

THE LEGAL PHILOSOPHY OF ZHU XI (朱熹) (1130-1200) AND
NEO-CONFUCIANISM'S POSSIBLE CONTRIBUTIONS TO
MODERN CHINESE LEGAL REFORM

Norman P. Ho

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Norman P. Ho*

Abstract

A vast literature exists on Zhu Xi's metaphysical and political philosophy; however, his status and views as a legal thinker have not garnered much scholarly attention. Most broadly, this Article argues that Zhu Xi made important contributions to the development of Chinese legal philosophy – by intertwining law closely with both morality and his metaphysical views on li (principle). Zhu Xi further empowered law and elevated its importance in Chinese society. This Article will first lay out and analyze Zhu Xi's legal philosophy (focusing especially on his view on punishments), situating it within his broader metaphysical philosophy. Then, Zhu Xi's legal thought in practice, particularly his views on some cases during his time and also his career as a local official, will be examined. Attention will also be given to his community compacts, which the paper argues should be viewed as quasi-legal institutions that supplemented and buttressed the formal legal system. Through this discussion of Zhu Xi's legal thought in practice, this Article hopes to show that there was consistency between Zhu Xi's legal philosophy in both theory and practice. Finally, this Article will briefly argue for the relevance of Zhu Xi's legal thought today in China's program of legal reform. Ultimately, Zhu Xi can be viewed as a model legal thinker for China who offered a complete, total vision of the place of law in society. Zhu Xi's views on law challenge continued notions that Confucianism is incompatible with a modern rule of law system, and also further emphasizes the deep engagement Neo-Confucians historically wanted to have with actual policy-making and society.

I. INTRODUCTION

After its violent suppression just a few decades ago in the Cultural Revolution, Confucianism is now making a strong comeback in China,¹ even forming the basis of written decisions in courts of law. For example, in June of 2010, the Beijing Dongcheng District (东城区) Court rendered a final decision on a contract dispute case.² The

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For a discussion on the rising interest in and influence of Confucianism in modern-day China, see Norman P. Ho, *Unlikely Bedfellows? Confucius, the CCP, and the Resurgence of Guoxue*, HARV. INT'L REV., Summer 2009, at 28-31.

For full details of the case discussed here, see Bai Long (白龙), *Beijing Dongcheng Qu Fayuan: Xiaojing Ru Panjue Changshi Yin Reyi* (北京东城区法院:《孝经》入判决 尝试引热议) [Beijing Dongcheng District Court: "The Classic of Filial Piety" Invoked in Court Decision, Stirs Debate], RENMIN RIBAO (人民日报) [THE PEOPLE'S DAILY], June 10, 2010, available at

court invalidated a property contract between the eighty-five year old mother and her daughter, ruling that the daughter had clearly and intentionally employed unreasonable methods in order to procure and transfer her mother's property to avoid paying back a debt she owed to her mother.³

The court did not stop there, however. Besides basing its decision on Chinese contract law, it argued that Chinese traditional values must be upheld and actively promoted in contemporary society. The court especially cherished the values of filial piety,⁴ which require that children take care of, support, and respect their parents. The judge quoted directly from an ancient classical Chinese Confucian text, the *Xiaojing* (孝经), or *Classic of Filial Piety*,⁵ to support his emphasis on these values: "Filial piety is the immutable, constant rule of Heaven, the full manifestation of righteousness on Earth, and the sworn duty of all men."⁶ The court then argued that filial piety is one of the most important virtues in Chinese society, and that in this case the daughter violated the principles of filial piety by disrespecting her very old mother. The court reasoned that the daughter's unfilial heart and actions not only created a rupture in her relationship with her mother, but also led her to break the law, violate moral

http://www.ce.cn/xwzx/gnsz/gdxw/201006/10/t20100610_21500418.shtml. The facts of this case can be summarized as follows: in August 2008, a Beijing resident named Ms. Zhang signed a contract with her eighty-five year old mother to transfer the title of a piece of property her mother owned for 370,000 RMB. However, Ms. Zhang never paid, and her mother took her to court. The court ruled that Ms. Zhang had breached the agreement and had to pay the amount of 370,000 RMB (about 56,000 U.S. dollars) specified in the contract, as well as her mother's litigation expenses. Yet, the matter was not over – in October 2009, in the course of filing for enforcement of the verdict by the court, Ms. Zhang's mother discovered that her daughter had in fact written another contract in December 2008 and transferred ownership of the property to her own daughter (surname Tang) for 380,000 RMB. This second contract in effect prohibited Ms. Zhang from collecting the debt she was owed, as the property was no longer in her name. Convinced that her daughter and granddaughter had colluded to originally procure the property at a low price, she again took her daughter to court, requesting that the court nullify the second contract.

³ *Is it Appropriate to Quote Classic Works in Court?*, BEIJING REV. (July 22, 2010), http://www.bjreview.com.cn/quotes/txt/2010-07/23/content_286577.htm.

⁴ The Chinese character for filial piety is *xiao* (孝). In modern Chinese and speech, the compound *xiaoshun* (孝顺) is used; the first character, *xiao* (孝), basically means one must take care of and support his parents. The second character, *shun* 顺, exhorts the child to listen to and respect his parents' wishes and not rebel against them.

⁵ The *Xiaojing* (孝经), or *Classic of Filial Piety*, is a classic Confucian text that discusses how one can practice the virtue of filial piety in one's life (such as how to act toward seniors, such as parents and rulers). The text is structured largely as a series of conversations between Confucius and his disciple, Zengzi. Authorship was traditionally attributed to Zengzi or Confucius, but the text most likely dates from in between the Qin and Han dynasties. For a scholarly overview of the *Classic of Filial Piety* and its textual history, see William G. Boltz, *Hsiao ching* (孝经) [*The Classic of Filial Piety*], in *EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE* 141-153 (Michael Loewe ed., 1993).

⁶ This sentence is a quote from the *XIAOJING* (孝经) [CLASSIC OF FILIAL PIETY] 30 (Wang Shoukuan (汪受宽), ed., Shanghai Guji Chubanshe 上海古籍出版社, 1998).

principles, and disrupt social harmony.⁷ As we can see, the court relied on traditional Confucian moral principles in its decision, almost treating the *Classic of Filial Piety* as a supplemental source of written law.⁸

Yet, despite this prominent example of the integration of Confucianism into modern Chinese jurisprudence, the historical treatment of Confucianism and its impact on the development of Chinese law continues to be unkind and stereotypical; the story of Chinese legal history continues to maintain that China lacked a rule of law system in its pre-modern past; Confucianism is generalized as a system of thought antithetical to law. This existing and unfortunately still-pervasive narrative of Chinese legal history in much of Chinese and English scholarship⁹ has been nicely summarized by two scholars as follows:

In the standard view widely held by Chinese and others, China lacked the rule of law throughout its long history for many reasons. First, the dominant intellectual tradition of China was “Confucianism” . . . that valued the rule by men . . . [D]uring the Han [dynasty], Chinese emperors ruled by will or whim over a hierarchical society. That “imperial society” subsequently grew in size and sophistication over two millennia without significant change . . . [O]nly with the decline of China’s last dynasty, the Qing (1644-1911 CE), and the arrival of

⁷ Bai Long, *supra* note 2.
⁸ This case sparked a wide range of responses by Chinese commentators. Some, like Sun Wu-fan, writing on the popular Chinese website sina.com, argued that there was no place for morality in a written legal ruling: “Obviously, the *Classic of Filial Piety* does not fall in the category of laws and rules, hence reference to the ancient literature does not comply with [the] basic rule of making judicial judgments. . . . The court could choose to educate or persuade the defendant [on moral standards], but that element should not be included in a ruling.” *Is it Appropriate to Quote Classic Works in Court?*, *supra* note 3. Others were more supportive; Yu Xiangrong of the *West China City Daily* argued that “[l]aw and morality do not contradict each other, but are interrelated instead. Laws provide the most basic requirement of conduct, and are compulsory, while morality is of a much higher standard than the law. . . . [a] good court ruling should not only make a legal judgment, but also point out the right moral standards and express the judge’s stance so as to enhance persuasiveness” *Is it Appropriate to Quote Classic Works in Court?*, *supra* note 3.

For representative works that advance this narrative, see, e.g., STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 15-16 (2000); JOHN W. HEAD & YANPING WANG, *LAW CODES IN DYNASTIC CHINA* 39 (2005); GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 11 (1996); RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 32-33 (2002); XUE MEIQING (薛梅卿), *XINBIAN ZHONGGUO FAZHI SHI JIAOCHENG* (新编中国法制史教程) [CHINESE LEGAL HISTORY: A TEXTBOOK] 43 (1995). Scholarship on contemporary Chinese legal reform also dangerously continue such generalizations when attempting to draw a sharp divide between traditional and modern China, see, e.g., Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L.J. 117, 121 (2005) (generalizing that “for thousands of years, the Chinese lived not under the rule of law but under the rule of man”).

Western ideas and institutions did the Chinese state really change. Finally, in the first half of the twentieth century, the Chinese transformed their inherited, traditional, feudal empire into a modern, capitalist nation state. . . .¹⁰

Besides substantive problems in this popular narrative, there also exists, generally speaking, a temporal imbalance in Chinese legal historical research – while much work has been done on the Qing dynasty (an attractive point of research for many scholars given the influx of Western ideas in the nineteenth century), far less attention has been given by scholars to law in more ancient dynasties,¹¹ especially in between the Qin and the Qing dynasties. I firmly believe that the legal philosophy of one of China's most important Neo-Confucian¹² philosophers, Zhu Xi (朱熹) (1130-1200), can serve as an important corrective to standard, still-prevalent misconceptions and generalizations on Chinese law, and specifically Confucianism's place in Chinese legal development. Indeed, Zhu Xi is an example of a deeply Confucian thinker and official who was able to successfully reconcile Confucianism and law, embedding law in Confucian morality while simultaneously advocating the importance of clear, transparent written legal rules and punishments in society. This Article will argue that Zhu Xi can be viewed as a model legal thinker – he shared the Confucian cultural distrust of sole reliance on law in regulating society, but at the same time he respected and was devoted to clarifying the written law and relying on it in judicial decision-making. By couching law in his ultimate moral and metaphysical

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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 C.E.*, 44 STANFORD J. INT'L L. 101, 103-104.

William P. Alford, *Law, Law, What Law?: Why Western Scholars of Chinese History and Society have not had more to say about its Law*, 23 MOD. CHINA 398, 411 (Oct. 1997).

By "Neo-Confucian" and "Neo-Confucianism," I refer to the group of philosophers and school of thought that arose from and followed the intellectual foundation laid by the brothers Cheng Yi (程颐) (1033-1107) and Cheng Hao (程颢) (1032-1085). Zhu Xi is the most important figure in Neo-Confucianism as he synthesized Neo-Confucian thinkers before him, including the Cheng brothers. It is important to note that Neo-Confucianism is not a term used in Chinese academic circles; it is a purely Western term. In China, Neo-Confucianism is often referred to by *Dao xue* (道学) (the learning of the Way), *Song Ming Li xue* (宋明理学) (the learning of principle in the Song and Ming dynasties), or most commonly, simply *Li xue* (理学) (the learning of principle). The foreign term "Neo-Confucianism" emphasizes that Neo-Confucian thinkers considered themselves as comprehending and carrying on the teachings of Confucius. See PETER K. BOL, NEO-CONFUCIANISM IN HISTORY 78-79 (2008), for a discussion of the term "Neo-Confucianism" and its Chinese equivalents. As Bol also points out, "Neo-Confucianism was a cumulative tradition, one that became central to literati life in the twelfth century and remained central for many centuries thereafter." It is outside the scope of this Article to explore and discuss the important Neo-Confucian or pre-Neo-Confucian thinkers that came before Zhu Xi, such as Cheng Yi, Cheng Hao, Zhang Zai (张载) (1020-1077), and Shao Yong (邵雍) (1011-1077). For an excellent overview of their lives and philosophical contributions, see generally XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 96-104 (2000).

philosophy, he did not weaken the law, but instead empowered it, offering a coherent vision of the role of law and legal punishment in society that was consistent in theory and practice.

This Article proceeds as follows: I will first examine Zhu Xi's legal philosophy, situating it within his broader metaphysical philosophy. Then, the Article will proceed to examine Zhu Xi's legal thought in practice, focusing on his career as a local official and his formation of community compacts in local society, arguing they both were consistent, integral parts of his broader legal philosophy. These two sections of the Article can be described as an intellectual legal history, arguing broadly for Zhu Xi's importance as a legal thinker in the Chinese philosophical tradition. I hope these two sections will enrich two ongoing and significant debates in professional Chinese historiography – namely, challenging continued notions that Confucianism and China's Confucian past are burdening liabilities and antithetical to a society that respects laws, and second, showing through Zhu Xi's thought that Neo-Confucianism was and is still a viable system of thought that was not simply content in engaging the abstract metaphysical world, but was also deeply concerned with politics and participating in social policy-making. Finally, this Article will conclude with a discussion on what components of Zhu Xi's legal thought can contribute to China's massive project of legal reform today.

II. WHY STUDY ZHU XI . . .

Zhu Xi is widely regarded among contemporary China historians and scholars as “the most influential Chinese philosopher since the time of Confucius (551-479 B.C.) and Mencius (372-289 B.C.). He was not only the crystallization of the Neo-Confucian movement that dominated China for 800 years, but also the only thinker in the Christian era to influence many phases of Asian life throughout East Asia.”¹³ His “impact on Chinese civilization . . . has been profound.”¹⁴ Furthermore, “in the opinion of many historians, the Song [Dynasty's] [960-1279] preeminent philosopher, Zhu Xi, outshone Confucius himself.”¹⁵ A prolific writer, Zhu Xi left for posterity over 300 chapters of writings, including literary works, philosophical works, and practical writings (such as manuals that instructed families how to properly conduct rituals like marriage and

¹³ Wing-Tsit Chan, *Introduction*, in *CHU HSI AND NEO-CONFUCIANISM* 1, 2 (Wing-Tsit Chan, ed., 1989).

¹⁴ F.W. MOTE, *IMPERIAL CHINA: 900-1800* 430 (1999).

¹⁵ DEITER KUHN, *THE AGE OF CONFUCIAN RULE: THE SONG TRANSFORMATION OF CHINA* 103 (2009).

funerals).¹⁶ One of Zhu Xi's greatest accomplishments was collecting and compiling the *Sishu* (四书) [*The Four Books*], which consisted of the *Daxue* (大学) [*The Great Learning*], the *Zhongyong* (中庸) [*The Doctrine of the Mean*], the *Analects* of Confucius, and the *Mencius*.¹⁷ Zhu Xi also wrote commentaries¹⁸ for *The Four Books* which laid out his interpretative views and philosophical vision; in 1313, *The Four Books* and Zhu Xi's commentaries were first made the foundation of the all-important imperial examinations.¹⁹ Zhu Xi's interpretations would continue to form the basis of the education and examination curriculum until 1905, when the imperial examination system was officially abolished.²⁰ Additionally, his importance grew beyond China's borders: after his death, his writings were also accepted in Korea and Japan as the most faithful and orthodox interpretations of Confucianism.²¹ Most significant, Zhu Xi was recog-

¹⁶ F.W. MOTE, *supra* note 14, at 343. For a full bibliographical list of Zhu Xi's writings, see ZHANG LIWEN (张立文), ZHU XI PING ZHUAN (朱熹评传) [ZHU XI: A CRITICAL BIOGRAPHY] 38-43 (1998).

The *Great Learning* was originally a chapter in the *Li ji* (礼记) [*Classic of Rites*]; the authorship of its main text has traditionally been attributed to Confucius. The *Great Learning* also consists of nine commentary chapters traditionally attributed to Zeng Zi, one of Confucius's disciples. The *Doctrine of the Mean* also was originally a chapter in the *Classic of Rites*; its authorship is attributed to Zisi (子思), Confucius's grandson. The *Analects* is a collection of Confucius's sayings, and the *Mencius* is a collection of Mencius's dialogues with various political leaders during his time. Daniel K. Gardner has described the importance of the *Four Books* this way: "[i]n short, no texts had greater presence or power in later imperial China than the *Four Books*. Just as knowledge of the Bible among literate people was assumed in Europe in medieval and early modern times, so was knowledge of the *Four Books* assumed in China." For this quote, see THE FOUR BOOKS: THE BASIC TEACHINGS OF THE LATER CONFUCIAN TRADITION xv (Daniel K. Gardner, trans., 2007).

¹⁸ The practice of writing textual commentary was an extremely important scholarly enterprise in premodern China. Scholars would often prepare linguistic and analytical glosses of classic Confucian texts, explaining terms and phrases in the original text while explicating their own interpretations. For an overview of the Chinese practice of commentary and textual exegesis, see JOHN B. HENDERSON, SCRIPTURE, CANON, AND COMMENTARY: A COMPARISON OF CONFUCIAN AND WESTERN EXEGESIS (1991).

The civil service examination system was one of the most important institutions in Chinese history. Although its roots can be traced back to the Han dynasty, the system was not formally established until the Sui dynasty (581-618 A.D.), and reached its height in the Song dynasty. In the Song dynasty, that the examination system reached arguably its most "objective" state as a great majority of officials were selected through the examination process. The examination system was not discarded until 1905, near the end of the Qing dynasty. Its importance to Chinese history cannot be understated – preparing for and doing well on the examinations consumed the lives of countless Chinese men, whose goal was to enter government service. Good historical overviews of the system include LI XINDA (李新达), ZHONGGUO KEJU ZHIDU SHI (中国科举制度史) [A HISTORY OF THE CHINESE CIVIL SERVICE EXAMINATIONS] (1995), GUO QIJIA (郭齐家), ZHONGGUO GUDAI KAOSHI ZHIDU (中国古代考试制度) [THE EXAMINATION SYSTEM OF ANCIENT CHINA] (1997), and THOMAS H.C. LEE, GOVERNMENT EDUCATION AND EXAMINATIONS IN SUNG CHINA (2000).

²⁰ BENJAMIN A. ELMAN, A CULTURAL HISTORY OF CIVIL EXAMINATIONS IN LATE IMPERIAL CHINA 33 (2000).

²¹ SOURCES OF CHINESE TRADITION (1) 699 (William Theodore de Bary and Irene Bloom, eds., Columbia University Press 2d ed. 1999).

nized as a critically important figure in the transmission of Confucian thought during his own time by his contemporaries. Huang Gan (黄干) (1152-1221), one of his disciples, directly connected Zhu Xi to Confucius and lauded Zhu for realizing and perfecting the Confucian vision, writing:

The transmission of *Dao* (道) [the Confucian Way] was made fortunately possible because of the work of specific individuals. From the Zhou Dynasty [1046-256 B.C.] onward, only a few people have been able to successfully tackle the challenge of transmitting the Way – and, out of these, only around one or two have been able not only to transmit, but also to develop and make the Way fully manifest in their studies and in society. From Confucius onward, his disciples Zengzi and Zisi were able to carry forth the Confucian Way. Only when Mencius came on the scene later was the Confucian Way developed and empowered. After Mencius, Zhou Dunyi, Cheng Hao, Cheng Yi, and Zhang Zai were able to recover and continue the transmission of the Way after a hiatus. [Finally], it was only not until Zhu Xi came on the scene did the Way become developed and manifested.²²

Zhu Xi's importance in East Asian intellectual, political, and social history has encouraged a vast literature on his thought and Neo-Confucianism in general.²³ While there has been much work done

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TUO TUO (脱脱) (1314-1355), *SONG SHI* (宋史) [HISTORY OF THE SONG DYNASTY] 12769-12770 (Yang Jialuo (杨家骆), ed., Dingwen Book Co. (鼎文书局), 1980). The *Song shi* is part of the dynastic histories, or official histories, known in Chinese as the 正史 zheng shi [official history]. The preservation of the past and the writing of history have both been very serious enterprises in Chinese civilization. Among the most important historical works that were produced are these twenty-five zheng shi. They cover important events, people, and institutions of the various dynasties. One dynasty's history was usually written by the dynasty that followed it.

²³ There is a huge number of books and articles that have been written on Zhu Xi and Neo-Confucianism in English, Chinese, and Japanese. A single footnote cannot do adequate justice to the massive bibliography available. For published bibliographies of secondary literature on Neo-Confucianism, see generally CHARLES FU & WING-TSIT CHAN, *GUIDE TO CHINESE PHILOSOPHY* (1978); ZHUZI XUE YANJIU SHUMU (朱子学研究书目) [A BIBLIOGRAPHY OF SECONDARY STUDIES ON ZHU XI] (Lin Qingzhang (林庆彰) et al., eds., 1992), and *Sō-Mingaku kenkyū bunken mokuroku* (宋明学研究文献目録) [Bibliography of Song-Ming Dynasty Research], in YŌ MEIGAKU BINRAN: Ō YŌMEI SEITAN GOHYAKUNEN KINEN (阳明学便覧: 王阳明生誕五百年記念) [A HANDBOOK ON WANG YANGMING'S NEO-CONFUCIAN THOUGHT: IN COMMEMORATION OF THE 500TH ANNIVERSARY OF WANG YANGMING'S BIRTH] (Uno Tetsuto 宇野哲人, et al., eds., 1974). For an overview of the historiographical debates and positions on Neo-Confucianism and its place in Chinese history, see PETER K. BOL, *NEO-CONFUCIANISM IN HISTORY* 112-114 (2008). I would like to thank Professor Bol for pointing out the above bibliographies to me. For a discussion of various competing schools of thought within Neo-Confucianism, see HOYT CLEVELAND TILLMAN, *CONFUCIAN DISCOURSE AND CHU HSI'S ASCENDANCY* (1992). For an interesting inquiry into the religious dimensions of Zhu Xi's thought, see JULIA CHING, *THE RELIGIOUS THOUGHT OF CHU HSI* (2000).

on Zhu Xi's metaphysical and political philosophy and the history of the Neo-Confucian movement in general, very little (especially in English) has been written specifically on Zhu Xi's legal thought.²⁴ While there are a number of Chinese scholars that have written articles on Zhu Xi's legal thought,²⁵ these articles generally only provide theoretical overviews of Zhu Xi's legal philosophy and do not discuss how Zhu Xi carried his views out in practice, nor do they examine his relevance in contemporary times.²⁶ Books on Chinese legal history also do not integrate Zhu Xi's legal philosophy, nor do they really discuss intellectual currents in Chinese legal development – take, for example, the Japanese scholar Niida Noboru's 仁井田陆 (1904-1967) monumental *Chūgoku hōseishi kenkyū: Keihō* 中国法制史研究: 刑法 [*History of the Chinese legal system: Criminal law*], which points out correctly that the source of power for Chinese criminal laws was that the laws were derived from the “nature of the universe” or the “Great Law of Heaven.” Yet, Niida does not connect any of these ideas with Zhu Xi, who created a philosophical system (as we will discuss later) based precisely on natural law ideas.²⁷ Thus, as one can see, Zhu Xi's legal thought has unfortunately been somewhat ignored. This Article will seek to fill in the gaps and

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See, for example, CHU HSI AND NEO-CONFUCIANISM (Wing-Tsit Chan, ed., 1986) and WING-TSIT CHAN, CHU HSI: NEW STUDIES (1989), which contain no comprehensive discussions of Zhu Xi's legal philosophy. There is a similar deficit in Chinese scholarship; see, for example, QIAN MU (钱穆), ZHUZI XUE TIGANG (朱子学提纲) [AN OVERVIEW OF ZHU XI] (2002), which includes various chapters on Zhu Xi's views on history, literature, and education, but none on law. Chapters on Zhu Xi in books on the history of Chinese philosophy also have largely neglected Zhu Xi's contributions to legal thought; see, for example, ZHONGGUO ZHIXUE SHI (中国哲学史) [HISTORY OF CHINESE PHILOSOPHY] 283-296 (Beijing Daxue Zhixue Xi Zhongguo Zhe Xue Yanjiu Shi (北京大学哲学系中国哲学研究室) [Peking University Dept. of Philosophy, Chinese Philosophy Research Section] ed., 2003), Shuhsien Lu, *Neo-Confucianism (I): From Cheng Yi to Zhu Xi*, in HISTORY OF CHINESE PHILOSOPHY 365-395 (Bo Mou, ed., 2009), and FUNG YU-LAN, A HISTORY OF CHINESE PHILOSOPHY, Vol. II, at 533-571 (Derk Bodde trans., 1953).

See, e.g., Shao Fang (邵方), *Zhu Xi Falü Sixiang Jianyi* (朱熹法律思想简义) [*On the Legal Ideology of Zhu Xi*], 22 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 124-129 (Jan. 2007); Wu Shuchen (武树臣), *Zhu Xi falü Sixiang Tansuo* (朱熹法律思想探索) [*An Exploration into Zhu Xi's Legal Philosophy*], 5 BEIJING DAXUE XUEBAO: ZHIXUE SHEHUI KEXUE BAN (北京大学学报: 哲学社会科学版) [JOURNAL OF PEKING UNIVERSITY: HUMANITIES AND SOCIAL SCIENCES], 71-88 (1983), and Xu Gongxi (徐公喜), *Zhu Xi Yili Falü Sixiang Lun* (朱熹义理法律思想论) [*A Discussion of Zhu Xi's Principle-Based Legal Philosophy*], 2 ZHONGHUA WENHUA LUNTAN (中华文化论坛) [FORUM ON CHINESE CULTURE] 119-123 (2004).

These limitations also appear in textbooks on Chinese legal philosophy used in Chinese universities, see, e.g., ZHONGGUO FALÜ SIXIANG SHI (中国法律思想史) [HISTORY OF CHINESE LEGAL THOUGHT] 125-29 (Wang Limin (王立民) ed., 2008).

NIIDA NOBORU 仁井田陆, CHŪGOKU HŌSEISHI KENKYŪ: KEIHŌ 中国法制史研究: 刑法 [HISTORY OF THE CHINESE LEGAL SYSTEM: CRIMINAL LAW] 6 (1959). For a helpful overview of both Niida's and Japanese scholars' contributions to the Chinese legal history field, see Denis Twitchett, *Niida Noboru and Chinese Legal History*, 14 ASIA MAJOR 218-28 (1967), available at <http://www.ihp.sinica.edu.tw/~asiamajor/pdf/1967/1967-218.pdf>.

show that Zhu Xi should also be viewed as a significant legal thinker who made important contributions to Chinese legal thought.

III. ZHU XI THE MAN

It is of course impossible to provide a full and complete biography of Zhu Xi here.²⁸ However, to properly understand his legal philosophy, we must first contextualize it in his career.

Zhu Xi was a precocious child. He was once playing with other children in the sand, but he was the only one who sat upright and used his fingers to draw the Diagram of the Eight Trigrams, important and very complex symbols of Chinese divination, right into the sand.²⁹ He passed the *jinshi* (the highest and most prestigious degree level) imperial examinations at the young age of 18, and in 1151 he was appointed to his first position as Keeper of Records in what is today Southern Fujian province. During his seven-year tenure, he was well-regarded for reforming important social rituals (such as marriage) to bring them in line with moral values and principles.³⁰ In 1158, he was appointed Guardian of a temple in Hunan province. The job allowed him plenty of time for writing and research, and he penned many of his seminal works during this period up to 1178.³¹ In 1179, he was appointed to the post of prefect of Nankang (南康) (located in modern-day Jiangxi province), becoming the local official in charge there.³² As prefect, Zhu Xi had to report to the emperor himself and oversaw judicial departments in the prefecture, such as the bureau of punishments and the law office.³³ As such, Zhu Xi would have been intimately involved in legal affairs. In 1187, he was selected to serve as a judicial official in charge of dealing with criminal cases in Jiangxi province.³⁴ In 1190, he was appointed prefect in Fujian province and later served as prefect in Hunan province in 1194.³⁵ Throughout his official career, Zhu Xi relentlessly spoke out against corruption and dishonest officials; he made many enemies in the process, enemies that eventually caused his dismissal

²⁸ There are several excellent biographies of Zhu Xi available. For example, in Chinese, see ZHANG LIWEN (张立文), *ZHU XI PING ZHUAN* (朱熹评传) [ZHU XI: A CRITICAL BIOGRAPHY] (1998). In English, consult WING-TSIT CHAN, *CHU HSI: LIFE AND THOUGHT* (1987).

²⁹ TUO TUO, *supra* note 22, at 12751.

³⁰ SIU-CHI HUANG, *ESSENTIALS OF NEO-CONFUCIANISM: EIGHT MAJOR PHILOSOPHERS OF THE SONG AND MING PERIODS* 125 (1999).

³¹ *Id.* at 126.

³² *Id.*

³³ Ichisada Miyazaki, *The Administration of Justice During the Sung Dynasty*, in *ESSAYS ON CHINA'S LEGAL TRADITION* 56, 62 (Jerome A. Cohen, R. Randle Edwards, & Fu-mei Chang Chen eds., 1980).

³⁴ TUO TUO, *supra* note 22, at 12757.

³⁵ A SOURCEBOOK IN CHINESE PHILOSOPHY 588 (Wing-Tsit Chan, trans. & ed., 1963).

from the government after he had just become Tutor to the emperor in 1194.³⁶ Accused by his enemies of many crimes, including the crime of “weixue” (伪学) (false learning),³⁷ he was finally stripped of his posts in 1196,³⁸ with a government official even requesting that he be executed.³⁹ After his death in 1200, Zhu Xi was eventually rehabilitated and honored in Confucian temples; his *Four Books* and commentaries would later become the foundation of Chinese education and the imperial examinations for roughly six centuries.⁴⁰

Throughout his life, Zhu Xi was committed to getting governance on the right track, particularly in local administration. Most germane to this Article, he was deeply dedicated to ensuring the clarity and fair application of written law and regulations to promote social order, educate the people, and curb political corruption. His sole government experience of serving local communities made him acutely aware of the problems faced by the common people. In a memorial to Emperor Xiaozong (孝宗) (reign dates 1162-1189), Zhu Xi advised that “the well-being of the entire state depends entirely on the happiness and concerns of the people. In turn, the welfare of the people depends on whether local officials are talented and upright.”⁴¹ Additionally, for Zhu, law had an important role to play in governance. He wrote:

Among the pressing matters faced by the state, there is none more important as comforting and providing for the people. The foundation for comforting and providing for the people lies in the emperor’s upright heart and proper, skillful enactment of laws, regulations, and moral standards. In [openly] enacting these regulations and standards, the laws of the imperial court will not simply arise from the whims of an individual [ruler], but rather emerge from the virtuous and fair policies of the emperor, policies that are not selfish, biased, or hesitant. Moreover, the successful implementation of such regulations cannot rely solely on the work of an emperor, but instead necessitates the participation of virtuous ministers.⁴²

³⁶ SIU-CHI HUANG, *supra* note 30, at 126.

³⁷ TUO TUO, *supra* note 22, at 12767.

³⁸ SIU-CHI HUANG, *supra* note 30, at 126.

³⁹ A SOURCEBOOK IN CHINESE PHILOSOPHY *supra* note 35, at 588.

⁴⁰ BENJAMIN A. ELMAN, *supra* note 20, at 27, 33.

⁴¹ TUO TUO, *supra* note 22, at 12752.

⁴² *Id.* at 12753-12754.

In 1188, Zhu Xi wrote another memorial to the throne, criticizing the improper handling of criminal legal cases in previous years and urging the government to select worthy and suitable judges.⁴³ Indeed, what makes Zhu Xi's legal philosophy worth studying is that he himself was not content to simply be an abstract philosopher. He once traveled all the way up to the capital to memorialize personally to the emperor; someone tried to stop him and dissuade him from going because the emperor apparently did not enjoy hearing extremely direct critiques. Zhu Xi replied, "All my life, I have only learned [how to speak] in an honest and straightforward manner; how can I now hide [my heartfelt criticisms] and therefore lie to the emperor. . . ."⁴⁴

Again, the important point here is that Zhu Xi himself served as a judicial official and was concerned with the proper administration of law, regulations, and justice throughout his entire career. He had much to say about the law.

IV. ZHU XI'S LEGAL THOUGHT

A. *Human Nature*

Having shown that Zhu Xi as a scholar and official was very concerned with the proper administration of law and regulations, we now proceed to examining the salient features of Zhu Xi's legal thought, starting with his views on human nature. Indeed, the question of human nature, especially man's original nature, has been a "philosophical problem that had long obsessed Confucians."⁴⁵ Mencius had maintained that human nature was fundamentally good, while Xunzi argued it was bad, but that man was capable of reformation through emphasis on ritual propriety.⁴⁶ Han Feizi pronounced human nature as irreparably evil,⁴⁷ proclaiming that human beings were motivated solely by profit and had to be controlled with strict punishments. As will be shown in this section, Zhu Xi generally continued the Mencian belief that human nature was fundamentally good. However, Zhu Xi highlighted man's goodness by connecting human nature with the omnipresent *li* (理) ["Principle"] and man's interconnectedness with all things and the universe.⁴⁸ Moreover, Zhu Xi blamed evil on his concept of *qi* (气) ["material force"],

⁴³ *Id.* at 12757.

⁴⁴ *Id.*

⁴⁵ A.C. Graham, *What Was New in the Ch'eng-Chu Theory of Human Nature?*, in CHU HSI AND NEO-CONFUCIANISM 138, 138 (Wing-tsit Chan, ed., 1986).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 138-139.

which interfered with man's original human nature.⁴⁹ Zhu Xi's views on human nature form the basis for his views on what role law should play in society, and his relating of human nature with his concepts of *li* and *qi* arguably provide a more prominent theoretical and practical role for law and punishment in society. This section begins with a brief discussion of Zhu Xi's metaphysics,⁵⁰ as it served as the foundation for all of his philosophical views.

Zhu Xi's major philosophical accomplishment was synthesizing Confucian thought and metaphysics into a unified, coherent system. This had the effect of theorizing and rationalizing Confucian thought, giving it both a cosmological backing and empowered universal applicability.⁵¹ Specifically, he built his entire thought system on *li* (理), commonly translated as "Principle."⁵² *Li* is in every object in the world and the cosmos, both inanimate and animate; without it, nothing could exist. It is "akin to natural law," as it is unchanging and constant.⁵³ Zhu Xi made three critical claims for *li*: first, everything has its *li*; second, the human mind can discern the *li* of something; and third, there is only one *li* in the world, as *li* is uniform.⁵⁴ Zhu also moralized and equated *li* with the *Taiji* (太极), or the "Supreme Ultimate." Zhu wrote:

The Supreme Ultimate is simply the Principle of the highest good. Each and every person has in him the Supreme Ultimate, and each and every thing has in it the Supreme Ultimate . . . the Supreme Ultimate is an appellation for all virtues and the utmost good in Heaven-and-Earth, human beings, and things . . . it is the ultimate of Principle.⁵⁵

Li, however, has no form – thus, while a cup, flower, and human being all have the same coherent and unified *li*, how does each get their own unique shapes and attributes. Zhu Xi's answer is that *qi* (气), commonly translated as "material force," provides form and

⁴⁹ BRIAN E. MCKNIGHT, LAW AND ORDER IN SUNG CHINA 7 (1992).

⁵⁰ There is also a huge amount of secondary material which examines Zhu Xi's metaphysical philosophy. For an excellent overview of Zhu Xi's metaphysical worldview by one of China's leading scholars on Neo-Confucianism, see CHEN LAI 陈来, ZHU XI ZHIXUE YANJIU (朱熹哲学研究) [RESEARCH ON ZHU XI'S PHILOSOPHY] (1987).

⁵¹ KUHN, *supra* note 15, at 103.

⁵² In this Article, I will use the terms *li* and "Principle" (with a capital "P") interchangeably. Some scholars, such as Willard Peterson, translate *li* as "coherence"; see Willard Peterson, *Another Look at Li*, BULL. SONG-YUAN STUD., No. 18, 1986, at 14.

⁵³ *Id.*

⁵⁴ PETER K. BOL, NEO-CONFUCIANISM IN HISTORY 163 (2008).

⁵⁵ SOURCES OF CHINESE TRADITION, *supra* note 21, at 702.

structure. Consequently, for example, all human beings are made of both *li* and *qi*.⁵⁶ Zhu Xi also introduced the concept of *Tianli* (天理), or “the Principle of Nature” or the “Principle of Heaven” – because *li* is present in everything and completely uniform, the *li* in each human being is indeed bestowed by Heaven, which is of course composed of the same *li*. Zhu maintained that “[w]hat exists before the physical form is the one Principle harmonious and undifferentiated, and [it] is invariably good.”⁵⁷ He further explained that:

Heaven-and-Earth has no other business but to have the mind to produce things. The *qi* [material force] of the origination [the Supreme Ultimate, including *li* and *qi*] revolves and circulates without a moment of rest, doing nothing except creating the myriad [of] things. Heaven-and-Earth reaches all things with this mind. When human beings receive it, it becomes the human mind. When things receive it, it becomes the mind of grass, trees, birds, and animals.⁵⁸ All of these are simply the one mind of Heaven-and-Earth.⁵⁹

Here, Zhu Xi further empowered humans by showing that all people – regardless of their backgrounds – are blessed with the mind and *li* of Heaven-and-Earth. What makes humans different from animals is that we have the capacity and ability to discover and see the *li* in ourselves and the natural world; animals, however, do not have self-consciousness. In addition, because *li* is fundamentally good, moral, and unchanging with the cosmos, all humans should aspire to make their endowment of *li* manifest. As Zhu Xi wrote, “[I]n the production of man and things, they must be endowed with *li* [Principle] before they have their *qi* [material force], and they must be endowed with material-force before they have corporeal form.”⁵⁹ In other words, Zhu Xi believed that human nature is originally good.

The following questions then naturally arise: if all human beings have the same fundamentally uniform and good *li*, why are there still bad people in society. Why do some bad people reform themselves, while others continue to behave poorly. Zhu Xi himself wrote that “[A]ll things are originally good, but degenerat[e] into evil, that is all.”⁶⁰ For Zhu, the answer lies in *qi*: it is *qi* that interferes with *li* (which is pure), and subsequently differentiates people into good and

⁵⁶ KUHN, *supra* note 15, at 104.

⁵⁷ SOURCES OF CHINESE TRADITION, *supra* note 21, at 597-598.

⁵⁸ *Id.* at 703.

⁵⁹ *Id.* at 701.

⁶⁰ *Id.* at 598.

evil.⁶¹ Zhu Xi provided two concrete examples to show *qi*'s negative impact on the endowment of *li* each human enjoys. First, he analogized human nature to water, which like everything else in the world and the cosmos, has *li* and *qi*. The original goodness of human nature is just like the original clarity of water. Water, after all, is clear and transparent in its most fundamental state. However, we all know that water can sometimes become murky and turbid; yet, although turbid water is less desirable, this does not mean turbid water has lost the *li* that defines it as fundamentally still being water. Zhu Xi continued:

Water flowing to the sea without getting dirty is similar to one whose material force with which he is endowed is pure and clear and who is good from childhood . . . water that flows only a short distance and is already turbid is like one whose material endowment is extremely unbalanced, impure, and is evil from childhood . . . water that flows a long distance before becoming turbid is like one who, as he grows up, changes his character as he sees something novel and attractive to him, and loses his child's heart . . . [t]hus although man is darkened by material force (*qi*) and degenerates into evil, nature does not cease to be inherent in him [in other words, the *li* inside him is still there and is still fundamentally good] . . . [B]ecause of this, man must increase his effort at purification.⁶²

Thus, all humans have an original nature just like the fully clear water; yet, different people have differing manifestations of *qi* – to continue the turbid water analogy, some may have more polluting sediment in the liquid than others. Yet, even if one's nature is almost fully obscured by sediment, this does not negate the fact that one is human and still has the naturally-present *li* in him. Zhu Xi offered yet another metaphor on the interplay between *li* and *qi* in affecting human nature – he compared human nature to a pearl. Like an unadulterated pearl, human nature was originally clear. The *li* in humans and the pearl is bright and fully potent. However, if a pearl is immersed in murky, dirty water, the pearl itself is still bright and fully clear – in other words, its *li* does not change. It is only that the dirty water, or *qi*, has obscured the *li* (the brightness) so it is not fully observable. But if one removes or cleans the dirty water, then the pearl will become bright again according to its original nature.

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Id.

62

Id. at 598-599.

Humans, similarly, have their original nature obscured by *qi*.⁶³ Furthermore, each individual has a different bestowment of *qi* – some people are born naturally smart and can discern the *li* in themselves more easily than others, who may be born with more *qi* or raised in an environment where surrounding *qi* may cloud their judgments.⁶⁴ This is how Zhu Xi was able to account for the great diversity of human behavior in society.

It thus follows that to successfully realize our *li*, we must seek to remove *qi* as an obstacle. Because Zhu Xi believed that the human mind was made of *li* and thus interconnected with the universe, it follows that any human is able to understand and grasp the *li* inherent in all things. Any human can perfect himself and become a sage through education and careful observation, trying to remove the effects of *qi* on his *li*.⁶⁵

For Zhu Xi, perfection for all humans would be realized when we are in coherence with our *Tianli* (the Principle of Heaven) and successfully suppress the impulse of *renyu* 人欲 (human desires), bad behaviors which arise from the problematic *qi*. Zhu Xi explained the difference between *Tianli* and *renyu* this way: eating and drinking for human beings is of course the Principle of Heaven. They are both biological, necessary requirements. However, yearning for gourmet, expensive, and fancy foods is human desire.⁶⁶ The fundamental goal, therefore, was for humans to strive to inculcate their *Tianli* while fighting off human desires. Moreover, according to Zhu Xi, it was a battle in which only one victor would emerge: “If the Principle of Heaven is protected, then it follows that human desires will be exterminated. However, should human desires triumph, one’s Principle of Heaven will be lost. There has never been a situation where the Principle of Heaven and human desires blend and mingle together.”⁶⁷

If we step back and look at Zhu Xi’s views on human nature more generally, it is tempting to believe that Zhu Xi simply followed Mencius’s views, since both philosophers upheld the idea that human nature was originally good. However, each arguably had different answers to the question of how a person could make manifest his

⁶³ ZHU XI (朱熹) (1130-1200), ZHUZI YULEI (朱子语类) [COLLECTED SAYINGS OF ZHU XI] 20.207 (Li Jingde 黎靖德, comp., Zhonghua Book Co., 1986). The *Collected Sayings of Zhu Xi* was compiled by Song dynasty scholar Li Jingde in 1270; it is an important source for Zhu Xi’s thought and consists basically of conversations among Zhu Xi and his students. The text is organized into *juan* (卷, chapters). Therefore, when pinciting from this text, I use the following format: [*juan* number][page number].

⁶⁴ PETER K. BOL, *supra* note 54, at 171.

⁶⁵ SOURCES OF CHINESE TRADITION, *supra* note 21, at 698.

⁶⁶ PETER K. BOL, *supra* note 54, at 171.

⁶⁷ ZHUZI YULEI, *supra* note 63, at 13.223.

original, good human nature – whereas Mencius argued that one must expend efforts to develop one's nature,⁶⁸ Zhu Xi instead focused on getting rid of one's obscuring *qi*, allowing more theoretical and philosophical space for an enlarged role for law and punishment. To better understand Zhu Xi's views on human nature and identify the key areas where he differed with Mencius, we now turn to part of Zhu Xi's commentary on one of the most famous passages on human nature in the *Mencius*. To make it easier to distinguish Zhu Xi's commentary, the original text from the *Mencius* has been bolded and Zhu Xi's commentary italicized. I rely on Daniel Gardner's translation of the passage from the *Mencius* and offer my own translation of Zhu Xi's commentary:

All people have a mind-and-heart that cannot bear to see the suffering of others.⁶⁹ Zhu Xi's commentary: Heaven-and-earth have the mind-and-heart⁷⁰ to produce everything in the world, and thus what is produced in turn has the mind of heaven-and-earth, and therefore people all have hearts that cannot bear to see others suffer ... **Here is why I [Mencius] say that all men have a mind-and-heart that cannot bear to see the suffering of others: Today, no matter the person, if he suddenly comes upon a young child about to fall into a well, his mind-and-heart fills with alarm and is moved to compassion. It is not because he wishes to ingratiate himself with the parents of the young child; nor is it because he seeks renown among villagers and friends; nor is it because he would hate the bad reputation [of lack of compassion toward the child].** Zhu Xi's commentary: [C]ompassion (ce

⁶⁸ Philip J. Ivanhoe argues for using a "development model" to think about Mencian views on human nature; see PHILIP J. IVANHOE, CONFUCIAN MORAL SELF-CULTIVATION 22 (2000).

⁶⁹ Translations for the original *Mencius* passages (in bold) are from THE FOUR BOOKS, *supra* note 18, at 65-66.

⁷⁰ The Chinese term, *xin* 心 means "heart" in modern Chinese, but as used in Chinese philosophy *xin* frequently refers to both to reason/intellect, as well as feelings/emotion, hence "mind-and-heart" is a more accurate rendering. See, for example, the *Bei Xi Zi Yi* (北溪字义) [*Chen Chun's Explanation of Neo-Confucian Terms*], a Neo-Confucian dictionary of important philosophical terms, compiled by Chen Chun (陈淳) (1159-1223), one of Zhu Xi's students. Chen's dictionary is regarded as a work that defines philosophical terms in a way that is faithful to Zhu Xi's original thought. The *Bei xi zi yi* defines *xin* 心 partly this way, emphasizing both *xin*'s emotional and intellectual powers: "The *xin* is most intelligent and most wonderful. It can enable people to become sage-emperors like Yao and Shun, form a trinity with Heaven and Earth, and attract spiritual beings to come. An instant of thought will reach something even though it may be three thousand miles away. An illumination will enable it to know the secret of human feelings and the changing events of antiquity. It can penetrate even the hardest of metals and rocks. And it can see through the most subtle and most obscure of all kinds of things." CHEN CHUN (陈淳) (1159-1223), NEO-CONFUCIAN TERMS EXPLAINED: THE *PEI-HIS TZU-I* 60 (Wing-tsit Chan, trans., 1986) (I have very slightly modified Chan's translation).

yin 惻隱) consists of pronounced pain (ce 惻) and intense pain (yin 隱). This speaks exactly of the mind-and-heart of men which cannot bear to see others suffer . . . [What Mencius means here] is when the person sees the child, he will have this mind-and-heart and these feelings [of compassion] immediately without any deliberation; the concerns he feels [for the child] also does not arise out of a desire for the three benefits mentioned above [trying to impress the young child's parents, seeking renown among the villagers and friends, or worrying about any possible negative impact on his reputation]. Cheng Hao said, "the mind-and-heart of compassion fills the chest." Xie Liangzou⁷¹ said, "all humans have this mind-and-heart . . . at the moment they feel compassion for the baby, they reflect their true and real mind-and-heart; no preparatory thinking is necessary, no coercion is necessary [for the compassion], it is simply the natural manifestation of the Principle of Heaven (Tianli). Courting favor with the parents, seeking renown, and hating bad reputation are [on the contrary] all the result of self human desires." **From this we can see that to be without a mind-and-heart of compassion is not to be human; to be without a mind-and-heart that is ashamed of evil in oneself and hates it in others is not to be human; to be without a mind-and-heart of humility and deference is not to be human; to be without a mind-and-heart of right and wrong is not to be human.** Zhu Xi's commentary: [W]hat comprises a person's mind-and-heart does not go beyond these four types of mind-and-hearts [that Mencius mentioned] . . . if a person lacks these four types of mind-and-hearts, he cannot be called a human being . . . **The mind-and-heart of compassion is the seed of benevolence; the mind-and-heart that is ashamed of evil in oneself and that hates it in others is the seed of righteousness; the mind-and-heart of humility and deference is the seed of propriety; the mind-and-heart of right and wrong is the seed of wisdom.** Zhu Xi's commentary: Compassion, hating evil in oneself and others, humility/deference, and notions of right and wrong are all feelings and emotions. Benevolence, righteousness, propriety, and wisdom are the nature. The mind-and-heart unites both nature and feelings. What Mencius meant by "seed" (duan 端) [is actually] "tip" or "endpoint." By following the manifestation of the feelings, the root of the nature can be discerned. This is just like when

⁷¹ Xie Liangzuo (谢良佐) (1050-1103) was a student of the Cheng brothers and a Neo-Confucian philosopher.

there is something inside and one can see its endpoint outside. **People have these four seeds just as they have the four limbs. To have these four seeds but to deny their potential in oneself is to rob from oneself.** *Zhu Xi's commentary: Every human being must have four limbs. If one accuses himself of being incapable, [his incapability] is actually simply obscured by material desire . . .*⁷²

For Mencius, the four mind-and-hearts that define humanity (mind-and-hearts of compassion, hatred of evil, humility/deference, and right/wrong) are *duan* (端), or “seeds” (also commonly translated as “sprouts”). By describing the mind-and-hearts this way, Mencius emphasized the preliminary, inchoate qualities of human nature. For Mencius, a person can realize his original, good human nature by developing and cultivating these seeds, allowing them to grow and be fully manifest. Zhu Xi's views, however, were different. Based on my interpretation of the excerpt above, I would argue that Zhu stressed more the role of “material desire[s]” and more significantly, interpreting *duan* (端) not as the Mencian seed or sprout, but rather as “tip” or “endpoint.” In other words, for Zhu Xi, the four hearts are representations of a completely refined and developed human nature. The principal problem comes not just from failure to cultivate or develop one's nature, but the obscuring, polluting nature of material desire. It thus follows logically that the goal is to literally and figuratively remove and eliminate the greed for material desire (the *renyu* and bad *qi*). In other words, the actual method, or process, for becoming fully virtuous and realizing one's true nature involves an active act of physically suppressing and destroying human desires.

Zhu Xi's different interpretation of human nature has important theoretical implications for the role of law and punishments in society. Given the importance of actually stripping away human desires that obstruct the unadulterated expression of one's nature, Zhu Xi's views allow for a more prominent role of law and punishments in regulating human behavior (as will be discussed later in the Article). While Zhu certainly deeply stressed the need for education and self-cultivation in the process to become virtuous,⁷³ it follows logically

⁷² For the original Chinese text I am translating, see ZHU XI, *SISHU ZHANGJU JIZHU* (四书章句集注) [COMMENTARIES ON THE FOUR BOOKS] 237-238 (Zhonghua Book Co., 1983).

⁷³ For an English translation of relevant passages from the *Zhuzi Yulei* that deal with Zhu Xi's views on the importance of education, along with scholarly commentary, see *LEARNING TO BE A SAGE: SELECTIONS FROM THE CONVERSATIONS OF MASTER CHU, ARRANGED TOPICALLY* (Daniel K. Gardner, trans., 1990). For a collection of essays that explore individual Neo-Confucian education, see

from Zhu Xi's human nature philosophy that there must be some sort of external force – whether it be punitive or encouraging – to assist in the process of actually ridding oneself of selfish desires. Law, along with moral education, can help a person attain sagehood. Indeed, we see these ideas affirmed in Zhu Xi's writings on law and punishments, which will now be explored.

B. *The General Role of Law in Society*

If Zhu Xi's views on human nature allow for a more prominent role of law in society, how can law help people attain sagehood and fully realize their innate goodness. What is the specific function of law. More importantly, what is law's relationship with major concepts of rulership, namely rituals⁷⁴ (the Chinese concept of *li* (礼), not to be confused with the *li* (理) that means Principle) and virtue (the Chinese concept of *de* (德)). This section will explore these questions and ultimately argue that Zhu Xi saw an important place for law in society. Law would be supplemented by rites and virtue, and, in turn, be indispensable for buttressing rites and virtue. Most significantly, Zhu Xi equated law with *li* itself, elevating the authority of law.

First, Zhu Xi's general views on law can be explored through part of his commentary on a passage in the *Analects* where Confucius expressed his personal misgivings and distrust of laws and punishments. As done with the passage from the *Mencius*, the original *Analects* text will be bolded and Zhu Xi's commentary italicized. James Legge's translation is used for the *Analects* text and my translations are offered here for the relevant parts of Zhu Xi's commentary on the passage:

The Master [Confucius] said, "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."⁷⁵ *Zhu Xi's Commentary*:

WILLIAM THEODORE DE BARY, *LEARNING FOR ONE'S SELF: ESSAYS ON THE INDIVIDUAL IN NEO-CONFUCIAN THOUGHT* (1991).

⁷⁴ "Rituals" conjure up images of legalistic, overly formal modes of behavior. But the Chinese notion of ritual here can be better thought of as norms of civility or social usages that cause people to act in certain ways, not out of a sense of legal obligation, but rather because it is the polite, moral, and civil way to behave. For a discussion of such a rendering of ritual in the Chinese context, see *THE ANALECTS OF CONFUCIUS* 175-176 n.1 (Simon Leys, trans., 1997).

⁷⁵ *The Analects*, in *Sacred Books of the East*, Vol. 1 2 3 (James Legge, trans., 1861), available at <http://ctext.org/analects/wei-zheng> (the *Chinese Text Project* is a valuable online depository of numer-

*[L]aws and regulations are tools of governance. Punishments are complementary methods for governance. Virtue is the root and foundation of rites. Although we cannot eliminate regulations, laws, and punishments, they are only good for keeping people away from committing crimes. Virtue and ritual, however, are the means by which people will move away from evil and navigate toward good*⁷⁶

Here, Zhu shared Confucius's misgivings toward law to some extent, but he did not believe that law had no role to play in society. Zhu Xi's view was that law was necessary, but not sufficient, to bring about social order; virtue and ritual were still important. Virtue, law, rites, and punishments were to work together in a complementary fashion. Zhu Xi further clarified his position:

*Zheng (政) are legal regulations. If there are no punishments or punitive measures, laws cannot stand; therefore, if a ruler wishes to use laws to guide his people, there must also be legal punitive measures in order to establish harmony among the populace. Virtue is the root of Principle. Without rites, virtue cannot be made manifest and put into action. Thus, in order to utilize virtue successfully to guide the people, rites must also be used to bring about harmony.*⁷⁷

Furthermore, Zhu Xi made very clear that governing by virtue and ritual was *not* incompatible with a system of laws and punishments. He argued that Confucius was not advocating a complete absence of laws and punishments in society, but rather that he was speaking out against solely relying on laws; Zhu Xi in essence softened the seemingly absolute, unwavering dislike of laws and punishments that Confucius expressed in the *Analects* passage, as shown in this exchange between Zhu Xi and a student:

Someone asked Master Zhu [about what Confucius meant when he criticized] "leading by means of legal regulations." Master Zhu answered: The ancient sages⁷⁸ said this because

ous Chinese classical texts and historical sources; the website is administered by Donald Sturgeon of the University of Hong Kong).

⁷⁷ For the original Chinese text, see ZHU XI, *SISHU ZHANGJU JIZHU*, *supra* note 72, at 54.

ZHU XI, *ZHUZI WENJI* (朱子文集) [THE COLLECTED WRITINGS OF ZHU XI] 41.1770 (Chen Junmin (陳俊民) ed., Defu Wenjiao Jijinhui Chubanshe (德富文教基金會出版) 2000). This compendium of Zhu Xi's writings is organized by *juan* 卷 (chapter); thus, I will pincite from this source in the following manner: [*juan*].[page number].

⁷⁸ The "ancient sages" refer to the ancient sage kings who are credited with establishing the foundation of Chinese civilization. The Chinese believed that during the dawn of Chinese civilization, they

during their time there were actual instances where virtue and rites were completely unused in governance, and only punishments and laws were used. Laws and punishments can only make crimes appear with less frequency and push them farther away. But if what is desired is to truly clarify and enlighten hearts, bringing them to remorse and shame, you must have virtue and ritual. Indeed, when the ancient sages were ruling their kingdoms, how would it have been possible for them to get rid of laws and punishments.⁷⁹

In another passage, Zhu Xi further clarified his position, saying that “[t]he ancient sage rulers could not solely rely on punishments and legal regulations, but to completely depend on rituals and virtue without the backing of law and punishment is also impossible.”⁸⁰ Zhu Xi, in order to give an example of his point, made an important claim, saying that the ancient sage king Shun (舜)⁸¹ set up legal punishments not primarily just to punish and deter offenders, but to educate them about proper Confucian relationships and to preserve the Principle of Heaven:

I have heard that in antiquity Shun was worried that the people were not kind to one another and did not adhere to the *wuchang* (五常) [the Five Constant Virtues], and thus he appointed Xie to be Minister of Education in order to teach the people the principles of human relationships: there should be 1) love between a father and son; 2) righteousness between a ruler and minister; 3) separation of functions and jobs between a husband and a wife, as they should each know their place and proper responsibilities; 4) a proper order between old and young; and 5) loyalty between friends. Shun was also afraid that despite his attempts to educate the people, there would be some that did not follow these five preceding precepts, and thus he commanded [his minister] Gao Yang to draw up legal punishments and codes to protect, defend, and complement the five teachings, but he hoped that eventually there would be no need for punishments. The *sangang wuchang* (三纲五常)

created basic inventions and technology for the people (such as teaching the people how to farm) and also set up the political and social architecture. In later dynasties, the sage kings were often looked to as models of excellent leaders.

⁸⁰ ZHUZI YULEI, *supra* note 63, at 23.547.

⁸¹ *Id.* at 23.550.

A legendary ancient sage king of China, ca. 3000 B.C.; *see also infra* text accompanying note 99 (more discussion of Shun).

[the Three Cardinal Guides and the Five Constant Virtues]⁸² is the concentrated essence of the Principle of Heaven (*Tianli*) and human relations, and indeed the fundamental root of governing according to the Way. Thus, when the ancient sage kings governed, they used education to illuminate these principles and punishments as mutually supporting; although sometimes they would punish first and then educate, or educate first and then punish . . . they always gave careful instructions . . . and their actions always emerged from a concern for these Guides and Virtues.⁸³

As we can see from the passage above, Zhu Xi supported utilizing law not just to evoke fear of punishment in people, but more importantly, to assist in the moral education of the populace. Law for him was intertwined closely with Confucian principles. As such, laws should be clear, streamlined, and transparent, to enhance their pedagogical power.⁸⁴ Law and legal punishments are also further elevated and empowered in the passage above because Zhu Xi directly equated one of law's goals with the preservation of the Principle of Heaven. Indeed, Zhu Xi maintained that law itself is Principle (*li*), as everything contains *li*, and that all the *li* in this world is uniform.⁸⁵ Thus, as we can see, Zhu Xi envisioned a legal system that interacts and is engaged with morality. Law, rites, virtue, and morality all work together in order to bring the people to goodness and promote social order and harmony. Law and punishments were also expressions of Principle themselves, and as such actively promoted morality. Law was thus seen not as an independently functioning entity in society, but deeply ingrained into all aspects of governance and the social moral fabric. At this point, some might

⁸² The *sangang wuchang* [Three Cardinal Guides and the Five Constant Virtues] was an important Confucian moral, ethical, and ultimately political framework of rules that applied to everyone in society. Its content can ultimately be traced back to Confucius. The Three Cardinal Guides stated that rulers should guide their subjects, fathers should guide their sons, and husbands should guide their wives. The Five Constant Virtues were benevolence, righteousness, propriety, wisdom, and fidelity. For an excellent discussion of the *sangang wuchang*, see Li Xiangjun (李祥俊), *Gangchang yu Zhongguo Chuantong Zhengzhi* (纲常与中国传统政治) [*The Three Cardinal Guides and the Five Constant Virtues and Chinese Traditional Politics*], BEIJING SHIFAN DAXUE XUEBAO (SHEHUI KEXUE BAN) (北京师范大学学报 (社会科学版)) [J. BEIJING NORMAL UNIV. (SOCIAL SCIENCE ED.)], Mar. 2001, at 25-31.

⁸³ ZHUZI WENJI, *supra* note 77, at 14.435.

⁸⁴ Cui Yongdong (崔永东), *Guanyu Zhuxi Falü Sixiang de Jidian Tanta* (关于朱熹法律思想的几点探讨) [*A Few Analytical Points on Zhu Xi's Legal Philosophy*], KONGZI YANJIU, (孔子研究) [CONFUCIUS STUDIES], No. 4, 1995, at 78.

⁸⁵ Xu Gongxi (徐公喜), *Lun Zhuxi Falü Sixiang Ronghe Yu Chuangxin Tese* (论朱熹法律思想融合与创新特色) [*A Discussion on the Synthesis and Innovative Aspects of Zhu Xi's Legal Thought*], JIANGXI SHEHUI KEXUE (江西社会科学) [JIANGXI SOCIAL SCIENCES], Sept. 2006, at 183.

question Zhu Xi's dedication to written law – what if there was a conflict between a written statute and one of the Cardinal Guides or Constant Virtues. Would one have to ignore the written law. Zhu Xi would respond that one does not even have to worry about such a situation occurring. Ideally, there would be no conflict between written laws and Confucian virtues, because all have the Principle of Heaven and are thus fully coherent with one another. Law would naturally reflect the correct virtues. As a result, as we will see in the next section, Zhu Xi unsurprisingly had great respect for following the written law because that would be akin to following *li*.

C. Zhu Xi's Views on Legal Punishments and Implications on his Legal Philosophy

As argued earlier in this Article, Zhu Xi's view on human nature (as opposed to Mencius's) allowed for a more prominent role for legal punishments in perfecting human behavior. Zhu Xi wrote several essays and letters specifically on legal punishments; in this section, comprehensive translations of some of these documents will be provided and analyzed (as many have never previously been translated into English). More importantly, Zhu Xi's views on legal punishments further supports one of the central arguments advanced in this Article: that Zhu Xi cared deeply about having clear laws and adhering to them in judicial decision-making. In many respects, Zhu Xi's views on punishments were quite revolutionary, as he supported harsh punishments (even supporting the resurrection of certain forms of corporal punishment). As I hope to show, one should not interpret Zhu Xi's support of severe punishments as a desire on his part to simply levy the maximum penalty possible; rather, he wanted government officials to follow the laws on punishments and saw punishments as fundamental to educating the people and helping them eliminate their selfish desires to fully realize their innate human nature.

Before delving into Zhu Xi's actual views on legal punishment, the sources must be set into context. In writing his various pieces on legal punishments, Zhu Xi was revolting against the popular Song dynasty practice of issuing amnesties,⁸⁶ particularly the *dashe* (大赦), or "great acts of grace", which generally would completely free the criminals in question without any strings attached. The following example from 960 in the beginning of the Song dynasty highlights the broad, total, irreversible reach – in terms of both the actual language and substance of the amnesty – of the "great acts of grace" that caused Zhu Xi much concern:

⁸⁶ The practice of freeing criminals by amnesty began in the Han dynasty.

We confer a *da she* (大赦) [Great Act of Grace] on the world. On the fifth day of this first month, just before dawn, all criminals are to be pardoned, whether or not the criminal cases have already been completed, whether or not the crimes have been discovered, without distinguishing between the serious and the minor and including those not forgiven under the terms of *chang she* (常赦) [ordinary amnesties].⁸⁷ Officials who have been dismissed, degraded, censured, impeached, or expelled from office are to be given grace. All those registered for penal labor, whether men or women, are to be freed according to convenience.⁸⁸

Indeed, the Song granted more amnesties than any other dynasty in Chinese history; the belief was that criminals would be encouraged to reform themselves because they would be deeply moved by the state's mercy.⁸⁹ In the 319 years of the Song, 95 great acts of grace were bestowed on criminals (an average of 1 every 19 months).⁹⁰ In many cases, the Song dynasty had no choice but to issue many amnesties as the government simply had too many criminal cases to deal with.⁹¹ Unfortunately, there were many reports of abusive and corrupt use of amnesties that either wrongfully set criminals free or reduced the severity of punishments,⁹² and many leading Song officials such as Wang Anshi (王安石, 1021-1086) and Sima Guang (司马光, 1019-1086) expressed their dissatisfaction with the practice.⁹³ In Zhu Xi's own words, he believed that: "In our current affairs, there is nothing more important and worthy of being taken seriously than the military and our system of legal punishments"⁹⁴

Besides the actual practice of amnesties and leniency in punishment, Zhu Xi also took issue with the historical and intellectual bases that his colleagues depended upon to justify their use of amnesties.

⁸⁷ There were two types of amnesties from the Tang dynasty (618-907 A.D.) onwards: the *da she* (Great Acts of Grace) and the *chang she* (ordinary amnesties). The Great Acts of Grace were more generous, and as discussed, freed criminals largely without any conditions. Ordinary amnesties were usually less generous and often only reduced penalties rather than completely removing them; see BRIAN E. MCKNIGHT, *supra* note 49, at 485-486.

⁸⁸ Quoted in BRIAN E. MCKNIGHT, *supra* note 49, at 486.

⁸⁹ *Id.* at 485.

⁹⁰ BRIAN E. MCKNIGHT, THE QUALITY OF MERCY: AMNESTIES AND TRADITIONAL CHINESE JUSTICE 75 (1981).

⁹¹ MCKNIGHT, *supra* note 49, at 490.

⁹² ZHONGGUO FAZHI SHI YUANLI YU ANLI JIAOCHENG (中国法制史原理与案例教程) [A SURVEY OF CHINESE LEGAL HISTORY: ORIGINS, PRINCIPLES, AND EXAMPLE CASES] 202-203 (Zhao Xiaogeng (赵晓耕) et al. eds., 2009).

⁹³ MCKNIGHT, *supra* note 49, at 490.

⁹⁴ ZHUZI YULEI, *supra* note 63, at 110.2711.

Many supporters of amnesties argued that the ancient sage kings were devoted to acts of leniency; other legal officials “[f]ell into the temptation of the Buddhist belief of retribution . . . [t]hey like to cancel legal punishments in order to bring forth good fortune on themselves.”⁹⁵ Others advanced arguments based on other Buddhist and Daoist notions of “divine” justice, where bad people would eventually be punished by Heaven while good people would be rewarded, and hence leniency of state-administered punishments was justified.⁹⁶

Zhu Xi rejected all of these arguments. He claimed that amnesty supporters had misread history and the actions of the sage kings, and were ignoring written law in order to satisfy their personal whims, hurting both the offenders and the victims, and disturbing social order. He also accused officials of using amnesties and lenient policies to reduce their own workloads: “When officials today speak of the notion of ‘lenient governance,’ this often translates into their not attending to their duties or affairs [an excuse for their own indolence]. They have thus misinterpreted and contaminated the original meaning of the word ‘lenient’.”⁹⁷ To support his positions against the overly-lenient officials, Zhu Xi addressed the following passage from the classic Chinese canonical text, the *Shang shu* (尚书), also known as the *Shu jing* (书经) [*Classic of History* or the *Book of Documents*, hereinafter the *Book of Documents*].⁹⁸ He believed this passage was being misinterpreted and abused by amnesty and leniency supporters. The passage comes from the *Shun dian* (舜典) [*Canon of Shun*] in the *Yu shu* (虞书) [*Documents of Yu*]⁹⁹ chapter in the *Book of Documents*:

He [Shun] exhibited (to the people) the statutory punishments, enacting banishment [exile] as mitigation of the Five (great) Punishments¹⁰⁰; with the whip to be employed in the magi-

⁹⁵ *Id.*

⁹⁶ ZHUZI WENJI, *supra* note 77, at 14.436.

⁹⁷ ZHUZI YULEI, *supra* note 64, at 108.2689.

⁹⁸ The *Book of Documents* was elevated as one of the Five Confucian Classics in the Han dynasty and records the various actions and speeches of China’s ancient sage kings, such as Yao and Shun. Throughout Chinese history, it has been venerated as a foundational text in Chinese political philosophy and used as a model handbook for governance. For a scholarly introduction to the *Book of Documents* and its scholarly history, see generally Edward L. Shaughnessy, *Shang shu (Shu ching)*, in *EARLY CHINESE TEXTS: A BIBLIOGRAPHICAL GUIDE* 376- 89 (Michael Loewe ed., 1993). For a convenient edition of the original Chinese text (including helpful annotations and commentary in modern Chinese), see SHANGSHU JIAOZHU (尚书校注) [THE BOOK OF DOCUMENTS: WITH ANNOTATIONS] (Chen Shuguo (陈成国) annot., Yuelu Book Co. (岳麓书社) 2004).

⁹⁹ In China, the ancient sage king Shun is also known as Yu Shun (虞舜), or simply Yu (虞).

¹⁰⁰ In Chinese antiquity (the Xia, Shang, and Zhou dynasties), the Five Punishments (*wu xing* 五刑) were the *mo* (墨, tattooing the criminal with permanent ink), *yi* (劓, cutting off the nose), *yue* (刖,

strates' courts, the stick to be employed in the schools, and money to be received for redeemable offenses.¹⁰¹ Inadvertent offenses and those which could be ascribed to misfortune were to be pardoned, but those who transgressed presumptuously and repeatedly were to be punished with death. "Let me be reverent! Let me be reverent!" (Shun said to himself). "Let compassion rule in punishment!" . . . [A]ll under Heaven acknowledged the justice (of Shun's administration).¹⁰²

In a letter to a colleague, Zhu Xi first explained that despite Shun's remark that compassion should rule in punishment, he and his administration clearly utilized both light and heavy punishments and did not simply treat all offenders leniently:

The *Canon of Shun* has the most detailed discussion of punishments . . . [t]he Five Punishments were used to deal with repulsive and evil criminals, such as murderers or those who commit assault, as well as those who plunder, rob, and commit acts of debauchery. Those that committed these crimes could not be granted amnesty. [When the *Canon of Shun* passage speaks of] "enacting banishment as a mitigation of the Five Punishments," it refers to exile-type punishments that were used to deal with those offenders whose crimes were a little bit less serious than murder, assault, plunder, and acts of debauchery. Exile was also suitable for dealing with those whose crimes were deserving of the Five Punishments but where their particular situations demanded some measure of compassion, or where there was uncertainty in the facts of the case and the law, or for those close to or related to the emperor, or for those who had been recognized by the state for meritorious service [to the realm]. "The whip in the magistrates' courts" and "the sticks in the schools" were the punishments for the court and schools, suitable for dealing with light infractions of the law. "Money to be received for redeemable offenses" is suitable for extremely light offenses, or those crimes which although are deserving of the Five Punishments, have some uncertainty in the application of the law or some other situational quality

also known as *fei* 刖; cutting off the leg or other limbs) *gong* (宫, castration), and *da pi* (大辟, death sentence).

¹⁰¹ This refers to the practice in premodern China of allowing some criminals to commute their punishments by paying fines.

¹⁰² For any translations of passages from the *Book of Documents* quoted in this Article, I use *Shangshu*, in *3 SACRED BOOKS OF THE EAST* (James Legge, trans., 1861), available at <http://ctext.org/shang-shu/canon-of-shun> (with my slight modifications of Legge's translation).

which allows for some latitude in sentencing. These Five Punishments [as set forth in the *Canon of Shun*] cover serious to light crimes; each provision is principled, correct, and has the backing of a relevant textual legal provision. “Inadvertent offenses and those which could be ascribed to misfortune were to be pardoned” means these types of crimes . . . should be directly pardoned without need for redemption through fines. But, “for those who transgressed presumptuously and repeatedly,” even if their crimes should be pardoned or their penalties reduced according to the law, these offenders cannot simply be exiled; they must be punished [severely]. These two sentences [in the *Canon of Shun*] show the possibility of one’s sentence become more serious or occasionally becoming lighter. Our statutes today also provide for such measures . . . [thus], th[is] [passage in the *Book of Yu*] is the foundation and basis of the punishment system of the great ancient sage-kings. Although the sage kings levied both harsh and light punishments . . . they were always guided by and acted out of the spirit of Shun’s remark, “Let me be reverent! Let me be reverent! Let compassion rule in punishment!” There was a proper place for both severe and light punishments . . . thus, [from all this above], how can one say that the sage kings always in every case simply chose to levy light punishments.¹⁰³

Here, Zhu Xi explained that Shun’s remark to “[l]et compassion rule in punishment” did not mean that Shun and the ancient sage kings pardoned crimes or levied the most lenient punishment in every instance; it simply showed that they did not punish people out of a desire to do evil or get revenge. Zhu Xi used Shun’s actions to show that the sage-kings did not always seek to pardon or reduce offenders’ sentences:

We can also look at Shun’s words to his minister Gao Yao to examine the punishment of the ancient sage kings. Shun said to Gao Yao: “Gao-Yao, the barbarous tribes trouble our great land. There are (also) robbers, murderers, insurgents, and traitors. It is yours, as the Minister of Crime, to use the Five Punishments to deal with their offenses . . . [p]erform your duties with intelligence, and you will secure a sincere (submission).”¹⁰⁴ [Gao Yao was clearly given discretion] to some-

¹⁰³ ZHU XI, ZHUZI WENJI, *supra* note 77, at 37.1504-1505.

¹⁰⁴ Zhu Xi here quotes from another passage in the *Canon of Shun* in the *Book of Documents*. I have used James Legge’s translation for this line; see SACRED BOOKS OF THE EAST, vol. 3, *supra* note 102.

times punish and sometimes pardon and to do what was proper under the law without any extraneous additional actions. Thus, from this example above, how is it possible to argue that the sage-kings only pardoned and did not punish. Today many stubbornly say that “during the times of the sage-kings Yao and Shun, there were [only] pardons and no punishments.” [If this were true], then it would mean that murderers were not executed and those that assaulted others were not punished. Furthermore, if what [the amnesty supporters] say is true, it would mean that the mind-and-heart of the ancient sage-kings could not bear to see repulsive and evil criminals suffer, but preferred to tolerate and accept the pain and writhing suffering of the innocent . . . [t]he absurdity and falsity of the logic of those [who say there were no punishments] is extremely apparent.¹⁰⁵

In the passage above, Zhu Xi argued that not only did the sage-kings themselves use punishments, but they also directed their ministers to do so as well. Using the example of Gao Yao, Zhu Xi seemed to be attempting to send his message directly to those ministers and officials who were arguing that there were only pardons in the sage-kings’ administration. Besides pointing out the logical fallacies in those officials’ arguments, Zhu Xi suggested that their interpretation of the *Book of Documents* actually was a direct, blasphemous insult to the sage-kings, as their reliance on the sage-kings to justify amnesties made Shun look as if he had “tolerate[d] . . . the writhing suffering of the innocent.”¹⁰⁶

Furthermore, Shun’s “Let me be reverent! Let me be reverent! Let compassion rule in punishment!” remark “represented the sage kings’ respectful attitude toward punishments as they were acutely aware of the fact that those killed could not be resurrected . . . they were [thus] fearful of being sloppy when examining [a case] and afraid of making a mistake.”¹⁰⁷ Zhu Xi continued to explain that there were even cases when the sage kings had to apply punishments, even though they had the personal means and power to pardon offenders; in the end, however, they still had to follow the law and, in some cases, consider the societal effect of the punishment:

Although the physical commission of the crime may have not been severe [or led to severe consequences] and although the

¹⁰⁵ ZHU XI, ZHUZI WENJI, *supra* note 77, at 37.1506.

¹⁰⁶ *Id.*

¹⁰⁷ ZHU XI, ZHUZI WENJI, *supra* note 77, at 69.3367.

sage kings had the means to forgive and pardon the offense, they nevertheless still had to exile the offender to a faraway place. For light offenses like this where the criminals did not kill or assault another person but rather engaged in debauchery or theft, although the affects of their crimes may not have been that severe, their true criminal intent was in reality quite serious. If these people are pardoned and not punished and then allowed to return and rejoin their hometowns as if nothing happened, then how can those they have harmed – such as widows and orphans – [bear to] see them.¹⁰⁸ These criminals who have been exempted from punishment, who have suffered no injuries and have all their hair, skin, and limbs preserved will have the means to follow the evil ways from their past. They will not understand remorse; this is why the *Canon of Shun* speaks of exiling criminals as a form of pardon.¹⁰⁹

Above, Zhu Xi argued against the practice of pardons and amnesties also for the negative impact it would have on victims and society in general. In addition, the amnesty-supporters' interpretation of the "let me be reverent" lines made a mockery of the legal system as a whole:

[What Shun] meant by "being reverent" is carefully deciding cases . . . and not allowing those who are guilty to get away without punishment . . . [t]oday's judges are all deluded into following the practice of being soft on crime; they use the "reverent" term to be more lenient and forgiving of crimes, even [to the point] of not supporting the death penalty. As a result, criminals that had committed crimes punishable by execution would be able to request and wait for leniency and amnesty decisions. The vast majority of capital crime death sentences were thus commuted; those who were sentenced to beheading ended up having their punishment reduced to banishment or exile; those who were originally to be banished then were subjected to penal servitude; those who originally were to be subjected to penal servitude were instead beaten with the heavy stick; those who were originally to be beaten with the heavy stick would instead be caned with the light stick.¹¹⁰ These

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 69.3368. Zhu Xi's point here is that even when the sage-kings "pardoned" criminals, criminals did not get a free pass. They still had to face some punishment such as exile.

¹¹⁰ It might be noticed here that the Five Punishments laid out here by Zhu Xi differ from those in the *Canon of Shun*; see text accompanying note 100. The Five Punishments (*wu xing*) changed after the Han dynasty; in Zhu Xi's time (indeed since the Tang dynasty all the way up to the Qing dynasty,

practices make a mockery of legal order and procedure, distort the legal code, and some officials even take bribes! What use, then, is there for “reveren[ce]”. . .¹¹¹

Zhu Xi lamented the fact that officials were setting aside written law and punishments to satisfy their own desires to pardon individuals. We can see thus how seriously Zhu Xi took law. Second, if we keep in mind Zhu Xi’s metaphysical philosophy, it can be said that these officials were in fact letting their selfish human desires cloud their judgments. Law was *li*; it expressed the Principle of Heaven, the morality and virtue in society. The gravity of the officials’ actions was thus compounded because they were not only going against the written codes, but against *li* itself.

On punishments, Zhu Xi also advanced an argument that law and punishments needed to be flexible to adapt to the times, a stance that cut directly into the amnesty supporters’ reliance on the *Book of Documents*. For Zhu, one should not blindly follow or apply the practices of preceding dynasties, even if they were policies of the glorious administrations of the sage-kings:

When the ancient sage-kings governed, their method of ruling was rooted in a desire to be lenient.¹¹² However, today, we must root governance in severity. We must first govern with strictness to rectify existing problems, and only after we do this will we have the means to obtain proper success. Today’s government officials act mercifully but unsystematically and not in accordance with laws and regulations . . . the result of their lenient acts is to allow those powerful criminals to be more successful. The innocent people will not be able to experience and enjoy the mercy of these officials, but rather suffer misfortune at their hands and policies!¹¹³

Yet, adherence to legal punishments as set out in legal codes and fighting against the abuse of amnesty and leniency measures in sentencing was not enough for Zhu; remarkably, he actually supported reusing certain rather brutal forms of corporal punishment that had

1644-1911 A.D.) the Five Punishments were: *chi* (笞, beating with a light stick), *zhang* (杖, beating with a large stick), *tu* (徒, penal servitude), *liu* (流, exile), *si* (死, death penalty); see KLAUS MÜLLHAHN, CRIMINAL JUSTICE IN CHINA: A HISTORY 31 (2009).

¹¹¹ ZHUZI YULEI, *supra* note 63, at 110.2712.

¹¹² Note that Zhu Xi is not contradicting himself here – a desire to be lenient does not mean the sage-kings were always physically sending out pardons or amnesties, as he argues in the passages discussed in the preceding pages.

¹¹³ ZHUZI YULEI, *supra* note 63, at 108.2689.

been abolished in the Han dynasty (206 B.C.-220 A.D.).¹¹⁴ In 167 B.C., Emperor Wen of the Han (汉文帝) (reign dates 180-157 B.C.), a revered Confucian emperor, abolished three out of the pre-Han Five Punishments¹¹⁵ - the *mo* (墨) [tattooing the criminal with permanent ink], *yi* (劓) [cutting off the nose], and *yue* (刖) [cutting off the leg or other limbs], replacing them with penal servitude or beating with a stick.¹¹⁶ Zhu Xi thus parted company with many of his fellow Confucian officials by advocating the reinstatement of the previously outlawed forms of corporal punishment above.

In the passage below, Zhu Xi first justified his position by arguing that the ancient sage-kings themselves utilized corporal punishment, and therefore there were historical roots to the practice. Second, the current situation required the use of previously banned punishments such as the *mo* and *yue* because existing punishments such as exile were not sufficient to stop serious criminal activities. On the other hand, Zhu Xi pointed out that using non-fatal corporal punishments such as *yue* could also bring about fairer justice, preventing the application of overly harsh punishments. Finally, Zhu Xi argued that corporal punishment should not be viewed as a desire on the part of the state to torture the criminal, but rather, to assist in the reformation of the criminal's bad character and further serve as a moral educational tool:

The ancient sage kings injured human bodies [through punishment] in order to punish evil. They [did not decide on this course of action lightly but rather] had exhausted their mind-and-hearts; therefore, they enacted and continued to use corporal punishments because they could not bear to see government go off to one extreme [to tolerate evil and crime, helping only criminals]. Today, the punitive laws of penal servitude and exile are unfortunately no longer sufficient in order to stop and prevent the treachery of the crimes of theft and debauchery. Furthermore, some of the punishments levied today are far too excessive: those that should not have been executed are being executed, such as individuals that have committed crimes like violent robbery . . . a more fitting punishment for these individuals would be to castrate them or cut off their legs;

¹¹⁴ Wang Weixuan (王威宣), *Lun Zhuxi de Falü Sixiang* (论朱熹的法律思想) [Zhu Xi's Legal Philosophy], TAIYUAN DAXUE SHIFANXUEYUAN XUEBAO (太原大学师范学院学报 (社会科学版)) [J. TEACHERS COLLEGE OF SHANXI UNIV. (SOCIAL SCIENCE ED.)], Jan. 13, 1995, at 45.

¹¹⁵ See *supra* text accompanying notes 100 and 110 (discussion of the changes in the Five Punishments throughout Chinese history).

¹¹⁶ JIAN MING ZHONGGUO GUDAI SHI (简明中国古代史) [A SHORT HISTORY OF PREMODERN CHINA] 155 (Zhang Chuanxi (张传玺) et al. eds., 2007).

although this would cause harm to their limbs, [these punishments] would nevertheless preserve their lives and destroy the root of their desires to commit evil, as well as [physically] preventing them from having the means to engage in those crimes again. Would this not preserve the intentions of the ancient sage-kings as well as appropriately [dealing with the problems] of our age. Moreover, for the ruler to accomplish his ambitions and be successful in his actions, he must have the tools of cultivation and the techniques of education¹¹⁷

While Zhu Xi's support of corporal punishments may seem very harsh and perhaps in contradiction with his broader world-view, I read this passage as fitting in with his broad legal and metaphysical philosophy. Here, it is important to recall Zhu Xi's views on human nature: as opposed to the Mencian emphasis on development of one's moral "seeds", Zhu stressed the need to suppress and eliminate human desires to make manifest the "endpoint" manifestations of one's originally good nature. This act of suppressing, eliminating, and stripping away, in my view, matches very well with the extremely physical imagery of the acts associated with the banned corporal punishments that Zhu Xi supported. For example, in the passage above, Zhu mentioned cutting off a limb from a criminal – this act of "eliminating" a limb would also have the effect of *completely* and *totally* "eliminating" the thief's desire to steal more things, as it would become anatomically almost impossible for him to engage in any more pilfering. Furthermore, only by cutting off a limb and preserving the life of the thief would the criminal be able to devote his time to moral education and bettering himself to control his *qi* and discovering the *li* inside him. In this way, by integrating Zhu Xi's views on corporal punishments with his views on human nature, we can see there is no philosophical contradiction.

Zhu Xi also emphasized the terrible domino-effect on society as a whole that would result from the abuse of amnesties and excessively lenient sentences; amnesties would ironically exacerbate problems that the amnesty-supporters thought they were solving. Furthermore, they would be a direct attack on the fundamental Principle of Heaven:

[W]hen punishments become lighter and lighter, then they will no longer be sufficient to improve the people's customs and behavior, and will instead encourage traitorous, rebellious, and delinquent hearts. This, in turn, will cause more and more lit-

¹¹⁷ ZHUZI WENJI, *supra* note 77, at 37.1506.

igation and cases . . . [O]ver the past few years, I have personally seen [some terrible things]: for example, sometimes a wife killing her husband; sometimes, a son killing his father; sometimes, a guest killing his host and patron. But yet, the judicial officials [wrongfully] apply the laws on exile to punish these offenders. [Zhu Xi also stresses that such cases are particularly important as they are connected with the Principle of Heaven and the Three Cardinal Guides and Five Constant Virtues] . . . I therefore advise your highness to apply the law and be resolute in assigning executions [when they are necessary]. I believe that for cases such as those I have just mentioned that implicate the fundamental roots of human relationships, if there are judges that do not adhere to the righteous principles enshrined in the Confucian Classics and instead indulge in the nonsense of some of their colleagues at court (such as their selfish desires or their [endless] prattle on Buddhist and Daoist theories on retribution), will the Heavenly Principle of human relationships not be [completely] destroyed. . . ¹¹⁸

To sum up this entire section, Zhu Xi spoke out against the abusive uses of amnesty and lenient sentencing because they violated the long-standing historical practices and attitudes of the ancient sage-kings, disturbed the social and moral fabric by favoring criminals over victims, made a mockery of the written legal code, encouraged corruption on the part of justice officials, and most importantly, ran counter to and endangered the Principle of Heaven and the great mission for criminals to reform themselves and discover their true, good *li*. Most importantly, Zhu Xi's vision of legal punishments was an indispensable part of his broader legal and metaphysical philosophy, therefore further supporting one of the main arguments advanced in this Article – Zhu Xi offered a coherent vision of the role law and punishment in society, and he took law extremely seriously.

V. ZHU XI'S LEGAL THOUGHT IN PRACTICE

A. *The A-Liang (阿梁) Case*

Having discussed Zhu Xi's legal philosophy as set forth in some of his writings, we now turn to examining how Zhu Xi applied his views on law and punishment in practice. The major point of this section is that there is a coherent consistency between Zhu Xi the theorist and Zhu Xi the government official who put his ideas into practice. This further supports the argument that he offered a cohe-

¹¹⁸ ZHUZI WENJI, *supra* note 77, at 14.436.

rent philosophy of law that was consistent in theory and practice. We begin first with Zhu Xi's views on the A-Liang case, a case that involved murder and adultery. Zhu Xi's views on this particular case are a reliable insight into how he carried out his legal philosophy in practice because he was serving as a judicial official in charge of criminal law matters in Jiangxi (as discussed in the biographical section of this Article).

Unfortunately, the historical record has not left us with that much information surrounding the facts of the case. A-Liang was the wife of Cheng Nian'er (程念二); both lived in Nankang, where Zhu Xi had served as prefect from 1179 to 1181. She had an affair with a man named Ye Sheng (叶胜), and they both plotted to kill her husband.¹¹⁹ There was, however, some confusion and dispute over A-Liang's precise role in the actual murder, which had been physically carried out by Ye Sheng.¹²⁰ Originally sentenced to death (at the time the legally mandated penalty for this kind of crime), in April of 1187 A-Liang had her death sentence commuted to 20 lashes on the back with the heavy stick and was banished to another prefecture.¹²¹ Ge Bi (葛邲) (ca. 1131-1196), the Imperial Minister of Justice, had dispatched officials to interrogate A-Liang, and there was some inconsistency with the findings of one interrogator. Ge Bi justified the measures of leniency in this way:

[T]he [previously] dispatched ten officials proceeded to interrogate A-Liang further again, and Jiangdong prosecutor Geng Yannian (耿延年) was also sent to personally question her as well . . . [H]e has determined that Cheng Nian'er was indeed killed by Ye Sheng, and from the beginning, A-Liang was never a co-conspirator. His finding is different from those of the ten officials previously sent to interrogate her. Today, if we take what prosecutor Geng has found out to be truthful evidence, then those ten previous interrogators should all be sentenced for the crime of wrongful sentencing; their responsibility is indeed heavy. For when even one person has a different finding from ten interrogators, there is reasonable doubt and we must [therefore] be cautious. Even if we do not believe

¹¹⁹ XU SONG (徐松), *SONG HUIYAO JI GAO* (宋会要辑稿) [SONG DYNASTY MANUSCRIPT COMPENDIUM] (7) Criminal Law ch. six, at 4 (Zhonghua Book Co., 1957). The *Song huiyao jigao* is an important source for Song dynasty political and legal history. It was written and compiled by Qing dynasty scholar Xu Song, who collected various important political documents (such as decrees and edicts by the emperor and other ministers) and organized them under various topical sections, such as divination, appointment of officials, and crime and punishment. See also SHU JINGNAN (束景南), *ZHUZI DAZHUAN* (朱子大传) [ZHU XI: A BIOGRAPHY] 408 (1992) for a brief mention of this case.

¹²⁰ ZHUZI WENJI., *supra* note 77, at 20.714.

¹²¹ XU SONG, *supra* note 119.

what Geng has learned is true, we still must send in another interrogator. Ye Sheng has already died of cold and hunger in prison, [but] A-Liang now has the ability to plead [for mercy] . . . [S]he has maintained her innocence, and indeed this has injured her spirits. She has spent nine years in prison, and there were still discrepancies in the information learned by the interrogators, who cannot be said to have been lax in their duties . . . thus we can say there is truly reasonable doubt to the case. Because there is doubt as to the true severity of her crime . . . her death sentence should be commuted. If she is not executed, this would also allow the ten interrogators to be exempt from punishment.¹²²

Gravely disappointed with this decision, Zhu wrote that despite the slight inconsistency among the findings of the various interrogators, A-Liang nevertheless had nourished the evil intent to murder her husband; her actions and the subsequent government decision to commute her death sentence were both staunchly against the Principle of Heaven and the historical precedent of the sage-kings:

As for the A-Liang case, multiple interrogators have been sent, one by one, but their findings are not consistent, and thus more interrogators were dispatched . . . [B]ased on what I can surmise from their situation, I believe that A-Liang cannot be forgiven. We need not send any additional interrogators. We have already thoroughly exhausted the number of interrogators, and we can now execute her. A-Liang and Ye Sheng had an affair, and this caused Ye Sheng to kill her ill husband [A]lthough in the end Ye Sheng's actually committing the murder resulted in A-Liang's having no knowledge of the [actual act of] murder, if we investigate the matter thoroughly, [we can see that] her actions were already in violation of the Principles [governing human conduct and relationships]. Furthermore, she already harbored the intent to murder [Zhu Xi then explained that, on one occasion, A-Liang was standing outside the door with her son, waiting for her husband to die (she mistakenly thought the murder was progressing). When she heard her husband's voice and then saw him coming out of their house, she knew at that point he was not dead, and only then did she fully yell out for help]. From this behavior we can plainly see her intent. She did not necessarily have to be physically present in planning or executing the actual mur-

¹²² *Id.*

der, but nevertheless she committed a serious offense that merits serious punishment. Now, there is nothing of greater importance in human relationships than the Three Cardinal Guides, and out of the three, the husband-wife relationship is particularly significant. A-Liang's crime is immensely cruel and evil and the Principle of humanity cannot forgive nor tolerate her actions. Based on the evidence, she should be executed . . . she is not worthy of any mercy or compassion. Although there has been a request to conduct more interrogations, I humbly request . . . that another report be prepared to the emperor, begging for his enlightened judgment and order to ask that the originally binding directive from the Secretariat [for the death sentence] be followed and that we proceed with the execution. Through this not only can we obtain the means in which to make behavior upright and promote the handling of matters according to the written law, we will also be able to levy rightful punishments (without delay) on those who engage in adulterous, immoral, and cruel acts. We can also move the populace, highlighting and further exposing them to the righteousness in proper human relations, as well as complementing and fully realizing the teachings of the ancient sage kings.¹²³

For Zhu Xi, ultimately the confusion over A-Liang's precise involvement in the murder was a non-issue; she had, in her actions outside the house, clearly demonstrated that she had the intent and desire to murder. A-Liang's intent was just too evil, a complete affront to the *li* governing basic human relationships, to be forgiven. But one thorny issue in Zhu Xi's thought remains: if, according to Zhu Xi's metaphysical views, every human being has the Principle of Heaven inside them that is ultimately good, and if everyone has the capacity eventually of discovering this *li*, how is the death penalty justified. For Zhu, there were simply some crimes that were so evil that the preservation of *li* in greater society depended on the execution of the criminal. Zhu also pushed for a victim-focused sense of justice in response to a question on how Zhu could support beheading and the death penalty when, according to his broad metaphysical philosophy, human life was sacrosanct:

Master Zhu replied: "[The death penalty] is justified because the criminal being executed previously killed another person. If this murderer is not himself killed, then the victim's suffered injustice cannot adequately be reduced or dealt with. By not

¹²³ ZHU XI, ZHUZI WENJI, *supra* note 77, at 20.714.

executing the criminal, it is as if you are putting your loving heart on his side.”¹²⁴

In sum, the A-Liang case offers us an example of how Zhu applied his coherent philosophy of law and punishment in a real-world context.

B. Zhu Xi's Xiang Yue (乡约) [Community Compacts] and Local Proclamations

As a local official, Zhu Xi would have been very much aware of the limitations of central rule from the capital. As part of his coherent philosophy on law and punishment, Zhu not only wrote about the need for important legal reforms from top-to-bottom, he was also concerned with an individual awareness of law and behaving in a moral way from bottom-to-top. We can see this concern reflected in Zhu Xi's formation of the *xiang yue* (乡约), or community compacts, as well as local proclamations. The community compacts were a Neo-Confucian social organization, a “fellowship” that joined members together to encourage virtuous behavior.¹²⁵ They were voluntary forms of social regulation as they offered an alternative to lay religious societies and also state-mandated community systems.¹²⁶ Neo-Confucian scholar Lü Dajun (吕大钧) (1031-1082) is credited with creating the community compact system,¹²⁷ which persevered into the Republican period in the early twentieth century.¹²⁸ Zhu Xi enlarged and amended Lü's original family community compact text (Zhu's version is known as the Zhu-Lü compact); indeed, this version would be “the most enduring model of the community compact” in Chinese history.¹²⁹ These compacts sought to reach into all areas of a person's life: those who entered into a compact would be expected to keep rules of decorum in their daily life. Members would agree on the rules themselves, hold monthly meetings, read out good deeds while writing down and circulating individual bad deeds; foods and entertainment would also be provided, turning meetings into true social events.¹³⁰ According to historian William Theodore de Bary, the key goal of the Zhu-Lü compact was “the establishment of stable self-regulating local communities

¹²⁴ ZHUZI YULEI, *supra* note 63, at 110.2712.

¹²⁵ BOL, *supra* note 54, at 249.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Monika Übelhör, *The Community Compact in the Sung*, in NEO-CONFUCIAN EDUCATION: THE FORMATIVE STAGE 371, 372 (William Theodore de Bary & John W. Chaffee eds., 1989).

¹²⁹ BOL, *supra* note 54, at 249.

¹³⁰ *Id.* at 249-50.

through the leadership of an educated moral elite that encouraged self-discipline, mutual respect and assistance, voluntary efforts, and joint rituals to provide for the needs of the community as a whole.”¹³¹

I view Zhu Xi’s community compacts not simply as purely voluntary organizations, but rather quasi-legal institutions that formed a contractual relationship among all members who decided to join them. The community compacts were, in other words, Zhu Xi’s answer to the promotion of legal and moral order in local society; they were the localized component of his consistent and coherent vision of law’s role in society. Furthermore, while membership was technically voluntary, entrance into a community compact became an important marker and symbol for a literatus’s (*shi* (士) [the Chinese educated elite]) identity as a Neo-Confucian. As Peter Bol has argued, “Neo-Confucianism was not only a way of learning that some *shi* believed could define values for everyone; it was also one possible representation of the identity of the *shi* as a group. It was an identity that some *shi* believed could provide moral and social guidance in their roles as the elite of a local society relative to which they could be powerful”¹³² Bol shows convincingly how literati in thirteenth and fourteenth century Wuzhou (婺州) (a prefecture in eastern Zhejiang province) banded together under a Neo-Confucian identity to create a powerful social movement in which they attempted to transform themselves and also to improve their communities through the creation of new communal institutions.¹³³ Thus, membership in a community compact was empowering for the literati, and I believe there was a certain type of social pressure that encouraged individuals to join so as to avoid being ostracized from the Neo-Confucian community.

The actual sources also support a reading of Zhu’s community compacts and his local proclamations as quasi-legal institutions that placed contractual obligations on members. Zhu Xi’s *Quan yu bang* (劝谕榜) (*Proclamation of Instructions*), issued when he was prefect of Zhangzhou (漳州) in 1190, is a good example of Zhu Xi’s efforts to create a sort of pre-modern neighborhood watch system, where members of the local society had obligations to ensure everyone was behaving morally. Below are some relevant sections of the *Proclamation of Instructions*:

¹³¹ WILLIAM THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 63 (1998).

¹³² Peter K. Bol, *Neo-Confucianism and Local Society, Twelfth to Sixteenth Century: A Case Study*, in THE SONG-YUAN-MING TRANSITION IN CHINESE HISTORY 245 (Paul Jakov Smith & Richard von Glahn eds., 2003).

¹³³ *Id.* at 242-43.

Following are items of instructions to be observed:

1. Instructions to members of community units on matters about which they should encourage and remind each other: All members should encourage and remind each other to be filial to parents, respectful to elders, cordial to clansmen and relatives, and helpful neighbors. Each should perform his assigned duty and engage in his primary occupation. None should commit vicious acts or thefts, or indulge in drinking or gambling. They should not fight with or sue each other. If there are filial sons or grandsons, or righteous husbands and virtuous wives, and their deeds are noteworthy, they should be reported. The government, in accordance with provisions of the statutes, will reward them and honor them with banners. Those who do not follow instructions should be reported, examined, and punished in accordance with the law.
2. Injunctions to members of community units on matters of which they should mutually watch and investigate each other: People should always be alert to save water, prevent fire, investigate thefts and robberies, and prevent infighting . . . People in the same community unit should watch each other. Anyone who is aware of a crime but fails to report it will share the punishment.¹³⁴

The *Proclamation* urged all individuals in the community to help each other realize their moral potential and to avoid breaking the law. Note also that Zhu's *Proclamation* was not in conflict with central state power; indeed, the government would play an important role as a partner, rewarding the upright "in accordance with provisions of the statutes" and also apply the correct legal punishment to those who did not follow the instructions. Again, everything in the *Proclamation* should be read as fully coherent and integrated into Zhu Xi's larger legal philosophy. Local rules ensured that the Principles inherent in law and morality would be preserved at all levels of society and administration. People who did not follow the *Proclama-*

¹³⁴ ZHUZI WENJI, *supra* note 77, at 100.4862-64, translated in SOURCES OF CHINESE TRADITION, *supra* note 21, at 749.

tion were not just revolting against the physical text, but they were also violating the Principles of Heaven. The *Proclamation* warned:

Now some people are unfilial to parents and disrespectful to brothers. They often violate their parents' instructions and commands and even fail to provide for them; they easily become angry and fight with their brothers and even refuse to help them out. They defy Heaven and violate principles. I deeply lament and feel sorry for them. They should urgently reform their conduct[;] otherwise[,] they will invite immediate disaster ...¹³⁵ [W]ith respect to [these instructions], I only wish that everyone understand what is right and be a good person. Everyone should realize that if he does not offend the authorities, there is no reason why he should be subject to punishment. All should earnestly follow these instructions so that peace and harmony will be with them. If anyone does not follow them and dares to be defiant, the law of the state is clear and officials must be impartial [in enforcing the law]. Everyone should deeply reflect on this so he will have no cause for regret later.¹³⁶

The Zhu-Lü compact also possesses some quasi-legal features. The entire compact is too long to be reduplicated here, but what is impressive is the specificity and wide topical range of its various provisions, addressing everything from rules to be followed to how people should seat themselves at monthly meetings. The Zhu-Lü compact lists a variety of individual faults that compact members should strive to avoid, including:

1. Drunken quarreling, gambling, fighting, litigation.¹³⁷
2. [E]xcessiveness and abnormality in conduct.
3. [I]rreverent and unyielding conduct.
4. [S]tating what is not true and not being trustworthy
5. Making up statements of false accusation and slander
6. Managing things to one's own undue advantage.¹³⁸

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¹³⁶ SOURCES OF CHINESE TRADITION, *supra* note 21, at 749-50.

¹³⁷ *Id.* at 751.

¹³⁸ Note that Zhu Xi did not express a blanket prohibition or dislike of litigation. As prefect of Zhangzhou, he himself had to deal with hundreds of pending lawsuits. Zhu Xi was speaking out against frivolous or false lawsuits designed just to hurt others; in the end, he still believed litigation had "a proper role in achieving a just society." For this viewpoint on Zhu Xi's policies on litigation, see Ron-Guey Chu, *Chu Hsi and Public Instruction*, in NEO-CONFUCIAN EDUCATION: THE FORMATIVE STAGE 252, 269, 270 (William Theodore de Bary & John W. Chaffee eds., 1989).

ZHUZI WENJI, *supra* note 77, at 74.3739-50, translated in SOURCES OF CHINESE TRADITION, *supra* note 21, at 753 (entitled *Zengjuan Lü Shi Xiangyue* (增捐吕氏乡约)).

Members not only had an individual obligation to the compact to monitor their own behavior, but there also was a sense of more collective obligations to actively assist other members. Other more collective faults which violated the compact, for example, included “not mutually encouraging virtue and meritorious deeds,” “not mutually correcting faults,” and “not mutually expressing sympathy for the distressed.”¹³⁹

Besides any legal penalties from state statutes that may have applied, there were also penalties for infractions within the community compact:

Those who have joined the compact should examine themselves with regard to the foregoing faults and mutually admonish one another. If the fault is slight, confidential admonition is in order; if it is great, group admonition is called for. If the person charged will not listen, then at a general meeting the head of the compact, so informed, shall try to reason with him and if he agrees to reform, the matter shall simply be recorded in the register, but if he resists, will not submit, and proves incorrigible, all shall agree to his ejection from the compact¹⁴⁰

Thus, ostracism and expulsion from the compact were methods of punishment within the quasi-legal community compact institution. And for literati who relied on their identity as Neo-Confucians for self-worth and authority, preserving memberships of good standing in these compacts would have been critically important. There was also the punishment of having potentially embarrassing events “recorded in the register” for all of posterity to see.

Quasi-legal punishments also came in the form of social humiliation in the monthly compact meetings:

Every month there shall be a meeting where a meal is served. Once every three months[,] there shall be a gathering where wine and a meal are served. The person in charge each month shall be responsible for covering these expenses. At these meetings, good and bad deeds shall be entered in a register and

139140 SOURCES OF CHINESE TRADITION, *supra* note 21, at 753.*Id.* at 754.

rewards and penalties administered. Any troublesome matter should be dealt with on the basis of general discussion.¹⁴¹

Again, there is the emphasis on the very physical act of writing bad deeds into the register. Given that “troublesome matters” would be openly and collaboratively discussed, one can see the very public, social humiliation that would have served as a deterrent for would-be violators of the compact. Thus, the community compacts were quasi-legal in that they were not technically legally binding, but nevertheless had clear, obligatory rules backed up with the threat of punishment from the state (if applicable) and from the community.

Community compacts have been interpreted by scholars largely as either “represent[ing] sometimes the increased extension of state power into private affairs” or as a form of resistance and alternative to state interference.¹⁴² I do not read community compacts, at least if we situate them within Zhu Xi’s broader legal philosophy, as being at odds with central state power. Instead, I view community compacts and the state as supporting and complementing each other to promote moral and social order through written statutes and punishments (issued of course from top-to-bottom) and also quasi-legal modes of obligation and punishments in the local community compacts (bottom-to-top approach). By integrating law with Confucian moral tenets at all levels of society – from the capital to the local village – Zhu Xi arguably empowered law, making it accessible for both the high official living in the capital down to the local literatus. Indeed, we must keep in mind that Zhu Xi’s *Proclamation*, for example, was made clearly available for the people in Zhangzhou to consult; the openness and frequency of the monthly meetings, coupled with the emphasis on the physical act of writing good and bad deeds and recording events in the community compacts also ensured everyone was aware of what was going on. Community compacts, when analyzed this way, serve as further support of the idea that Zhu Xi was promoting a coherent, consistent vision of law and punishments in society and law as a powerful, transformative tool that could bring communities together. People would be motivated not just out of fear of the statutory law, but out of genuine con-

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¹⁴² *Id.*

WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS*, *supra* note 131, at 61. See also Peter K. Bol, *Neo-Confucianism and Local Society, Twelfth to Sixteenth Century*, *supra* note 132, at 282, who argues that: “[N]eo-Confucians sought to limit interference by the central government . . .” and that Neo-Confucian movements highlight the competition between “government that sought to reassert the authority and centrality of the court and throne and those local literati who envisioned a more decentralized society, one in which morally committed and socially responsible men would provide leadership in every county and prefecture.”

cern for others in the compact. By equating law with morality, people would live the law out every day in their lives.

VI. ZHU XI AND NEO-CONFUCIANISM'S POSSIBLE CONTRIBUTIONS TO MODERN CHINESE LEGAL REFORM

I share China law scholar Randall Peerenboom's view that "[t]he value of the study of ancient Chinese philosophy is greatly enhanced . . . if it can be made relevant to today's world and the contemporary philosophical scene."¹⁴³ I am of the conviction that Zhu Xi's legal philosophy can serve as a valuable resource in understanding the benefits of how Confucian morals and modern legislation and statutes can support one another in China's modern legal system.¹⁴⁴ Zhu Xi and his ideas are living proof that traditional Confucian morals are not necessarily antithetical to a political system that rules according to the written law.

Many problems appearing in the modern Chinese legal system are certainly not unique to China, but endemic in many other developing legal systems. One of the fundamental charges levied against the modern Chinese judiciary is that "law is overshadowed by [political] power"¹⁴⁵ and that there are no checks on the influence of the Chinese Communist Party (CCP), which continues at times to challenge courts' independence to decide cases.¹⁴⁶ Peerenboom also argues that a Chinese rule of law system "must reflect the moral concerns of the people" and also "impose legal and institutional constraints on those with the power to create, interpret, and alter the law."¹⁴⁷ He identifies characteristics which a successful coherent legal system that "is both philosophically justifiable and practically workable"¹⁴⁸ must have: institutional checks on leaders, similar handling of similar

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R.P. PEERENBOOM, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO 265 (1993).

¹⁴⁴ Some scholars have argued that Neo-Confucian philosophy supports a vision of law as a "second resort"; see, e.g., STEPHEN C. ANGLE, SAGEHOOD: THE CONTEMPORARY SIGNIFICANCE OF NEO-CONFUCIAN PHILOSOPHY 220 (2009). However, I believe this view continues to suggest law and morality are separate; these views also do not necessarily hold true if we consider the coherence of Zhu Xi's legal thought.

¹⁴⁵ *Id.* at 266.

¹⁴⁶ For a discussion of limited judicial independence in rural China, see Xin (Frank) He, *Ideology or Reality? Limited Judicial Independence in Contemporary Rural China*, 6 AUST. J. OF ASIAN L. 213-230 (2004). See also Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 69, 80 (Randall Peerenboom ed., 2009), which states that despite promising growing judicial independence in China, problems still exist in the handling of "specific cases," especially those that are politically-sensitive, where government apparatuses will interfere with judicial decision-making. I thank Professor Jerome A. Cohen for alerting me to this excellent book chapter.

¹⁴⁷ R.P. PEERENBOOM, *supra* note 143, at 270.

¹⁴⁸ *Id.* at 270.

cases, generating and publicizing laws, as well as “some means of protecting the individual against undue interference from other members of society and the state.”¹⁴⁹ Taking some of these characteristics as an analytical framework, this Article will proceed to tackle some of them and discuss what contributions Zhu Xi might be able to make today. The speculative nature of this topic will make this section quite brief, but I nevertheless hope it will lead to more discussion:

A. Institutional Checks on Leaders

Zhu Xi’s fusion of law with his metaphysical views of *li* and the Principle of Heaven can arguably serve as a “natural law” limitation on corruption and other undesirable behavior by government officials who violate Confucian moral principles. At the very least, couching arguments in the ideas of Confucian morality can be a powerful rhetorical check on government abuses. In other words, the natural law espoused in Zhu Xi’s thought – the idea that *li* governs all things and that everyone is made of both *li* and *qi* and thus subject to the latter’s influence on human desire – can be a source of authority that citizens could invoke against bad officials. Indeed, the idea that Neo-Confucianism, through its doctrine of universal moral laws and social order, could serve as a limiting force on autocracy, is certainly not new.¹⁵⁰ But what are the specific channels and ways in which Neo-Confucianism can form a check on government leaders.

One way is that Zhu Xi provides a vocabulary and language for addressing government abuses of power and interference in the legal system that would be palatable and acceptable to both the central government and more liberal-leaning human rights activists. It would be a very powerful way to make an argument that went something like this: judicial corruption is violating the universal Confucian norms that have always been important to Chinese society. It is very difficult, for example, to convince the CCP of the necessity for certain legal reforms by using the vocabulary of Western liberal and democratic philosophers. Moreover, Zhu Xi himself was a faithful government official working within the political system of his time. This might also enhance the appeal of his thought to the current Chinese leadership.

More broadly, now is also a good time when the CCP would probably be receptive for arguments couched in Confucian philosophical vocabulary. As early as Jiang Zemin’s administration, the

¹⁴⁹ *Id.* at 270-271.

¹⁵⁰ See, e.g., ALAN T. WOOD, LIMITS TO AUTOCRACY: FROM SUNG NEO-CONFUCIANISM TO A DOCTRINE OF POLITICAL RIGHTS (1995).

CCP has drawn on the Chinese tradition and Chinese history to buttress morality and traditional values in society.¹⁵¹ Chinese President Hu Jintao has actively promoted Confucian virtues such as “harmony” and “loyalty.”¹⁵² There is also a Confucian revival going on in China: thousands of schools have been set up whose curricula focus largely on the Confucian classics, and the central party school now teaches Confucian classics to officials-in-training.¹⁵³ One scholar has even argued that the CCP might be “re-labeled the Chinese Confucian Party.”¹⁵⁴ This is certainly a different CCP than the one that vilified Zhu Xi as a backwards and hypocritical thinker.¹⁵⁵ Being seen as a good, Confucian government can only bring benefits for the CCP as this can serve as yet another source of legitimacy for its rule.

Second, just as Zhu Xi’s commentaries on the *Four Books* were tested in the imperial examinations, there might be a greater role for Confucian history and morals to play in civil service examinations in present-day China. Candidates for government service could be required to show a certain level of knowledge about Confucian morals or write essays on what a Confucian response might be to pressing societal problems. Although not all officials might whole-heartedly become moral Confucians, I believe they would nevertheless have some internalization of Confucian principles in the test preparation and test taking process.¹⁵⁶

Indeed, Zhen Dexiu (真德秀) (1178-1235), a prominent Neo-Confucian scholar, maintained that the *Great Learning* – one of Neo-Confucianism’s seminal, guiding texts on cultivation – was “the full legal code for him who is ruler to all under Heaven.”¹⁵⁷

B. *Generating and Publicizing Laws & Reducing State Interference in Daily Life*

Here, we can draw on Zhu Xi’s policies in local society. It should be noted that China has already launched several *pufa* (普法),

¹⁵¹ RONALD C. KEITH & ZHIQIU LIN, NEW CRIME IN CHINA: PUBLIC ORDER AND HUMAN RIGHTS 6-7 (2006).

¹⁵² DANIEL A. BELL, CONFUCIAN POLITICAL ETHICS ix-x (2008).

¹⁵³ DANIEL A. BELL, CHINA’S NEW CONFUCIANISM: POLITICS AND EVERYDAY LIFE IN A CHANGING SOCIETY 12, 194 n.15 (2008).

¹⁵⁴ DANIEL A. BELL, CONFUCIAN POLITICAL ETHICS, *supra* note 153.

¹⁵⁵ F.W. MOTE, *supra* note 14, at 341.

¹⁵⁶ Many other countries do similar things in selecting judges. In the United States, for example, federal judges are required to go through a Senate confirmation hearing. The Senate considers of course the judge’s intellectual and professional qualifications, but also considers his personal ethics and his dedication and commitment to the principles and values enshrined in the U.S. Constitution.

¹⁵⁷ BOL, *supra* note 54, at 137.

or legal education, campaigns.¹⁵⁸ But while the *pufa* program has largely been a top-to-bottom approach, we can learn from Zhu Xi's equal emphasis on a bottom-to-top approach. Local residents can take greater steps to inform their friends, family members, and neighbors of legal developments. Legal officers could go to apartment complexes, for example, to post up pamphlets or notices, similar to Zhu Xi's *Proclamation*. For the preservation of social order, the government could conduct media campaigns promoting harmony and good relations among neighbors, encouraging people to look out after one another in the spirit of Confucian mutual concern.¹⁵⁹ In turn, this might empower ordinary citizens to be more vigilant of the government to see if it itself is violating Confucian principles.

I also believe modern Chinese legal reform and legislation must seek to intertwine moral education with law, just as the Dongcheng District court did in the Zhang case introduced at the beginning of this Article. There are two benefits to some utilization of Confucian morality in legislation and case judgments: first, it can serve as yet another limiting force on possible government recklessness; second, it empowers the force of the law and increases its accessibility. This, in turn, will make citizens feel more involved in the application of the law (because it speaks to their moral beliefs) and perhaps be an encouraging force for them to also get involved in the political process. Also, by encouraging more community legal-virtue initiatives, the state will have less need to intrude into the private lives of citizens.

VII. CONCLUSION

I have attempted to show that Zhu Xi should be viewed as a significant, model legal thinker who took law seriously, empowered it by situating it within his greater moral and metaphysical philosophy, and offered a coherent, internally consistent vision that respected the rule of the written law and valued the participation of all levels of society in creating a legally conscious and stable social order. We should therefore avoid following broad generalizations that Confucianism was antithetical to legal development or a "rule of law" sys-

¹⁵⁸ For an overview of the Pufa campaigns, see Mechthild Exner, *Convergence of Ideology and Law: The Functions of the Legal Education Campaign in Building a Chinese Legal System*, ISSUES & STUDIES, Aug. 1995, at 68. Many thanks to Professor Benjamin van Rooij for pointing out this source to me.

¹⁵⁹ My recommendation may sound a little strange, but a variety of television soap-opera programs broadcast in Taiwan have strived to encourage cooperation and friendliness among neighbors in apartment communities. See, for example, the 2010 hit soap drama, *Fantuan zhi jia* (饭团之家) [Rice Dumpling Family], which details several Confucian virtues, including filial piety, within a contemporary urban setting.

tem in Chinese legal history; at the very minimum, Zhu Xi can serve as an invaluable corrective to the traditional narrative of Chinese legal history. He also stands as further proof for the fact that Neo-Confucianism was not just purely an intellectual and abstract movement, but a social and political movement deeply concerned with the well-being of the state and the people.

I have also tried to argue that Zhu Xi has something to offer modern Chinese legal reform today. Indeed, this Article closes by quoting recommendations that Zhu Xi himself advanced in a memorial to the emperor; these recommendations drip with contemporary applicability and relevance given his emphasis on making law as clear and fair as possible, systemization and consistency in legal application, legal training and education, and making sure there exist checks on government power:

[A]s for the final court judgments, the judges cannot recklessly use the laws of pardon or amnesty. I also call on those scholar-officials well-versed in the Classics, histories, and the ways of the ancient sage-kings to . . . prepare a text of the remarks of authorities both today and in antiquity on crime and punishment, and utilize this text to train individuals . . . planning on entering government service, and to also provide this text to all officials involved in deciding cases. This way we can make all understand the ways in which the ancient sage kings prepared and promulgated their decrees, laws, and teachings, as well as gaining an appreciation of how they established the great elements that comprised their punishments [U]ltimately, this will give us the means to assist in realizing proper education in this world¹⁶⁰

¹⁶⁰ ZHUZI WENJI, *supra* note 77, at 14.436.