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LEGAL REALISM AND CHINESE LAW: ARE CONFUCIAN LEGAL REALISTS, TOO?

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Abstract

How should we understand, describe, and/or characterize classical Confucian legal thought (i.e., pre-Qin Confucianism, namely, the thought of Confucius and Mencius)? Some scholars have argued that classical Confucianism should be understood as a natural law theory. Others have argued that it should be understood as a Dworkinian coherence theory of law. Still others have maintained that classical Confucian legal thought should not be understood as a legal theory but rather as a moral theory emphasizing self-cultivation and harmony. In this paper, I argue that classical Confucian legal thought and approaches to adjudication are best understood as an (American) legal realist approach to law and adjudication. Primarily examining the legal thought of Confucius and Mencius, I hope to show that classical Confucian legal thought can be described as anti-formalistic and very much concerned with the nature of adjudication and how legal officials should decide cases. In many respects, classical Confucian legal thought and adjudicatory practices can also be understood as representing the ideal approach and reflection of adjudication as advocated by many of the leading American legal realists. Finally, this paper makes the following preliminary conclusions which are more macroscopic: First, by showing the similarities classical Confucian legal thought shares with American legal realism, I hope to show that there is nothing fundamentally uniquely "Sinic" about classical Confucian approaches to adjudication, which hopefully will bring Confucian legal thought more into dialogue with Western theories of law and adjudication. Second, American legal realism, which has experienced heavy criticism and even scorn by legal philosophers, actually has important applications even in non-American systems of law, and should be treated with more respect and seriousness by legal theorists. Third, many of the ideas and principles of American legal realism are not really novel; they can also be found in earlier legal

traditions, such as the Confucian legal tradition.

I. INTRODUCTION

How should we understand or characterize classical (*i.e.*, early or foundational) Confucian legal thought?[1] One group of scholars has argued that classical Confucianism should be understood as a natural law theory.[2] Another prominent Chinese law and legal theory scholar has argued that classical Confucianism should be compared to Dworkin's coherence theory of law.[3] Other scholars disagree with the above two views and have maintained that classical Confucianism should not really be understood as a legal theory but rather as an "ambitious moral theory" which requires self-cultivation and aims at fostering a society of peace and harmony.[4]

In this paper, I want to argue that, in terms of comparative legal theory, classical Confucian legal thought is actually best understood as, and compared to, (American) legal realism[5] and its key ideas. Examining the writings and legal thought of the foundational Confucian thinkers Confucius (551–479 BC) and Mencius (372–289 BC), I hope to show that classical Confucianism was not concerned with conceptual questions regarding law — or put another way, classical Confucian legal thought was not concerned with the typical questions

[1] Classical Confucianism, early Confucianism, and foundational Confucianism refer primarily to the thought of the two earliest and foundational Confucian thinkers in the Confucian tradition — Confucius and Mencius. This paper focuses on their legal thought, and it does not cover later schools of Confucianism such as Neo-Confucianism. It should be noted that Xunzi is of course also an important Confucian thinker in classical Confucianism, but because his thought never became part of the Confucian orthodoxy in Chinese history, I will not discuss Xunzi's legal thought here in this paper (although I will use his writings as a source for the legal thought of Confucius and Mencius, as his writings contain some recorded stories regarding Confucius). Furthermore, I use the term "legal thought" broadly to refer to ideas and philosophies regarding law, legal norms, and norms on social control and social order.

[2] Scholars that have advanced this view include Liang Qichao, Hu Shi, Mei Zhongxie, Futukaro Masuda, Hyung I. Kim, J. J. L. Duvyendak, Derk Bodde, and Joseph Needham. *See, e.g.*, Hu Shi, *The Natural Law in the Chinese Tradition*, 5 NAT. L. INST. PROC. 117 (1953); HYUNG I. KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY (1981); J. J. L. DUYVENDAK, THE BOOK OF LORD SHANG: A CLASSIC OF THE CHINESE SCHOOL OF LAW 46 (1963); DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 21 (1967); JOSEPH NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA (VOL. 2) 544 (1956). *See also* YU RONGGEN (俞荣根), RUJIA FA SIXIANG TONGLUN (儒家法思想通论) [ON CONFUCIAN LEGAL THOUGHT] 42–43 (1998) (discussing some of these scholars who hold such a view). However, I tend to agree with those scholars who do not believe classical Confucianism (that is, pre-Qin Confucianism) should be understood as a natural law theory. For example, *see* the persuasive arguments advanced in YU RONGGEN, *supra*, at 41–61, 132–33. *See also* Elena Consiglio, *Early Confucian Legal Thought: A Theory of Natural Law?*, 2 RIVISTA DI FILOSOFIA DEL DIRITTO 359 (2015). I have argued elsewhere that Neo-Confucianism — namely, the philosophical system of Wang Yangming (1472–1529) — can be understood as a coherent, integrative natural law theory; *See* Norman P. Ho, *Natural Law in Chinese Legal Thought: The Philosophical System of Wang Yangming*, 8 YONSEI L.J. 1 (2017).

[3] *See* R. P. Peerenboom, LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO (1993).

[4] *See*, *e.g.*, Consiglio, *supra* note 2.

[5] There are, of course, two recognized legal realist movements — American legal realism and Scandinavian legal realism. When I use the term "legal realism" or "legal realist(s)" in this paper, I am referring to the American one.

in the domain of analytical jurisprudence (*e.g.*, "what is law?"). Rather, like the legal realists, classical Confucian legal thought was very much concerned with the nature of adjudication and how judges[6] decide cases. Also, like the legal realists, classical Confucian legal thought can be described as anti-formalistic. I will also argue that classical Confucian approaches to adjudication reflect the legal realist approach toward adjudication in its rawest or purest (and perhaps idealized, at least in the view of realists like Jerome Frank) form.

From a more macroscopic level, this paper hopes to make the following scholarly contributions. Most immediately, I hope to deepen our understanding of classical Confucian legal thought. More broadly, this paper aims to contribute to the fields of comparative jurisprudence by showing the value of legal realism not only in understanding American (or Western) approaches to law, but to non-Western legal traditions as well. In that sense, this paper takes a sympathetic approach to legal realism (which has fallen under heavy and biting criticism from legal theorists) and attempts to contribute to the project of resuscitating legal realism.

This paper proceeds as follows: Section I lays out a brief overview of the key tenets and ideas of legal realism. Section II presents my analysis of classical Confucian legal thought, with a focus on classical Confucian views on adjudication. I also show how classical Confucian legal thought can be compared to legal realism. The paper then concludes.

II. A BRIEF OVERVIEW OF LEGAL REALISM AND ITS MAIN THEMES AND IDEAS

It is outside the scope of this paper to provide a detailed analysis about the origins, history, development, influence, and full contours and content of legal realism.[7] Rather, this section only provides a very brief overview of the key tenets of legal realism, particularly those which concern adjudication;[8] as a result, it is a necessary simplification of the intellectual movement that is legal realism.

[6] I use the term "judges" for convenience purposes. It should be noted, however, that in traditional China (that is, China from antiquity to 1911), there was no real independent class of "judges" — magistrates, for example, were responsible for judicial, administrative, financial, and other matters in their jurisdiction. Perhaps the use of the term "legal officials" might be more historically accurate, but again, I use "judges" here out of convenience to refer to "legal officials" in traditional China.

[7] The secondary literature on American legal realism is vast. *See*, *e.g.*, AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007); MICHAEL MARTIN, LEGAL REALISM: AMERICAN AND SCANDINAVIAN (1997); HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY (2013); and J. William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

[8] There have been many excellent analytical summaries and overviews of legal realism produced in the secondary literature. In this section, I rely substantially on this secondary literature, as I find no reason to re-invent the wheel. I include what I think are important and representative excerpts from the primary texts of legal realism as appropriate.

Legal realism grew out of the work and ideas of certain American legal theorists — especially Oliver Wendell Holmes, Jr., who is largely considered the intellectual founding father of legal realism[9] in the late 19th into the early 20th century. American legal realists questioned prevailing notions and explanations of adjudication and legal reasoning.[10] While legal realism has had an influence on American legal education, many legal theorists and law scholars have criticized legal realism, questioning whether legal realism is even a coherent, fully-formed school of legal theory.[11] While there were many legal realists in the movement and their ideas were not entirely the same, we can certainly set forth recognized, general themes that all legal realists articulated in their works.

The legal realists focused mainly on understanding adjudication and how judges made decisions; they were not overly concerned with questions of analytical jurisprudence[12] or with offering a grand theory of law.[13] As Karl Llewellyn argued, "This doing of something about disputes [. . .] is this business of law [. . .]. And the people who have the doing in charge [. . .] are officials of the law [. . .]. What these officials do about disputes is, to my mind, the law itself."[14] They were called "realists" because they believed they were setting forth a realistic, real-world account of how judges actually decided cases. Legal realists attacked formalism and the formalistic notion that judicial decisions "should or could be deduced from general concepts or general rules, with no attention to real-world conditions or consequences"[15] and that judicial decision-making was based on legal rules and reasons, justifying a unique outcome in most, if not all, cases.[16] All legal realists believed that the law and legal reasoning are rationally indeterminate, and so to understand how judges decide cases, one must look beyond the law.[17] In their view, judges did not

[9] Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 51 (Martin P. Golding & William A. Edmundson eds., 2005).

[10] BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 195 (7th ed. 2015).

[11] *See*, *e.g.*, H. L. A. HART, THE CONCEPT OF LAW 133 (1961) (dismissing legal realism as a coherent, viable theory of law); Michael S. Moore, *The Need for a Theory of Legal Theories*, 69 CORNELL L. REV. 988, 1013 (1984) (remarking that the American legal realists "lacked the necessary detail and philosophical sophistication to qualify the amalgam of their views as a distinct theory of adjudication"); and Leslie Green, *The Concept of Law Revisited*, MICH L. REV. 1687, 1694 (1996) (agreeing with Hart's criticisms of the legal realists). I thank Brian Leiter for directing me to these sources. *See* Leiter, *supra* note 9, at 59 n.2. *See also* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 229–31 (1986) (arguing, *inter alia*, that legal realism was a failed project and not intellectually significant).

[12] BIX, *supra* note 10, at 196. Scholars sympathetic to legal realism, like Brian Leiter, have recognized that "the Realists never made explicit their philosophical presuppositions about the nature of law" and have attempted to reconstruct a more philosophically sophisticated legal realism. Leiter, *supra* note 9, at 50. *See*, *e.g.*, LEITER, *supra* note 7.

[13] SCOTT VEITCH ET AL., JURISPRUDENCE: THEMES AND CONCEPTS 124 (2d ed. 2012). Legal realists can be contrasted with H. L. A. Hart, who attempted to set forth a general, complete theory of law that was applicable to any legal system.

[14] KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 3 (1930).

[15] BIX, *supra* note 10, at 197.

[16] Leiter, *supra* note 9, at 50.

[17] *Id.* at 52.

decide cases mechanically as the formalists claimed. The legal realists therefore downplayed the importance of established legal rules and "law in the books" in judicial decision-making.[18] To them, theorizing about the question "what is law" was a fruitless and unhelpful endeavor; rather, the focus should be on understanding the process of adjudication. As Holmes put it: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[19]

According to legal realism, judges did not really principally focus on legal rules or general principles to reach their decisions, but rather, the particular facts of each case (and also how the facts were presented) formed an critical basis for their decisions[20] — put another way, what Brian Leiter has termed the "core claim" of all legal realists is that judges "respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons"[21] — that is, judges are mainly "fact-responsive" and not "rule-responsive".[22] As Llewellyn put it, legal realists have in common a "[d]istrust of traditional legal rules [. . .] insofar as they purport to *describe* what either courts or people are actually doing" and a "distrust of the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions".[23] While facts are of course always relevant to any judge deciding a case, the legal realists claimed that in adjudication, judges always react to the underlying facts of the case before them, regardless of whether those facts have legal significance (*i.e.*, regardless of whether the facts "are relevant in virtue of the applicable legal rules").[24] Furthermore, legal realists also pointed out that judges often reach decisions on cases based on their own personal, moral, and/or political views.[25] Or, put another way, realists believed that all judges approach cases with their own personal ideals, values, and political motivations (although it is important to clarify here that realists did not believe that judges were simply bidding servants of certain political parties).[26] The personality of a judge may also play a role in the judicial decision-making process.[27] In short, in the view of legal

[18] JAMES PENNER & EMMANUEL MELISSARIS, MCCOUBREY & WHITE'S TEXTBOOK ON JURISPRUDENCE 123 (5th ed. 2008).

[19] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV L. REV. 457, 461 (1897).

[20] BIX, *supra* note 10, at 202.

[21] Leiter, *supra* note 9, at 52. Although "core claim" is a term of Leiter, it is also relied on by leading jurisprudence textbooks, such as RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE 170 (4th ed. 2015).

[22] Brian Leiter, *American Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 249, 249 (Dennis Patterson ed., 2d ed. 2010).

[23] Karl Llewellyn, *Some Realism About Realism-Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

[24] Leiter, *supra* note 9, at 53.

[25] BIX, *supra* note 10, at 196.

[26] Hugh Collins, *Law as Politics: Progressive American Perspectives*, *in* INTRODUCTION TO JURISPRUDENCE AND LEGAL THEORY: COMMENTARY AND MATERIALS 279, 286 (James Penner et al. eds., 2002).

[27] Leiter, *supra* note 22, at 249.

realists, legal rules, concepts, and precedents — *i.e.*, law — could not adequately determine or predict judicial decision-making.[28]

Legal realists — at least representative thinkers such as Llewellyn and Felix Cohen — contended that if one accepts their description of judicial decision-making, then lawyers and other individuals can in fact predict with a good degree of accuracy how judges would decide certain cases before them.[29] As discussed in the previous paragraph, legal realists believed judicial decisions were often determined by non-law factors, such as the facts of a case and the particular belief systems or personal outlooks of judges themselves (described sometimes as "psychosocial facts about judges"[30]). One could therefore look into the backgrounds, politics, or beliefs of certain judges to predict accurately how they might decide on a particular case. Indeed, Llewelyn proudly claimed that a person cognizant of the points made by the legal realists should be able to correctly predict the outcome of cases around 80 percent of the time (8 out of 10 times).[31] Of course, there may be certain cases (*e.g.*, controversial cases such as those on abortion) where different judges with different political orientations may reach different results, but there may also be certain cases where one might predict a similar result among different judges because the facts are not strongly politically controversial and all judges ultimately share similar educational training and experiences.[32]

Besides the descriptive, empirical claims made by legal realists — that is, how they believed judges actually decided cases in the real world — legal realists often had normative aims as well (*i.e.*, the question of how judges ought to decide cases). Since, in their view, judges had immense discretion and decided cases often not on legal rules or precedents, legal realists hoped that courts and judges would use such discretion to improve the law and ultimately society.[33] Many legal realists, for example Holmes, Felix Cohen, and Jerome Frank, believed that judges should stop pretending that they are reaching decisions based on legal rules and applying the law, and transparently and openly make public policy and legislate from the bench (since that is what they do anyway in real life).[34] Put another way, these legal realists believed judges should stop "engaging in the facade of legal reasoning" and instead "tackle directly … the kinds of political and economic considerations a legislature would weigh."[35] Taking this approach, judges could make their decisions more amenable and responsive to society's needs and problems.[36] Indeed, legal realists emphasized the instrumental character of law and of judicial decision-

[28] *Id.*
[29] Leiter, *supra* note 9, at 56.
[30] *Id.*
[31] KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 45 (1960).
[32] Leiter, *supra* note 9, at 56.
[33] SURI RATNAPALA, JURISPRUDENCE 112 (3d ed. 2017).
[34] *Id.* at 116; *See also* Leiter, *supra* note 9, at 58.
[35] Leiter, *supra* note 9, at 58.
[36] PENNER & MELISSARIS, *supra* note 18, at 124.

making, viewing law (and judges, who made law through their decisions) as a tool to bring about social change.[37] Llewellyn, for example, listed among his "law-jobs" (*i.e.*, the jobs on which law should be focused) "the positive side of law's work, seen as such, and seen not in detail, but as a net whole: the net organization of the society *as a whole* so as to provide integration, direction, and incentive."[38]

III. CLASSICAL CONFUCIAN LEGAL THOUGHT AS LEGAL REALISM: CONFUCIUS AND MENCIUS AS LEGAL REALISTS?

This section sets forth classical Confucian legal thought as primarily seen through the writings and actions of the foundational thinkers in the Confucian tradition — Confucius and Mencius. Comparisons to the main ideas and tenets of legal realism (as described in the preceding section) will also be undertaken.

Before looking specifically at Confucius's and Mencius's views on adjudication, it is important to provide a brief overview of classical Confucianism's views on morality, society, politics, and law on the macroscopic level as are germane to this paper (it is outside the scope of this paper to provide a comprehensive discussion of Confucian philosophy). Confucian thinkers like Confucius and Mencius believed that people and society had gotten off the right path (the *dao* 道) and that the way to get back on the right path was through *li* 礼, translated often as ritual or ritual propriety.[39] *Li*, in their view, should form the basis of education, self-cultivation, and government. Law (*fa* 法) and corresponding punishments were needed in society, but only a government founded on virtue could truly govern successfully.[40] As Confucius himself stated:

> *If you try to guide the common people with coercive regulations and keep them in line with punishments, the common people will become evasive and will have no sense of shame. If, however, you guide them with Virtue, and keep them in line by means of ritual (li), the people will have a sense of shame and will rectify themselves.*[41]

Above, Confucius never said that laws, regulations and punishments should be completely abolished. However, he considered law to be less effective than other norms — namely, ritual propriety (*li*) and virtue — in truly changing,

[37] Collins, *supra* note 26, at 281.

[38] KARL LLEWELLYN, MY PHILOSOPHY OF LAW 186–87 (1941).

[39] This term *li* originally referred to specific religious rites (*e.g.*, ancestral sacrifices), but Confucius broadened its meaning and application to also include general matters regarding etiquette, ethics, propriety and the way one conducted and behaved himself in his life. (*See* Philip J. Ivanhoe & Bryan W. Van Norden, READINGS IN CLASSICAL CHINESE PHILOSOPHY 390 (2d ed. 2005))

[40] CHEN JIANFU, CHINESE LAW: CONTEXT AND TRANSFORMATION 10 (2008).

[41] LUNYU (论语) [CONFUCIUS ANALECTS, WITH SELECTIONS FROM TRADITIONAL COMMENTARIES] ch. 2.3 (Edward Slingerland trans., 2003).

transforming and guiding human behavior. A society which guides the people primarily through laws, regulations and punishments will also create a situation where the people become "evasive" — that is, they will structure their behavior and affairs to evade or avoid violating certain regulatory provisions and/or to look for loopholes, but their heart may still harbor bad intentions. Guiding people primarily through virtue and ritual propriety (*li*) will cause the people to be self-correcting on their own, which ultimately will lead to a society where punishment may not even be necessary, since people would stop their criminal or illegal behavior on their own because they know and genuinely believe such behavior to be morally wrong and shameful.

Classical Confucianism also provided more explication of what moral norms and principles constitute — the notion of "Virtue" that Confucius mentioned in the quotation above. One key Confucian moral norm is the concept of *ren* 仁, which is often translated as benevolence or humaneness. While there are many layers to the concept of *ren*, its central meaning is a moral charge that says "a human being should treat another human being as a human being."[42] In terms of how to concretely practice or make manifest *ren*, Confucius gave different explanations, including loving your fellow human beings,[43] being tolerant, sincere and respectful,[44] helping others overcome challenges and difficulties,[45] helping others reach the aspirations you yourself wish to reach,[46] avoiding placing impositions on others that you would not want imposed on yourself,[47] and diligently observing ritual propriety.[48]

Another moral norm and principle Confucianism emphasized was *xiao* 孝, or filial piety — the love and relationship between parent and child. Confucius recognized the relationship between parent and child as the most natural relationship, and considered *xiao* to be the most natural emotion between human beings as such, and therefore the most fundamental expression and manifestation of *ren.*[49] Confucius himself called filial piety one of the fundamentals of humanity.[50] In terms of how to concretely practice *xiao*, Confucius gave different examples, including: respecting one's parents and elders,[51] taking care of your parents' material and emotional needs,[52] and obeying your parents and serving them in accordance with ritual propriety both in their lifetime and after they pass away.[53]

[42] WEJEN CHANG, IN SEARCH OF THE WAY: LEGAL PHILOSOPHY OF THE CLASSIC CHINESE THINKERS 49 (2016).
[43] *See* LUNYU, *supra* note 41, at ch. 12.22.
[44] *See* LUNYU, *supra* note 41, at ch. 17.6.
[45] *See* LUNYU, *supra* note 41, at ch. 6.30.
[46] *Id.*
[47] *See* LUNYU, *supra* note 41, at ch. 12.2.
[48] CHANG, *supra* note 42, at ch. 49. *See* LUNYU, *supra* note 41, at ch. 12.1.
[49] CHANG, *supra* note 42, at ch. 49.
[50] *See* LUNYU, *supra* note 41, at ch. 1.2.
[51] *See* LUNYU, *supra* note 41, at ch. 1.6.
[52] *See* LUNYU, *supra* note 41, at ch. 2.7.
[53] *See* LUNYU, *supra* note 41, at ch. 2.5.

Politically, Confucius was disappointed and horrified at what he saw around him — gone were the days of the early Zhou dynasty, where the Zhou king ruled the various vassal states in peace. During the time of Confucius, the Zhou king had now become a figurehead, and the various states used violence and war to expand and to intimidate other states around them. Confucius's political views, which were shaped by his moral philosophy and views on ritual propriety, can be characterized as revivalistic — trying to bring about positive change in the present-day by rediscovering values and practices of a better time in the past.[54] More specifically, Confucius admired the political leadership of the early Zhou dynasty — especially the Duke of Zhou, whom Confucius saw as a benevolent, loyal and kind ruler.[55]

Having briefly covered Confucius's more macroscopic views on law, morality, and politics, what were Confucius's views on adjudication and the administration of justice, and why might we say they are comparable to legal realism? One important, preliminary point to note is that, just as most of the legal realists were themselves lawyers and judges, Confucius also served as a judicial official in his career. He started off his career in government in his home state of Lu as a minor official, and then in 501 BC, served as a district magistrate (in charge of judicial and administrative matters in his jurisdiction), and a few years later, was promoted to vice minister of public works, a chief judge, and an acting principal minister.[56] Therefore, part of Confucius's career involved the adjudication of both criminal and civil cases in his jurisdiction.

One story as recorded in the *Analects* highlights Confucius as a legal realist, where he made a recommendation regarding a case based on the facts of that case, his own moral and political views, and saw judicial decision-making as a way to bring about certain desirable social ends:

> *The Duke of She said to Confucius, "Among my people there is one we call 'Upright Gong'. When his father stole a sheep, he reported him to the authorities." Confucius replied, "Among my people, those who we consider 'upright' are different from this: Fathers cover up for their sons, and sons cover up for their fathers. 'Uprightness' is to be found in this."*[57]

The Duke of She was a magistrate (and therefore heard cases in his jurisdiction) from a neighboring state. The "uprightness" to which he and Confucius referred is *zhi* 直, which is another moral norm valued by Confucius, and characterizes honesty and truthfulness.[58] In the story above, the

[54] I follow Bryan Van Norden's characterization here of Confucius's political views as "revivalisitic". BRIAN W. VAN NORDEN, INTRODUCTION TO CLASSICAL CHINESE PHILOSOPHY 23 (2011).

[55] *Id.* Indeed, Confucius even said he dreamed of the Duke of Zhou (*see* LUNYU, *supra* note 41, at ch. 7.5).

[56] CHANG, *supra* note 42, at 41.

[57] *See* LUNYU, *supra* note 41, at ch. 13.18.

[58] CHANG, *supra* note 42, at 51.

Duke of She praised the actions of Gong in his jurisdiction, who followed the legal rules and reported his father's crime (stealing a sheep) to the authorities. Gong, in other words, followed the requirements of public order and public justice. However, Confucius analyzed the case completely differently and made it clear that he would have reached the opposite result. In Confucius's view, what would have been truly a manifestation of being "upright" is not fidelity to one's obligations under the requirements of public law, but fidelity to one's obligations to their parents. If legal rules could simply determine the outcome of this case, Confucius should have praised Gong's reporting his own father. However, Confucius's decision can be better understood in legal realism terms. Here, Confucius was not "rule-responsive" but rather "fact-responsive" — the key facts here are that Gong and the sheep-thief were son and father. As such, Confucius's moral and political beliefs — in particular, his emphasis on the importance of *xiao* (filial piety) — led him to his belief that the Duke of She's decision and evaluation of the Gong case was incorrect (perhaps Confucius's opinion might have changed had the facts been different, *e.g.*, if Gong and the sheep-thief were strangers).

Indeed, Confucius's opinion in the Gong case can also be understood as a reflection and example of what the legal realists hoped judges would do — to strip away the facade of legal reasoning and tackle the economic and political considerations directly, using their decisions to bring about desirable social change. Here, Confucius completely eschewed or even ignored any legal rule or legal reasoning, and he believed that the norm of filial piety outweighed any legal rule or legal obligation, because what was at stake was the most basic relationship of human society — the relationship between parent and child.[59] Encouraging children to report on their parents would destroy the inherent, natural trust and bonds between parents and children, unraveling families and ultimately society. Confucius's opinion here also furthered his political and social goals of dealing with the disorder and violence in his society by promoting filial piety, which he himself considered to be at the root of social order and harmony.[60] We can thus see that Confucius — as did the legal realists — saw judicial decision-making in instrumental terms, furthering some desired social objective.

This legal realist approach taken by Confucius also influenced the Han dynasty jurisprudence, which can be illustrated with a hypothetical judicial decision drafted by Confucian scholar Dong Zhongshu (179–104 BC) — although Dong lived many hundreds of years after Confucius, given this hypothetical case's connection with Confucius's adjudication of the Gong case, it is worthy of attention:

[59] While the written legal codes (*i.e.*, legal rules) during Confucius's time are no longer extant, there is evidence to suggest that it was commonly believed (and perhaps codified) that a son who reported and testified to his father's crimes was considered righteous. *See* Lau Nap-yin, *Mutual Concealment*, *in* THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY (VOL. 4) 197, 198 (Stanley N. Katz ed., 2009).

[60] *See* LUNYU, *supra* note 41, at ch. 1.2.

> *Mr. A did not have a son. One day, he found an abandoned infant (named B) on the side of the road and raised him as his own son. After B grew up, he killed someone; he told Mr. A of his act. Mr. A proceeded to hide B [from the authorities]. How should we judge Mr. A's action of the concealment [of B's crime]? I, Dong Zhongshu, would rule this way: Mr. A did not have a son, but he raised and provided for B. Although B was not his biological son, who can ignore or [even] take lightly the relationship between Mr. A and B? The Classic of Poetry says: "The mulberry insect has young ones, and the sphex carries them away."*[61] *Now, [in the] Spring and Autumn Annals, we see a principle [where it is righteous] for a father to conceal the misconduct of his son. Therefore, in this case, Mr. A's concealment of B was proper, and thus he should not be punished.*[62]

The central legal issue here is whether A's concealment of B's crime was illegal, especially because B was his adoptive, not biological son. Confucius himself had said in the Gong case that it was morally upright for parents to conceal the wrongdoings of their children, although he was not explicit about whether non-biological children and parents were also covered by this moral principle. Dong Zhongshu's opinion here can also be understood in legal realist terms. What is striking in this hypothetical opinion is the complete absence of citation of law or really anything we might identify as formalistic, legal reasoning.

Dong — like Confucius in the Gong case — was not rule-responsive (*e.g.*, to the rules concerning harboring criminals), but rather, fact-responsive, focusing on the substance of the parent-child relationship between Mr. A and Mr. B. Dong ultimately reasoned that A's conduct was not illegal and hence he should not be punished, relying on Chinese Confucian literary classics — both the *Spring and Autumn Annals* and *The Classic of Poetry* — as sources of law to justify his legal decision. As a Confucian scholar who advocated successfully to the Han throne to establish Confucianism as the orthodox governing philosophy of the dynasty, Dong was most likely influenced by Confucius's views and principles on father-son mutual concealment. Regarding whether the adoptive parent-child situation between A and B disallowed A from covering for B, Dong's answer was no. In support, he cited a line from a poem in *The Classic of Poetry*, discussing the habit of the sphex wasp in acting as a surrogate parent of mulberry larvae.[63] According to legend, the mulberry fly does not protect its young (larvae), which makes them vulnerable to predators. Under these circumstances, the sphex wasp becomes a surrogate parent of sorts; it does

[61] *Xiaowan (小宛), in* SHIJING (诗经) [THE CLASSIC OF POETRY] no. 196.

[62] *Translated in* Norman P. Ho, *Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgements)* 22 PAC. RIM L. & POL' J. 48, 83 (2013).

[63] Benjamin Wallacker, *The Spring and Autumn Annals as Sources of Law*, 2 J. CHINESE STUD. 59, 63 (1985).

not consume these larvae but carries them back to its own nest and takes care of them until they metamorphosize into wasps.[64] Dong's legal reasoning can be summarized as thus: in his view, the Confucian classical text *The Classic of Poetry* itself affirms the legitimacy and significance of adoptive relationships, even in the insect realm (which is far less significant than the human realm). The mulberry larvae were not biological offspring of the wasps, but with the sphex wasp's care and protection, they grew up to become adult insects. Thus, in Dong's view, the substance of the parent-child relationship is important, not the form — *i.e.*, it does not matter whether scientifically the relationship is biological or adoptive. In other words, Dong's interpretation of "father" and "son" was informed by the principles on mutual concealment contained in Confucian morality (and encapsulated in the *Spring and Autumn Annals*) and by a specific passage on an analogous surrogate parenthood between mulberry larvae and wasps in *The Classic of Poetry*. He did not adopt a narrow, formalistic interpretation of "father" — anybody, like A, who had the heart of a father and who cared for a child as if it was his own qualified as a "father".[65]

Indeed, the facts of the strong parental-child relationship between Mr. A and Mr. B seemed to be the key fact for Dong — outweighing any information concerning the possible severity, enormity, or evil of Mr. B's crimes. Ultimately, through his anti-formalistic judicial decision-making, Dong, like Confucius, was trying to promote a certain social goal — to strengthen the bonds of family and parent-child.

Getting back to Confucius, we can see an even more realist approach toward judicial decision-making in Confucius's reported adjudication and subsequent sentencing of one of his associates, Shaozheng Mao,[66] which has been criticized by many, especially during the Cultural Revolution.[67] The necessary background before the actual part where Confucius explained his judgment has also been provided below:

> *When Confucius acted temporarily as prime minister of Lu, he had been at court but for seven days when he executed Deputy Mao [Shaozheng Mao]. His disciples came forward to ask him about it, saying: "Deputy Mao is a famous man in Lu. You, Master, have just begun to exercise the government, and as your first act of punishment you execute him.*

[64] YANG HSIUNG, THE ELEMENTAL CHANGES: THE ANCIENT CHINESE COMPANION TO THE I CHING — THE T'AI HSUAN CHING OF MASTER YANG HSIUNG, TEXT AND COMMENTARIES 161 (Michael Nylan trans., 1994).

[65] Norman P. Ho, *Literature as Law? The Confucian Classics as Sources of Law in Traditional China*, 31 L. & LITERATURE 173 (2019).

[66] Shaozheng Mao was a scholar-official and contemporary of Confucius in Confucius's home state, the state of Lu. Shaozheng Mao, like Confucius, was also a teacher, and it is believed that he lured many of Confucius's students away, causing Confucius's classes to be empty. *See* Ho, *supra* note 62, at 70 n.76.

[67] It should also be noted that the veracity of the Shaozheng Mao story, especially the question as to whether or not a person named Shaozheng Mao ever existed, is a topic of scholarly debate. *See*, *e.g.*, ANALECTS 190 (D.C. Lau trans., Penguin Classics 1979) (Lau speculating that the character Shaozheng Mao may be "totally fictitious").

> *How will you not lose the support of the people?" Confucius replied: "Sit there, and I will tell you the reason. Humans act in five ways that are detestable, and robbing and thieving are not among them. The first is called a mind of penetrating cleverness devoted to treachery. The second is called peculiar conduct engaged in obstinate persistence. The third is called false teachings defended with discriminations. The fourth is called a memory that is comprehensive but recalls only wickedness. The fifth is called obediently following what is wrong while glossing over it. If even one of these characterizes a man, then he cannot avoid punishment by a gentleman. But Deputy Mao possessed all of them at the same time. Thus, in his private life he had sufficient means to gather about him followers who operated effectively as a group. In his speech and discussions he was good enough to gloss over his depravity and bedazzle the masses. His strength was such that he could turn against what was right and stand alone. For these reasons he became the 'swaggering hero' of petty men, and it was impossible that he should go unpunished. It was for just such reasons that Tang punished Yinxie, King Wen punished Panzhi, the Duke of Zhou punished Guan and Cai, the Grand Duke punished Huashi, Guan Zhong punished Fuliyi, and Prince Chan [of Zheng] punished (Deng Xi and) Shi He. These seven men, although they lived in different ages, shared a common frame of mind, so it was impossible that they should go unpunished. An Ode [in The Classic of Poetry] says: 'My sorrowful heart is pained, pained, I am hated by that herd of petty men.' When petty men congregate and work effectively as a group, this is cause enough for sorrow."*[68]

Confucius's arrest, judgment, and subsequent execution of Shaozheng Mao reflects a legal realist approach to adjudication, and perhaps a very extreme approach at that. No legal rule seems to be controlling. Instead, Confucius cited five vague descriptions of five different kinds of detestable people, and told his disciples that he believed that all five applied to Shaozheng Mao. Confucius then quoted to a poem in *The Classic of Poetry* about the dangers of "petty men" and brought up historical examples of famous and well-regarded rulers in Chinese antiquity punishing bad people. Facts — not rules — drove Confucius's decision on Shaozheng Mao, as well as his personality and normative policy preferences — for example, perhaps his desire to rid a competitor taking away his students, and/or to protect society from (in his view) dangerous, misleading teachings of a petty individual who could become a threat to social order. No matter what one thinks of his decision on Shaozheng Mao, it can be understood in legal realist terms. Indeed, Confucius here did not bother to engage in the "facade" of legal reasoning, but was transparent in what he wanted to bring about in his decision — precisely the kind of approach that legal realists like Holmes, Cohen, and Frank hoped judges would engage in.

[68] XUNZI (荀子) [XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME III] (BOOKS 17–32) 246 (John Knoblock trans., Stan. Univ. Press 1994).

An even more extreme legal realist approach can be seen in a later, 2nd-century AD version of Confucius's judgment on Shaozheng Mao:

> *Shaozheng Mao lived in Lu and was a contemporary of Confucius. The disciples of Confucius came in droves and left in droves. Only Yan Hui refused to go near [Shaozheng Mao's gate] because he alone knew that Confucius was a sage. But all his other disciples had abandoned him for Shaozheng Mao, whose instructions they now sought. A person could not have known that Confucius was a sage and Shaozheng Mao was a specious man if he had not followed Confucius and apprenticed with him for a long time. For this reason, even Confucius' own disciples were muddled. [Sometime later], Zigong said to Confucius, "Shaozheng Mao was a famous man in Lu. So why did you have him executed as soon as you were put in charge of government?" Confucius snapped him short. "Go away!" he said, "This is not something you are able to understand."*[69]

This version of the judgment shows Confucius as a judge deciding a case based most likely on personality, personal preferences, and the like. The legal realists would not have advocated a decision like this (it is far less transparent than the above previous judgment of Shaozheng Mao), but it nevertheless highlights the legal realist inclinations of Confucius the judge.

Thus far, we have looked at Confucius the judge in the context of criminal cases (the Gong case involved theft, and the Shaozheng Mao case resulted in execution). Confucius was also involved in civil adjudication, which reflects his legal realist approaches as well. First, to briefly reiterate, as many of the legal realists (*e.g.*, Holmes, Cohen, Frank) posited, judges should transparently and openly make public policy, making their judicial decisions more responsive to the needs of society and bringing about desirable social change — recall one of Llewellyn's law-jobs was "the net organization of the society *as a whole* to provide integration, direction, and incentive".[70] What was Confucius's ultimate policy goal regarding civil litigation? It was to reduce (and perhaps ultimately eliminate) civil suits. According to Confucius:

> *When it comes to hearing civil litigation, I am as good as anyone else. What is necessary though, is to bring it about that there is no civil litigation at all.*[71]

While Confucius probably was being a bit melodramatic here (one questions whether it is possible to fully eliminate litigiousness in a society), his major point is clear — for him, a society characterized by harmony where

[69] ANN-PING CHIN, THE AUTHENTIC CONFUCIUS: A LIFE OF THOUGHT AND POLITICS 159 (Simon & Schuster eds., 2007).

[70] LLEWELLYN, *supra* note 38.

[71] *See* LUNYU , *supra* note 41, at ch. 12.13.

people try to solve disputes in a virtuous manner without resorting to impersonal judicial institutions which have the side effect of possibly destroying human relationships, is preferred. At the same time, Confucius self-confidently assured us that, although he had a personal disquiet toward society's litigiousness, he was perfectly skilled in hearing civil cases if needed.

We have a record of one of Confucius's "judicial" (I use this term very loosely) approach toward one civil case:

> *When Confucius was director of crime in Lu, there was a father and son who had a legal dispute pending before the court. Confucius put the son in prison and for three months did not resolve the matter. When the father requested permission to stop the proceedings, Confucius released the son.*[72]

We can, arguably, interpret the Confucian approach to adjudication above in legal realist terms. Here, Confucius's way of resolving the dispute reflects the legal realist approach in its rawest form. Again, Confucius was driven by the facts, not a legal rule — it seems that Confucius made absolutely no pretense about engaging in legal reasoning. He wanted to promote social harmony and good relationships, especially between a father and son, one of the most central relationships. Father and son suing each other was also an affront to the key virtue of *xiao* (filial piety). Thus, by imprisoning the son, Confucius punished the son for his unfilial behavior (*i.e.*, the son's resorting to civil litigation to resolve a dispute with his father, which should be resolved ideally at home in the privacy of the family), but also to provide "direction" and "incentive" (to use Llewellyn's language) to the father as well, playing to the father's love for his son (*i.e.*, the father's unwillingness to see his son suffering in prison). Confucius here played the role of the legal realist's view of judge as legislator — using his role as a judge and legal official to bring about social change (promotion of parent-child relationships and general social cohesiveness by discouraging civil lawsuits). Indeed, Confucius's approach to civil litigation and civil adjudication fits in well with his overall, macroscopic views of law as ideally not occupying the prime position in the hierarchy of norms in society.

Indeed, Confucian's legal realist approaches — namely, his anti-formalistic approach, distrust of legal rules, and unabashed promotion of social aims through adjudication — is also reflected in his attitude regarding the publicization of statutory legal rules (statutes). In 513 BC, the state of Jin decided to inscribe the Jin penal code on a cauldron, publicizing those laws for all those in Jin to see and read. Confucius responded with fury:

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[72] *See* XUNZI, *supra* note 68, at 246.

> *Jin will perish! It has lost its standards . . . [n]ow that they [the state of Jin] have abandoned these standards and made a penal cauldron, the people attend to the cauldron. How are they to respect the elite? In what way will the elite maintain their hereditary duties? When there is no proper order for elite and common, how will they manage the state? [. . .].*[73]

Confucius was not against statutory law *per se* — he was against publicization of statutory law (legal rules) to the greater populace. He believed that legal rules did not necessarily make for a better society. He argued above that if the people know the legal rules clearly, they will "attend to the cauldron" — in other words, rather than focusing on moral self-cultivation and betterment and seeking to the be the morally best they can be (and restraining themselves because of shame and feelings of moral wrongness), people will fixate themselves on what laws prohibit and try to structure their affairs and behavior just so they do not break the letter of the law. In turn, this will create, in Confucius's view, social disorder — social hierarchies will be broken, and in the end, the state will be extremely difficult to govern. It is not a surprise, given Confucius's distrust of legal rules generally, that he adopted an anti-formalistic approach to adjudication as discussed in the cases above.

So far, we have looked at Confucius's views on law and adjudication, and I have tried to compare them with legal realism and also describe Confucius and his adjudicative approaches as legal realist. The other key classical Confucian to be discussed — Mencius — can also, I believe, be classified as a legal realist in his adjudicative approaches.

The key passage which allows us to examine Mencius's approach to adjudication is a conversation between Mencius and one of his disciples/students, Tao Ying. In this dialogue, Tao Ying presented a legal hypothesis to Mencius, and asked Mencius how the case should be decided:

> *Tao Ying asked, "If, when Shun was the king and Gao Yao the judge, the Blind Old Man [Shun's father] killed someone, how was the case to be handled?" Mencius said, "Arrest the killer. That is all." "Shun would not try to stop the arrest?" "How could Shun stop it? Gao Yao's action had good grounds." "Then what would Shun have done?" "Shun regarded abandoning the kingdom as no more than discarding a worn shoe. He would have secretly carried the old man on his back and fled to the edge of the sea and lived there happily, never giving a thought to the kingdom."*[74]

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[73] ZUO QIUMING (左丘明), ZUOZHUAN (左传) [ZUO TRADITION/ZUOZHUAN: COMMENTARY ON THE "SPRING AND AUTUMN ANNALS"] 29.5 (Stephen Durrant et al. trans., Univ. of Washington Press 2016). *See* DAVID SCHABERG, A PATTERNED PAST: FORM AND THOUGHT IN EARLY CHINESE HISTORIOGRAPHY 297 (Harv. Univ. Asia Center 2002).

[74] MENGZI (孟子), MENGZI (孟子) [MENCIUS] ch. 13, § 35 (D. C. Lau trans., Penguin Classics 2005). *See* CHANG, *supra* note 42, at 205.

There are three important characters in this hypothesis: Shun (an ancient Chinese sage king revered throughout Chinese history), Shun's blind father, and Gao Yao (the minister of justice in Shun's administration). Tao Ying asked Mencius what the result should be if Shun's blind father committed the crime of murder. At first, Mencius seemed to endorse non-interference in the judicial process — Shun's father should be arrested, and presumably prosecuted, like any other offender. The fact that the defendant here is the king's father makes no difference. Murder is illegal under legal rules, and the culprit should be arrested. However, ultimately, Mencius endorsed interference. He argued that Shun would (and implicitly, should) have given up his post as king (as quickly as throwing out an old shoe) and helped his father escape, never looking back.

Here, as with many of the cases involving father and son which Confucius commented on, Mencius's judging of the case was driven primarily by facts, not legal rules — namely, the fact that the killer and Shun had a parent-child relationship. Similar to Confucius's commentary on the Gong case as well as Confucius's approach to the parent-child civil litigation case, Mencius had a specific social goal in mind — to promote and protect the parent-child relationship, filial piety, and ultimately promote a more cohesive society (after all, if the most basic human relationship — that between a parent and child — is in tatters, how can we expect other human relationships such as those between a citizen and ruler, a stranger and another stranger, to be in a good state?).

IV. CONCLUSION

I have tried to show that classical Confucian legal thought — as seen through the legal thought and adjudicative approaches of Confucius and Mencius — should be compared to, and understood as, a legal realist approach to law. Confucius and Mencius's approach to adjudication was anti-formalistic. They shared a distrust of legal rules. Further, they were unabashed in advocating a role of policy-maker for judges (as seen through their own views on cases) to promote certain identifiable, desirable social goals. More specifically, Confucius's and Mencius's jurisprudence can be seen to promote filial piety and the parent-child (especially the father-son) relationship.

As discussed earlier in the paper, some prominent legal realists believed that judges should stop disguising their legislative inclinations (and "secretly" deciding cases more based on their policy preferences and desire to solve social problems, rather than through formalism and legal reasoning) and be transparent, embracing their roles as policymakers on the bench. In many ways, Confucius and Mencius — representing classical Confucianism — met this legal realist normative ideal of a transparent judge. Confucius and Mencius made no pretense to engage in formalistic legal reasoning, and instead set forth opinions on cases based on the facts of the case and what they believed was the morally correct decision — a decision that would not only benefit the parties

but society as a whole (and in the case of the Shaozheng Mao, Confucius in deciding that case did not hide his personal disdain for Shaozheng Mao!).

What are some of the broader, more macroscopic points we might be able to make based on the findings of this paper? I believe there are several points, concerning both our understanding of Confucian legal thought (and traditional Chinese legal thought more generally, given that Confucianism was the main orthodoxy in Chinese political and legal thought) and also of legal realism. I begin first with points about Confucian legal thought more generally, and then proceed to legal realism.

First, legal realism gives us, I believe, a good and accurate framework for theorizing about Confucian legal thought and adjudication. Applying legal realist ideas to Confucian legal thought shows us that Confucian approaches to adjudication are really not that unique, nor specifically Sinic in orientation. There is thus no cultural or geographic reason why Confucian legal thought should not enter mainstream jurisprudential debates. It also shows us that Confucian adjudication and traditional Chinese law was not, in Max Weber's famous description, substantively irrational.

Second (related to the earlier point that Confucian adjudication was not substantively irrational), Confucian adjudication also highlights and perhaps vindicates the legal realists' belief that if one accepts their description of judicial decision-making, then lawyers and other individuals can predict with a good degree of accuracy how judges would decide certain cases. We can see a common thread in how Confucius and Mencius approached cases involving a parent and child — each reached decisions in a way which they believed would promote filial piety and protect the parent-child relationship. Thus, they supported mutual concealment (even at the expense of legal rules and legal obligation to the state) and discouraged civil litigation between parent and child. Even in China today, the Confucian influence arguably continues in adjudication — cases involving parents and children are treated "differently" from those between regular people, with courts reaching decisions which also help promote filial piety. For example, take the Yu Huan case — in 2016, eleven debt collectors went to Yu Huan's mother's store to get payment for a high-interest loan she had borrowed. The debt collectors were extremely aggressive, with one debt collector (surname Du) screaming insults and exposing his genitals to Yu Huan's mother. Yu Huan (the son), in his mother's defense, stabbed Du and other debt collectors. Du died from his wounds. Originally, the court sentenced Yu to life in prison (he had committed murder). But in June 2017, the Shandong Higher People's Court overturned this sentence and instead re-sentenced Yu to five years in prison; some commentators believe public pressure and public sympathy for Yu (and his filial defense of his mother) may have played a role in the court's decision to overturn the original

sentence.[75] Based on the legal realists' ideas and an understanding of Confucian legal thought as legal realist in orientation, this result in the Yu Huan case would not be that surprising — that is, legal realists would argue that the court's decision to re-sentence Yu was strongly influenced by personal and social attitudes toward the importance of the parent-child relationship and aimed to make sure a child (like Yu) would not be punished too severely for taking the filial step to protect a parent from bodily harm. Cases involving a parent-child relationship may, in other words, be predicted with a high degree of accuracy.

Third, the comparisons undertaken in this paper also, I believe, allow us to better characterize Confucianism and law: They show us that classical Confucianism did not espouse a full and coherent theory of law *per se*, just as the legal realists were not concerned with putting forth a general, grand theory of law. Thus, it would be inaccurate to say Confucius or Mencius had a legal theory — they had legal thought, but not a legal theory.[76]

Fourth, I hope this paper also helps contribute to the vindication and sympathetic treatment of legal realism. As Brian Leiter has argued, "[. . .] it is time for legal philosophers to stop treating Realism as a discredited historical antique, and start looking at the movement with the sympathetic eye it deserves."[77] This paper shows that there is nothing specifically "American" about American legal realism — its fundamental ideas and tenets also help us understand and accurately describe foreign, even non-Western legal systems. It is, in other words, a type of general jurisprudence. Nicholas J. McBride and Sandy Steel — who, like Leiter, are sympathetic toward legal realism — have also argued that "[t]he Realist Model seems to provide a more faithful account of how judges actually decide hard cases than any other model on offer".[78] They admit that this conclusion of theirs is an "unpopular one."[79] I hope this paper provides more empirical support for McBride and Steel's conclusion (there is no reason why it should be "unpopular") — the Realist model also provides a more faithful account of how the Confucian tradition decided cases.

Fifth, the enhanced viability of American legal realism aside, I do believe this paper also shows that American legal realism and its main ideas and tenets were not that uniquely novel; similar ideas can be found in earlier legal traditions, such as the Confucian legal tradition.

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[75] Javier Hernandez & Iris Zhao, *Court in China Reduces Sentence for Man Who Killed Debt Collector*, N.Y. TIMES (June 23, 2017), https://www.nytimes.com/2017/06/23/world/asia/chinese-court-debt-collector-ruling.html.

[76] Again, there may be other later Confucian thinkers that espoused a more complete theory of law. But I do not believe Confucius or Mencius did so.

[77] LEITER, *supra* note 7, at 80.

[78] NICHOLAS J. MCBRIDE & SANDY STEEL, GREAT DEBATES IN JURISPRUDENCE 134 (Palgrave 2d ed. 2018).

[79] *Id.*

William Singer famously proclaimed the now often-quoted "we are all realists now".[80] The "we" may include Confucian, too — at least classical Confucians. Put another way, it seems that Confucian may be legal realists, too.

[80] Singer, *supra* note 7, at 503.