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# CHINESE LEGAL THOUGHT IN THE HAN-TANG TRANSITION: Liu Song's (d. 300) Theory of Adjudication

Norman P. Ho\*

*This article explores and analyzes the fourth century Chinese legal official and legal scholar Liu Song's (d. 300) theory of adjudication through a full translation into English (the first translation of its kind) of his famous "Memorial on Adjudication," which urged judicial and legal reforms during the reign of Emperor Hui (r. 290–306) of the Western Jin dynasty (265–316). This article argues that Liu believed that written law should reign supreme over other factors (e.g., societal needs, public opinion) in adjudicating cases. He was also one of the first major Chinese legal thinkers to explicitly set forth what we would today call the "legality principle." But while Liu's theory of adjudication was centered on written law, it was also motivated by a desire to control the power and discretion of judicial officials and preserve the authority of the emperor. Liu's theory of adjudication is significant in the history of Chinese legal thought as it runs counter to the so-called "qing-li-fa" (QLF) theory of adjudication, which has strongly influenced contemporary theoretical accounts and descriptions of traditional Chinese law as a whole. This article also briefly considers Liu's theory in a comparative legal theory perspective, arguing that Liu's theory is different from key Western theories on adjudication—namely, Hart's and Dworkin's theories of adjudication with respect to hard cases. Finally, this article also briefly discusses the relevance of Liu Song's legal thought to 21st century Chinese law, given the current Chinese leadership's penchant for using traditional Chinese political and legal philosophy as sources and justifications for government and administration. This article suggests that Liu Song is a figure whose legal thought could be equally palatable to rule of law reformers and more conservative party officials in China today.*

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## INTRODUCTION

The transition between the Han (206 B.C.–220 B.C.) and the Tang (618–907) dynasties is important in Chinese legal history because it is commonly understood as the period where “Confucianization of the law” took place.<sup>1</sup> This process, as commonly described, began in the Han dynasty (when Confucianism was selected as the state philosophical orthodoxy by Emperor Wu (r. 141–87 B.C.) of the Han) and was completed in the Tang, as best represented by the famous Tang Code of 653. But while there has been Western scholarly attention on Han law<sup>2</sup> and Tang law,<sup>3</sup> the actual transition between the Han and Tang has drawn essentially almost no attention from Western scholars of Chinese legal history or legal thought.

This article contributes to the study of Chinese legal thought and legal theory during the early years of the Han-Tang transition by focusing on the legal thought (and in particular, the adjudication theory) of Liu Song 刘颂 (d. 300), an official who served during the Western Jin dynasty (265–316). To do so, the article provides a full translation and analysis of his famous memorial on adjudication to Emperor Hui (r. 290–306) of the Western Jin. Liu Song’s memorial—the full text of which survives in the “Treatise on Penal Law” (*xingfazhi*) in *Book of Jin (Jinshu)*<sup>4</sup>—is consid-

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1. The phrase “Confucianization of the law” was first coined by Chinese legal historian T’ung-tsu Ch’ü. T’UNG-TSU CH’Ü, *LAW AND SOCIETY IN TRADITIONAL CHINA* (1961). I am grateful to Paul Goldin for this point; see Paul Goldin, *Han Law and the Regulation of Interpersonal Relations: ‘The Confucianization of the Law’ Revisited*, 25 *ASIA MAJOR*, no. 1, 2012, at 1, 2–3. Goldin defines “Confucianization of the law” as the “process by which the legal system, comprising not only statutes and ordinances, but also principles of legal interpretation and legal theorizing, came to reflect the view that the law must uphold proper interactions among people, in accordance with their respective relationships, in order to bring about an orderly society.” *Id.* at 6. For a scholarly reassessment of the “Confucianization of law” label and narrative, see Geoffrey MacCormack, *A Reassessment of ‘Confucianization of the Law’ from the Han to the Tang*, in *ZHONGGUO SHI XINLUN: FALÜSHI FENCE (中国史新论：法律史分册)* [NEW DISCUSSIONS ON CHINESE HISTORY: LEGAL HISTORY] 397, 397–442 (Liu Liyan (柳立言) ed., 2008).

2. See A.F.P. HULSEWE, *REMNANTS OF HAN LAW* (1955).

3. See 1 WALLACE JOHNSON, *THE T’ANG CODE: GENERAL PRINCIPLES* (1979) and 2 WALLACE JOHNSON, *THE T’ANG CODE: SPECIFIC ARTICLES* (1997).

4. *Book of Jin* is one of the 24 standard histories (*zhengshi*) and was written by a group of scholars led by Fang Xuanling (578–648). Compiled in 646 A.D., it consists of 130 chapters (*juan*) and covers the period from 265 to 420 AD. 13 of the standard

ered a famous, significant, and key primary source text in the history of Chinese legal theory and is included in many leading Chinese-language sourcebooks on traditional Chinese jurisprudence.<sup>5</sup> In these sourcebooks, the memorial is frequently titled and known as *Liu Song Shang Hui Di Shu* [*Liu Shu's Memorial to the Emperor*], although in *Book of Jin* there is no formal title; this title (or its variations) was added later by modern scholars. Despite its importance, however, this memorial has (to my best knowledge) never been fully translated into, or analyzed in, English.

First, his article argues that Liu Song believed that adjudication should be based on the strict application of statutory, written law to the facts of the case. For Liu, factors outside the written law should not be considered by officials deciding cases, even if there is significant public and social opinion against such an approach. Liu's emphasis on the primacy of written law can also be seen through his belief that if there is no law directly on point which covers the defendant's actions, then the defendant should not be tried. In this sense, he is one of the first major Chinese legal thinkers to explicitly espouse what we would refer to in modern legal systems as the "legality principle"—i.e., the principle that says there should be no punishment or no crime without law. However, while Liu's theory of adjudication was centered on the supremacy of written law, it was also animated by a desire to control the discretion and power of judicial officials and preserve the authority of the emperor.

On a broader level, as this article will show, Liu's theory on adjudication is arguably unique in that it runs counter to the so-called "*qing, li, fa*" (hereafter, "QLF") adjudicative theory and adjudicative approach in traditional China. The QLF theory has also strongly influenced contemporary theoretical accounts and descriptions of traditional Chinese law as a whole; many scholars utilize the QLF theory (or its variations) to describe and theorize about traditional Chinese adjudication and legal

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histories each contains a "treatise on penal law" chapter. See ENDYMION WILKINSON, *CHINESE HISTORY: A NEW MANUAL* 626, 635 (4th ed. 2015).

5. There are, to my knowledge, five such sourcebooks (all in Chinese). See ZHONGGUO LIDAI FAXUE WENXUAN (中国历代法学文选) [READINGS FROM CHINESE LEGAL HISTORY] 377–87 (Gao Chao (高潮) & Ma Jianshi (马健石) eds., 1983); ZHONGGUO LIDAI FAXUE MINGPIAN ZHU YI (中国历代法学名篇译注) [FAMOUS READINGS FROM CHINESE LEGAL HISTORY, WITH ANNOTATIONS AND TRANSLATIONS TO MODERN CHINESE] 365–73 (Gao Shaoxian (高绍先) ed., 1993); ZHONGGUO GUDAI FAXUE WENXUAN ZHU YI (中国古代法学文选译注) [READINGS FROM PREMODERN CHINESE JURISPRUDENCE, WITH ANNOTATIONS AND TRANSLATIONS INTO MODERN CHINESE] 227–33 (Zhang Yantian (张衍田) ed., 2015); ZHONGGUO GUDAI FAXUE WENXUAN (中国古代法学文选) [READINGS FROM PREMODERN CHINESE JURISPRUDENCE] 154–60 (Zhao Zhongxie (赵中颢) ed., 1992); ZHONGGUO FALÜ SIXIANGSHI ZILIAO XUANBIAN (中国法律思想史资料选编) [SELECTED AND EDITED MATERIALS FROM THE HISTORY OF CHINESE LEGAL THOUGHT] 390–93 (Zhongguo Falü Sixiangshi Bianxiezu (法学教材编辑部《中国法律思想史》编写组) ed., 1983). In preparing my translation, I have also referred to these sourcebooks for guidance. I have also consulted ZHONGGUO LIDAI XINGFAZHI ZHU YI (中国历代刑法志译注) [THE TREATISES IN LAW FROM THE STANDARD HISTORIES, WITH ANNOTATIONS AND TRANSLATIONS INTO MODERN CHINESE] 112–19 (Gao Chao (高潮) & Ma Jianshi (马健石) eds., 1994) (hereinafter TREATISES IN LAW).

reasoning as a whole.<sup>6</sup> While the QLF theory will be discussed in greater detail later in the Article, it can be generally understood as a set of three considerations relevant to officials deciding a case in traditional China. These include *qing* (referring to *renqing*, or human feelings), *li* (referring to *tianli*, or heavenly reason or heavenly principles, *lun li*, or ethical principles, and *qingli*, or accepted code of conduct), and *fa* (referring to *guofa*, the posited laws of the state, specifically penal sanctions or norms enforced through penal punishment).<sup>7</sup> The order of these considerations was also important—according to the QLF theory, adjudication in accordance with the concept of *qing* was considered of paramount importance, followed by accordance with *li*, and then finally *fa*.<sup>8</sup> Liu Song’s memorial can be read as a rejection of QLF theory, which continues to affect Chinese jurisprudence today. Furthermore, with respect to comparative legal theory and jurisprudence, we can see that Liu’s theory of adjudication is different from that of Hart’s and Dworkin’s, in that Liu denies judicial officials the opportunity to even hear cases where the law has run out.

The article proceeds as follows. First, the article provides some brief historical context and some biographical information regarding Liu Song. Second, it provides a full translation of Liu’s memorial on adjudication.

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6. For example, Chinese legal scholar Huo Cunfu has argued that “[t]he fact of the matter is, when historical or contemporary Chinese evaluate the law, they do so with reference to *Qing*, *Li* standards.” KAM WONG, *POLICING IN HONG KONG* 220 (2012); see also Huo Cunfu (霍存福), *Zhongguo chuantong fa wenhua de wenhua xing-zhuang yu wenhua zhuixun: Qing li fa de fasheng, fazhan ji qi mingyun* (中国传统法文化的文化形状与文化追寻：情理法的发生、发展及命运) [*The Character and Origins of Traditional Chinese Legal Culture: The Phenomenon, Development, and Fate of Qing, Li, Fa*], 3 *FALÜ YU SHEHUI FAZHAN* (法制与社会发展) [J.L. Soc. Dev.] 1 (2001). Geoffrey MacCormack also argues that in general, judicial authorities in traditional China desired to find a balance between the facts of the case (*qing*) and the laws (*fa*) to reach an equitable sentence and to harmonize circumstances and principles (*li*) so punishments could serve a higher ideal—i.e., strengthening some value or moral absolute. See GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 198 (1996). Philip C.C. Huang, a prominent legal historian of China, has also noted that many scholars have pointed to the reliance on *qing* and *li* in traditional Chinese law. See PHILIP HUANG, *CHINESE CIVIL JUSTICE, PAST AND PRESENT* xiii (2010). For an example of Japanese scholarship which also relies heavily on QLF theory in its explication and analysis of traditional Chinese law, see generally the work of Shiga Shūzō, which Huang argues is “the most important” and “whose point of view [on *qing* and *li*] continues to enjoy immense influence in China.” *Id.*

7. Albert H.Y. Chen, *Confucian Legal Culture and its Modern Fate*, in *THE NEW LEGAL ORDER IN HONG KONG* 505, 508 (Raymond Wacks ed., 1999). Note that *fa* (法) [law] in the Chinese tradition generally has a more narrow meaning than “law” in the Western tradition. As Chen has also noted, “[f]a is not a direct counterpart of the concept of ‘law’ in the Western legal tradition, and is narrower in meaning. *Fa* refers to penal sanctions (*xing* 刑), or norms the violation of which would lead to penal sanctions. *Fa* therefore corresponds to criminal law rather than to law in the broad and general sense.” ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA* 10 (4th ed. 2011); see also KAM WONG, *POLICE REFORM IN CHINA* 55 (2012).

8. FAN ZHONGXIN (范忠信) ET AL., *QING LI FA YU ZHONGGUOREN* (情理法与中国 人：中国传统法律文化探微) [QING, LI, FA, AND THE CHINESE PEOPLE] 23 (2011).

Third, it analyzes the memorial, not only explaining Liu's views but also showing the significance of his adjudicative theory on traditional Chinese legal thought more generally. It will also make some comparative legal theory points, comparing Liu to Dworkin and Hart. Finally, it concludes with a discussion of Liu's memorial and its relevance for Chinese jurisprudence today.

## I. HISTORICAL AND BIOGRAPHICAL CONTEXTS

Liu Song was a native of Guangling, in present-day Jiangsu province.<sup>9</sup> He was a prominent legal scholar and official who lived during the tumult of the Jin dynasty (265–420), which itself was comprised of the Western Jin (265–316) and the Eastern Jin (317–420) dynasties. Liu served in prominent positions in the dynastic central government, most notably Chamberlain for Law Enforcement<sup>10</sup> (*ting wei*), where he was responsible for recommending decisions in questionable or difficult judicial cases that emerged from localities and also conducting significant, major trials in the capital.<sup>11</sup> The Jin dynasty, which was founded by Sima Yan (later known as Emperor Wu of the Jin) in 265, briefly unified China in 280, ending the divisive era of the Three Kingdoms. Liu's memorial on adjudication was addressed to Sima Yan's son and successor, the mentally disabled Sima Zhong (also known as Emperor Hui; r. 290–306).<sup>12</sup>

Liu was writing and living in a precarious time characterized by instability and corruption in the government. Thus, his memorial was directed toward corruption and inconsistency in adjudication of cases by officials, who were deciding cases based on personal desires and preferences, leading to instability in the law.<sup>13</sup> During the Jin dynasty, elite clans had come to dominate government, monopolizing official

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9. For Liu's biography in the *Book of Jin*, see FANG XUANLING (房玄龄) ET AL., *JINSHU* (晋书) [BOOK OF JIN] 46.1293–309 (Taipei TingWen Publishing Co. ed., 1980) [hereinafter BOOK OF JIN]. All citations to *Book of Jin* will be in the format of “chapter. page number”; which is the standard way of citation to such sources in the field of sinology. Note that this source is available for free online at the Academia Sinica Scripta Sinica database at <http://hanchi.ihp.sinica.edu.tw/ihp/hanji.htm>. According to the Academia Sinica, the Scripta Sinica, which was started in 1984 in an effort to digitize all key documents for traditional sinological studies, is the largest Chinese full-text database of its scale. I should note that a popular edition for sinologists is the Zhonghua Book Company (Beijing) editions in hard copy, but in this Article, I have chosen to use the TingWen Publishing Company edition (i.e., the edition on the Scripta Sinica database) because it is freely available online, far more accessible to scholars, and equally authoritative.

10. I use Charles Hucker's translation for this official title. See CHARLES HUCKER, *A DICTIONARY OF OFFICIAL TITLES IN IMPERIAL CHINA* 512 (1985).

11. LIU XIN (刘新) & WANG ZHENDONG (王振东), *ZHONGGUO FALÜ SIXIANGSHI* (中国古代法律思想史) [A History of Chinese Legal Thought] 172 (4th ed. 2012).

12. Zhang Chuanxi, *Creation and Development of a Unified Multi-ethnic State System*, in 2 *THE HISTORY OF CHINESE CIVILIZATION* 42, 84 (Yuan Xingpei et al. eds., 2012).

13. BOOK OF JIN, *supra* note 9, at 30.933.

positions.<sup>14</sup> However, they had a reputation for corruption, disloyalty, and indolence.<sup>15</sup> One official during the Jin dynasty summed up the situation well: “office holders today consider managing affairs the work of vulgar officials, and upholding the law as excessive severity . . . they consider relaxed calm as splendid, and unrestraint as the mark of a gentleman of attainment.”<sup>16</sup> Liu tried to fight these attitudes and corruption in the court, believing that a person’s character should be studied and evaluated to determine whether he should proceed to an official position.<sup>17</sup>

The Jin dynasty and the Han-Tang transition more broadly was also an important time in the development of Chinese legal history and legal theory. With respect to institutional developments, Sima Yan himself had pushed through comprehensive legal reforms, helping to clarify distinctions in types and categories of law, which had been ambiguous in the Han dynasty.<sup>18</sup> For example, categories of law such as regulations (*ge*) and ordinances (*shi*) were developed during the Jin dynasty.<sup>19</sup> Legal reforms in the Jin dynasty also helped lay the groundwork for the eventual Sui-Tang dynasty legal system comprised of codes, statutes, regulations, and ordinances, a model of legal categorization which lasted until the fall of the Qing, China’s last imperial dynasty.<sup>20</sup> With respect to developments in legal theory, ancient Legalist ideas were combined more with Confucian ethics and principles during the Han-Tang transition, which formed the philosophical basis of dynastic government in later dynasties.<sup>21</sup>

Furthermore, Liu was part of a general intellectual movement called *lǐxue* (the study of statutory laws), which has been described as an “epitome of ancient Chinese jurisprudence” and a “miracle in the garden of ancient Chinese legal culture.”<sup>22</sup> In simple terms, *Lǐxue* was an intellectual movement that was focused on legal scholarship. Specifically, it was focused on preparing commentaries on legal codes, analyzing legislative intent and the rationale behind certain laws, annotating and expounding on legal terminology, conducting normative discussions on the origins, successes, and failures of certain laws, and understanding the relationship between different categories of law, all in order to promote uniform application of law, a unified legal system, and ultimately, the maintenance of dynastic political rule.<sup>23</sup> Famous *lǐxue* scholars in the Han-Tang transition include Zhang Fei (third century A.D.)<sup>24</sup> and Du Yu

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14. Yan Buke, *The Establishment and Transformation of Bureaucratic Government*, in THE HISTORY OF CHINESE CIVILIZATION, *supra* note 12, at 118.

15. *Id.*

16. *Id.*

17. *Id.* at 123–24.

18. *Id.* at 128.

19. *Id.*

20. *Id.*

21. *Id.* at 124.

22. ZHANG JINFAN, THE TRADITION AND MODERN TRANSITION OF CHINESE LAW 297 (Zhang Lixin et al. trans., 2014).

23. *Id.* at 297.

24. For a study of Zhang Fei’s legal thought, see Benjamin Wallacker, *Chang*

(222–284). Liu Song stood out among such figures, however, because he had a long career actually adjudicating cases in the real world and wrote many memorials to the emperor on legal and political issues; unfortunately, only a couple have survived.<sup>25</sup> Liu Song was not only recognized during his time as a leading official and legal scholar, but he was also praised and quoted by Ming dynasty legal thinkers as well.<sup>26</sup>

Thus, Liu Song's memorial must be read and understood in the historical and intellectual context as discussed above. It would not be accurate, for example, to interpret Liu Song as a forerunner and proponent of "rule of law" reform in China. Ultimately, Liu was reacting against the weakness and corruption in dynastic government in the tumultuous and unstable dynasty in which he lived and did so by offering suggestions on how to improve and stabilize the dynastic, emperor-led system of government through, *inter alia*, strengthening the law and keeping officials limited by, and accountable to, the written law. As mentioned before, he was also one of the first Chinese legal thinkers to espouse what we would refer today as the "legality principle."

Having provided a brief biographical and historical context to the memorial, we can now proceed to a full translation of the memorial, which dates to the last decade of the third century A.D. As mentioned earlier, his memorial sought to address the problems of corruption and instability in adjudication of cases by officials. In the translation below, I have tried to be as faithful to the original Chinese text as possible while ensuring maximum readability in English.

## II. LIU SONG'S MEMORIAL: A FULL TEXT TRANSLATION<sup>27</sup>

自近世以來，法漸多門，令甚不一。臣今備掌刑斷，職思其憂，謹具啟聞。

臣竊伏惟陛下為政，每盡善，故事求曲當，則例不得直；盡善，故法不得全。何則？夫法者，固以盡理為法，而上求盡善，則諸下牽文就意，以赴主之所許，是以法不得全。刑書徵文，徵文必有乖於情聽之斷，而上安於曲當，故執平者因文可引，則生二端。是法多門，令不一，則吏不知所守，下不知所避。姦偽者因法之多門，以售其情，所欲淺深，苟斷不一，則居上者難以檢下，於是事同議異，獄犴不平，有傷於法。

In the recent past up until the present, different categories and types of laws have steadily increased in number. As a result, our laws and regulations are not unified. As the person in charge of sentencing and

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*Fei's Preface to the Chin Code of Law*, 72 T'OUNG PAO 229 (1986).

25. LIU & WANG, *supra* note 11, at 172.

26. ZHANG, *supra* note 22, at 92.

27. The full memorial appears in BOOK OF JIN, *supra* note 9, at 30.935–38. See *supra* text accompanying note 9 for information about the source of the original Chinese text which is reproduced in this Part. At the end of each paragraph of my English translation, I include the specific pinpoint cite to *Book of Jin*.



criminal trials,<sup>28</sup> I am extremely concerned. I wish to elucidate all my concerns with your Majesty in this memorial.<sup>29</sup>

I have humbly considered the following: I know that when governing and attending to matters of state, your Majesty often hopes for perfect outcomes. As a result, your Majesty expects that matters are handled carefully and flexibly (in order to accommodate or adapt to different circumstances or needs). But, an expectation of flexibility and accommodation in handling affairs does not allow for direct adherence to laws. Moreover, expecting perfect outcomes will not allow for preserving the integrity of the legal codes. Why is this? Law takes as its primary standard and foundation what is reasonable. But when the ruler demands a standard of perfection, officials at various ranks below will interpret statutes in forced and far-fetched ways in order to cater to personal wishes and desires and ultimately to gain your Majesty's accolades. This is why I say that it is not possible to preserve the integrity of the legal codes. Deciding cases in accordance to the law and taking written statutes as the foundation for judicial decisionmaking necessarily leads to results that are detrimental to personal relationships. Because your Majesty is satisfied when matters of state are handled "appropriately"; judicial officials will selectively choose laws to make their decisions, which in turn lead to divergent interpretations over laws. This all leads to more categories of different laws and disunity in laws and regulations, causing officials to be befuddled over how to decide cases in accordance to the law as well as confusing the people as to how they can follow the law and avoid illegal behavior. Those who are dishonest and corrupt take advantage of the confusion in our laws, practice favoritism for personal benefits, and decide whether to punish someone severely or lightly based solely on their own personal whims. As long as there is no unified standard for deciding cases, officials above will find it difficult to restrain officials below. Indeed, there are cases nowadays which involve the same set of facts, but each have different, diverging judgments. Adjudication therefore becomes unjust, and the law is also harmed.<sup>30</sup>

古人有言：「人主詳，其政荒；人主期，其事理。」詳匪他，盡善則法傷，故其政荒也。期者輕重之當，雖不厭情，苟入於文，則循而行之，故其事理也。夫善用法者，忍違情不厭聽之斷，輕重雖不允人心，經於凡覽，若不可行，法乃得直。又君臣之分，各有所司。法欲必奉，故令主者守文；理有窮塞，故使大臣釋滯；事有時宜，故人主權斷。主者守文，若釋之執犯蹕之平也；大臣釋滯，若公孫弘斷郭解之獄也；人主權斷，若漢祖戮丁公之為也。天下萬事，自非斯格重為，故不近似此類，不得出以意妄議，其餘皆以律令從事。然後法信於下，人聽不惑，吏不容姦，可以言政。人主軌斯格以責羣下，大臣小吏各守其局，則法一矣。

28. Recall that Liu Song served as Chamberlain for Law Enforcement (*ting wei*). See LIU & WANG, *supra* note 11, at 172.

29. Recall that Liu Song served as Chamberlain for Law Enforcement (*ting wei*). See LIU & WANG, *supra* note 11, at 172.

30. *Id.* at 30.935–36.

An ancient writer once said: “When the ruler enters into the specific details, his government [becomes] barren; when the ruler only expresses general expectations (essential principles), then all matters fall [smoothly] into order.”<sup>31</sup> “Entering into the specific details” means nothing more than pursuing perfect goodness but in detriment to the law. As a result, the ruler’s administration will be in ruins.<sup>32</sup> “Expressing general expectations (essential principles)” means to appreciate gravity or lightness [in each particular case].<sup>33</sup> Even if it does not meet or comport with personal feelings and relations, as soon as something is written into the text of the law, then it must be followed and enforced.<sup>34</sup> This way, a ruler’s administration can “fall [smoothly] into order.”<sup>35</sup> Those skilled with applying the law can tolerate and are more accepting of going against personal relations/feelings and the dissatisfaction of others, and they persevere and hold steadfast to their decision and judgment. Even if it means that such a legal judgment would not be in accordance with people’s thoughts and feelings or that such a judgment would be seen as ineffective with respect to customs, the law still has been thoroughly implemented and upheld. With respect to the ruler and his ministers, each has their own responsibilities. Law must be implemented, and so let the official directly and immediately in charge of hearing the case adjudicate the case in accordance with law. If and when the logic is not clear, get the high-ranking ministers to remove obstructions; if there are special needs in the current situation, then the ruler should help decide the case with more attention to flexibility. The official adjudicating the case in accordance with written law is just like Zhang Shizhi’s fair and impartial hearing of the man who did not follow orders to clear the way for the emperor’s carriage.<sup>36</sup> The higher minister removing obstructions is like

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31. The “ancient writer” to whom Liu Song is referring to is the pre-Qin Confucian philosopher, Xunzi. Liu Song’s quote is based on a passage in the *Xunzi* text (Book 11.11: “Of Kings and Lords-Protectors”), which originally reads: “If the ruler is fond of essential principles, the Hundred Tasks will be precisely detailed and exactly specified. But if he is fond of precise details and exact specifications, then the Hundred Tasks will be ruined by the excess of detail.” XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOLUME II: BOOKS 7–16, 166 (John Knoblock trans., 1990). I thank an anonymous reviewer for pointing this out to me and for suggestions on translating this sentence in Liu Song’s memorial. “The Hundred Tasks” (*baishi*) here generally refers to various matters the ruler must attend to.

32. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

33. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

34. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

35. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

36. Zhang Shizhi was a Han dynasty minister and served in a number of important positions, including Commander of Gate Traffic Control and Chamberlain for Law Enforcement. He had a reputation for strictly adhering to written laws. See Ulrich Theobald, *Persons in Chinese History—Zhang Shizhi*, CHINA KNOWLEDGE.DE (Sept. 16,

Gong Sunhong's judgment of Guo Jie.<sup>37</sup> The ruler taking into account expedience and flexibility is like Emperor Gaozu of the Han dynasty's execution of Ding Gong.<sup>38</sup> Today, unless these three situations in history occur and as long as the matter before the judicial officer is not similar to these three precedents, we cannot decide cases based on personal wishes, affections or feelings. All cases must be decided and adjudicated in accordance with the law. Only then will the people be confident in, and trust, the law. The people will not be confused or led astray, and officials will not proceed to evil or corruption. Only after this is accomplished can we start to talk about how to handle matters of state. If the ruler demands

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2011), <http://www.chinaknowledge.de/History/Han/personszhangshizhi.html> [https://perma.cc/SE97-UXT7]. The judgment Liu Song referred to here is recorded in Sima Qian's (c. 145–86 B.C.) famous *Records of the Grand Historian (Shiji)*, a history that covers the period from the Yellow Emperor to Emperor Wu (r. 141–87 B.C.) of the Han dynasty. During the reign of Emperor Wen (180–157 B.C.) of Han, Emperor Wen was on an excursion and passing a bridge when a man suddenly ran out from under the bridge, startling the emperor's horses. Emperor Wen got very angry and ordered the man arrested and handed over to Zhang Shizhi for judgment. The man was indeed guilty of the crime of not clearing the roads, and Zhang Shizhi levied a fine, which was the punishment mandated by law. Emperor Wen was enraged and wanted the man executed, but Zhang Shizhi explained that the emperor and everyone must uphold and follow the written law, which prescribes the penalty of a fine, not an execution, for this crime. Emperor Wen, in the end, listened to Zhang Shizhi. See TREATISES IN LAW, *supra* note 5, at 114; SIMA QIAN, RECORDS OF THE GRAND HISTORIAN: HAN DYNASTY I, 470 (Burton Watson trans., 1993); SIMA QIAN (司马迁), SHIJI (史记) [RECORDS OF THE GRAND HISTORIAN] 102.2751–57 (Taipei TingWen Publishing Co. ed., 1981) (note pinpoint citation here is to “chapter.page number”).

37. The case to which Liu Song referred to here is also recorded in RECORDS OF THE GRAND HISTORIAN. Gong Sunhong was a high-ranking official in the Han and served in high positions such as Censor-in-chief and Counsellor-in-chief, and he had a reputation for frugality and uprightness. See Theobald, *supra* note 36. As for the case—a wandering knight named Guo Xie in his later life had a reputation for being fair and just. One day, a Confucian scholar slandered Guo, and one of Guo's retainers later killed this slanderer and cut out his tongue. The lower-ranking officials in charge of the jurisdiction where Guo lived finally submitted a report to the emperor, saying Guo should not have any criminal liability since he did not know of the murder. In other words, Guo was not involved. However, Gong Sunhong, who was serving as Censor-in-chief at the time, said Guo should be executed: “[Guo] Xie, although a commoner, has taken the authority of the government into his own hands in his activities as a [wandering] knight, killing anyone who gave him so much as a cross look. Though he did not know the man who murdered the Confucian scholar, his guilt is greater than if he had done the crime himself. He should be condemned as a treasonable and unprincipled criminal!” SIMA QIAN, RECORDS OF THE GRAND HISTORIAN: HAN DYNASTY II, 417 (Burton Watson trans., 1993); see also TREATISES IN LAW, *supra* note 5, at 114; SIMA QIAN, SHIJI, *supra* note 36, at 124.3185–89.

38. Ding Gong (also known as Ding Gu) was the uncle of Ji Bu, who himself was a governor during Emperor Wu of Han. Ding Gong was one of Xiang Yu's generals. In the Battle of Pengcheng, Ding Gong fought Liu Bang and had the upper hand. Liu Bang asked Ding Gong for mercy, and Ding Gong then pulled back his troops and left. After Liu Bang became the first emperor of the Han dynasty (i.e., Emperor Gaozu of the Han, r. 202–195 B.C.), he met Ding Gong again but then had Ding arrested and executed for the crime of disloyalty. See TREATISES IN LAW, *supra* note 5, at 114; SIMA QIAN, SHIJI, *supra* note 36, at 100.2729–33.

such compliance and behavior from officials and officials (regardless of their rank) all indeed act in such a way, then the laws and regulations can be unified.<sup>39</sup>

古人有言：「善為政者，看人設教。」看人設教，制法之謂也。又曰「隨時之宜」，當務之謂也。然則看人隨時，在大量也，而制其法。法軌既定則行之，行之信如四時，執之堅如金石，羣吏豈得在成制之內，復稱隨時之宜，傍引看人設教，以亂政典哉！何則？始制之初，固已看人而隨時矣。今若設法未盡當，則宜改之。若謂已善，不得盡以為制，而使奉用之司公得出入以差輕重也。夫人君所與天下共者，法也。已令四海，不可以不信以為教，方求天下之不慢，不可繩以不信之法。且先識有言，人至愚而不可欺也。不謂平時背法意斷，不勝百姓願也。

An ancient writer also said: “Those who are good at governing will adopt the appropriate measures to educate the people based on the current situation.” What they meant by “adopt the appropriate measures to educate the people” is setting forth and creating laws. The ancients have also said, “measures must be chosen in accordance with the needs of the time and in light of trends.” What this means is that it is important to focus on timely, pressing matters. “Adopting the appropriate measures to educate the people” and keeping in mind the needs of the time and trends requires deep and wide mastery of the current situation, and only after that, can effective laws be created. Once laws have been set forth and promulgated, they must be implemented. The implementation should be as reliable as the cycle of the four seasons and be as solid as gold and stone. So, after a law has been set down, how can officials still use the flimsy excuse of “taking into account the current situation” and justifying their behavior by quoting the ancients’ exhortation of “adopting appropriate measures to educate that people”; all in order to disturb and confuse our kingdom’s laws?<sup>40</sup> And why [is it even necessary to rely on such an excuse]? Because in the early stages of a law’s promulgation, the people’s needs and current situation has already been investigated and taken into account [by the lawmaker]. If the current laws are no longer completely appropriate, then they should be amended. If we think they are already appropriate but still do not completely follow them faithfully, then this will cause officials tasked with deciding cases to brazenly flout the law and set forth heavy or light judgments based on whatever they like. What the people and the ruler have in common is law. Once the empire is already under command, it is impossible to educate people in an untrustworthy way. And, if we search for having a population that is not arrogant, we should not restrain or bind them by untrustworthy laws.<sup>41</sup> Furthermore, a very sagacious man once said, “even the most stupid people won’t let

39. BOOK OF JIN, *supra* note 9, at 30.936.

40. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

41. I want to thank an anonymous reviewer for his/her helpful comments and suggestions on translating this sentence.

themselves be bullied/cheated.”<sup>42</sup> Would this not be like habitually adjudicating cases according to one’s ideas/preferences in contradiction with the law and not overcoming the desires of the people?<sup>43</sup>

上古議事以制，不為刑辟。夏殷及周，書法象魏。三代之君齊聖，然咸棄曲當之妙鑒，而任徵文之直準，非聖有殊，所遇異也。今論時敦朴，不及中古，而執平者欲適情之所安，自託於議事以制。臣竊以為聽言則美，論理則違。然天下至大，事務眾雜，時有不得悉循文如令。故臣謂宜立格為限，使主者守文，死生以之，不敢錯思於成制之外，以差輕重，則法恒全。事無正據，名例不及，大臣論當，以釋不滯，則事無闕。至如非常之斷，出法賞罰，若漢祖戮楚臣之私己，封趙氏之無功，唯人主專之，非奉職之臣所得擬議。然後情求傍請之跡絕，似是而非之奏塞，此蓋齊法之大準也。主者小吏，處事無常。何則？無情則法徒克，有情則撓法。積克似無私，然乃所以得其私，又恒所咀以衛其身。斷當恒克，世謂盡公，時一曲法，迺所不疑。故人君不善倚深似公之斷，而責守文如令之奏，然後得為有檢，此又平法之一端也。

In remote antiquity, cases were decided on the basis of discussion; criminal law was not promulgated. In the Xia, Shang, and Zhou dynasties, laws were written and displayed on a *xiangwei*.<sup>44</sup> The rulers in the Three Dynasties<sup>45</sup> were all sagacious, but they did not take the so-called virtues of accommodation and flexibility as their main standard. Rather, they used statutory law as the main standard for equitable adjudication. The reason they did this is not because they are more special than us, but because they faced different challenges than we do now. Our current customs and practices these days cannot compare with the honest and simple practices of the Three Dynasties, but our officials tasked with deciding cases nevertheless still want to conform to trends of individual and personal preferences and desires, using these as justifications for deciding cases on the basis of discussion. In my personal opinion, these justifications sound good, but when subject to further scrutiny, they do not hold up. But all-under-heaven is too vast, and there are many complex and different matters to attend to. There may be times when we cannot comply fully with statutory laws or adhere to laws and regulations. Because of this, I believe that we must establish restrictive rules and regulations to require officials in charge of hearing cases to follow the statutory laws. Even if it is for the sake of preserving his life, the official will not dare to ignore the written law and arbitrarily decide cases. Through this, the law will be always preserved and protected. If there is a

42. Here, Liu Song is quoting from the Confucian scholar Jia Yi (200–169 BC). I would like to thank an anonymous reviewer for bringing this to my attention as well as his/her helpful suggestions on translating this sentence. See JIA YI (贾谊), XINSHU (新书) [NEW WRITINGS] 339 (Zhonghua Book Co. ed., 2000).

43. BOOK OF JIN, *supra* note 9, at 30.936–37. I would like to thank an anonymous reviewer for his/her helpful suggestions on translating this sentence.

44. In Chinese antiquity, *xiangwei* was a place where laws were hung and displayed.

45. The Three Dynasties refers to the Xia (c. 2070–1600 B.C.), Shang (c. 1600–c. 1046 B.C.), and Zhou (1046–256 B.C.) dynasties.

particular case with no *mingli* on point,<sup>46</sup> then the high-ranking ministers can discuss and decide the case, in order to help remove confusion and keep things moving. With respect to very extraordinary and uncommon cases which require recourse beyond the law to decide whether to punish or reward (such cases include Emperor Gaozu's execution of minister Ding Gu of Chu who had secretly helped Emperor Gaozu and his installing the Zhao clan, which did not have meritorious service, as the King of Nanyue),<sup>47</sup> such cases can only be adjudicated by the ruler. Officials will be unable to get involved in such adjudication. If we do all of this, there will no longer be the phenomenon of officials deciding cases not based in the written law or deciding cases based on personal relationships. Furthermore, specious memorials reporting on criminal judgments will also cease. This is the main principle for unifying the law. Those deciding cases are usually lower-level officials, and when they hear cases, they do not have set principles or standards. Why is this? If they disregard personal relationships and feelings, then they apply the laws and only strive for severity. If they consider personal relationships and feelings, then they ignore and distort laws. Officials often will hear a case and strive for severity to try and prove they are not considering personal relationships, but in reality they are just using this as an excuse to reach a decision that brings profits to themselves. They will frequently protect themselves by doing legally risky things. When one is severe in convictions and sentencing, society will think that the entire process has been fair; even if one time or another there is some distortion in the law, the official will not be doubted. As a result, the ruler cannot approve of or praise severe decisions and convictions which appear to be fair and just, but rather he must demand that those officials tasked with upholding the law to base their memorials and decisions in strict compliance with the statutory law. Only in this way can it be said that the process has been conducted in conformity with the published rules, and law can be made more fair and just.<sup>48</sup>

夫出法權制，指施一事，厭情合聽，可適耳目，誠有臨時當意之快，勝於徵文不允人心也。然起為經制，終年施用，恒得一而失十。故小有所得者，必大有所失；近有所漏者，必遠有所苞。故諳事識體者，善權輕重，不以小害大，不以近妨遠。忍曲當之近適，

46. Wallacker translates *mingli* as “Names of Punishments and Rules of Application of the Law.” The *mingli*, according to Wallacker, were the first chapters of the Jin Code, which set forth criminal liabilities and rules for their application. See Wallacker, *supra* note 24, at 232.

47. For information on the Ding Gu case, see *supra* text accompanying note 38. The Zhao clan reference refers to Zhao Tuo (r. 203–137 B.C.), who proclaimed himself king of Nanyue (an ancient kingdom which stretched from modern-day northern Vietnam to Guangxi, Yunnan, and Guangdong provinces in China) in 204 B.C. After Emperor Gaozu ascended to the Han throne in 202 B.C., Zhao Tuo eventually submitted to his authority, and was in turn recognized by Emperor Gaozu as the king of Nanyue (which retained quite a deal of autonomy, even though technically it became a subject state under the Han dynasty).

48. BOOK OF JIN, *supra* note 9, at 30.937.

以全簡直之大準。不牽於凡聽之所安，必守徵文以正例。每臨其事，恒御此心以決斷，此又法之大概也。

When hearing a case, if one abandons or disregards the law and reaches a decision based on the tenets of flexibility and accommodation, and if such a decision is in accordance with public sentiment and feelings and enjoys support, the people's ears and eyes will be satisfied. It is true that such happiness resulting from the decision will be more powerful and persuasive than deciding a case in strict conformity with the requirements of the law. But if we take the accommodative and flexible practice as a permanent feature of our legal system and decide cases like this for the entire year, then for every one correctly decided case, there will be 10 wrongly decided ones. In other words, there are some benefits, but they are insignificant. Meanwhile, great harm is done to significant things. Although currently we have some problems, in the future we will be able to reap great harvests. Therefore, it is said that people who understand the big picture and situation, and who are also good at measuring the levity or gravity of a situation, are not going to harm the overall situation for just small, insignificant benefits. To willingly abandon the temporary comforts that the notion that "matters are handled carefully and flexibly (for accommodating or adapting to different circumstances)" can bring, is an important yardstick for protecting the law and making it fair and just. One should not consider what others think is appropriate but rather must utilize and rely on the written law, allowing the full implementation of the promulgated law. When handling cases, one should approach cases using this adjudicative theory. This is another important principle of properly implementing the law.<sup>49</sup>

又律法斷罪，皆當以法律令正文，若無正文，依附名例斷之，其正文名例所不及，皆勿論。法吏以上，所執不同，得為異義。如律之文，守法之官，唯當奉用律令。至於法律之內，所見不同，迺得為異議也。今限法曹郎令史，意有不同為駁，唯得論釋法律，以正所斷，不得援求諸外，論隨時之宜，以明法官守局之分。

Additionally, when deciding cases and convictions in accordance with the law, all decisions should be made based on the text of the laws. If there are no written laws on point, then rely on the *mingli*.<sup>50</sup> If neither the written laws or *mingli* are on point, then the defendant should not be tried. Judicial—basically officials at the *xian*, *zhou*, or higher levels, if officials at or above the district (*xian*) and regional (*zhou*) levels rely on different statutes when adjudicating the same case, then we can legitimately consider this case to have different opinions.<sup>51</sup> As for the written laws and statutes, officials tasked with implementing the law can only decide matters in strict compliance and strict reading of the text of the

49. *Id.* at 30.937–38.

50. *See supra* text accompanying note 46.

51. Lower-level officials were based at the township (*xiang*) and village (*li*) levels. As illustrated here, Liu seemed to take the opinions of the district and regional officials more seriously than those of lower-level officials.

laws. If there is disagreement over the meaning or interpretation of a law, officials can still express their opinions. What we should do now is impose the following limits: only certain level officials in the judicial agencies—namely, certain section (*cao*) officials in the Department of State Affairs (the so-called 2,000-bushel<sup>52</sup> section officials, officials in the Three Dukes section, and officials in the Review section), certain sections' court gentlemen (*lang*) officials, and certain clerks (*lingshi*) responsible for handling documents of the Department of State Affairs<sup>53</sup> can have debates over their disagreements, and such discussions should only concern interpretations of the actual text of the law to ultimately reach a decision. They cannot bring in justifications outside the written law under the excuse of addressing the current needs of the time or trends. Only through this can we make clear the proper bounds and scope of authority of judicial officials.<sup>54</sup>

(*Book of Jin* then records that in the end, Emperor Hui ordered his high-ranking ministers to deliberate on Liu's memorial, and they recommended adopting Liu's proposed policies.)<sup>55</sup>

### III. ANALYSIS AND DISCUSSION

It is first important to understand what Liu was reacting against. In his memorial, Liu strongly spoke out against disunity and inconsistency in the application of law and the adjudication of cases. He criticized officials who were deciding cases not based on written law, but rather on things outside the written law, such as custom, personal feelings, personal whims, personal relationships, and other factors that might “profit” them.<sup>56</sup> Liu, ever the outspoken official, even criticized the emperor for exacerbating these problems, since the emperor had expectations for “perfect outcomes” for cases.<sup>57</sup> This often led to officials “interpret[ing] statutes in forced and far-fetched ways in order to cater to personal wishes and desires” in order to satisfy and please the emperor.<sup>58</sup> Liu's memorial can also be read as a sharp rebuke of blind, uninformed obedience to the authority of tradition and antiquity. For example, in his memorial, Liu attacked those officials who misunderstood what the ancients meant by “adopt[ing] the appropriate measures to educate the people” and twisting it in order to “make a mockery” of dynastic written law.<sup>59</sup> Rather, Liu reinterpreted many of these ancient sayings (he does not specify who

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52. Officials were compensated at that time in bushels of grain, based on their rank. See HUCKER, *supra* note 10, at 205 and TREATISES IN LAW, *supra* note 5, at 319.

53. For further discussion of these kinds of officials, see HUCKER, *supra* note 10, at 205–06, 245, 301, 315, 376, 399, 412, 520 and TREATISES IN LAW, *supra* note 5, at 319.

54. BOOK OF JIN, *supra* note 9, at 30.938.

55. *Id.*

56. *Id.* at 30.937.

57. *Id.* at 30.935.

58. *Id.*

59. *Id.* at 30.937.



the original speaker was) by trying to show that the ancients emphasized clear, dispassionate, and consistent application of law in deciding cases.

As a specific example of the method of adjudication which Liu spoke out against, starting in the Han dynasty, some Confucian classical texts were used by officials to decide cases, notably the *Spring and Autumn Annals*. Officials would often ignore or set aside statutory law and decide cases solely based on general principles and/or specific stories contained within the *Spring and Autumn Annals*. This practice of using the *Spring and Autumn Annals* to decide cases (*chun qiu jue yu*) persisted as far as the Song dynasty (960–1279), and so Liu would have almost certainly been familiar with it and would have seen it in action.<sup>60</sup>

What was Liu's preference? Concerned with consistency and unity of law, Liu strongly advocated for the supremacy of written law in adjudication. As he put it bluntly in his memorial, "[a]ll cases must be decided and adjudicated in accordance with the written law."<sup>61</sup> Furthermore, for Liu, the "implementation of law should be as reliable as the cycle of the four seasons and be as solid as gold and stone."<sup>62</sup> The analogy to the four seasons emphasizes Liu's belief that the application of law to adjudication should have almost scientifically certain standards of reliability. Liu also made it clear that an official should seek to decide cases solely in accordance with the written law, even if such an adjudicatory approach flies in the face of public opinion, public sentiments, personal relationships, or even what the emperor himself may fancy. Indeed, as Liu dramatically put it, "[e]ven if it is for the sake of preserving his life, the official will not dare to ignore the written law and arbitrarily decide cases."<sup>63</sup> Furthermore, if there was no written law on point which covered the defendant's actions, Liu argued that the "defendant should not be tried."<sup>64</sup> The significance of such a statement should not be understated. As one Chinese historian indicated, Liu's statement is comparable to the Western notion of "what is not expressly forbidden must not be a crime"<sup>65</sup>—i.e., what we would term today the "legality principle" in modern legal systems. Indeed, it would not be necessary to inquire into things outside the written law, because for Liu, the legislative process already has taken into account factors such as "appropriate measures . . . based on the current situation" and the "people's needs."<sup>66</sup> All an official needs to do is to apply and implement the law.

In this sense, while Liu considered the written law supreme, the same cannot be true of judicial officials and institutions more generally. It

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60. For further discussion of the practice of using the *Spring and Autumn Annals* to decide legal cases, see Norman P. Ho, *Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen*, 22 PAC. RIM L. & POL'Y J. 48, 78–100 (2013).

61. BOOK OF JIN, *supra* note 9, at 30.936.

62. *Id.*

63. *Id.* at 30.937.

64. *Id.* at 30.938.

65. Yan, *supra* note 14, at 128.

66. BOOK OF JIN, *supra* note 9, at 30.936.

seems that Liu wanted very much to control the power of judicial institutions and officials tasked with judging cases by reducing their discretion. Hence, as discussed in the above paragraph, Liu believed that officials should simply stop trying a case if the law was unclear or not on point. In this way, Liu's theory of adjudication is quite different from well-known Western theories of adjudication regarding hard cases, such as those of H.L.A. Hart and Ronald Dworkin. In their view, a "hard case" includes cases where "no settled rule dictates a decision either way . . .,"<sup>67</sup> which is the same type of case Liu referred to (i.e., cases where the law is not on point). For Hart, there are certain hard cases where there may be "gaps" in the law where the law runs out and there is no law on point, or the law itself may be unclear due to the open texture of the language used.<sup>68</sup> In such cases, according to Hart, the judge exercises a limited "law-creating discretion" and decides the case by determining what the law should say.<sup>69</sup> Dworkin sharply disagreed with Hart, arguing that the law in fact never runs out in a hard case. Even though written statutes or judicial precedents may not be directly applicable to the case, Dworkin argued that judges would and should rely on principles, which are non-rule standards that also constituted law. More specifically, for Dworkin, principles are moral standards implied by or explicitly stated in past official actions, such as legal statutes, precedents, and constitutional provisions.<sup>70</sup> When a judge faces a hard case, Dworkin argues in his theory of adjudication of "law as integrity" that the judge does, and should, "[try] to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be."<sup>71</sup> In both of their theories of adjudication, Hart and Dworkin (the latter in particular) provide narratives of a judge who will decide hard cases even if the law is not on point—whether it be Hart's narrative of a judge as lawmaker or Dworkin's narrative of a judge as an applier of principles in the law. However, these two theories of adjudication for hard cases would have been anathema to Liu. His theory differed greatly from that of Hart or Dworkin by arguing that the judicial official in question simply should not try the case at all.

His idealism regarding the supremacy of written law aside, Liu was realistic about possible ambiguities in the law and provided for some flexibility in his adjudicative theory. He admitted that there may be situations where different officials have different interpretations of

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67. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 83 (1978); NICHOLAS MCBRIDE & SANDY STEEL, *GREAT DEBATES IN JURISPRUDENCE* 115 (2014).

68. H.L.A. HART, *THE CONCEPT OF LAW* 127, 272 (2012); MCBRIDE & STEEL, *supra* note 67, at 115.

69. HART, *supra* note 36 at 272; MCBRIDE & STEEL, *supra* note 67, at 115.

70. 1 Brian Bix, *Ronald Dworkin*, in *PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 233 (Christopher B. Gray ed., 1999).

71. RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986); MCBRIDE & STEEL, *supra* note 67, at 115.

a particular written law. In these cases, there should be discussion and debate on the interpretations, but Liu limited such discussions to certain officials based on their area of responsibility (officials in judicial agencies) and rank (e.g., certain officials in the Department of State Affairs and officials of 2,000–bushel rank). Furthermore, Liu made clear that such discussions could not raise justifications outside the written law, although Liu was never really clear about what kinds of justifications were truly considered outside the written law, and he never provided any specific examples. To muddle things further, Liu made an example of three historical judgments—Zhang Shizhi’s judgment of the man on the bridge, Gong Sunhong’s judgment of Guo Xie, and Emperor Gaozu’s execution of Ding Gong<sup>72</sup>—suggesting that if any cases are similar to these, they need not necessarily be decided on factors solely in the written law (although Liu was not clear on the specifics). It is also apparent that Liu still gave the emperor a lot of flexibility to get involved in adjudication, especially in “very extraordinary and uncommon cases” (unfortunately, Liu did not give a specific definition on what set of facts would constitute such a case).<sup>73</sup> Liu also gave quite a bit of latitude to high-ranking ministers to “help remove confusion and keep things moving” in certain cases.<sup>74</sup> But he did not provide specifics as to what kind of ministers, nor did he specifically set forth what such ministers can and cannot do. These are all weaknesses in Liu’s reasoning.

Ultimately, Liu thought that strict compliance with written law in adjudication would have many desirable effects: unity in, and integrity of, law would be promoted; officials’ discretion would be limited; adjudicative judgments would be fairer and more just; people’s trust in the law would grow; government administration would be smoother; and administrative and bureaucratic hierarchies would be respected. In the end, Liu should not be read with an anachronistic 21st century lens. He was not someone who was advocating for what we would today understand as “rule of law.” In his adjudicative theory, Liu still maintained flexibility for the emperor, evidencing his belief that the emperor was sometimes above the law and not subject to the written law. While Liu’s proposals for adjudicative reform were motivated by enhancing respect for the status of the law, he was equally concerned with preserving and strengthening the dynastic system of government as well as official hierarchies. By giving the emperor the final say over cases, Liu preserved the emperor’s ultimate judicial authority.

What is the significance of Liu’s memorial in Chinese legal theory more generally? As mentioned in the introductory section of this Article, I believe Liu can also be understood as a premodern Chinese legal theorist who was against the QLF theory of adjudication, a theory which

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72. For a discussion of these cases, see *supra* text accompanying notes 36, 37 and 38.

73. BOOK OF JIN, *supra* note 9, at 30.937.

74. *Id.*

has otherwise been strongly influential on our understanding of traditional Chinese law. QLF theory as standards for adjudication can trace its intellectual heritage back to Confucius's thought. In the *Analects*, for example, Zengzi (505–435 B.C., one of Confucius's most important disciples) stressed the importance for a judicial authority to consider *qing* in adjudicating a case:

When the Meng Family appointed Yang Fu to be their Captain of the Guard, he went to ask Master Zeng [Zengzi] for advice. Master Zeng said: "It has been a long time since those above lost the Way, and so the people lack guidance. When you uncover the truth in a criminal case, proceed with sorrow and compassion. Do not be pleased with yourself."<sup>75</sup>

In other words, according to Zengzi, it was important for a judicial official like Yang Fu to judge a defendant with compassion, sorrow, and pity (i.e., to consider *qing*) and not to relish in his role as a punisher. This line of thinking influenced the development of Chinese legal thought, and since antiquity, judicial officials have adopted QLF as the "*de facto* dispute-resolution standard."<sup>76</sup> And as early as 653 A.D. in the Tang dynasty, imperial governments have also set QLF as a legislative goal.<sup>77</sup>

The basic idea animating QLF theory is the conviction that *fa* cannot and does not guarantee justice—justice can only be realized by taking *qing*, *li*, and *fa* all into account. In applying QLF as a dispute-resolution standard, *qing* originally first referred to *anqing* (facts of the case) or *zhenqing* (truth of a case)—in other words, according to QLF theory, Chinese judicial officials first sought to collect and understand all the facts of a case and to establish truth. Only by obtaining the truth behind a case could the ultimate cause of the problem under adjudication be ascertained and the case resolved correctly. The judicial official had to understand the cause, historical context, factors, situational dynamics, and the state of mind of the involved parties. In the view of Chinese judicial officials, ascertaining all the facts and the truth of a case was important because they were not simply solving one case, but seeking to solve a societal problem—i.e., to solve the societal contradictions animating the case to avoid reoccurrence.<sup>78</sup>

Having understood all the facts, the judicial official would be in a better position to understand the offender's actions and could then proceed to utilize the central meaning of *qing-renqing*, or human feelings, human compassion—as a standard in deciding the case. In other words, the ultimate objective of adjudication was for the judicial official to empathize, or to step into the shoes of the offender. This would allow the judicial official to understand the offender's situation, motivations, and to feel what the offender feels. In determining guilt and punishment,

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75. CONFUCIUS, *THE ANALECTS, WITH SELECTIONS FROM THE TRADITIONAL COMMENTARIES* 227 (Edward Slingerland trans., 2003) (quoting from book 19, passage 19).

76. WONG, *supra* note 7, at 55.

77. *Id.*

78. *Id.* at 259.

a judicial official should therefore consider the offender's heart—for example, well-intentioned actions should not be punished, or they should be punished less severely. The principle of compassion should also reign supreme—doubtful cases should be treated lightly and offenders should not be sentenced with heavy punishment. Furthermore, extra-legal considerations in the form of *li* should also be considered because reference to general heavenly and ethical principles could help a judicial official determine whether the actions of the offender were justified by higher-level principles, and therefore normal or natural. The use of *qing* and *li* could help a judicial official answer the following question—did the offender do something a normal person would do in a similar situation?<sup>79</sup> Then, of course, *fa* was to be applied to the case, but it had to be applied in the context of *qing* and *li*.<sup>80</sup> The ultimate goal of the judicial official in applying QLF theory as standards in adjudication was to “actualize QLF as a way of life” and to create a harmonious society.<sup>81</sup>

While the precise character and specific meanings of QLF differed in various dynasties (for it is important to remember that QLF were dynamic concepts in interaction with each other), it has been argued in the scholarly literature that QLF theory as a general standard and tool of adjudication has been a constant feature of Chinese legal culture since antiquity and extending to the present day. In other words, QLF theory has been used to portray, generalize, and represent traditional Chinese legal culture as a whole.<sup>82</sup> QLF has also been described in the scholarly literature as an indispensable “trinity” in Chinese legal culture, with *fa* portrayed as an isolated island, and *li* and *qing* as two bridges on opposite banks, connecting with the *fa* island.<sup>83</sup> Moreover, existing scholarship has continued to emphasize the inherent hierarchy and relationships among each of the factors in QLF—indeed, it has been argued that for judicial officials in traditional China, it is most important for decisions to be in accordance with *qing*, then *li*, and then *fa*.<sup>84</sup>

In relying on QLF theory to generalize traditional Chinese jurisprudence, existing scholarship has also used QLF theory to emphasize the cultural uniqueness of Chinese traditional adjudication versus more dispassionate Western modes of jurisprudence.<sup>85</sup> Western scholars have

79. *Id.* at 259–61, 265.

80. *Id.* at 265.

81. *Id.* at 265–57.

82. *See supra* text accompanying note 6 for examples of such scholarly usages of QLF theory.

83. FAN ET AL., *supra* note 8, at 23.

84. *Id.* at 24.

85. *See, e.g.,* Hu Keming (胡克明), *Wo guo chuantong shehui zhong de qing li fa tezhen* (我国传统社会中的情理法特征) [The Special Characteristics of Traditional Chinese Society's QLF Approach], 3 ZHEJIANG SHEHUI KEXUE (浙江社会科学) [Zhejiang Soc. Sci. J.] 83 (2012) (arguing that QLF are not separated easily in daily life in traditional China, which is different from Western society and Western philosophy); Kang Jiansheng (康健胜), *Qing li fa yu chuantong sifa shijian* (情理法与传统司法实践) [Qing li fa and Traditional Chinese Judicial Practice], 2 QINGHAI SHEHUI KEXUE (青

also relied on QLF theory to generalize traditional Chinese law and portray it in a negative light. As one prominent example, in an article published in *The New York Review of Books* following his visit to China in 2002, Dworkin blasted the modern Chinese legal system, writing that “China’s record of ignoring the rule of law, suppressing democracy, and systematically violating human rights is notorious.”<sup>86</sup> He also specifically attacked the Chinese legal tradition and Confucianism, saying that traditional legal practice in China rejected two principles central to the rule of law—that “coercive power of the state may only be exercised in accordance with standards established in advance, and that judges must be independent of the executive and legislative powers of government.”<sup>87</sup> Instead, Dworkin argued, traditional Chinese legal practice followed the Confucian view: “that law is a matter not of rules or general principles, but of virtue, equity, and reasonableness in individual cases,” and that “[j]udges developed no system of legal precedent: there was no understanding, that is, that judges in later cases would follow principles laid down in earlier decisions.”<sup>88</sup> In other words, Dworkin essentially argued that traditional Chinese jurisprudence was all about *qing* and *li*, and not at all about *fa*.

While QLF was indeed used as a tool of adjudication and that it was referenced throughout Chinese history, for example in the Tang (618–907), Song (960–1276), Ming (1368–1644), and Qing (1644–1911) dynasties, the Chinese legal tradition and traditional Chinese legal theory cannot be understood simply in QLF terms,<sup>89</sup> especially if we consider Liu Song’s memorial and its sharp rebuke of consideration for factors such as personal relationships, public opinion, and human feelings in adjudication. When analyzed in the context of QLF theory, his theory of adjudication has great significance for Chinese legal theory as a whole, since he largely eschewed QLF, pushing instead for the supremacy of the *fa* component of QLF, such as his version of the “legality principle.” In other words, for Liu Song, adjudication should be about *fa* first and then possibly *qing* and *li* (recall his retention of flexibility for “extraordinary and uncommon” cases).<sup>90</sup> Liu Song can be read as a notable countercurrent in the QLF-influenced Chinese legal tradition.

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海社会科学) [QINGHAI SOC. SCI. J.] 73 (2011) (arguing that the Chinese judicial practice of QLF is exceptionally different from judicial practices in any other country or ethnic culture).

86. Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. BOOKS, Sept. 26, 2002, [www.nybooks.com/articles/archives/2002/sep/26/taking-rights-seriously-in-beijing](http://www.nybooks.com/articles/archives/2002/sep/26/taking-rights-seriously-in-beijing) [<https://perma.cc/G2HM-UF96>].

87. *Id.*

88. *Id.*

89. WONG, *supra* note 7, at 259; Chen, *Confucian Legal Culture and its Modern Fate*, *supra* note 7, at 521.

90. BOOK OF JIN, *supra* note 9, at 30.937.

## CONCLUSION: LIU SONG IN THE 21ST CENTURY

This article has translated and analyzed Liu Song's famous memorial on adjudication and has argued that he advocated for the dispassionate implementation and application of written law in adjudication. Furthermore, the article highlights unique, significant aspects of Liu Song's legal thought as seen through his memorial on adjudication—notably, that he can be read as a countercurrent to the QLF theory of adjudication which has strongly influenced our understanding of traditional Chinese law and legal theory.

Although the main focus of this Article has been historical, it is worth concluding with some thoughts on Liu Song's relevance in 21st century China. The Chinese leadership today has been fond of quoting from historical Chinese texts and philosophers, such as Confucius and Han Fei, as sources for governance and administration. It can be argued that even in 21st century China today, aspects of traditional QLF theory still play a role in judicial decisionmaking.

Take, for example, the recent case where a 22-year-old man named Yu Huan stabbed several debt collectors and killed one of them after they threatened his mother and him. In 2016, eleven debt collectors went to his mother's store to get payment for a high-interest loan she had taken out. They became increasingly aggressive, eventually cornering Yu and his mother in their back office, with one debt collector, named Du Zhihao, screaming insults and exposing his genitals. Then, Yu stabbed Du and other collectors, killing Du in the process. Originally, in February 2017, Yu was sentenced to life in prison, but this sentence was deeply unpopular and public opinion on social media favored clemency for him. Some netizens argued, for example, that Yu was only upholding the key Chinese moral virtue of filial piety (*xiao*). In June 2017, the Shandong Higher People's Court overturned the lower court's sentence of life imprisonment and instead resentenced Yu to five years in prison. This decision has been widely shared and viewed on Chinese social media, and legal experts have said that "public anger had probably influenced the ruling."<sup>91</sup> While many were pleased with the lighter sentence, some were disappointed that the court was influenced by public opinion, with one netizen writing that "[a]fter you kill someone, all you need to do is spend a little money to hire some people to cause a stir online, then you'll be commuted. Too easy!"<sup>92</sup>

Liu Song likely would have also been distressed if public opinion was indeed the main crux on which the Shandong Higher People's Court based its decision. Liu, who argued that the implementation of law should be as faithful as the four seasons, would have wanted the court to reach its sentencing decision in accordance with statutory law. As he argued in

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91. 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>.

92. *Id.*

his memorial, “[o]ne should not consider what others think is appropriate but rather must utilize and rely on the written law, allowing the full implementation of the promulgated law.”<sup>93</sup> Most likely, Liu would have regarded the Shandong Higher People’s Court’s decision as something based on “flexibility and accommodation” (using Liu’s own words from his memorial) in order to satisfy the “people’s eyes and ears” (i.e., public opinion).<sup>94</sup> However, he would also have concluded that in the long term, such decisions would harm the law and cause people to lose confidence in the law. Under Liu’s theory, if the statutory law covered Yu’s offense and mandated life imprisonment, then the lower’s court penalty was correct. If there was no statutory law on point, then Yu should not be tried at all, and the legislature should work on passing a new law which covers the facts of the Yu case. However, considering Liu’s exceptions for “extraordinary” or “uncommon” cases where the emperor could get involved,<sup>95</sup> it is unclear whether the Yu case would qualify as an “exceptional” or “uncommon” case that would permit the emperor’s (the modern “equivalent” of which perhaps may be officials in the highest echelons of the Chinese government) personal intervention.<sup>96</sup>

Thus, Liu’s scholarship continues to be relevant for modern times because the main tenets of his adjudicative theory could be very useful as a historical precedent to those who want a more hearty and vigorous rule of law reforms in China. It would promote supremacy of law over the desires of the Chinese Communist Party (CCP). At the same time, the exceptions built into Liu’s adjudicative theory—with its continued support of the dynastic system and the emperor—could easily appeal to those who want continued CCP oversight over judicial agencies.

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93. BOOK OF JIN, *supra* note 9, at 30.937–38.

94. *Id.* at 30.937.

95. *Id.*

96. *Id.*



