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## CONFUCIAN JURISPRUDENCE, DWORKIN, AND HARD CASES

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### ABSTRACT

*This Article argues that Confucian jurisprudence can accurately be analogized to Dworkin's adjudicative theory of law, in particular, his interpretive theory of law. To more effectively reveal the methods of Confucian jurisprudence and therefore carry out a comparison with Dworkin's interpretive theory of law, this article adopts Dworkin's methodology of focusing on "hard cases." Specifically, this article identifies and then examines an actual hard case (from Tang dynasty China) which is arguably representative of Confucian jurisprudence in action – the controversial case of Xu Yuanqing, who committed a revenge killing against a low-ranking official who had killed his father. In particular, this article translates into English and analyzes two diverging legal opinions authored by Confucian officials on the case (one calling for Xu's execution, the other calling for Xu to be spared), attempting to show the similarities between Confucian jurisprudence and Dworkin's interpretive theory of law. This article concludes by discussing the implications of such similarities on legal theory more generally. To that end, it will argue that Dworkin's adjudicative theory of law need not necessarily be confined to Anglo-American jurisprudence, and that, despite Dworkin's own assertions to the contrary, Confucian jurisprudence is in fact not incompatible with*

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*Dworkinian approaches to law. Finally, this article will also highlight some unique, different features of Confucian jurisprudence and how such features might contribute to comparative jurisprudence more generally.*

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INTRODUCTION

China law scholar Randall Peerenboom has challenged existing, standard scholarly accounts of Confucianism as natural law<sup>1</sup> and has argued that Confucian jurisprudence shares more in common with Ronald Dworkin’s interpretive theory of the law as integrity than natural law doctrines.<sup>2</sup> In his book *Law and Morality in Ancient China: The Silk Manuscripts of Huang-Lao*, Peerenboom wrote that Confucian legal theory is “much closer to a Dworkinian coherence account of the law as constructive interpretation.”<sup>3</sup> Peerenboom asserts the Confucian sage-judge’s goal in deciding a case is to “striv[e] for an equilibrium among the conflicting interests that will reflect the highest possible degree of social harmony attainable given the particular constraints” of the case, to “render the law consistent with a specific society’s values, practices, goals and needs” and, following Dworkinian language, to “make both the law *and the*

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<sup>1</sup> See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967); JOSEPH NEEDHAM, *SCIENCE & CIVILISATION IN CHINA: VOLUME 2* (1956) (both setting forth accounts of Confucianism as natural law).

<sup>2</sup> Randall P. Peerenboom, *Confucian Jurisprudence: Beyond Natural Law*, 18 *ASIA CULTURAL Q.* 12, 12 (1990); see also Geoffrey MacCormack, *Natural Law in Traditional China* (2013-2014) 8 *J. COMP. L.* 104, 121 (2013-14).

<sup>3</sup> See S.L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, in *EXPLORING LAW’S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 69 (Scott Hershovitz ed., 2006) (discussing coherence accounts and Dworkin’s visions of legal reasoning).

*world we live in* the best it can be.”<sup>4</sup> However, in the same book, Peerenboom himself explicitly notes that despite the great interest Eastern and Western legal theorists might have in a comparison of Dworkin and Confucian jurisprudence, his book would not engage in a sustained, “sophisticated” comparison between Dworkin and Confucius and therefore such a discussion must “await another forum.”<sup>5</sup>

As its most immediate goal, this article seeks to be such a forum and to develop Peerenboom’s thesis that Confucian jurisprudence can accurately be analogized to a Dworkinian interpretive theory of law. Indeed, to my knowledge, no scholarly work to date—in English or Chinese—has really engaged in such an enterprise.<sup>6</sup> To accomplish this immediate goal, I adopt Dworkin’s methodology of focusing on hard cases, which, as Raymond Wacks has noted, allow us to focus “our attention on the judicial role in its most graphic and most important form.”<sup>7</sup> In other words, a judge’s approach to hard cases allows us to best understand a judge’s theory, method of adjudication, and what is most novel about his or her adjudicative approach. I also adopt Dworkin’s definition of a “hard case,” which he defines as a case where “no settled rule dictates a decision either way . . . .”<sup>8</sup> In other words, hard cases are cases where no clear rule of law was immediately applicable, and hence judges will have to use other standards to decide cases than rules.<sup>9</sup> They are also cases which deal with fundamental propositions of law, upon which lawyers may disagree.<sup>10</sup> They have also been described as cases where arguments exist as to what is the best understanding of law, in contrast to clear cases, where no such doubt exists.<sup>11</sup>

The importance of such hard cases to Dworkin’s views on law cannot be overstated. William Twining argues that Dworkin’s central question was, in fact, “what constitutes a valid and cogent argument on a question of law in a hard case.”<sup>12</sup> Therefore, I have identified, from the Chinese historical record, an actual, real-world case which I believe can be accurately termed

<sup>4</sup> RANDALL P. PEERENBOOM, *LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO* 119 (1993).

<sup>5</sup> *Id.* at 25.

<sup>6</sup> Linghao Wang & Lawrence Solum, *Confucian Virtue Jurisprudence*, in *LAW, VIRTUE, AND JUSTICE* 105, 128 (Amalia Amaya & Hock Lai Ho eds., 2012) (claiming it will address the argument that Confucian theory of law is considered a Dworkinian coherentist theory, but ultimately does not do so).

<sup>7</sup> RAYMOND WACKS, *UNDERSTANDING JURISPRUDENCE* 142 (4th ed. 2015).

<sup>8</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 83 (1978).

<sup>9</sup> *Id.* at 81, 116-17; *see also* WACKS, *supra* note 7, at 140.

<sup>10</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at xiv; WACKS, *supra* note 7, at 141.

<sup>11</sup> M.D.A. FREEMAN, *LLOYD’S INTRODUCTION TO JURISPRUDENCE* 720 (8th ed. 2008).

<sup>12</sup> WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 64 (2000).

a Dworkinian “hard case”, dating from the Tang dynasty (618-907 A.D.)—namely the case of Xu Yuanqing, who had committed a revenge killing against a low-ranking official who had killed his father. This article will translate into English, compare, and analyze two competing legal opinions written by two prominent Tang dynasty Confucian officials tasked with opining on this case who can generally be described as representing the Confucian tradition and whose opinions can be seen as examples of Confucian jurisprudence. It will argue that Confucian jurisprudence does in fact share many points in common with Dworkin’s interpretive approach to law, as well as other aspects of his broader views on the composition of law and legal systems.

As a broader and hopefully more far-reaching goal, this article also seeks to contribute to legal theory and comparative jurisprudence more generally in three ways. First, through a comparison between Confucian jurisprudence and Dworkin’s interpretive theory of law, I hope to show that Dworkin’s theories of adjudication and the application of his views on law more generally need not be confined only to Anglo-American jurisprudence. Second, despite Dworkin’s own beliefs to the contrary, I hope to show that the traditional Confucian approach to jurisprudence (as seen through the Xu Yuanqing case) is not incompatible with Dworkin’s interpretive approach to law. In that sense, one could therefore argue that many elements of Confucian jurisprudence are not uniquely Sinic, but have more universal, general characteristics. Third, I also hope to highlight what is perhaps more unique about Confucian jurisprudence and how it might contribute to dialogue on comparative jurisprudence generally.

This article is comprised of three major sections. First, I will provide a brief overview of Dworkin’s interpretive theory of law (at least, the aspects which are germane to this article and the comparison to be undertaken) and, in particular, his use of “hard cases” in his theory of adjudication in order to set the stage for comparison with Confucian jurisprudence as reflected by the Xu Yuanqing case. Second, I will discuss the Xu Yuanqing case and analyze the two competing Tang legal opinions to highlight points of similarity with Dworkin’s interpretive theory and views on law. Third, this article will conclude by discussing the three broader implications mentioned in the preceding paragraph of such comparison on legal theory generally.

## I. A BRIEF OVERVIEW OF DWORKIN’S INTERPRETIVE THEORY OF LAW

Much has been written on Dworkin’s interpretive theory of law, from jurisprudence textbooks summarizing the salient aspects of Dworkin’s legal thought to monographs and book chapters responding to and critiquing

specific elements of Dworkin's visions of law.<sup>13</sup> Furthermore, Dworkin's views on law are complex, and they have developed over his academic career. Therefore, this section aims to provide only a brief overview of what I think are the more salient aspects of Dworkin's interpretive theory of law and, in particular, his use of "hard cases" in his adjudication theory. It is not intended to be a wide-ranging, comprehensive summary of Dworkin's views on law. Furthermore, given that much has been written on Dworkin's legal theories, I rely substantially on existing scholarly summaries of Dworkin's legal theories already present in the literature, as I find no need to reinvent the wheel.

Let us begin with the building blocks of Dworkin's legal universe. Dworkin's main charge against legal positivism—and a theme seen in his early writings—is that law is not simply made up entirely of rules with discretion to judges when deciding cases not covered by an existing rule.<sup>14</sup> Rather, in addition to rules, law also consists of non-rule standards which Dworkin called principles. For Dworkin, principles are moral standards implied by or explicitly stated in past official actions, such as legal statutes, previous case decisions, and constitutional provisions.<sup>15</sup> In Dworkin's view, a principle was a standard to be followed and adhered to, not because it would bring about some social, political, or economic benefit, but because "it is a requirement of justice or fairness or some other dimension of morality."<sup>16</sup> Therefore, in Dworkin's view, when judges were faced with deciding on a dispute not covered by an existing rule of law, they appealed to principles of "the great network of political structures and decisions of [their] community."<sup>17</sup> As an example of what constitutes a principle, Dworkin utilized the American case of *Riggs v. Palmer*.<sup>18</sup> In that case, a murderer sought to inherit under his victim's will, which had been validly executed and which was in his favor. The court had to decide whether this was permitted; there was no clear guidance under New York rules of testamentary succession, which did not clearly prohibit the murderer from inheriting. However, the court ultimately decided against the murderer, relying on the principle that "no man should profit from his own wrong." Examples of principles in Confucian jurisprudence might be principles

<sup>13</sup> See STEPHEN GUEST, RONALD DWORKIN (3d ed. 2012), Hershovitz, *supra* note 3, FREEMAN, *supra* note 11, RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed. 1984).

<sup>14</sup> BRIAN BIX, *Dworkin, Ronald*, in PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (VOL. 1) 233 (Christopher Berry Gray ed., 1999).

<sup>15</sup> *Id.* at 233-34.

<sup>16</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 8, at 22.

<sup>17</sup> RONALD DWORKIN, LAW'S EMPIRE 245 (1986).

<sup>18</sup> See 115 N.Y. 506, 22 N.E. 188 (1889).

which seek to uphold the parent-child relationship, given the importance of filial piety in Confucian morality—e.g., “a child should not knowingly cause physical or emotional harm to his parents” or perhaps a principle stated in the positive, such as “a child should properly honor and respect his parents.” It should be noted here that Dworkin was careful to distinguish his notion of principles from “policies,” which themselves could theoretically serve as another form of justification for decisions. Policies, for Dworkin, are different in the sense that they are standards that represent goals to be reached, “generally an improvement in some economic, political, or social feature of the community.”<sup>19</sup> Examples of policies which can be commonly found in traditional Chinese Confucian political rhetoric are standards which seek to promote Confucian morality in society as a whole, or standards which seek to ensure social and political stability. Ideally, for Dworkin, decisions to cases must be driven by and decided upon principles, as decisions generated by policy are more the proper concern of the legislature than the courts.<sup>20</sup> Yet, as Dworkin noted, even if a judge is advancing a policy argument to justify a decision, he is actually referring to principles because he is deciding the individual rights of members of the community (e.g., an argument to favor public safety by limiting an abstract right should be understood as an appeal to the competing rights of those whose security is to be sacrificed).<sup>21</sup>

Having now discussed the broad strokes of Dworkin’s attack on positivism and the main components of his theories on law (namely, his belief that law is comprised not simply of rules but also of principles), we can now proceed to discuss Dworkin’s views on adjudication. For Dworkin, in deciding cases, a judge could not choose principles regarding the law simply at whim. Judges had to ask whether the principles relied upon could form “part of a coherent theory justifying the network as a whole”<sup>22</sup>—and, for every legal problem, there was one right answer which would best cohere with the institutional and constitutional history of the law.<sup>23</sup> In other words, according to Dworkin, judges reject principles (or other theories of law they are considering in the case before them) which do not adequately “fit” previous official actions; with regard to principles that do adequately “fit” previous official actions, judges will choose those which best combine “fit” and moral value to make the law the best it can be.<sup>24</sup> Dworkin’s

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<sup>19</sup> DWORIN, TAKING RIGHTS SERIOUSLY, *supra* note 8, at 22.

<sup>20</sup> WACKS, *supra* note 7, at 141.

<sup>21</sup> *Id.* at 140.

<sup>22</sup> DWORIN, LAW’S EMPIRE, *supra* note 17, at 245.

<sup>23</sup> WACKS, *supra* note 7, at 137.

<sup>24</sup> BIX, *supra* note 14, at 234.

concept of “fit,” in other words, is concerned with how well a judge’s particular decisions “fit with what is accepted as settled law”<sup>25</sup> and the legal history of the judge’s particular jurisdiction.<sup>26</sup> Therefore, for Dworkin, law is best understood through, and as, constructive interpretation—interpretation “that makes its object the best example of its genre that it can be.”<sup>27</sup> He ultimately uses the principle of “integrity” to encapsulate his theory of adjudication; Dworkin’s concept of integrity stands for the notion that judges should decide cases in a way which makes the law more coherent, favoring interpretations which make law more “like the product of a single moral vision.”<sup>28</sup> Just as a person who has integrity is faithful and consistent to his previous conduct and viewpoints, a judge with integrity should ensure his decisions line up with settled law (“fit”) as well as the substantive political morality (“substance”) of his jurisdiction.<sup>29</sup>

Dworkin used a hypothetical judge named Hercules to further explicate his interpretive approach to law and to illustrate the principle of integrity in the adjudication of hard cases. What happens, therefore, when Hercules is presented with a hard case? First, some basic remarks about Hercules’s characteristics are in order. Dworkin imagined Hercules as a judge in an American jurisdiction who accepts the “main, uncontroversial constitutive and regulative rules of the law in his jurisdiction.”<sup>30</sup> Furthermore, Dworkin assumed Hercules accepts certain important propositions about the operation of law: namely, that statutes have the power to create and extinguish legal rights and that judges have the general duty to follow earlier decisions of their own court or higher courts whose reasoning and rationale extend to the case at hand.<sup>31</sup> Hercules himself is a judge “of superhuman skill, learning, patience, and acumen” and is expected to “construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and---so far as these are to be justified on principle---constitutional and statutory principles as well.”<sup>32</sup> Should more than one reconstruction be possible, Hercules must decide on the theory of law which best coheres with his community’s

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<sup>25</sup> JAMES PENNER & EMMANUEL MELISSARIS, MCCOUBREY & WHITE’S TEXTBOOK ON JURISPRUDENCE 94 (5th ed., 2012); *see also* DWORKIN, LAW’S EMPIRE, *supra* note 17, at 228-58.

<sup>26</sup> DWORKIN, LAW’S EMPIRE, *supra* note 17, at 255.

<sup>27</sup> BIX, *supra* note 14, at 234.

<sup>28</sup> *Id.*

<sup>29</sup> DWORKIN, LAW’S EMPIRE, *supra* note 17, at 256-57; PENNER & MELISSARIS, *supra* note 25, at 94.

<sup>30</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 8, at 105.

<sup>31</sup> *Id.* at 105-106.

<sup>32</sup> *Id.* at 105, 116-17.

institutional history.<sup>33</sup>

In deciding a hard case, Hercules must seek consistency and integrity in answering legal questions, and he should be “wide-ranging and imaginative in his search for coherence with fundamental principle.”<sup>34</sup> Viewing law as integrity would also mandate that Hercules ask himself whether his interpretation of law could form part of a coherent theory justifying the whole legal system in which he operates.<sup>35</sup> To further illustrate his interpretive vision of law, Dworkin also analogized law to literature, comparing a judge to authors in a chain novel.<sup>36</sup> Judges are like authors who are writing new chapters in a chain novel. When authors do this, they must pay attention to the previous chapters and aim to write something that will ultimately make the finished chain novel readable and most importantly, coherent as a whole. Likewise, when judges are deciding cases, they must also have knowledge and a vision of the story—they must have a vision of its “characters, plot, theme, genre, and general purpose, attempting to find the meaning in the evolving creation, and an interpretation that best justifies it.”<sup>37</sup> Ultimately, akin to a critic who interprets a work of art to show it in its best possible light, a judge interprets his jurisdiction’s law to display it “as the most morally sound body of law it can be, given the actual legal history the judge finds.”<sup>38</sup>

The key takeaway of the above summary is perhaps that Dworkin viewed law as an interpretive process, not simply a collection of posited rules. Furthermore, as opposed to legal positivism, which focused more exclusively on rules, Dworkin believed that the resources on which judges could draw upon to decide cases according to law were much more diverse, and that the process of legal interpretation and reasoning on the judges’ part in deciding the particular case were more subtle, nuanced, and sophisticated.<sup>39</sup> One final important aspect of Dworkin’s “interpretive” approach to law should be stressed here—Dworkin’s concept of integrity was very much grounded in political liberalism with its emphasis on equality and individual rights.<sup>40</sup> In his discussion of legal adjudication and principles, Dworkin emphasized that principles related to rights (in contrast with policies, which usually served some broader community social,

<sup>33</sup> WACKS, *supra* note 7, at 140.

<sup>34</sup> DWORKIN, *LAW’S EMPIRE*, *supra* note 17, at 220.

<sup>35</sup> WACKS, *supra* note 7, at 148-49.

<sup>36</sup> *See* DWORKIN, *LAW’S EMPIRE*, *supra* note 17, at 228-32.

<sup>37</sup> WACKS, *supra* note 7, at 147.

<sup>38</sup> James Penner, *Law as Integrity: Dworkin’s Interpretive Turn*, in *JURISPRUDENCE & LEGAL THEORY: COMMENTARY AND MATERIALS* 385 (James Penner et al. eds., 2005).

<sup>39</sup> BIX, *supra* note 14, at 233.

<sup>40</sup> *See, e.g.*, DWORKIN, *LAW’S EMPIRE*, *supra* note 17, at 95-96.



political, or economic goal). Judges should decide cases, if the case required, based on principles, not policies. For Dworkin, rights had a trumping effect. In other words, in any particular case and if there were no exceptional considerations at play, legal arguments based upon rights should always defeat arguments based on other interests, namely policy or community goals. Judges should “decide, according to principle, litigants’ entitlements, not what services community best.”<sup>41</sup> This emphasis on rights is important, especially given that Dworkin was ultimately trying to define and defend a liberal theory of law.<sup>42</sup> Ultimately, Dworkin’s legal theory is couched in a liberalism where government treats its citizens as equals and where government “must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of equal worth.”<sup>43</sup> Thus, for Dworkin, individual rights and liberty are critically important and lynchpins of individual dignity, the protection of which he considered key in his philosophical positions.<sup>44</sup>

This section has only sketched out the salient aspects of Dworkin’s interpretive theory of law and his portrayal of judges and hard cases in his theory of adjudication. The next section presents a real case, a Dworkinian “hard case,” from the Chinese tradition which I believe allows us to see Confucian jurisprudence and legal adjudication in practice and hence will allow us to compare Dworkin and Confucian jurisprudence in a systematic way.

## II.A “HARD CASE” IN CONFUCIAN JURISPRUDENCE: THE XU YUANQING REVENGE KILLING IN THE SEVENTH CENTURY A.D.

As discussed in the preceding section, “hard cases” for Dworkin were cases where no clear rule of law was immediately applicable, leading judges to resort to other standards to decide the cases. They can also be understood as cases dealing with fundamental propositions of law, upon which lawyers may disagree, as well as cases where arguments exist as to what is the best understanding of law. I believe the revenge killing case of Xu Yuanqing – which reached the court of Empress Wu Zetian in the mid-690s – is a good example of a Dworkinian “hard case” from traditional China for two major reasons.

First, revenge killings were a type of crime not clearly covered by any

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<sup>41</sup> FREEMAN, *supra* note 11, at 718.

<sup>42</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at i.

<sup>43</sup> *Quoted in* WACKS, *supra* note 7, at 145.

<sup>44</sup> *See, e.g.*, RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (discussing individual dignity).

provision of the Tang Code, which did not contain any specific article on revenge in retaliation for murder. Therefore, as we will see in the Xu Yuanqing legal opinions, officials<sup>45</sup> tasked with ruling on revenge killings had to resort to other standards to decide such cases. Such standards included examples of revenge killings in earlier periods of Chinese history or writings on revenge killings in Chinese classical texts, including the *Book of Rites (Liji)*,<sup>46</sup> the *Rites of Zhou (Zhouli)*,<sup>47</sup> and the *Gongyang* and *Zuozhuan* commentaries to the *Spring and Autumn Annals (Chunqiu)*.<sup>48</sup> Indeed, these early classical canonical texts advanced the principle that it is natural for a man to retaliate with violence if his parents are murdered.<sup>49</sup> One passage in the *Book of Rites*, for example, sets forth that “one should not live under the same Heaven with the enemy who has slain one’s father.”<sup>50</sup> The *Rites of Zhou* sets forth the role of a conciliator, whose job included resolving revenge killing cases by, for example, expelling the murderer of a father “beyond the seas” and “in cases where a man has

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<sup>45</sup> It is important to point out that there was no independent professional class of “lawyers” or “judges” in Tang dynasty China; rather, officials were tasked with judging cases, along with other responsibilities in their jurisdiction. Therefore, I do not use the term “judge” to describe Tang officials tasked with deciding criminal cases.

<sup>46</sup> The BOOK OF RITES was, for much of Chinese history, thought to have been compiled by Confucius. Today, most scholars agree that the text was most likely compiled and edited by Han dynasty scholars. Regardless, the BOOK OF RITES is one of the Chinese Confucian Classics that describes the government system and rites of the Zhou Dynasty.

<sup>47</sup> The RITES OF ZHOU is often dated back to about the 3rd century BC. It is an important primary source text that provides information on the political and administrative system of the Zhou dynasty. The text discusses various officials in Zhou government, the details of their responsibilities, and how they should perform their duties.

<sup>48</sup> The SPRING AND AUTUMN ANNALS is essentially a history of the twelve dukes of the ancient Chinese state of Lu from roughly 722 to 481 BC. Its structure is akin to that of a historical outline or timeline, reporting facts in a chronological, pithy order. Authorship was traditionally attributed to Confucius. Because of the terse nature of the SPRING AND AUTUMN ANNALS, some authors wrote commentaries to expound and explain certain events and personages in the SPRING AND AUTUMN ANNALS. The ZUOZHUAN is one such commentary and is regarded as the earliest work of narrative history in China. Its authorship has been traditionally attributed to Zuo Qiuming, a writer that lived in the fifth century BC in Lu. It runs chronologically parallel with the SPRING AND AUTUMN ANNALS and expounds on numerous events and is filled with rich accounts and stories. Some scholars in China now believe the ZUOZHUAN should be understood not as a commentary to the SPRING AND AUTUMN ANNALS, but rather as a free-standing work that was later inserted into the SPRING AND AUTUMN ANNALS. The ZUOZHUAN is thought to date to the late fourth-century BC; it is considered one of the most important primary sources for the period as it augments the basic information provided in the SPRING AND AUTUMN ANNALS. The GONGYANG is another commentary on the SPRING AND AUTUMN ANNALS. Its authorship has traditionally been attributed to Gongyang Gao, who was a disciple of Zixia (himself a disciple of Confucius).

<sup>49</sup> Michael Dalby, *Revenge and the Law in Traditional China*, 25.4 AM. J. OF LEGAL HIST. 267, 270 (1981). Dalby’s article is the most comprehensive treatment of the subject of revenge killings and traditional Chinese law in English. Traditional Chinese perspectives on revenge are also discussed in James McMullen, *Confucian Perspectives on the Akō Revenge: Law and Moral Agency*, 58.3 MONUMENTA NIPPONICA 293, 296-98 (2003).

<sup>50</sup> Dalby, *supra* note 49, at 271.

murdered someone but was justified in doing so”, the conciliator should order “that no reprisal shall be taken against him.”<sup>51</sup> The *Gongyang* commentary advanced an even clearer standard: “when one’s father has not undergone [a proper or just] execution, the son may take revenge on his behalf. But if the father has been [legitimately] executed, and the son then takes revenge [anyway], this is the way of the thrusting sword, which cannot remove the danger.”<sup>52</sup> Besides the above textual and historical standards, officials judging revenge killing cases – such as the Xu Yuanqing case – also paid heed to other societal, cultural, and legal standards, such as the desire to maintain good precedents and to preserve societal order.

Second, revenge killing cases in traditional China can generally be understood as “hard cases” because they often were not covered by a specific legal rule and also dealt with fundamental propositions of law upon which lawyers (or, in traditional China, officials)<sup>53</sup> disagreed. Indeed, they were cases which involved the most serious of crimes—premeditated homicide—and which dealt with the most fundamental issues and questions of law: questions of guilt (e.g., whether the avenger should be held culpable for avenging his father’s murder and punished under the Tang’s laws against murder) and punishment (e.g., whether the ultimate punishment, capital punishment, should be levied). And, there were disagreements on these issues and questions. For example, some officials did not even seek to punish acts of vengeance as the act of revenge in retaliation for murder frequently elicited sympathy in traditional China, and such acts were often not prohibited or legally punished.<sup>54</sup> For example, in the early Tang, it appears from the historical record that sentences applied to avengers were not set in stone but rather vacillated between two extremes – capital punishment or complete pardon.<sup>55</sup> Other officials argued that revenge killings, despite their different circumstances and moral attractiveness in avenging an innocent victim’s death, should be punished under the regular murder laws (such as the Tang Code provisions which prescribed

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<sup>51</sup> *Id.* at 271-72.

<sup>52</sup> *Id.* at 273.

<sup>53</sup> It is important to remember that “lawyers” – that is, the notion of an independent, licensed class of legal professionals – did not exist in traditional China. Nor did “judges” in the Western sense exist – i.e., officials trained in law whose sole government function was to adjudicate cases. In traditional China, officials who decided cases also often had other administrative responsibilities. For example, cases were usually adjudicated first by a magistrate, who was responsible for all administrative responsibilities (hearing cases, implementing fiscal policies, overseeing lower-level administrators) in their jurisdiction. Hence, it is more accurate to refer to officials who adjudicated cases in traditional China simply as “officials” and not as “judges.”

<sup>54</sup> Dalby, *supra* note 49, at 267-68.

<sup>55</sup> *Id.* at 279.

decapitation for premeditated murders where the murderer’s intention was formed prior to the killing, since it is common for people avenging a murdered comrade to plan out his act of revenge).<sup>56</sup>

More specifically, regarding the Xu Yuanqing revenge killing case, Xu’s fate – i.e., to offer him clemency from capital punishment or to execute him – was debated at court and led to the writing of two diverging legal opinions by two high-ranking officials in the Tang court, one of whom favored execution and one of whom favored clemency. Therefore, I believe that the Xu Yuanqing case – and indeed revenge killing cases in traditional China more generally – can be properly understood as “hard cases” in the Dworkinian sense.

Let us first begin with the factual background of the Xu Yuanqing case. A few years before the mid-690s, Xu’s father was put to death by a low-ranking official named Zhao Shiyun in his home county near the capital city of Chang’an. The precise circumstances of the case and of the murder of Xu’s father are not fully clear, but it appears that Zhao was abusing his official power in executing Xu’s father.<sup>57</sup> Xu was angered by the death of his father and went into hiding. He changed his name and supported himself as a laborer in a post station. All of his actions were premeditated and focused on one goal – to lie in wait and avenge his father by killing Zhao Shiyun (who, incidentally, had become a more famous official). Eventually, Xu successfully hunted Zhao Shiyun down and murdered him. Xu then immediately turned himself into the authorities, and the case eventually reached the highest court of the Tang Dynasty.<sup>58</sup> The general attitude there was that Xu Yuanqing should be spared from death, a position Empress Wu Zetian agreed with. However, one high-ranking official, Chen Ziang (~661-702 A.D.), disagreed, and put forth a legal opinion on the case urging that Xu Yuanqing be executed. In the end, Empress Wu had Xu Yuanqing put to death, but also had him honored posthumously, largely following Chen Ziang’s legal opinion.<sup>59</sup> In about 805, approximately a century after Chen Ziang’s legal opinion was published, Liu Zongyuan (773-819 A.D.), a prominent Tang poet and official, wrote a legal opinion attacking Chen

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<sup>56</sup> GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 38 (1996).

<sup>57</sup> Dalby, *supra* note 49, at 279.

<sup>58</sup> *Id.*

<sup>59</sup> For Chen Ziang’s biography in the dynastic histories, see LIU XU, *JIU TANG SHU [THE OLD BOOK OF THE TANG]* 190.5018-5025 (Beijing Zhonghua Publishing 1962) (945).

Ziang's opinion.<sup>60</sup> We begin first with Chen Ziang's legal opinion:<sup>61</sup>

The Sage Kings established rites (*li*)<sup>62</sup> in order to allow man to improve and advance, and they clarified punishments in order to facilitate government. It is filial righteousness for a son to lie in wait with arms to prepare to take revenge against his enemy. A guiding principle and central element of a government is to execute criminals in order to prohibit and prevent rebellions. However, immorality and lack of righteousness cannot instruct and lead the people, and by putting the guiding principles of government into disorder, [the written] laws will not be able to be clarified. The Sage Kings established rites to regulate internal (i.e., domestic and home) affairs, and they established laws to prevent external disorder. Through these means, law-abiding people did not manipulate rites in order to abolish punishments. Conversely, those who abided by the rules of the rites did not misuse laws to harm the meaning of the way. As a result, [the sage kings were able to] put an end to violent disorder and nurture [hearts of] integrity and shame. Therefore, from this, the whole world was able to proceed on the right Way and develop.<sup>63</sup>

As we can see above, Chen began his opinion by creating a dichotomy between rites on one hand and laws and punishments on the other. A quick note on terminology here is in order - by "law", Chen (and later, Liu, in the

<sup>60</sup> Dalby, *supra* note 49, at 282. Kam-por Yu, Confucian Views on Revenge (conference paper delivered at the First Global Conference on Revenge, organized by Interdisciplinary Net, Mansfield College, Oxford, June 15-17, 2010) 8, available at <https://www.inter-disciplinary.net/wp-content/uploads/2010/06/yuchapter.pdf>. See also Li Jie, *A Comparative Study of Revenge and Law in the Chinese and Western Cultures*, 11.4 CAN. SOC. SCI. 180, 181 (2015). For an overview of Liu Zongyuan's life, see JO-SHUI CHEN, *LIU TSUNG-YÜAN AND INTELLECTUAL CHANGE IN T'ANG CHINA*, 773-819 (1992).

<sup>61</sup> Dalby discusses this opinion, although he does not provide a full translation, in Dalby, *supra* note 49, at 279-282. I am indebted to Dalby's discussion, which helped in my understanding and translation of Chen Ziang's legal opinion. However, my interpretation of Chen Ziang's legal opinion differs in some areas from Dalby's.

<sup>62</sup> I also translate this as "ritual" or "ritual propriety" in this article.

<sup>63</sup> OUYANG XIU & SONG QI, *XIN TANGSHU* [THE NEW STANDARD HISTORY OF THE TANG] 195.5585-5586 (Taipei Dingwen Publishing 1981) (1060). The text of Chen Ziang's opinion is recorded in the *XIN TANGSHU*. Another version of Chen Ziang's opinion can also be found in Chen Ziang, *Fu chou yi* [Memorial on the Revenge Debate], in CHEN ZIANG JI [THE COLLECTED WORKS OF CHEN ZIANG] 7.152-153 (Beijing Zhonghua Publishing ed., 1962). My translation is mainly based on the *XIN TANGSHU* version, but I also include material from the *CHEN ZIANG JI* version not recorded in the *XIN TANGSHU* version, to ensure a complete translation. All translations to English in this article are mine, unless otherwise indicated.

second legal opinion) was referring to posited, written law (e.g., statutes and codes). In Chen’s view, the Sage Kings – progenitors of Chinese civilization and model leaders – created rites to strengthen individual and societal morality. Rites should be understood separately from punishments, which were established to “prevent external disorder” and strengthen and make government more effective. However, both rites and the written laws and punishments are indispensable to the smooth running of society – written laws and punishments keep society and government orderly, while rites nurture the moral hearts of the people. In other words, for Chen, laws and punishments were not the only standards in society – non-rule standards, such as rites, were also important. Rites can perhaps therefore be analogized to Dworkin’s notion of “principles” or moral standards to be followed due to the requirements of justice, fairness, or another dimension of morality. Chen also advanced a Dworkinian principle above – that it is a manifestation of filial righteousness for a son to lie in wait with weapons and essentially premeditate an act of vengeance for his parent(s). Besides advancing standards which we might analogize to Dworkinian “principles,” Chen also advanced a standard which we can identify as a Dworkinian “policy” as well – that any government must execute criminals in order to “prevent rebellions.” In other words, we can see that Chen made an appeal to public safety and order. Therefore, even from this introductory paragraph in Chen’s legal opinion, we can see Chen’s similar belief to Dworkin that the sources of law in society are far more complex and nuanced than simply a system of rules or posited, written law. Having set forth his understanding of rites and written laws & punishments as the key regulatory tools for individuals and government, Chen then continued with a specific discussion of the Xu case:

I have now learned of the case of Xu Yuanqing. His father was killed by a district official named Zhao Shiyun. Yuanqing kept himself healthy and worked odd jobs [to support himself]. He then avenged his father’s murder and killed Shiyun with his own bare hands. Afterwards, he turned himself in. Even the ancient heroes cannot compete with him. His sincerity is sufficient to drive out evil and usher in the good, as well as to educate others [on morality] . . . . But according to the law of our state, he who kills another shall himself be put to death. This is a unified standard and rule; the law must therefore be consistent. Xu Yuanqing therefore should be put to death.<sup>64</sup>

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<sup>64</sup> *Id.* at 195.5586.

Here, early on in his legal opinion, Chen made clear his ultimate decision on the Xu Yuanqing's punishment – that Xu should be put to death. Despite the fact that there was no specific Tang law or statute – or in Dworkin's terms, a "rule" – on revenge killings, Chen relied on the principle that a person "who kills another shall himself be put to death." This is quite similar to the approach of the court in the *Riggs v. Palmer* case (as discussed earlier) which Dworkin used to show that law includes principles, in addition to rules. Indeed, in *Riggs v. Palmer*, the court relied on the principle that "no man should profit from his own wrong" to help reach its decision in a homicide case. Despite Chen's clear decision that Xu should be put to death, his legal opinion as recorded in *The Collected Works of Chen Ziang* also acknowledged certain contradictions and competing sources of authority – namely, the authority of the rites, as contained in the Confucian classics. Indeed, Chen quoted to the Confucian classics, notably the famous passage justifying revenge killings in the *Book of Rites*: "one should not live under the same Heaven with the enemy who has slain one's father."<sup>65</sup> Chen admitted that such a principle was important for moral instruction, and that based on this principle, it appeared that Xu should be pardoned.<sup>66</sup> Therefore, Chen continued his legal opinion, offering more justification and explanation for why executing Xu was the proper decision:

I have heard that punishments were created in order to contain and control chaos and disorder. Furthermore, the purpose of benevolence (*ren*) is to exalt and promote moral integrity and moral conduct. Xu Yuanqing's act of vengeance for his father was not an act of [or motivated by] chaos or disorder. His adherence to the proper Way of the father-son relationship is an expression of benevolence (*ren*). Practicing benevolence (*ren*) yet not receiving any benefits, while receiving a punishment akin to having committed acts of chaos or disorder as well as suffering capital punishment – such an approach emphasizes adeptness at punishing, and it cannot be made a law of the state. On the other hand, evil arises in opposition to uprightness. Creating a stable and tranquil government also requires overcoming and ending periods of significant chaos or disorder. Therefore, there are times when ritual propriety cannot deal with all eventualities. The ancient sage kings

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<sup>65</sup> Dalby, *supra* note 49, at 271.

<sup>66</sup> *Id.*

recognized this limitation, and that is why they created punishments.<sup>67</sup>

In this passage, Chen admitted that Xu's act of killing Zhao Shiyun was not driven by a desire to cause chaos or disorder, which Tang criminal law was aimed at controlling and containing. He also admitted that morally speaking, and according to the standards of ritual propriety, Xu's acts were admirable and were manifestations of benevolence (*ren*), one of the highest Confucian virtues. Indeed, as Chen pointed out, Xu committed a benevolent act and did not receive any benefit, recognition, or reward for it. Rather, Xu was going to be punished and receive the ultimate penalty – capital punishment – for his actions. However, in this passage, we do not see Chen pushing for Xu's release based on the standards of ritual propriety which extol the morally worthy nature of his actions. Rather, Chen also continued the dichotomy between written laws and punishments on one hand, and ritual propriety and the rites on the other hand, the same dichotomy he presented at the very start of the legal opinion. Chen continued his legal opinion, again opting for the supremacy of legal standards and principles regarding homicide as the guiding standard in the Xu case:

In the present case, if we solely admire Xu Yuanqing's motivations of integrity and righteousness [and pardon him], this would be invalidating the laws of the state. However, we must remember that the reason why Xu Yuanqing's righteous actions could move all-under-Heaven is that he did not fear death in his pursuit of virtue and righteousness. If we pardon him in order to keep him alive, we are actually robbing him of his virtue and diluting his filial righteousness. This would not be in alignment with the moral principles of sacrificing one's life without fear of death to make benevolence more manifest. I believe we should act in accordance with the law and put Xu Yuanqing to death. We should also erect a memorial pennant at his tomb and at his home [to honor the morality of his actions].<sup>68</sup>

Above, Chen made clear that the laws of the state should be the prevailing standard. He also attempted to argue that his decision would actually benefit Xu and moral education in the long-run, as putting Xu to death would enshrine Xu's status as a martyr. The version of the legal

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<sup>67</sup> OUYANG & SONG, *supra* note 63, at 195.5586.

<sup>68</sup> *Id.* at 195.5586.



opinion contained in *The Collected Writings of Chen Ziang* also contains other arguments offered by Chen in support of his decision. He also considered other potential consequences of pardoning Xu. First, Chen argued that pardoning Xu would create a bad precedent for future cases which would make governance more difficult and lead to more disorder and killing.<sup>69</sup> Specifically, Chen argued that people will have sons, and sons will definitely have feelings of love for their parents.<sup>70</sup> Therefore, a precedent of pardoning Xu could potentially lead to a succession of revenge killings, which would be anathema to societal order.<sup>71</sup> Second, Chen pointed out that to rule in Xu's favor would be equivalent to placing overly optimistic faith in people's inborn righteousness, which is an inadequate foundation for government.<sup>72</sup> Furthermore, ruling for Xu would be tantamount to furthering private righteousness at the expense of the public law.<sup>73</sup> Thus, we can see Chen's reliance on other "policies" to decide the case, including a concern for precedent, social order, and keeping the public law strong and intact.

Now that we have examined the sections of Chen's legal opinion, we can take a step back and holistically analyze Chen's legal opinion and compare it to Dworkin's theories on adjudication. Chen's approach is indeed similar to Dworkin's interpretive approach to law in dealing with hard cases. First, Chen relied on principles and policies in rendering his decision, including the principle that murderers should themselves be put to death, as well as policies favoring public safety, order, and effective government. This shows that law was understood as more than simply rules and posited law and statutes in traditional China. Second, Chen did not simply choose principles or policies at whim, but wrestled with the question of how his decision would best cohere with the institutional history of the law and which would fit past official actions. He tried to seek consistency and integrity in answering the legal question of whether Xu should be found culpable. Specifically, Chen considered the history of the Sage Kings and their visions of government, attempting to show that his decision to execute Xu was in alignment and in coherence with the Sage Kings' emphasis on social order and the importance they placed on laws and punishments. In other words, Chen attempted to show that his decision was not a novel one, but one which simply respected and applied the standards

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<sup>69</sup> Dalby, *supra* note 49, at 280-81. See also Chen, *Fu chou yi zhuang*, *supra* note 63, at 7.153.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

set forth by the Sage Kings. Indeed, the very act of using and referring to the Sage Kings as a standard can be understood by Chen's effort to operate within, in Dworkinian terms, the institutional history of his community<sup>74</sup> – after all, since the time of Confucius, the Sage Kings were universally acknowledged as the cultural and political heroes and models of the Chinese polity worthy of emulation.

Third, Chen also considered whether his decision would make the law the best it could be – indeed, one of Chen's central arguments in defense of his decision was that pardoning Xu would directly “invalidate” and weaken the laws of the state. At the same time, Chen was not simply applying the principle that murderers should themselves be put to death. He was not, in other words, a pure formalist. In his decision, Chen sought not only to make it a best “fit” with past official actions (i.e., the actions and philosophies of the Sage Kings), but also sought to combine “fit” and moral value to make the law even stronger – he did this by arguing that putting Xu to death actually enhanced and strengthened the moral value and power of Xu's benevolent act, as well as recommending that a memorial be constructed for Xu. This, in Chen's view, would have the effect of also humanizing the law and his theory of law by transforming it also into a moral tool of instruction, which would also serve the policy goal of ensuring order. His decision would therefore justify the entire legal system even further not as one which simply made sure that murderers would be punished, but as one which also ensured that the moral quality and value of certain criminal acts could be preserved. Thus, on the whole, Chen sought to ensure coherence between his interpretation of law and the moral and ritual conventions of his community – to fail to do so would likely have weakened Tang criminal law (e.g., Tang citizens might have been outraged at the coldness of Chen's legal opinion if he had only blindly applied the principle that murderers must themselves be put to death without considerations of combining “fit” and moral value). In sum, we can see elements of Dworkin's interpretive theory of law in the context of hard cases in Chen's legal opinion.

A hard case requires disagreements about legal propositions so we now turn to the diverging legal opinion in the Xu Yuanqing case, authored by Liu Zongyuan approximately a century after Chen's legal opinion. The fact that the Xu case was still being discussed in the highest echelons of the Tang court indicates the importance, significance, and controversies associated

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<sup>74</sup> The Dworkinian concept of “institutional history” can be understood as “resid[ing] in the common law, statutory law and in the construction of the state in question, including communal morality. Such institutional history is the source of the system of norms.” KOOS MALAN, *POLITOCRACY: AN ASSESSMENT OF THE COERCIVE LOGIC OF THE TERRITORIAL STATE AND IDEAS AROUND A RESPONSE TO IT* 169 (Johan Scott trans., Pretoria Univ. L. Press 2012) (2011).

with the Xu case. Liu began his legal opinion attacking Chen's understanding of ritual, as well as Chen's attempted compromise solution of executing Xu while honoring him posthumously:

The roots of ritual are to prevent and stop chaos and disorder. For example, the ritual codes say that one shall not commit acts which harm or mistreat his parents. Any sons who do such things must be executed and not pardoned. The roots of punishments are also to prevent and stop chaos and disorder. For example, criminal law mandates that one shall not commit acts which harm or abuse the people. Any official who does such things shall be put to death and not pardoned. The root of ritual and punishments are the same, but their use and application are different. You cannot simultaneously erect a memorial pennant to honor someone and also have him executed. It is excessive and undue to execute someone who should be honored [via a memorial pennant]. Such an act is to misuse punishments. Likewise, to honor someone [via a memorial pennant] is also a serious mistake. Such an act destroys and makes a mockery of the rites.<sup>75</sup>

Above, Liu disagreed with the dichotomy created between the rites on one hand, and laws and punishments on the other as was seen in Chen's opinion. Instead, Liu argued that the purposes of ritual on the one hand, and written law (e.g., statutes) & punishments on the other, was indeed the same – both sought to prevent and stop chaos and disorder. He also immediately attacked Chen's attempted compromise as self-contradictory and harmful toward rites and punishments as tools of government. At the same time, Liu seemed to have advanced a guiding, overarching, absolutist “principle” in the Dworkinian sense – that is, that any official which harms or abuses the people shall be put to death (interestingly, he does not cite to Tang Code provisions on official misconduct or corruption).<sup>76</sup> Liu then continued his

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<sup>75</sup> OUYANG & SONG, *supra* note 63, at 195.5586. Another longer version of Liu's legal opinion can also be found in Liu Zongyuan, *Bo fu chou yi [Refuting the Revenge Debate]*, in LIU HEDONG JI [THE COLLECTED WORKS OF LIU ZONGYUAN] 4.63-65 (Shanghai People's Press ed., 1974). My translation is based on the version in OUYANG & SONG, *supra* note 63, at 195.5586-5587, although I will include important additional material from the version in THE COLLECTED WORKS OF LIU ZONGYUAN. Dalby discusses Liu's opinion, although he does not provide a full translation, in Dalby, *supra* note 49, at 282-85. I am indebted to Dalby's discussion, which helped in my understanding and translation of Liu Zongyuan's legal opinion. However, my interpretation of Liu Zongyuan's legal opinion differs in some areas from Dalby's.

<sup>76</sup> For example, Article 148 in the Tang Code provided that officials who took advantage of their power could be punished up to a maximum of three years' imprisonment. See THE TANG CODE,

legal opinion with a discussion of two possible competing factual circumstances of the case:

Take, for example, if Xu Yuanqing's father was innocent and Zhao Shiyun had him killed out of personal hatred and abuse of official authority, or if his superiors had not been informed of the case, or if Xu Yuanqing's cry for justice had been ignored – then, Xu Yuanqing's deliberate and planned act of vengeance and his self-reliance for carrying out such revenge, without any fear of death or regrets, is in accordance with ritual and an act of righteousness. If this was indeed the situation and the circumstances surrounding the case, then the officials should feel ashamed. They would not delay in the slightest to vacate Xu Yuanqing's conviction – indeed how could they have him executed? Now, it is entirely possible that Xu Yuanqing's father was guilty of something, and so when Zhao Shiyun had him executed, he was not acting against the law of the state. Therefore, under this situation, we cannot say that Xu Yuanqing's father died at the hands of an individual official, but rather, he died under, and in accordance with, the law. Indeed, how could we possibly hold a grudge against the law? To hold a grudge against the law of the emperor or to execute or harm a law-abiding official is an act of presumptuous arrogance and defiance against the emperor. Under this set of facts, arresting and executing Xu Yuanqing are both acts in alignment with, and which uphold, the laws of the state. Therefore, why should we honor Xu Yuanqing's actions in these circumstances?<sup>77</sup>

Above, Liu emphasized the importance of understanding the facts surrounding Xu's father death. Based on the principle he advanced earlier of the necessity of putting abusive and harmful officials to death, Liu argued that Xu Yuanqing's revenge killing would be justified if Zhao Shiyun had unjustly killed Xu's father. It would also be justified if Zhao's killing of Xu's father had not been properly reported to higher-level authorities, or if Xu's cries for justice had been ignored, presumably by other officials – in other words, Xu's act of revenge would be justified if there was misconduct on the part of officials. However, if Xu's father was indeed guilty and justly

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VOLUME II: SPECIFIC ARTICLES 118-19 (Wallace Johnson trans., Princeton University Press 1997) (653).

<sup>77</sup> OUYANG & SONG, *supra* note 63, at 195.5586-5587.

executed, Xu would not be justified in taking revenge, for doing so would be an affront to the laws of the state. Thus, similar to Chen, Liu also was concerned with “making the law the best it could be” in preserving and upholding the laws of the state. Liu then continued his legal opinion, critiquing specific arguments previously advanced by Chen. He first took issue with Chen’s policy argument that chaos and disorder would result from pardoning Xu, because that would encourage a likely succession of revenge killings – recall that Chen’s logic (as discussed earlier) was that people would definitely have sons, sons would definitely have feelings of love for their parents, and therefore if every son took revenge, chaos and disorder would result.<sup>78</sup> Liu argued that Chen again misunderstood the meaning and significance of ritual propriety and the entire concept of revenge:

The enmity (*chou*) referred to in the codes of ritual is a type of enmity which arises because someone has suffered a significant injustice or oppression and who has nowhere to turn. It is not a type of enmity which arises simply because a person who has broken the law is punished and executed – to say that because the avenger killed someone and therefore the avenger himself must be killed – this kind of attitude is not based on an understanding of the distinctions between uprightness and injustice. It is nothing more than threatening and bullying the weak.<sup>79</sup>

As Michael Dalby has also explained, Liu argued here that Chen’s articulated fear of a descent into social chaos and Chen’s belief that revenge killings should hence be banned (recall one of the guiding principles in Chen’s decision – one who kills another shall be put to death) were misplaced.<sup>80</sup> In Liu’s view, Chen was wrong because the revenge referenced in the ritual codes (i.e., as set forth in the Confucian classics) described situations where feelings of injustice were not properly answered because they were not heard; simply executing an avenger under the principle of “one who kills another shall be put to death” without delving into the facts and circumstances around the case would be simply “threatening and bullying the weak.”<sup>81</sup> Liu then proceeded to examine standards as set forth in the classical texts, again akin to the Dworkinian

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<sup>78</sup> LIU, *supra* note 75, at 4.65.

<sup>79</sup> OUYANG & SONG, *supra* note 63, at 195.5587.

<sup>80</sup> Dalby, *supra* note 49, at 284.

<sup>81</sup> *Id.*

belief that law consists of more than simply rules. Liu used these standards as further evidence that Chen's fear of unending social disorder resulting from pardoning Xu and allowing revenge killings was misplaced:

The *Gongyang* commentary says: "if a father who should not have been killed has been killed, then his son can take revenge. If a father should have been killed and was indeed killed, and if the son still proceeds to take revenge, this will cause an endless spiral and vicious cycle of revenge killings." Using this principle to decide the Xu Yuanqing case would be in accordance with the requirements of ritual.<sup>82</sup> [In the version of the legal opinion contained in *The Collected Works of Liu Zongyuan*, Liu also quoted to the *Rites of Zhou* material on the conciliator figure, whose job was to help resolve enmity in people and to put avengers to death who take revenge for fathers killed justly. Liu then argued that in antiquity it was therefore considered highly unlikely that social chaos would erupt from revenge killings due to this conciliator figure.<sup>83</sup>] Furthermore, not forgetting the enemy of your father constitutes filial piety. Not fearing death constitutes righteousness. Xu Yuanqing was able not to exceed the boundaries of ritual propriety, act in a filial manner, and he ultimately died for the sake of righteousness. He must have been a rational person who understood the way of righteousness. How could the law of the state treat such a person as an enemy? Yet some [like Chen Ziang] have memorialized the throne, arguing that Xu Yuanqing should be executed. Such decisions abusing the use of criminal sanctions and destroying the codes of ritual propriety must not be taken as precedents.<sup>84</sup> If there are future similar cases, we must not follow the precedent of Chen Ziang's decision.<sup>85</sup>

Liu concluded above by arguing that Xu was indeed acting righteously in the revenge killing, and he also urged the Tang leadership to void and

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<sup>82</sup> In the version of the legal opinion contained in *The Collected Works of Liu Zongyuan*, Liu also quoted to the *Rites of Zhou* material on the conciliator figure, whose job was to help resolve enmity in people and to put avengers to death who take revenge for fathers killed justly. Liu then argued that in antiquity it was therefore considered highly unlikely that social chaos would erupt from revenge killings due to this conciliator figure.

<sup>83</sup> Liu, *supra* note 75, at 4.65.

<sup>84</sup> It is unclear whether Chen's opinion became a part of the Regulations (*ge*) of the Tang dynasty, which was the proper way to incorporate new legislation into Tang dynasty law. Dalby, *supra* note 49, at 282 n. 30.

<sup>85</sup> OUYANG & SONG, *supra* note 63, at 195.5587.

ignore Chen's legal opinion as precedent. If we step back and holistically analyze Liu's legal opinion, we can see that his approach can also be analogized to Dworkin's interpretive approach to law in dealing with hard cases. First, he of course reached a different result than Chen. But, like Chen, Liu relied on principles and policies in rendering his decision, also showing that law was understood as more than simply rules in traditional China, although he disagreed with certain propositions of law advanced by Chen, a defining characteristic of a "hard case." For example, Liu believed that Chen's principle that murders should themselves be put to death was too rigid and did not take into account the facts and circumstances of revenge killings. Furthermore, in Liu's view, Chen's policy concerns were misguided (i.e., the policy concerns of social chaos and disorder due to pardoning Xu and condoning revenge killings) because they were based on a mistaken and ahistorical understanding of the rites. With respect to principles, Liu's adjudication seems to have been driven by the principles that the facts and circumstances of revenge killing cases must be examined closely for evidence of official misconduct. If there is evidence of official misconduct, then it would be justified for the son to take revenge against the official, since another guiding principle is that officials who harm and abuse others should be put to death. Liu also considered certain "policies", including the harm that Chen's contradictory compromise of execution and posthumous honoring would have on society and government through mutual destruction of both rites and laws & punishments, as well as his concerns over the abuse of criminal penalties by Chen's legal opinion.

Second, as with Chen, Liu did not simply choose principles or policies at whim, but similarly wrestled with the question of how his decision would best cohere with the institutional history of the law and which would fit past official actions. Whereas Chen largely appealed specifically to the Sage Kings and what he considered to be their visions of government, Liu instead looked more closely at Chinese classical texts, such as the *Gongyang* commentary and the *Rites of Zhou*, arguing that these texts disproved Chen's concerns over social disorder and therefore that Chen's decision was not in alignment and coherence with the standards and visions contained within these texts, which were representations of the institutional history of the community – after all, we must remember that these texts had important, almost canonical status in the Tang as containing important principles, lessons, and models for governance and human behavior.

Third, as with Chen, Liu also considered whether his decision would make the law the best it could be. Rather than what he considered to be Chen's unyielding, absolutist formalism, Liu believed his more nuanced approach would arguably strengthen the law by taking into account the

precise facts and circumstances surrounding the particular revenge killing (e.g., whether the father's death was justified under the law) – otherwise, as Liu mentioned, the law might be viewed as simply “threatening and bullying the weak.” And, like Chen, his adjudicatory methods show him to be considered about combining “fit” and moral value to make the law even stronger – Liu believed his legal opinion “fit” ritual and legal expectations, as well as the standards advanced by the Chinese textual tradition. At the same time, it of course preserved the morality and righteousness of Chen's actions, which collectively had the effect of enhancing ritual and punishment as tools in government (which, as Liu had argued, share the same roots of preventing chaos and disorder).

In sum, I believe that Chen and Liu's legal opinions on the Xu Yuanqing hard case— representative of traditional Chinese jurisprudence generally— reveal an adjudicatory technique akin to Dworkin's interpretive theory of law. Of course, it should be pointed out that there are some differences between Chen's and Liu's approach and Dworkin's interpretive theory. Recall that Dworkin's interpretive theory of law is grounded largely in liberalism and a vocabulary of individual rights. Clearly, Chen's and Liu's legal opinions did not contain vocabulary or language grounded in Dworkin's notions of liberalism or rights. However, I do not believe this difference should obscure the similarities between the overall adjudicative approaches of Confucian jurisprudence and Dworkin; indeed, although they do not use language couched in Western liberalism, Chen and Liu did have concerns for Xu's “rights” (e.g., even Chen, who called for Xu's execution, wanted Xu properly honored after his death).

### III. CONCLUSIONS: IMPLICATIONS ON THE FIELD OF LEGAL THEORY GENERALLY

Having now attempted to show that traditional Chinese jurisprudence as viewed through the adjudication of an actual Tang dynasty hard case shares much in common with Dworkin's interpretive theory of law, this paper concludes by discussing the broader implications of these findings on the field of legal theory, and comparative jurisprudence, more generally.

First, through the above comparison between Confucian jurisprudence and Dworkin's interpretive theory of law and the argument that Confucian jurisprudence shares much in common with Dworkin's interpretive theory of law, it can be argued that Dworkin's theories of adjudication and the application of his views on law need not be confined to Anglo-American jurisprudence. This is a significant jurisprudential point because Dworkin himself has espoused particularist tendencies, and he has also been criticized as a particularist. For example, in the Postscript to the second



edition of his *The Concept of Law*, Hart argued that he was attempting to put forth a theory of general jurisprudence, while Dworkin's jurisprudence was addressed to a particular legal culture.<sup>86</sup> Others have criticized Dworkin of being a cultural relativist.<sup>87</sup> Dworkin, similarly, was circumspect regarding the application of his interpretive theory of law outside the Anglo-American tradition, arguing that "interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong."<sup>88</sup> However, as Twining has pointed out, Dworkin may have been too modest about the geographical reach of his more general ideas, arguing that Dworkin's Hercules could be a "citizen at least of the West and possibly of the world" and a role model for the European Union or even Islamic courts.<sup>89</sup> Twining also argues there is "no reason in principle why possible application of Dworkin's most general ideas should not be tested . . . in respect of non-Western cultures and discourses."<sup>90</sup> This article has sought to do such testing, and through the earlier analysis of adjudication of the Xu Yuanqing hard case in the Chinese legal tradition, we can see that Dworkin's interpretive theory does arguably "travel better" than Dworkin himself as well as other critics have believed.

Second, by showing that Confucian jurisprudence is akin to Dworkin's interpretive theory of law, this article also hopes to correct one of Dworkin's misunderstandings and show that traditional Chinese law and jurisprudence specifically are not incompatible with the Dworkinian approach. This is an important point because Dworkin himself did not have a very good impression of the modern Chinese legal system or of traditional Chinese law. Indeed, as some have argued, Dworkin likely believed the U.S. and British legal systems were by far the best, if not the only real, legal systems.<sup>91</sup> For example, in May 2002, Dworkin was invited to China for two weeks to deliver multiple lectures in different Chinese universities; the lecture topics included human rights, democracy, and legality.<sup>92</sup> In an

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<sup>86</sup> H.L.A. HART, *CONCEPT OF LAW* 239-240 (2d ed., 1994); *see also* TWINING, *supra* note 12, at 12.

<sup>87</sup> *See, e.g.*, Ruth Gavison, *Comment, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF HLA HART* 26-28 (Ruth Gavison ed., 1987); P.S. ATIYAH & R.S. SUMNERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 420 (1987). I am grateful to William Twining for this point and for introducing these sources. *See* TWINING, *supra* note 12, at 42.

<sup>88</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 17, at 102-103.

<sup>89</sup> TWINING, *supra* note 12, at 44, 65.

<sup>90</sup> *Id.* at 65.

<sup>91</sup> *See, e.g.*, Jean-Marc Coicaud, *A Research Agenda: Global-National Law: The Case of Taiwan and the Comparative Analysis*, Lecture at the Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan, July 14, 2015 (transcript available in the Institutum Iurisprudentiae).

<sup>92</sup> *See also* DANIEL A. BELL, *BEYOND LIBERAL DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIAN CONTEXT* 1-4 (2006) (summarizing and discussing Dworkin's 2002 visit to China).

article published in *The New York Review of Books* following his visit, 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>93</sup> He also attacked the Chinese legal tradition and Confucianism, claiming that traditional legal practice in China rejected two principles central to the rule of law – “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>94</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>95</sup> However, as we can see in Liu and Chen’s legal opinions in the Xu case, Dworkin’s views on Confucian jurisprudence were not accurate. Liu and Chen were concerned about law, legal rules, and general principles, as well as precedent. Indeed, one of Liu’s central concerns was that Chen’s legal opinion was being taken as a precedent by officials judging revenge cases – he would not have had such concerns if Chinese officials did not seek to follow principles laid down in earlier decisions.

Finally, while the focus of this article has been on how Confucian jurisprudence can be analogized to Dworkin’s interpretive theory of law, we might now step back and ask a more macroscopic question: what is more unique about Confucian jurisprudence, and how might it contribute to dialogue on comparative jurisprudence more generally? First, Confucian jurisprudence, as seen through the legal opinions on the Xu Yuanqing case, can be understood as a jurisprudence which draws on an even more numerous and diverse base of resources for adjudication and solving legal problems than in Dworkin’s vision of law. In other words, one of Dworkin’s major contributions to legal theory was precisely that his vision of law was much broader than that of the positivists – he believed law was made up of much more than simply rules, but also principles. Confucian jurisprudence goes beyond Dworkin’s vision of law and sees law and sources of law as being comprised of not only principles but also of history, historical actors, and classical canonical texts. Chen’s legal opinion was not just based on the principle that murderers should themselves also be executed, but also

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<sup>93</sup> Ronald Dworkin, *Taking Rights Seriously in Beijing*, N.Y. REV. BOOKS, Sept. 26, 2002, <http://www.nybooks.com/articles/archives/2002/sep/26/taking-rights-seriously-in-beijing/>.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

considered the visions and concerns of the ancient Chinese Sage Kings History and historical models conveyed, and themselves became, legal standards. Indeed, this is different from Dworkin's approach and attitude toward the historical. For example, he was not a strong supporter of using historical approaches to interpreting the U.S. constitution, and as Keith E. Whittington has argued, described his legal theory project in largely "ahistorical terms."<sup>96</sup> On the contrary, history played an important role in Liu's and Chen's legal opinions and rose to become legal standards. Liu, for example, made reference to classical canonical texts, such as the *Gongyang* commentary, in his legal opinion. In other words, Confucian jurisprudence is arguably even more interpretive than Dworkin's interpretive theory of law, and it assumes a far more integrated world of law, where law interacts with, and is enriched by, history, political theory, and morality. History, historical actors, and historical texts do not merely provide rhetorical power to legal opinions, as they often do in Anglo-American judicial opinions. In Confucian jurisprudence, they can also serve as sources of law and legal standards. This integrated view of law is not surprising, given that an independent judiciary never emerged in traditional China.

Dworkin criticized the Confucian view of law as eschewing the idea of law as rules or general principles and instead relying on virtue, equity, and reasonableness. Dworkin was incorrect. The strength and uniqueness of Confucian jurisprudence is its ability to simultaneously view the idea of law as rules and general principles, while bringing to bear virtue, equity, and reasonableness-based considerations. Indeed, practitioners of Confucian jurisprudence (like Chen and Liu) would argue that it is precisely this integrated view of law which actually makes law the best it can be, because rather than law being relegated to the intellectual and institutional confines of an independent judiciary, law is empowered when it is applied in a case with due concerns toward the decision's effects on the community's history, sense of morality, policy concerns, and future. Practitioners of Confucian jurisprudence might even say that their integrated theoretical understanding of law is really not that much different to Dworkin's own integrated understanding of jurisprudence as a branch of moral and political philosophy.<sup>97</sup>

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<sup>96</sup> Keith E. Whittington, *Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation*, 62.2 REV. POLITICS 197, 199 (2000). Indeed, as quoted in Whittington's article (on page 199), Dworkin remarked that: "[w]e're not concerned with the historical question here. We're not concerned about how principles are in fact chosen. We're concerned about which principles are just."

<sup>97</sup> PENNER & MELISSARIS, *supra* note 25, at 84.