forms of government.¹⁵ Even with a revival of Confucian thought in China, the Western political theory remains influential and cannot be ignored.

It is difficult to define “Confucianism.” Covering various themes, Confucianism is expansive as a school of thought, having undergone various transformations throughout Chinese history. In this essay, we focus specifically on pre-Qin Confucianism, specifically drawing from the *Analects*. Further, as Confucius did not have a general philosophy of jurisprudence, we will draw from political interpretations of Confucius’s moral philosophy. It is from this interpretation of Confucianism that we think is compatible with systems of law.

At first glance, it is odd to ask whether Confucianism is compatible with law. Confucianism has long co-existed with Chinese legal systems throughout various dynasties. Eric Li, for example, argues that China historically incorporated both Confucianism and Legalism to develop its government.¹⁶ While Confucianism emerged over Legalism as the preeminent philosophy of China, co-existing happily with Buddhism and Daoism, Li acknowledged that Legalism continued to remain an “integral” part of the Chinese government.¹⁷ Nevertheless, as discussed above, Chinese law is not recognized as a genuine rule-of-law system, given its focus on moral development and the “rule of man.” In this essay, however, we argue that Confucianism is compatible with the rule-of-law.¹⁸

Between Confucianism and Democracy, in CONTEMPORARY CHINESE POLITICAL THOUGHT: DEBATES AND PERSPECTIVES 131 (Fred Dallmayr & Zhao Tingyang eds., 2012); QING JIANG, A CONFUCIAN CONSTITUTIONAL ORDER: HOW CHINA’S ANCIENT PAST CAN SHAPE ITS POLITICAL FUTURE (Daniel A. Bell & Ruiping Fan eds., Edmund Ryden trans., 2013); YONG XIA, THE PHILOSOPHY OF CIVIL RIGHTS IN THE CONTEXT OF CHINA (2011).

15. The unconventional Confucian thinker Jiang Qing, for example, has argued for a form of government in which Confucianism permeates society at the foundational level. See generally JIANG, *supra* note 14. Though unconventional, however, Jiang’s model still envisions a trifurcated legislature with each house possessing checks-and-balances over the others. *Id.*

16. Eric Li, *China and the Rule of Law*, 3 AM. AFFS. J. 133 (2019).

17. *Id.*

18. Our methodology in this paper will follow the methodology we used in

One attempt to address the question of compatibility is Professor He Baogang's identification of four models describing the relationship between Confucianism and democracy. In his essay, Professor He identifies the models of the relationship as conflict, compatible, hybrid, and critical.¹⁹ However, even within his compatibility model, we can identify four additional models to describe the different ways the systems can be compatible: soft compatibilism, hard compatibilism, co-existing compatibilism, and integrating compatibilism.²⁰

Soft compatibilism and hard compatibilism examine *what* is compatible between Confucianism and democracy, such as the elements, aspects, or institutions being compared between traditions. Co-existing compatibilism and integrating compatibilism, on the other hand, distinguish *how* Confucianism and democracy can be compatible. The primary concern of these models is what a government that combines the two traditions might look like and how the traditions' different elements might work together.²¹

II. SOFT COMPATIBILISM: *FA*, *LI*, AND LAW

We will begin by looking at the "what" question. "What" are we comparing when we say that Confucianism is compatible with the rule of law? Asking the "what" question gives us two models: hard compatibilism and soft compatibilism. Hard compatibilism looks at the different legal institutions between Confucian and democratic systems.²² However, identifying institutions between the traditions is demanding as the development of institutions is often tied with their historical background.²³ Instead, we will begin by examining the abstract

our examination of the compatibility of Confucianism and democracy. Specifically, we examine compatibility through the four models of compatibilism we established in the previous analysis (i.e., soft, hard, co-existing, integrating). See Sophia Gao & Aaron Walayat, *Confucianism and Democracy: Four Models of Compatibilism*, J. CHINESE HUMANITIES (forthcoming 2021). While that analysis focused on the compatibility of Confucianism and democracy generally, this examination is primarily concerned with Confucianism and the rule of law.

19. He, *supra* note 14.

20. Gao & Walayat, *supra* note 18.

21. *Id.*

22. *Id.*

23. *See id.*

ideas or values upon which these legal institutions are based or attempt to manifest.

The comparison of abstract concepts is what we call soft compatibilism. Professor He, discussing this comparison, compares it to “color matching” referring to the comparison of concepts within one system with its counterparts in another.²⁴ In this section, we will compare the abstract conceptions of the law (*li* and *fa*) between Confucian and Western democratic systems.

We now have the difficult task of asking what is meant by the word “law.” Latin has two words that can be translated to mean law—*jus*, denoting the abstract nature of the law, and *lex*, referring to enacted laws.²⁵ More modernly, the Austinian definition of law describes the law as the command of a sovereign which an inferior must obey under threat of punishment.²⁶ Alternatively, sociologist Eugen Ehrlich refers to a “living law,” composed of norms resultant from influences outside of legal and political systems, including family, religious, and other social influences.²⁷ Luke T. Lee and Whalen W. Lai argue that there are two conceptions of the law in Chinese philosophy mirroring the Austin-Ehrlich definitions of law: *fa* (法) and *li* (禮).²⁸

Fa is the definition of the law associated with the Legalist school of thought. The Legalists “rel[ie]d] on the force of sanctions to obtain obedience to and compliance with the law, and therefore . . . stress[ed] government by *fa* or decree, as opposed to the Confucian emphasis on government by man and *li*.”²⁹ Thus, while *fa* is defined as “law,” its scope is narrow, focusing mainly on decree and punishment. *Li* is more difficult to translate, but it has been described as “propriety, ethics, or

24. He, *supra* note 14, at 138.

25. See Caleb Wan, Note, *Confucianism and Higher Law Thinking in Ancient China*, 10 REGENT J. INT'L L. 77, 78 (2013) (citing Liang Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55, 56 (1989)).

26. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

27. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 493 (2009).

28. Luke T. Lee & Whalen W. Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L.J. 1307, 1308 (1978).

29. *Id.* at 1309.

moral rules of correct conduct and good manners.”³⁰ In the narrowest sense, *li* refers to religious rituals. However, in a broader sense, it can also denote a “variety of duties and polite behaviors in all customary situations involving social relationships.”³¹

Confucius was pessimistic with the use of the law and punishments (*xing*) alone.³² *Analects* 2:3 expresses this view:

If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid *the punishment*, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.³³

Confucius’s pessimism about the law in the form of punishments is that it would not build a sense of shame, as the people would merely seek to avoid punishments. It is not enough for Confucius to avoid punishments, as his philosophical goals were not simply to create a society that avoided legal punishments, but to cultivate individuals to actively seek good. Instead, people ought to be led by virtue and *li*, in which they would have a healthy sense of shame that would lead to the self-correction of their wrongness into a good moral character. Thus, the goal is not just to prevent misconduct, but to develop proper moral emotions, like a sense of shame to moral shortcomings which would motivate moral development.

While Confucianism places less emphasis on the law as punishment (*fa* and *xing*), the more abstract notion of *li* plays an important role in Confucian thought. *Li* is often translated as “rituals,” “propriety,” “politeness,” or “etiquette.” For Confucius,

30. *Id.* at 1308.

31. Wan, *supra* note 25, at 85; see also Herbert H. P. Ma, *The Legalization of Confucianism and Its Impact on Family Relationships*, 65 WASH. U. L.Q. 667, 670, n.13 (1987) (describing how *li* originally referred only to “religious sacrifice” but has also come to include “ceremony, ritual, decorum, rules of propriety, good customs, etc.”).

32. See, e.g., 1 CONFUCIUS, THE CHINESE CLASSICS: THE LIFE AND TEACHINGS OF CONFUCIUS bk. II (James Legge trans., 2d ed. London, N. Trübner 1869).

33. *Id.*

li was a revival of rituals purportedly practiced in the Zhou dynasty. These rituals were deeply focused on religious aspects such as ancestor veneration, but also applied to other situations. Confucius also believed that *li* would be helpful in moral education. One of the main functions of *li* is to regulate people's actions and attitudes in order for them to better perform their social roles. *Li*'s function can also be instrumental, serving as a means to cultivate virtues through ritual practice.³⁴ Confucius emphasized that the mechanical practice of *li* would not be enough, and participants needed to develop proper emotions toward the practice of *li*.³⁵ *Li* could also help in reforming peoples' moral emotions and virtues.³⁶

Rituals, generally, include a wide range of content which include the ceremonies of birth, death, marriage, initiation, healing, harvest, and religious observance. *Li* also includes how one dresses, walks, and sits. Like rituals, *li* touches on people's "core emotions" and reveals a society's values.³⁷ The law can also serve this function, joining individuals in solidarity within their group and imposing certain conventions and obligatory behaviors. Both law and ritual become part of the "essential constitution of human societies," developing "a set of shared understandings about how political power is to be allocated among, and exercised by, the members of a given social organization."³⁸ Similarly, *li* can be compared to Western conceptions of the law, albeit in an abstract sense. While Western law is still possessed by legal positivism, which conceptualizes the law as commands or as rules, there have also been contemporary legal theorists like John Noonan and Walter Otto Weyrauch who recognize the important role of legal

34. See Kwong-loi Shun, *Jen and Li in the Analects*, 43 PHIL. E. & W. 457, 457–79 (1993) (providing more information on the "instrumental" function of *li*).

35. See, e.g., CONFUCIUS, *supra* note 32, at bk. XVII. Confucius notes that ritual is more than "gems and silk," referring to the importance of ritual beyond mere ornamentation. *Id.* The importance of *li* is not in simply keeping the rules, but in developing the moral emotions through the practice of rituals. This can be compared to the use of "burnt offerings" in the Old Testament where God sometimes notes the meaninglessness of offerings made mechanically. See *Psalms* 50:8 (King James); *Isaiah* 1:11 (King James).

36. See CONFUCIUS, *supra* note 32, at bk. VIII.

37. Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI.-KENT L. REV. 1181, 1181 (2005).

38. *Id.* at 1181.

rituals.³⁹

The late Judge John Noonan, Jr. discussed legal masks and legal rituals in his book, *Persons and Masks of the Law*.⁴⁰ “Masks” refer to legal constructs that hide an individual’s humanity within the legal process.⁴¹ The clearest example is the masking of people as property in the case of slavery.⁴² Noonan condemned the use of masks as problematic, as they breed injustice by allowing courts to render judgments with little concern for the humanity of the parties.⁴³ Writing in response, Walter Otto Weyrauch recognized these problematic uses, but also noted the value of legal masks as well as their inevitability.⁴⁴ The uses of “masks” are inevitable, as the notion of “law as mask” is used to “invoke a higher authority in a dramatic ceremony” by “channel[ing] emotions and events into fixed styles of reasoning that are, regardless of their intrinsic truth, aesthetically appealing and persuasive to the participants and the community.”⁴⁵ Legal rituals, therefore, have an aesthetic role in being persuasive in people’s lives and in constructing the appearance of authority. Some of the practical aspects of masks, Weyrauch notes, include aiding in the exercise of control, being “tools for the enforcement of social policies,” and supporting the legal system’s “peace-keeper” function.⁴⁶ The uses of legal masks described by Weyrauch, however, only note the helpfulness of these masks in “control,” “enforcement,” and “peace-keeping.”⁴⁷ “Legal masks” are a part of legal rituals where the ceremonial masks and the law play a similar social function.⁴⁸ These uses are limited, then, by the fact that the masks are useful in restraining the participants of the legal system.

Confucius would acknowledge these uses of masks and legal

39. See generally JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976); Walter Otto Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1978).

40. NOONAN, *supra* note 39.

41. *Id.*

42. *Id.* at 14–19.

43. *Id.*

44. Weyrauch, *supra* note 39, at 721–25.

45. *Id.* at 725–26.

46. *Id.* at 714.

47. *Id.* at 714–18.

48. *Id.* at 717.

rituals. *Li* regulates conduct by providing rules meant to guide people to making right actions in the proper situations.⁴⁹ As he states in the *Analects* 15.18: “The superior man in *everything* considers righteousness to be essential. He performs it according to the rules of propriety. He brings it forth in humility. He completes it with sincerity. This is indeed a superior man.”⁵⁰ However, Confucius would go a step farther than Weyrauch, not only examining the usefulness of masks in restraining people toward proper actions, but as offering a pedagogical characteristic to *li*.⁵¹ John Finnis identifies “aesthetic experience” as one of his basic human goods.⁵² He writes: “the aesthetic attitude is constituted by a unique balance of intellect and feeling in the contemplation and grasp of a symbol that expresses the idea of emotion or feeling.”⁵³ As Bullough notes, contemplating art requires a “psychical distance” between the work at the audience, a distance that comes from “separating the object and its appeal from one’s self,

49. Wan notes that *li*, in the “broadest sense” include the “rules of propriety and proper conduct for all institutions and relationships.” Wan, *supra* note 25, at 85–86. *Li* in this sense provides requirements, even rules, for proper conduct in private relationships, most reflected in Confucius’s concern for filial piety, or the duties that people owe to their familial relations, specifically their parents. Confucians also emphasized “governing by *li*” and “teaching by example.” *Id.* This indicates that Confucius saw *li* as also guiding public conduct and in an ideal Confucian order, a good ruler must “provide the people with an example of proper behavior according to *li*.” *Id.*

50. CONFUCIUS, *supra* note 32, at bk. XV.

51. There are different interpretations of Confucius regarding the relationship of *li* with traditional rules. Joel Kupperman, for example, acknowledges that Confucius’s *li* was “very closely related to rules and traditions.” JOEL J. KUPPERMAN, *LEARNING FROM ASIAN PHILOSOPHY* 33–34 (1999). Nevertheless, Kupperman writes that other commentators, like H.G. Creel, argue that Confucian *li* was not only grounded on traditional practice, but also involves “the ability to modify them as circumstances and common sense might require.” *Id.* (citing H.G. CREEL, *CONFUCIUS, THE MAN AND THE MYTH* 85 (1949)). Kupperman cites the *Analects*’s “general avoidance of pat [*sic*] solutions and in his willingness to adjust to a student’s personality what he says to the student.” *Id.* With a moral philosophy that was not based on bright-lines rules, Kupperman notes that Confucius instead emphasized moral education, internalizing the relationships embodied in *li* not as simple, bright-line rules, but as rules that develop personal character into someone who is able to come to right moral decisions in particular situation. Thus, moral education is central. *See id.*

52. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 87 (Paul Craig ed., 2d ed. 2011).

53. John M. Finnis, *Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 236 (1967).

by putting it out of gear with practical needs and ends.”⁵⁴ The contemplation of art also contributes to developing our ability to talk about beauty. As Iris Murdoch wrote, “[w]e develop language in the context of looking.”⁵⁵

Understanding *li* as a form of art or drama, the value of the ritual practice comes from what is learned from contemplating rituals at a “psychical distance.” As Bullough notes, contemplation of art at this distance comes from separating the rituals from our practical needs and ends, allowing observers to contemplate the rituals as things-in-themselves.⁵⁶ In observing *li* from a psychical distance, that is, observing *li* outside of the practical aspect of ritual behaviors, observers are able to contemplate the moral and emotional development communicated through ritual. While this type of contemplation may initially seem like a practical benefit, note that this moral and emotional development is not said to occur because of the rituals themselves but from the communicated meaning contemplated from the rituals. Contemplating rituals as works of art provides an aesthetic experience that both develops moral emotions as well as developing the “language” by which we understand the rituals themselves.⁵⁷

What would it mean to look at the law as a ritual from a “psychical distance?” The legal positivist and legal realist interpretations of the law would likely be unable to see the law from this distance, as it would be unable to contemplate the law separated from its practical needs and ends. However, observing the law from a psychical distance allows observers to contemplate the law, or the meaning within legal rituals, separated from the immediate needs and ends of the law as applied in the present case. Observing the law from a distance

54. EDWARD BULLOUGH, AESTHETICS 96 (Elizabeth M. Wilkinson ed., 1957).

55. IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 33 (1971).

56. See BULLOUGH, *supra* note 54, at 93–130.

57. Drawing from Iris Murdoch’s observation that we develop “language in the context of looking,” observing ritual from a “psychical distance” creates an understanding of the rituals as ends-in-themselves. MURDOCH, *supra* note 55, at 3. The value of the ritual is not the conservative benefits of social cohesion through cultural practice, but as moral communication of the person’s relation to himself, others, and the world as described in the way rituals frame that person’s relations to others. In this way, persons develop a “language” or an understanding of their relations to others through observations of the communications within rituals.

allows observers to contemplate the narratives within the law. John Noonan, as discussed above, provides an important contemplation of the law in this way, noting the masks of the law.⁵⁸ While the judges described by Noonan applied the masks of the law in an immediate way, Noonan observes the uses of masks to hide an individual's humanity.⁵⁹ He observes how these fictions change how people are viewed within legal cases.⁶⁰ This is because peoples' humanity is "masked" by the law.⁶¹ The law, therefore, assists in "developing a language in the context of looking."⁶² By contemplating the law, we can see how the law values certain behaviors generally. It is through this contemplation that we develop our language of understanding what we are observing. This language notes the difference between "relevant" and "admissible" evidence and the existence of *mens rea* in committing a murder. The law, like *li*, has ritual significance in people's lives, developing a "language in the context of looking" that may be internalized by the participants in the legal process.⁶³

In Confucianism, it is difficult to separate the ethical from the aesthetic. As the *Analects* 12:8 states:

Kih Tsze-shing said, 'In a superior man it is only the substantial qualities which are wanted;—why should we seek for ornamental accomplishments?' Tsze-kung said, 'Alas! Your words, sir, show you to be a superior man, but four horses cannot overtake the tongue. Ornament is as substance; substance is as ornament. The hide of a tiger or a leopard stripped of its hair is like the hide of a dog

58. See generally NOONAN, *supra* note 39.

59. *Id.* at 19.

60. *Id.*

61. *Id.* at 20.

62. MURDOCH, *supra* note 55, at 30.

63. Miller notes that both law and ritual "joins the individual in solidarity with the group" and "imposes on people certain conventional and obligatory forms of behavior." Miller, *supra* note 37, at 1181. As part of the "essential constitution of human societies," law and ritual provide a "constitutive" form of self-conceptualization and internalization of the communicated values within the ritual. *Id.* Law and ritual develop an understanding within its own conceptualization, or a "language in the context of looking" to use Murdoch's term. MURDOCH, *supra* note 55, at 30.

or a goat stripped of its hair.⁶⁴

In the above quote, there is a substance within the ornamentation of rituals, an acknowledgment that the aesthetic contemplation of ritual practice ties moral emotions into the rituals themselves. David Wong writes, “a graceful and whole-hearted expression of respect can be beautiful precisely because it reflects the extent that the agent has made this moral attitude part of her second nature.”⁶⁵ In this way, “beauty has a moral dimension.”⁶⁶

An aesthetic appreciation of both ceremonial rituals through *li* and legal rituals through the legal process provides an aesthetic appreciation of the virtues expressed in rituals. By observing both rituals at a psychical distance, people can contemplate the meaning within the practice deriving an aesthetic experience of the virtues communicated in rituals and developing a language of understanding these communicated virtues through contemplation.

III. CO-EXISTING COMPATIBILITY

Now that we have examined the ways Confucian ideas can be compatible with the idea of the law, we will now look to the question of how Confucianism can be compatible with the law. We propose two different models in addressing the “how” question: the co-existing model and the integrating model. The co-existing model sees Confucianism and the law co-existing in real ways within a legal system.⁶⁷ While some compromise will be needed, a co-existing model sees both Confucianism and the law existing in recognizable forms within each system. The integrating mode, on the other hand, sees the two traditions integrating into a new political and legal system.⁶⁸

We will begin with the co-existing model. This model is, historically, the most recognizable. As Luke T. Lee and Whalen W. Lai acknowledge, while Confucianism was not optimistic

64. CONFUCIUS, *supra* note 32, at bk. XII.

65. David Wong, *Chinese Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2020).

66. *Id.*

67. Gao & Walayat, *supra* note 18.

68. *Id.*

about incorporating positive law into its philosophy, Confucianism co-existed with the philosophical tradition of Legalism throughout most of China's history.⁶⁹ Most Chinese dynasties since the Han dynasty (207 B.C.-220 A.D.), have maintained Confucianism as a guiding philosophy, while also utilizing extensive positive laws and punishments inspired by the Legalist tradition. Given that Confucianism always maintained "clear and definite purposes of government," it was not uncommon in China's history to make Confucian doctrines "the content of the law, [with] the criminal code bec[oming] the instrument of executing such content."⁷⁰ Herbert H. P. Ma refers to this as the "Legalization of Confucianism."⁷¹ Ma notes, however, that this phenomenon "brought disrespect and even damage to both the law and Confucianism," as "[c]ompulsory' morality" was unable to bring about moral development, which is the first priority of Confucius and Mencius.⁷²

Contemporarily, however, Confucians can still maintain an influence outside of being the concrete content of the law. In some cases, given Confucianism's influence on a country's culture, Confucianism can also serve as a guiding influence in a court's interpretation of laws. The clearest example of this is seen in the experience of South Korea. In a 2003 article, Chaihark Hahm discusses two cases in which the Constitutional Court of Korea faced issues related to Confucian traditions in Korean culture and whether they conflicted with South Korea's democratic constitution.⁷³

The first case Hahm discusses was a 1998 case in which the Constitutional Court struck down a law concerning family rituals, a form of sumptuary law.⁷⁴ Sumptuary laws were a common part of Confucian Korea, governing what and how much people could consume in family rituals, though traditionally, there were traditional differences based on social status and class.⁷⁵ However, in 1993, the Korean government promulgated

69. See Lee & Lai, *supra* note 28, at 1307.

70. Ma, *supra* note 31, at 673.

71. *Id.*

72. *Id.* at 674.

73. Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253 (2003).

74. *Id.* at 280–87.

75. *Id.* at 281–82.

a sumptuary law regarding family rituals which “aimed at obliterating or minimizing any class distinctions,” limiting across the board “the amount people could spend on food and drinks at family rituals.”⁷⁶ The government, recognizing the importance of such a ritual in Korean culture, sought to minimize the inequality that would naturally stem from differences in spending among the families.⁷⁷ In 1998, the Constitutional Court held parts of the law unconstitutional, finding that the practice of serving food and drinks on special occasions were part of an individual’s “general freedom of action,” a protected constitutional right under the “right to pursue happiness.”⁷⁸ Further, the court found the law unconstitutionally vague, as the “law allowed an exception for food and drinks that were ‘reasonable in light of the true meaning of family ritual and ceremony,’” a standard unclear and certainly unobvious.⁷⁹ Hahm points out that the court’s decision had the effect of upholding traditional Confucian customs on the basis of individualistic principles and also notes that the court sidestepped the issue of Confucianism’s place in Korean society by not commenting on arguments about whether matters of ritual are better decided by the government or by social custom.⁸⁰

The second case Hahm discusses was a 1997 decision by the Constitutional Court which struck down an article of the family law section of the Korean Civil Code as unconstitutional.⁸¹ The section prohibited marriages between people with the same surname who also had the same “ancestral seat.”⁸² An “ancestral seat” is a geographical location where a given surname is believed to have originated from.⁸³ In South Korea, many people share the same surname, but if two people sharing the same surname and the same ancestral seat, they were said to be members of the same family, and their marriage would be

76. *Id.* at 282.

77. *Id.*

78. *Id.* at 283 (citations omitted).

79. *Id.* (citations omitted).

80. *Id.* at 285.

81. *Id.* at 287.

82. *Id.*

83. *Id.*

deemed incestuous.⁸⁴ However, people of the same surname from the same ancestral seat could be so numerous that large swaths of the population with otherwise no familial ties to each other would not be allowed to marry.⁸⁵ The Constitutional Court found the prohibition unconstitutional as it violated human dignity and the right to pursue happiness as provided for in the constitution.⁸⁶ However, the decision was not unanimous, and the dissenting Justices argued that the prohibition was not inconsistent with another enshrined constitutional principle: “the duty of the state to preserve and develop traditional national culture.”⁸⁷

In these two decisions, we see that the court’s decisions were never expressly made on Confucian interpretations, but that Confucianism was so entrenched in Korean culture that respect for cultural considerations needed to be considered by the court in making their decisions. The family ritual decision can be said to have been made without regard for Confucian interpretations, as the law was struck down for vagueness and for violating a constitutional right to pursue happiness. The second decision, specifically in the conflict between the majority and dissent, took more seriously the issue of making decisions based on cultural considerations; while both sides made their decision based on enshrined constitutional rights, the dissent acknowledged that the government had a place in protecting cultural traditions, many of which have a strong connection with Confucianism. Thus, Confucianism and the law can co-exist. It can exist through Confucian traditionalism guiding private lives with governments responsible for enshrining and protecting these cultural practices through the force of law.

Another example would be succession laws in predominately Chinese communities. In her investigation of the succession laws of Hong Kong, Taiwan, and mainland China, Lusina Ho determines that the laws of each entity were influenced by Confucianism.⁸⁸ She distinguishes between what

84. *Id.* at 288.

85. *Id.*

86. *Id.* at 293.

87. *Id.*

88. Lusina Ho, *Traditional Confucian Values and Western Legal Frameworks: The Law of Succession*, in CONFUCIANISM FOR THE MODERN WORLD 288 (Daniel A. Bell & Hahm Chaibong, eds., 2003).

she calls the “strong claim,” in which the distinctive aspects of the laws can only be justified by Confucianism, with the “weak claim,” in which such features of the succession law can be justified on the Confucian values within the mind of legislators.⁸⁹ Like the Korean examples above, the “weak claim” can draw from Confucian interpretations of societal concerns, including culture. In her observations, Ho concludes that all three communities—Hong Kong, Taiwan, and mainland China—have special provisions for needy heirs that were sometimes more “far-reaching” than Western counterparts, that mainland China entitled parents to the first priority of succession along with the decedent’s spouse and children, and that mainland China would grant or withhold inheritance regarding whether the claimant furnished maintenance to the decedent.⁹⁰ Here, we can see examples of succession laws being influenced by Confucian concerns. Ho notes that the provision for needy heirs may draw from the Confucian concept of “*ren*” (仁) or “benevolence.”⁹¹ The provision of placing parents to the first priority of succession can be seen as being influenced by the Confucian value of *xiao* (孝) or “filial piety.”⁹² The Chinese civil law’s consideration of whether the heir has provided support to the decedent and its equitable adjustment of the claimant’s share, depending on the maintenance provided, may be influenced by the Confucian value that encourages the young to care for the old.⁹³

Ho interestingly notes that certain “forced heirship rules” provide that “certain rights of inheritance cannot be curtailed by will” and that “rules that grant provisions for the family and dependents of the deceased irrespective of what the will says.”⁹⁴ She acknowledges that forced heirship is not uncommon in civil law countries, yet it differs greatly from common law countries in which testamentary intent of the decedent is the “cornerstone of [the] will.”⁹⁵ Some examples of forced heirs include the

89. *Id.* at 288.

90. *Id.* at 300.

91. *Id.* at 302.

92. *Id.*

93. *Id.* at 303.

94. *Id.* at 305.

95. Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569, 569 (2016); see Ho, *supra* note 88, at 305.

decendent's siblings and needy heirs in Chinese civil law.⁹⁶ In all of these scenarios, Ho notes that Confucianism needs not to be the only basis of justifying these laws and that Western liberalism may also alternatively justify these rules, including the right of those heirs who have a "legitimate expectation" of succession.⁹⁷ While there is an inference of Confucian influence on these laws, there is no direct evidence that these laws were based solely on Confucian grounds.

The co-existence of Confucianism and the law goes beyond decision-making based on legal considerations of Confucian culture. The examples described above can be interpreted as a weak form of Confucian influence transmitted through the culture of Korean and predominantly Chinese communities. However, there is room within co-existing compatibilism for Confucianism to serve as a basis for decision-making. This model would develop a more concrete form of Confucian influence, allowing private arbitration to be decided with direct reference to Confucianism in decision-making rather than through indirect considerations for culture.⁹⁸ It would be similar to the way religious law is used in private arbitration in family law cases where decisions are rendered through the use of *Halakha* (Jewish law), *Sharia* (Islamic law), and Canon law (Christian law).⁹⁹ Controversies remain today, but it still maintains a robust jurisprudence in Western democratic countries.¹⁰⁰ This model would apply Confucian decision-making as if it was religious law, though this may be a misnomer. Nevertheless, this model would provide a familiar form of co-existence between Confucian decision-making and a Western legal system.

IV. INTEGRATING COMPATIBILISM

Scholars like Xu Keqian have argued that Confucianism can

96. See Ho, *supra* note 88, at 307–08.

97. *Id.* at 308.

98. See Gao & Walayat, *supra* note 18.

99. See generally MICHAEL J. BROYDE, SHARIA TRIBUNALS, RABBINICAL COURTS, AND CHRISTIAN PANELS: RELIGIOUS ARBITRATION IN AMERICA AND THE WEST (2017).

100. See generally Joshua T. Carback, *On Sharia in American Family Law: Confronting the Dangers of Legal Pluralism*, 7 INT'L J. JURIS. FAM. 165 (2016).

serve to ground typical democratic elements by offering alternate explanations for democratic institutions or to infuse democracy with better meaning.¹⁰¹ Thus, a model of integrating compatibilism seeks to examine how Confucianism can offer alternative explanations for legal systems and perhaps infuse legal systems with deeper meaning. In order to examine this, it is worth examining differing views of the “ends” of the law. To speak of the “end” of something can be taken in many ways. In one sense, speaking about the “end of the world” defines “end” as the “termination,” at which point the world would no longer exist as it once did. Alternatively, “end” can refer to an endpoint in a linear progression. Finally, we come to the meaning of “end” that we use for this section, that of “end” or “ends” as “goals.” In this sense, we are speaking of the “ends of the law” as referring to the goals, or what Lon Fuller calls the “substantive aims” of the law.¹⁰²

The Western legal tradition has struggled with the question of the “ends of the law,” with the specific aims differing among the different legal schools of thought. Roscoe Pound, for example, writing from the position of sociological jurisprudence, argues that the law is a tool of social engineering.¹⁰³ He notes four functions of the law over history, with the law first serving as a way of (1) keeping peace in society to prevent self-redress by a victim’s kin organization, (2) preserving the status quo, (3) creating an environment to allow for maximum free self-assertion, and (4) satisfying the social wants of people.¹⁰⁴ Perhaps not contradictory to Pound’s identification of the functions of the law, H.L.A. Hart identifies “survival” as the central human good as the main motivational factor for legal development.¹⁰⁵

Hart’s version of legal positivism is particularly important, because nearly all theories finding a relationship between law and morality is written in response to Hart. Lon Fuller, for

101. See Gao & Walayat, *supra* note 18 (citing Keqian Xu, *Early Confucian Principles: The Potential Theoretic Foundation of Democracy in Modern China*, 16 ASIAN PHIL. 135 (2006)).

102. LON L. FULLER, *THE MORALITY OF LAW* 152–84 (rev. ed. 1969).

103. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922).

104. *Id.* at 36–99.

105. H.L.A. HART, *THE CONCEPT OF LAW* 191 (Penelope A. Bullock & Joseph Raz eds., 3d ed. 2012).

example, identifies an internal morality of the law, commenting that there are eight desirable aspects of the law necessary to make it effective.¹⁰⁶ To Fuller, the end of the law is to support an environment where individuals would be most able to communicate with each other by “[o]pen[ing] up, maintain[ing], and preserv[ing] the integrity of the channels of communication by which men convey to one another what they perceive, feel, or desire.”¹⁰⁷

Natural law theorists take a more moral view on the substantive ends of the law. John Finnis, for example, argues that the law should serve to protect the basic human goods, and while every moral decision cannot exercise every human good for every human being, laws must be structured in a way that they do not actively act against a basic human good.¹⁰⁸ Finnis identifies seven basic human goods, but notes that this list is non-exhaustive, consisting of life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.¹⁰⁹ Legal deontologists see the end of the law as the implementation of a system of moral rules or principles, such as the avoidance of moral wrongs and the protection of moral rights. One example might be Ronald Dworkin’s theory of law as integrity, which seeks the “coherence of the fundamental moral principles that justify the relevant moral, political and legal past decisions in a given domain.”¹¹⁰

More recently, there has been a growing scholarship within what can be called a “virtue jurisprudence” or the “aretaic theory of law.”¹¹¹ This school of jurisprudence drawing from the virtue

106. FULLER, *supra* note 102, at 39. Fuller argues there are eight principles that formed law’s internal morality:

- (1) The rules are actually made and cases are not decided on an ad hoc basis
- (2) The rules are publicized, or at least made available to an affected party
- (3) The rules are not retroactive
- (4) The rules are understandable
- (5) The rules are not contradictory
- (6) The rules are not impossible
- (7) The rules are relatively stable and do not change frequently
- (8) The announced rule is not incongruent with the rule as administered. *Id.*

107. *Id.* at 186.

108. FINNIS, *supra* note 52.

109. *Id.* at 85–90.

110. Andrei Marmor, *Integrity in Law’s Empire* 3 (Cornell L. Sch. Research Paper, Paper No. 19-28 2019), <http://ssrn.com/abstract=3422173>.

111. Linghao Wang & Lawrence B. Solum, *Confucian Virtue*

ethics tradition in moral philosophy sees the promotion of “human flourishing” as the aim of the law.¹¹² Human flourishing is defined as a life of “rational and social activities that express the human excellences or virtues.”¹¹³ One advocate of this approach is Lawrence Solum, who describes a theory of law that sees legislation as a way to promote virtue.¹¹⁴ Solum argues that legislation “should aim at the promotion of human flourishing” by “creating vibrant communities with opportunities for meaningful work and play that engage our rational capacities,” while also “creating the conditions for healthy emotional and intellectual development.”¹¹⁵ Thus, for Solum:

The core idea [of Justice as Lawfulness] is that justice is a disposition to be lawful, but in a special sense that departs from the idea that lawfulness reduces to a disposition to obey the positive law. This departure is illuminated by substituting a stipulated concept of a *nomos* for the notion of positive law. Let us use the term *nomoi* in this stipulated sense to refer to the deeply held and widely shared social norms of a community with human flourishing. The positive laws of a given community can play a role similar to the *nomoi* to the extent that they are promulgated by institutions or persons whose authority is recognised by the relevant social norms and so long as the content of the positive laws is consistent with substantive content of the system of *nomoi*. Many positive laws correspond directly to widely shared and deeply held social norms: laws prohibiting murder and theft are like this.¹¹⁶

Jurisprudence, in LAW VIRTUE AND JUSTICE 105 (Amalia Amaya & Ho Hock Lai eds., 2013); see also ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3d ed. 2007). MacIntyre’s book is considered to have inspired the revived interest in virtue ethics.

112. Lawrence B. Solum, *Virtue as The End of Law: An Aretaic Theory of Legislation*, 9 JURIS. 6, 6 (2018).

113. *Id.* at 7.

114. *Id.*

115. *Id.* at 10–11.

116. *Id.* at 13–14.

Solum notes, however, that positive laws could directly conflict with the *nomoi*, though conflicts are not necessarily fatal and positive laws could co-exist with contradictory *nomoi*.¹¹⁷ Solum's theory of law focuses on the promotion of *nomoi*, or the development of communities that "encourage the internalisation of the widely shared and deeply held social norms that are consistent with human flourishing."¹¹⁸ Solum's aretaic theory of law, drawing from virtue ethics, while Aristotelian in its influence, is compatible with Confucian ethics, at least Confucian ethics interpreted as a form of virtue ethics. Solum and Linghao Wang later developed a theory of "virtue jurisprudence" influenced by Confucianism.¹¹⁹ Solum and Wang's virtue jurisprudence is an example of integrating compatibilism, as their project seeks to reconcile individual freedom with a social order developed by the Confucian notion of harmony.¹²⁰ Drawing from *li*, they identify "harmony of society and harmony of the individual" as the central end of the law within their theory.¹²¹ *Li* plays both a social coordinative function by directing the harmony of society and ordering everyone into their proper positions in the community while at the same time developing voluntary compliance by individuals with the law, which is related to *li*'s expressive function.¹²² To Solum and Wang, "[i]ndividuals can express their emotions or exercise their virtues smoothly with the help of *Li* and follow their own sentiments and desires without creating a breach of *Li*."¹²³ With enough "external proper social circumstances and the natural development of affective capacity without disruption, humans can experience an inner harmony between their emotional state[s] and the requirements of virtue."¹²⁴

They note, however, that because *li* and the law do not share common functions of expression and disposition, the law's ability to "foster autonomous harmony" is limited as it is unable to play the same pervasive role in shaping values and virtues the same

117. *Id.* at 14.

118. *Id.* at 17.

119. Wang & Solum, *supra* note 111.

120. *Id.* at 134.

121. *Id.* at 121.

122. *Id.* at 121.

123. *Id.*

124. *Id.*

way that *li* can.¹²⁵ The correct use of names, therefore, would help to identify certain legal principles within reality and help citizens to internalize these legal norms and build a motivation to obey the law.¹²⁶ The proper use of names, therefore, has an important part in the communicative aspects of the law. By focusing on the proper definitions of names and concepts within the law, a Confucian virtue jurisprudence would seek to ensure that the legal definitions of legal concepts correspond with reality. Ensuring that the names of concepts within the law correspond with reality would encourage people to internalize the proper behaviors communicated within the law into behaviors in reality. This would encourage people to understand the definitions of the relationships within *li* when participating in the legal process. A Confucian theory of law would seek to define these narratives and the relationships they represent. While it may not be committed to enshrining principles of *li* within positive law, it would ensure that these inherent relationships are defined within the context of the values of *li*. Further, given Confucius's emphasis on the proper use of names, a Confucian virtue jurisprudence would need to go beyond merely enforcing *li* through the law. It should instead focus on identifying consistent names between concepts in the law and in

125. *Id.* at 123.

126. *Id.* at 127. The "correct use of names" is translated as "*zhengming*." The importance of the uses of names is discussed in *Analects* 13:3, which reads: "[Zi Lu] said, 'The [ruler] of Wei has been waiting for you, in order with you to administer the government. What will you consider the first thing to be done?' The Master replied, 'What is necessary is to rectify names.' 'So, indeed!' said [Zi Lu]. 'You are wide of the mark Why must there be such rectification?' The Master said, 'How uncultivated you are, [You]! A superior man, in regard to what he does not know, shows a cautious reserve.' 'If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success. 'When affairs cannot be carried on to success, proprieties and music will not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot. 'Therefore, a superior man considers it necessary that the names he uses may be spoken appropriately, and also that what he speaks may be carried out appropriately. What the superior man requires, is just that in his words there may be nothing incorrect.'" CONFUCIUS, *supra* note 32, at bk. XIII. From this passage, Confucius notes the importance of having names in proper accord with reality in order to build an understandable moral language. Likewise, a Confucian theory of law would focus on ensuring that the legal definitions of things are correctly in accord with reality in order for people to properly internalize the definitions communicated in the law.

reality, communicating their applicability both within and outside of the legal process.

An integrating compatibilism model seeks to infuse concepts with additional, and perhaps fuller meaning, both in identifying an “end” of the law as well as providing additional meaning to the narratives inherent within the law. Wang and Solum have provided one of the strongest attempts to identify a new system which acknowledges Confucianism and the law. The integrating model takes a step further than previous Chinese dynasties’ attempts to enforce Confucianism by the law. Instead, this model does not simply seek to enforce *li*, but to construct systems which apply *li* into legal systems, providing the law with deeper ritual meaning. By doing this, the law would be a way to communicate virtue and right actions through the observation of right behaviors within the legal relationships protected in legal systems. Such a model may provide a foundation for a landscape that is fertile for moral cultivation and the attainment of moral virtues.

The most important thing integrating compatibilism provides is an examination of the meaning of the law. To say that Confucianism can inflect the law with deeper meaning requires observers to ask what the meaning of the law is, or more properly, what are the ends and purposes of the law. A Confucian virtue jurisprudence, as well as virtue jurisprudence among other virtue ethics traditions like Neo-Aristotelianism or Stoicism, sees virtue as the end of the law, with the law not simply enforcing “virtuous” behaviors, but by creating an environment in which a human being can pursue virtues and, by pursuing such virtue, flourish. Wang and Solum identify “harmony” as the state of affairs in which human beings are most able to pursue virtues.¹²⁷ However, the law is not simply relegated to providing a system in which material needs are filled, but must be incorporated within the pursuit of virtues themselves. The law in an integrating model serves as a way for individuals to participate in pursuing virtues within the legal process.

The integration of Confucianism and the law leads to the creation of a new system in which these two elements are identifiable but also incorporated. It does not only see the law

127. Wang & Solum, *supra* note 111, at 134.

as enforcing Confucian rituals, as was discussed in the examples of co-existing models, but also seeks to utilize the law to pursue Confucian ends: a harmonious society and the pursuit of virtues. It does this by providing legal identification of the relationships within human society in order to assist in internalizing these relationships as well as developing legal rituals in which people would be able to practice *li*.

V. CONCLUSION

To say two traditions are “compatible” requires an examination of “what” is compatible and “how” they are compatible. We hope that we have taken the first few steps into examining the different ways that Confucianism is compatible with the law. In discussing the “what” question, we can see how different abstract concepts such as rituals play an important role in both Confucianism and in systems of the law. Also, in examining the “how” question, we can also see ways in which Confucianism and the law can exist within one system in a meaningful way. While many Chinese dynasties have attempted to combine both Confucian philosophy and complicated legal systems within their political culture, a compatible view goes beyond merely the “legalization of Confucianism.” Instead, it is a “Confucianization of the law,” seeking to expand the nature and functions of the law as a way to promote virtues rather than simply a pragmatic tool of coercion.

While a Confucian view of the law would certainly see the law as an opportunity for social engineering, the engineering would not come from coercion, but from providing the law with ritual significance which participants in the legal system would, hopefully, internalize. Confucianism does not need to be abandoned to modernity, for it provides indigenous alternatives that are compatible with systems of law. More than simply an example of a backward rule-of-men understanding of Chinese law, Confucianism offers the possibility of a Chinese law that looks beyond mere commands of the sovereign, touching upon the “soul” of the Chinese legal subject.