

***Lord Shangyang vs. Ms Qiuju: A Thought Experiment on
Legal Professionalization in the Context of Legal Popularization****

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Abstract: This paper attempts to examine a popular claim in China’s legal process that the rule of law in china should be transformed from legal popularization to legal professionalization, and the method it adopts is thought experiment which has gained great attention in recent years. After introducing the application of thought experience in legal scholarship and its intellectual history, the author proposes his thought experiment of Lord Shangyang vs. Ms Qiuju, which, after being examined from three aspects, manifests that the ways and ends of the transformation of the rule of law will not only fail to help legal professionals to establish their exclusive entitlement to the judicial power, but may also give rise to despotism and tyranny, given the contexts of dominance of the popularization of law that makes no difference in knowledge and power between experts and laypeople. The author thus reaches his conclusion that Chinese legal professionals have to overcome legal professionalism and elitism and try to, at first and at least, establish a consensus among all the people for the Chinese road to the rule of law. Taking this thought experiment as an example, the author further discusses the elements and categories of thought experiment, and in what way it can contribute to legal thinking and practice.

Keywords: Thought Experiment; Lord Shangyang; Ms Qiuju; Legal Professionalization; Legal Popularization

Those who have handled the sciences have been either Empiricists or Rationalists. Empiricists, like ants, merely collect things and use them. The Rationalists, like spiders, spin webs out of themselves. The middle way is that of the bee, which gathers its material from the flowers of the garden and field, but then transforms and digests it by a power of its own.¹

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¹ Francis Bacon, *Novum Organum*, Book I, aphorism 95.

A. Question to Be Examined: Turning to “Legal Professionalization”?

“Social transformation” has been a hot topic in China in recent years. Along with it, the issue of “transformation of the rule of law” has also gained great attention in Chinese legal academia. The core of “legal transformation” does not mainly lie in the transformation of *the law in text*, but in that of *the rule of law in context*, viz. “legal professionalization” In the context of “legal popularization”.²

The longing for legal professionalization and the claim for “the rule of law by experts” is a new tendency in the Chinese social reform and legal practice. Though discussions about the independence of judiciary, the legal professionalism and the rule of legal professionals have long been going on since the very beginning of rule of law progress, and the judicial reform has been carried out correspondingly, it is only in recent five or six years that the strong claim for turning to “the rule of law by legal professionals” gained general acknowledgement from the legal community and was put into social practice. At present, a firm faith in the “expert” opinions and “specialized” knowledge by the legal scholars, judges and lawyers, especially the law students can be perceived in the heated debates on the main BBSs, the positions and opinions of lawyers in such hot cases as “Liuyong Case”, “Huangjing Case”, “Dingzihu Case” (*nail house case*), the deliberation on important legislation, and the selection and adoption of reform measures on the court system. After more than two decades’ effort to popularize the law, an increasing number of legal professionals simultaneously turned to the Shangyang approach, i.e., to use specialized knowledge as a professional barrier, to emphasize the autonomy of law and independence of the judiciary, and thus to negate the intellectual qualification and entitlement of common people and officials to express their opinions on particular legal issues.

After ten years’ construction of the rule of law, the emerging of an ideological pursuit for the rule of law by legal professionals and its corresponding social practice suggests that the conditions for the transformation of rule of law is ripening to some degree. The professional quality of legal professionals, though still far from satisfaction, has enhanced significantly. What is more important is that promoted by legal reforms, especially that on the legal education and professional examination, the number of lawyers surges, who as a professional group have stepped onto the stage of history.³ With the rapid development of market economy, the formation of a legal professional community based on labor division, not only in a formalistic

² See Ling Bin, Two Roads to the Rule of Law, 6 *Peking University Law Journal* 1, 1--20 (2006).

³ According to *Law Yearbook of China*, from 1994 to 2004, the registered lawyers were increasing year by year, except for 1997. In 2006, there are nearly 120,000 lawyers in China, which doubles the lawyers in 1994.

sense, proves no longer a utopia. In fact, the growing ideological demand for a rule of law by legal professionals can already be taken as a mark for the formation of a professional spirit and a common interest among them.

Therefore it requires much prudence to deal with the surging claim for professionalized rule of law. The difficulty lies in that introspection needs our jumping out of the case, yet we are “party” in it; self-reflection demands us to distance ourselves from the current affairs, yet we are involved in the “contemporary history”. This paper hence chooses the so-called “thought experiment” as its research method, which has been widely used in modern natural sciences and gradually adopted by social sciences and jurisprudence.⁴ Generally speaking, a thought experiment consists of three basic steps: first, it takes the theory or claim that it relates to as the proposition to be examined; second, it is to construct an imagined or counter-factual experiment scenario in the laboratory of mind; third, it will examine the truth of the proposition by questioning what result will occur if the proposition and its inference is placed into this scenario.⁵

In the following paragraphs, I will first give a brief introduction to the method of thought experiment, before I take the prevalent claim that China’s rule of law should turn to rule by legal professionals as the hypothesis to be examined, and analyze it to draw some conclusions by placing it into an imagined experiment scenario of “Lord Shangyang vs. Ms. Qiuju” that is constructed from the practical experience in contemporary China’s context of legal popularization.

B. Introduction to Thought Experiment

I. Thought Experiment and Its Application in Legal Scholarship

While the legal professionals are extolling the saying of Judge Holmes that “The life of the law has not been logic, but experience,”⁶ we must face a question, viz. how can the law rooted in experience transcend the confinement of experience and prejudice to respond to new problems emerging at present and in future? Must the law be “the Owl of Minerva” which takes off only when the shades of night are gathering? How can he discover the life of a lark if he must know it?

⁴ For the influence of thought experiment in the social sciences, see James Brown, Thought Experiments, Edward Zalta(ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2006).

⁵ For detailed discussion, see Alisa Bokulich, Rethinking Thought Experiments, 9 *Perspectives on Science* 285 (2001).

⁶ Oliver Wendell Homes, Jr. , *The Common Law*, with an Introduction by Thomas Schweich, 1 (Barnes & Noble Publishing, Inc., 2004).

Of course we can seek for the answer from philosophy of law which enjoys a long history, yet the practical reply of legal professionals to such a question is not too complex ---- the thought experiment, a thinking method that is widely adopted in legal research and teaching, and also in legal practice all over the world.

In *The Common Law*, from which the famous saying is quoted, Justice Holmes not only sorts out the historical cases, but uses the method of thought experiment all through his book as well. For example, he constructs the thought experiment in which workers on the roof of the houses along the street throw heavy things into the street, in order to demonstrate the relationship between intention and predictability in criminal law; he constructs thought experiments in which people enter their neighbors' land by mistake to analyze the rules of common law on the trespass; he constructs the thought experiment in which while the gold owner is in jail a thief intends to steal his gold, so as to refute Savigny's theory of *Besitzes*; he constructs a series of thought experiments in which the two parties relieve their contracts of employment to elaborate the necessity of differentiating different kinds of promise, etc.⁷ There are also many examples of thought experiment in modern legal science, for instance, to explore what would have happened by supposing that the composition of the Supreme court had been changed in a different way from the actual history, or to discuss constitutionalism by imaging a Convention in the New World of outer space.⁸

In the development of legal doctrine, thought experiment has also played an important role. After all, modern law does not only acquire betterment after trial and error, or conclude from established results; it also designs beforehand and predicts possible results by the academic research of "legal science". The legal professionals would not be satisfied with the simple rules based on experience such as "those who murder must die", and need not wait for more murders to happen to accumulate enough "experience". Instead, they can use the thought experiment to conceive different conditions that enriches the rule beforehand, for example, to define the behavioral agent by conceiving that the murderer may consist of beasts or animals with special training; to define the implication of "human" by imaging that the victim may consist of fetus, gork or corpse; to further discuss the relationship between the attributes of the behavior and its responsibility, and even its punishment, by supposing that the murder may be out of ignorance, negligence or intention, and so the forth. From the angle of thought experiment, a real-life case is nothing but an "experiment in living." Modern law has advanced in the process of

⁷ Id., pp.41, 72-72, 175, 234-235.

⁸ See Richard Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformations*, 142 *U.Pa.L.Rev.* 1891(1994); Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980); Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1965); Lon Fuller, *The Case of the Speluncean Explorer*, 62 *Harvard Law Review* (1949).

accumulating empirical experience together with concluding from thought experiments, which are both of great importance. As Larenz pointed out, “It is necessary to consider the historical evolution and its openness to the future, if one wants to know the current situation of law.”⁹

In the aspect of legal teaching, both the Socratic methodology in American law schools and the teaching of legal doctrine in German law schools are filled with the spirit and application of thought experiment. While I was studying in Yale Law School, the course that interested me most is *Procedure Law* given by professor Owen Fiss, who used the method of thought experiment to analyze the famous cases in history and thus revealed all the possible conditions and approaches. A colleague of mine who received education in the German law school told me that, in their classes, teachers also invented different cases around the basic legal doctrine to train the students’ ability to grasp the doctrine. The current legal educational system in China is near to the German mode, especially in the department law, in which teachers often employ invented cases with “Party A” and “Party B” to explain the legal theory. After all, real cases can not cover all possibilities in a legal doctrine, so to invent particular cases as the “experiment scenario” becomes necessary for legal research and legal education in each legal system.

The aim of the use of thought experiment in legal research and education is not just to concretize an abstract issue, but to train people to think like a lawyer. We will always find that the lawyers invent scenarios that are similar to the case to illustrate the essential question for the case and to show the substantial points of disputation, whether in the court of U.S or of China. “If...” “Suppose that...” “Let us assume such a scenario”, all of these are the common language of lawyers in the debates in court as well as in movies. Those who have watched the movie *A Few Good Men* must have been deeply impressed by the thought experiment in it, viz. if the victim should leave the army station forever, whether he would not prepare his travelling bag. Obviously, like this detail in the movie, many things that have never happened or been detected do influence our understanding of certain fact, and we can do nothing but discuss this kind of issues by way of thought experiment, rather than the empirical facts; the thought experiment in this way proves an indispensable instrument for a lawyer.

However, there is little systematic application and reflection on thought experiment as a research method in the legal scholarship, though it has been used widely in legal education and practice. In the American legal academia, there are only six articles that used thought experiment as the basic research method in the LexisNexis database, and all of them were published after the 1990s and were just the offshoot of the rise of thought experiment in

⁹ 拉伦茨,《法学方法论》, 陈爱娥译, 商务印书馆, 2003, 页73。

humanities and social sciences. Such is the same case in China. There is plain use of this method, yet with little methodological consciousness or reflection on it, and few academic treatises have ever discussed it intentionally.¹⁰

Since the thinking method has received wide use for a long time, we must ask ourselves, what are its features? Why can it transcend the limitation of experience? What theoretical instructions can it bring to us? What are its limitations? These questions must be answered from the academic perspective, not just habitual practice, for though the lack of self-consciousness does not hinder the following of the convention, only experience and spontaneity are not enough if one wants to reflect on existing experience so as to improve and refine it. By the same token, people can build a house without theoretical knowledge of physics, yet they can never build up the Three Gorges Dam or Chang'e-1 lunar satellite.

Therefore, it is necessary and also helpful for us to understand the theoretical elements and academic significance of thought experiment, especially for the purpose of better understanding, applying and reflecting on the method in legal education, research and legal practice. This article is an initial study on the thought experiment by which I hope to raise further discussions.

II. Galileo as the Beginning: Brief History and basic types of Thought Experiment

Galileo is regarded as the first man to adopt thought experiment as an academic method in the intellectual history. Four centuries ago what he faced is a strong limitation of experience and an authoritative governance of prejudice. Precisely speaking, it is the classical proposition of Aristotelian physics that ruled, viz. in the same medium, the heavy object falls quicker than the light, and its velocity is proportional to its weight.¹¹ This theorem had dominated people's mind for two thousand years, and had not been refuted logically and persuasively until Galileo creatively proposed his experimental conception which was deemed as the beginning of modern physics by Einstein.¹² This also became the theoretical origin of the historically renowned experiment in the Leaning Tower of Pisa.

Scientists afterwards continued to employ this method to explore the undetected world and to refute the authoritative judgments. We may say that, in the modern era, almost every revolution

¹⁰ For few exceptions, see, 苏力(Su Li):《纠缠于事实与法律之间》,《送法下乡》,中国政法大学出版社,2000。

¹¹ See 向义和 (Xiang Yihe):《大学物理导论:物理学的理论与方法、历史与前沿》(上册),清华大学出版社,1999年,第29-30页。

¹² See Tamar Gendler, Galileo and the Indispensability of Scientific Thought Experiment, 49 *The British Journal for the Philosophy of Science* 3, 397-424 (Sep., 1998).

in natural science was accompanied with a thought experiment.¹³ Take physics for example, Newton's "apple" led to the law of gravity, Maxwell's "demon" to the statistical thermodynamics, Einstein's "elevator" to the equivalence principle, Heisenberg's "Gamma Microscope" to the uncertainty principle, and Schrodinger's cat to multi-mode quantum states.¹⁴ This is the same with humanities and social sciences: Thomas Hobbes and John Locke's "state of nature", Ronald Coase's "battle between cattle and crops", Rawls' "division of a cake", Albert Tucker's "prisoner's dilemma", George Akerloff's "lemon market" are all good examples which have given rise to the "revolution" in Kuhn's sense of paradigmatic transformation, so are some classical games in the game theory, such as "battles of the sexes", "boxed pigs", "chicken game" and so on. Other thought experiments, such as John Searle's "Chinese room" and Hilary Putnam's "Twin Earth", though did not bring about a philosophical revolution, still triggered heated and extensive discussion, which deepened people's thinking on such issues. Especially since the 1990s, "the philosophic interest in thought experiment burst suddenly, and has continued till present."¹⁵

Thought experiment, which does not only belong to modern science, actually has a long history. Great minds in the world, ancient and modern, employ it to explore the truth and to persuade the public. At the origin of the Western thought, the "cave allegory" of Plato in *the Republic* proves a classic thought experiment. Moreover, if we do not confine ourselves to its strict sense, many Greek dramas can be taken as thought experiments, such as the tragedies of Sophocles's *Oedipus* and *Antigone*, and the comedies of Aristophanes' *Birds* and *Clouds*. In ancient China, such idiom stories as "the useless tree" (*bu cai zhi mu*) told by Zhuangzi, "hundreds of people chasing after a rabbit" (*bai ren zhu tu*) by Shangyang and "my spear attacking my shield" (*zi xiang mao dun*) by Hanfeizi are also impressive thought experiments.

In fact, thought experiment originates from people's basic thinking method. Lovers falling in love always propose interesting thought experiments, such as "who would you save firstly, your mother or me, if we fell into the river at the same time?" "If I were old, would you still love me?" etc., which prove no inferior to Galileo's in their conciseness and acuteness. The experimental scenarios are not totally imaginary, many of which happen every day in the real life. Yet those "life experiments" are often too trivial and sporadic and thus need selection and refinement by

¹³ See, Thomas Kuhn, A Function For Thought Experiments, *Scientific Revolutions* 6 (1981); James McAllister, The Evidential Significance of Thought Experiment in Science, *Studies in History and Philosophy of Science* 233 (1996); Alisa Bokulich, Rethinking Thought Experiments, 9 *Perspectives on Science*, 285 (Fall 2001).

¹⁴ 向义和 (Xiang Yihe): 同注5, 第470-471、334-336页; 郑永令、贾起民、方小敏 (Zheng Yongling, Jia Qimin, Fang Xiaomin): 《力学》, 高等教育出版社, 2002年, 第523-527页; 曾谨言 (Zeng Jinyan): 《量子力学》(卷II), 科学出版社, 2000年, 第53页。

¹⁵ Julian Reiss, Causal Inference in the Abstract or Seven Myths about Thought Experiments, *Causality: Metaphysics and Methods Technical Reports CTR 03/02* (CPNSS LSE 2001); James Brown, Thought Experiments, Edward Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2006).

theoretical research.

As thought experiment becomes an important academic tool, its types increase. Here I will briefly introduce several that are related to my discussion in the following paragraphs. As my classification is mainly to facilitate my discussion, it may not be a strictly logical division, and also has left out some types.¹⁶

Thought experiments can be divided into three categories in accord with their relevance to current context. The first category is the “prefactual” thought experiment, which speculates on the possible results which may happen in certain situations in future. Many historical choices in Chinese history are actually simple “prefactual thought experiments”¹⁷, and the cost-benefit analysis we adopt when we try to decide on an important issue, if in the form of supposing certain scenarios, is also a rudiment of “prefactual thought experiment”. The second category is the “counterfactual” thought experiment, which ponders whether to change the results of certain key events would lead to a different history, which, as a basic method, is commonly used in historical study. A most classic example is Pascal’s saying, “If Cleopatra’s nose were shorter, the appearance of the whole earth would change.”¹⁸ The third category is the “ideal” thought experiment, that is, to conceive an ideal state, such as a vacuum, without friction, without transaction cost, complete information and so on, so as to simplify the elements and reveal the essence of the matter. This is a method emphasized specially by Newton,¹⁹ however, this type of thought experiment usually bears some ideal suppositions which, if not recognized by the experiment designer, may be misleading.

In addition, based on the relation between evidence and hypothesis, thought experiments can also be divided into “constructive” thought experiment, “destructive” thought experiment and “illustrative” thought experiment. Constructive thought experiment means that as the working hypothesis is the conclusion of the thought experiment, the thought experiment is to prove its truth. On contrary, for the destructive one, the hypothesis is the proposition to be examined that is employed to construct the thought experiment. Generally speaking, to destruct is easier than to construct, for it needs less information to nullify than to justify a hypothesis. The “illustrative” thought experiment is more popular, such as “Schrodinger’s Cat” and Rawls’ “Division of a Cake”.

¹⁶ My classification is summarized from these articles, but has some difference, see Tamar Gendler, Thought Experiments, *Encyclopedia of Cognitive Science*, Polk & Seifert (eds.) (Nature Publishing Group 2002).

¹⁷ See 《史记·淮阴侯列传第三十二》，中华书局，1982年；罗贯中(Luo Guanzhong), 《三国演义》，中华书局，2005年，“第四十三回 诸葛亮舌战群儒 鲁子敬力排众议” (Though from the ancient fiction, but an excellent example and prefactual thought experiment); 《续资治通鉴·宋纪二》，中华书局，1956年。

¹⁸ 帕斯卡尔(Blaise Pascal): 《思想录》，何兆武译，商务印书馆，1997年，第79页。

¹⁹ 牛顿(John Newton): 《自然哲学的数学原理》，王克迪译，陕西人民出版社，2001年，第三卷。

Strictly speaking, illustrative thought experiment contains the basic elements that lead to the working hypothesis, and may be regarded as a particular kind of constructive or destructive thought experiment.

Now, I would like to construct a thought experiment for the question I want to explore: what will happen if China turns to legal professionalization in the context of legal popularization?

C. Lord Shangyang vs. Ms Qiuju: Construction of Experiment Scenario

The starting point for inquiring such a question is the construction of an experiment scenario. For the purpose of conciseness, the article designs the experiment scenario as a simplified one-to-one model. However, we can undoubtedly view the two participators in this thought experiment as two groups that co-exist and compete with each other in a “society”, hence the simplified experiment scenario will not constitute an obstacle to our substantial understanding of the proposition to be examined.

The experiment scenario is a jurisprudential version of “Napoleon vs. Montgomery”—“Lord Shangyang vs. Ms Qiuju”. Lord Shangyang, as an important statesman of Qin in the Warring States Period of ancient China, developed his legalist (*fa jia*) philosophy and used it to direct his reforms which changed Qin from a peripheral, backwards state into a militarily powerful and strongly centralized state, changing the administration by devolving power from the nobility, yet he was executed immediately after the Duke of Xiaogong who supported his reforms died. Ms Qiuju, a character in the famous movie *Story of Qiuju*, is an ordinary village woman who has never left her village, not to say to have any touch with the law. Seeking for a “*shuo fa*”(claim) that can force an apology from the village head who injured her husband, Qiuju sues in court yet is finally embarrassed, or even humiliated, by the result she has brought about.

Shangyang and Qiuju represent the two groups respectively, legal professionals and common people. The reason why I divide people into such two categories is that this is the internal requirement of the rule of law by professionals, and is also the prerequisite for the proposition to be examined in the experiment. The so-called rule of law by professionals requires insistence on the division of experts and laypeople on legal issues, so as to establish the rule of legal professionals based on their professional preponderance over the common people. Why I choose Shangyang and Qiuju is not only that I hope to give the readers a vivid intuitive

impression, as the two figures visualize legal professionals and common people, but also that, compared with the real-life persons in the contemporary China's legal practice, Shangyang and Qiuju are more suitable for analysis as "ideal type". This will also help us avoid useless sentimental entanglement and moral indignation, and by means of detachment and fictionalization, "take different persons and combine them in one,"²⁰ and hence perfect the typicality of these two figures.

Shangyang, in my view, is a typical legal professional, as he bears almost all the virtues acclaimed by contemporary Chinese legal professionals: upholding the rule of law, reforming the society and rebuilding the ethics according to the rule of law ideals, insisting on the principle that "there must be laws to go by, the laws must be observed and strictly enforced, and law-breakers must be prosecuted," sticking to administration by law and equal treatment before the law, negating private relations and abuse of power by authorities and nobilities, appointing professionals with specialized legal knowledge to judiciary posts, and maintaining the independence of the judiciary, etc.²¹ Therefore, I take Shangyang as the representative of lawyers in the thought experiment, and conceive what would happen if he had promoted the rule of law by professionals in contemporary legal reality.

The shadow of Shangyang is ubiquitous in contemporary China's process toward rule of law. The personification of Shangyang today may be found in judges, lawyers, legal scholars, law students, and lots of people who believe in law-centralism and legal-professionalism. But not all the legal professionals are rule-of-law centralist, and it is not necessary that a believer of Shangyang should have the professional legal knowledge or hold the judicial power. It is quite possible that, a judge or a law professor takes the rule of law by common people as his goal and strongly opposes the rule of law by legal professionals, yet a white-collar in the Central Business District thinks that law should only be applied by professional lawyers. In my opinion, the image of Shangyang represents those who hold that only the legal professionals are the "legal experts", and that the entitlement to interpretation, application and even the enactment of law should be reserved to the legal professionals; they believe that the common people, as the laypeople of law, can do nothing but accept the ultimate result of legal decisions, and as they are not able to understand the rationales in the legal process, they at least should not interfere with the process of legal reasoning; they think that law should function according to its own logic, otherwise it is

²⁰ See 鲁迅 (Lu Xun): "《出关》的关", 《鲁迅全集》(第6卷), 人民文学出版社, 1958, 页423.

²¹ For the related claims and actions, see 《商君书》(张觉:《商君书校注》, 岳麓书社, 2006年; all the citations below is from this version) and 《史记·商君列传》(中华书局, 1982, 第七册, all the citations below is from this version). For the detailed analysis, see another article of mine, "The Essential Elements of Rule of Law in the Xiaogong Question", to be published.

not the law *per se*, and there will be no rule of law. In a word, the rule of law is the rule of legal professionals, and the jurisdiction of law should be held by them. The examples of believers of Shangyang are Lawyer Wu and the anonymous judge, but not Police Li or Director Yan in *Story of Qiuju*. Many lawyers in the real life, like them, have no patience nor think it necessary to explain or elaborate the rules and rationales of law to their clients. What they say is just like Lawyer Wu, “well, so much for this case, I am the universal agent of your case. You can go home and wait for the notification. I will manage it for you. I am busy now, so can not see you off.” This is like a doctor who does not explain to the patient his health condition, yet directly makes diagnosis and a prescription, then treats another patient. In fact, it is the Legalists’ thought that legal professionals should be compared to doctors.²²

There is only one adversary for Shangyang in this experiment, i.e. “Qiuju” as the personification of the common people. The artistic figure Qiuju is the typical character that inevitably emerges in the process of legal reform and legal popularization.²³ The image of Qiuju represents those who have no legal knowledge but still use their common sense to stake their claims before the law, especially those who participate in the lawsuit without any professional legal training. This figure is quite free from moral colors, who is neither nobly kind nor severely wicked. What matters is that, from the perspective of Shangyang, she constitutes the obstacle to the rule of law by legal professionals. On the one hand, as I have demonstrated above, Qiuju can not understand the law and the rule of law applauded by the lawyers at all²⁴ in the context of legal reform; while on the other hand, under the inculcation by the popularization of law, this does not hinder her, after she gets access to the law, from interpreting the law with her common sense confidently and replacing the law with her “*shuo fa*”, and ultimately using her “perplexity” to question or even to fight over the law.²⁵

Qiuju is also ubiquitous in the real life. People tend to understand Qiuju in a very narrow sense and take her as a common person without knowledge, wealth, power or preponderance. Actually Qiuju, as an image symbolizing all the legal laypeople, can be either a “small potato” (*xiao min*) or a “notable dignitary” (*zhong ren*).²⁶ Qiuju may represent every kind of people in the society, unemployed workers, migrant workers, Deputy of the People’s Congress, officials, professors, CEOs or journalists. All of these people can be Qiuju. They will use all the means they can find to

²² See 《韩非子·定法》，in 《韩非子集解》，中华书局，1998，页399-400.

²³ For the legal implication of the image of “Qiuju”, see 苏力 (Su Li): “秋菊的困惑和山杠爷的悲剧,” 《法治及其本土资源》，中国政法大学出版社，1996; 冯象 (Peter Feng), “秋菊的困惑与织女星文明”, 《木腿正义》，中山大学出版社，1999.

²⁴ See Ling Bin, Legal Popularization, Legal Ignoramus and the Rule of Law, *Law and Social Development* 127-130 (2004.2).

²⁵ See Ling Bin, Two Roads to the Rule of Law, 6 *Peking University Law Journal* (2006).

²⁶ See 《韩非子·孤愤》，页78.

fight over the law with Shangyang. On the one hand, notable dignitaries with knowledge, wealth, power and preponderance are often involved with phenomena of transgression of the law and slack enforcement of law; whereas on the other, even if as a common person, Qiuju can resort to many approaches such as bribes, private relations, and even death or marriage to control the will of Shangyang, to interfere with the judicial decision, and ultimately to influence the implication of law. The “nail house case” is quite such a Qiuju.²⁷

The contrast between such two pictures shows a conspicuous tension between legal professionals and common people, whether in the thought experiment or real-life experiments. The tension comes from two tendencies: first, they disregard, misunderstand and disbelieve each other; second, they hold to their own understanding of law and claim that they have the qualification and right to interpret the law—just as Shangyang said, they assert that they themselves, and they alone, have the “title and right” (*ming fen*) to interpret the law. And, as Shangyang himself saw clearly, for him, law is “the basis for the rule”; while for Qiuju, law is “the life of the people.”²⁸ Neither Shangyang nor Qiuju will give up the entitlement to law easily.

Our thought experiment is to combine Shangyang and Qiuju, the two detached pictures, into one. Just as Galileo ponders the question whether the two iron balls will drop onto the earth simultaneously, I would like to inquire, what would happen if Shangyang and Qiuju have confronted each other in the same world? What does this imply for the transformation of rule of law in China?

D. Experiment Analyses

I. Experiment Analysis I: The Weak Knowledge Barrier

In this section, the issue to be examined is the rule of law by legal professionals in the minimum level: the justification and legitimacy of the rule of legal professionals is confined to the legal knowledge barrier, that is, the preponderance of professionals in the legal knowledge is the only legitimate basis for them to construct the rule of law by experts. In fact, this is the reason why legal professionals often compare law to the medical science, the foundation for such professional admission institutions such as legal qualification exam, and the basis for the legal professionals to label the common people “legal ignoramus” publicly or privately so as to distinguish the attributes of a legal profession.

²⁷ See, 张悦(Zhang Yue), Investigation into the Nail House Case in Chongqing, *Southern Weekends* (April 2, 2007),

²⁸ 《商君书·定分》，页189.

However, in the recent two decades or more, what the propaganda of legal popularization presupposed and proclaimed was an equal capability of Qiuju and Shangyang in understanding the law. Since Qiuju has never been regarded as a legal ignoramus, she and the common officials and people she represents have no idea of the law as medical science, or as a special knowledge that excludes laypeople from using it. Therefore, contrary to legal professionals, Qiuju and the laypeople see no similarity between law and medical science. What's more, since Qiuju has no feeling of unattainability of the legal knowledge, she can train herself to be a "legal expert" and then supervise the judges and lawyers.

In the eyes of officials and common people living in contemporary China, since the cardinal doctrine of the rule of law in the past two decades is "to bring law to the millions of people" and let "the millions of people grasp the law", every Chinese should have the confidence and capability to use legal weapons to protect their right and to stake their claims (*shuo fa*). Since the rule of law all over the world requires "equal protection under the law", the understanding ability between legal professionals and common people should also be equal before the law. This kind of logic may seem ridiculous to some legal scholars, yet after many years' popularization of law it has become an ingrained notion among the common people and officials. Such is the "legal consciousness" cultured by the popularization of law in the past two decades. Both the researches of experimental psychology and behavior psychology show that, it is easy for people to listen to or even automatically believe the information indoctrinated from outside, and after that the "initial effect" which features an adherence to the first impression and "perseverance effect" will occur.²⁹ This implies that, to some degree, the popularization of law as a kind of indoctrination from outside will exert a greater influence over people's understanding of their life and law than we imagined and it is hard to rectify the influence.

The significance of such a situation in reality is that since legal profession is in its nature a kind of "artificial monopolization", "governmental monopolization" instead of "natural monopolization",³⁰ the knowledge barrier of legal profession relies upon power coercion rather than intellectual hierarchy. A direct reason why Qiuju does not take Shangyang as an expert is that legal knowledge is not like medical science, natural science or economics which can not be mastered without years of study. The legend of legal professional barrier is always the *Psalms* sung within the circle of legal professionals, otherwise we can not explain why many non-legal students are able to pass the legal qualification exam after only a three-month review. Such is

²⁹ Elliot Aronson, Timothy D. Wilson, Robin M. Akert, *Social Psychology* 74, 76, 94-95 (Addison-Wesley Educational Publishers Inc., 1999).

³⁰ See Richard Posner, *Overcoming Law* 73 (Harvard University Press 1995).

the same case in the U.S.. Many Chinese students skillful in taking exams can pass the bar exam even if they have not learned most laws. For this reason a friend of mine jokes that it is easier for a Chinese student to obtain the lawyer license than the driving license. In this situation, even if the knowledge barrier of the rule of law by legal professionals is established, for example, judges and lawyers have to graduate from certain law schools, pass the exam and complete required internship, the real barrier is still not so high that the common people would be awed and willingly regard themselves as “legal ignoramus”.³¹

In sum, the practice of popularization of law in the past two decades has shattered the knowledge barrier of the rule of law by legal professionals. Of course, this is only the first round between Shangyangs and Qiuju. The following analysis will show that the difference between them in the “joint ownership” of legal knowledge determines that the rule of law by legal professionals which has been put into effective practice in ancient Qin Kingdom and modern West is doomed to a failure in contemporary China.

II. Experiment Analysis II: The Weak Power Barrier

Since the knowledge barrier fails to exclude the common people from “intruding” into the legal sphere, the next means to subjugate Qiuju, as is usually seen, is to erect the power barrier through governmental coercion, such as establishing the crime of contempt of court, the supreme status of the judge in court and the institution of compulsive lawyer agent, etc. Yet the problem is, given the mistrust of the officials and common people toward the judges and lawyers and their equal status in possession of the legal knowledge, it remains doubtful that to fortify the power of judges or to enforce the lawyer agent will help attain the goal of rule of law by legal professionals, which is taken as a goal of transformation of rule of law.

Firstly, proceeding from her survival instincts and life experience, Qiuju would not give her case to the lawyer as her “universal agent” just because Shangyang claims to be an expert or have the support from governmental coercion. In this sense it provides no insight to attribute the confusion and misunderstanding of the common people towards law to their lacking a lawyer agent. The reality is that many people choose to go into the process of lawsuit, though they may appear as awkward, perplexed and embarrassed as Qiuju, not because they can not afford hiring a lawyer, but because they do not trust that the lawyers would offer much help. They will pose the same question as Qiuju’s, “Can’t I deal with my own case?” They will complain after getting

³¹ For detailed argument, see Ling Bin, *Legislation and the Rule of Law ---- From a Professional Perspective*, 6 *Peking University Law Review* 251 (2004).

out of the gate of the legal empire and seek for other solutions, just like Qiuju. They do not have trust in the lawyers just as they disbelieve the judges who profess to represent the state to uphold justice. We must perceive that, albeit the effort to fortify the judiciary power and to enforce the institution of lawyer agent that enable the legal professionals to dominate the court can help exclude the laypeople from legal activities temporarily, yet it can never change them into believing and recognizing the judicial authority. Instead, if the institution of compulsive lawyer agent had been carried out in the judicial process, it would only have brought more doubt toward the rule of law, it would have made people feel that its aim is exactly the same as the retaining fees in the secondary mortgage loan in the real estate market,³² which has not brought justice to people, but only created new ways for the lawyers to steal money from people's pockets.

Therefore, in contradistinction to Judge Holmes' argument, law in China does not mean that common people should hire lawyers to predict the decision of the court,³³ but that judges have to weigh the significance of the common people's "shuo fa". Judge Holmes' judgment is only valid with the premise of the courts' monopolization of the judiciary. But in the context of China, it is the plaintiffs and defendants rather than the judges who occupy the position of the "examiner", for when Qiuju steps into the court, she has already got full understanding of the content of law and an asserted expectation for the final decision of the case, whatever Shangyang will explain to her about the "law". In this situation, Qiuju actually "makes the decision before the trial". She is the true judge who comes into the court with her draft decision, viz. she has grasped the law and predicted the decision through self-learning and media-teaching long before the trial. The real life shows a picture far from the beautiful scene of rule of law described in the books, where the two parties listen to their lawyers during the lawsuit, and finally to the judges for their decision. Here Qiuju is the bystander in the court witnessing the debate between the lawyers and waiting for the decision of the judge; yet in real life Qiuju is the supervisor of the court and the examiner for the lawyers and the judge with her answer already prepared. Hence, if the debate and decision of Shangyang coincides with Qiuju's answer, he passes the exam; if not, Qiuju will give him a zero, whether explicitly or implicitly, graciously or ungraciously, for Qiuju believes that she loses her case of course not because she is a legal ignoramus, but because Shangyang has made a wrong decision and did her wrong for the reason of his incapability, ignorance or corruption.

In such a situation, the officials and common people who have "mastered" the law will not be

³² For the background of this rule and the reason for its abolishment, see 《检察日报》 (*Procuratorial Daily*) Jan.23 2007.

³³ See Oliver Wendell Holmes, *The Path of the Law*, 10 *Harvard Law Review* 457, 461(1897).

intimidated by the title of “legal ignoramus”; moreover, they will attack back and label the legal professionals with the title of “corruption” and “incapability.” Those common people involved in the lawsuits, let alone the government officials, deputy of the People’s Congress and journalists, cannot avoid doubting whether the judges are disqualified or have been bribed, as long as they lose the case, and think that the judiciary decisions contrary to their prediction are “wrong”. Admittedly, Shangyang, addressed by the people with the title of “corruption and disqualification”, will reply in indignation and denounce the Qiuju as “legal ignoramus” who assume that they have legal knowledge; but this will not change his “identity and status” as being tried and criticized, for the “judge” Qiuju who tries and criticizes Shangyang has read through the law word by word, thus confidently holds that it is she that is “trying according to the law”, and believes that the law is to protect her and give her what she seeks. Therefore, once the law does not satisfy her “*shuo fa*”, something must be wrong, and she will condemn Shangyang for “failing to understand, and to try to understand what Qiuju’s *shuo fa* is...he sets limits to the common knowledge and other possibilities.”³⁴

The problem is, whatever the judge does, he can only comply with one party, not both. Thus only with a little imprudence may he be driven into an embarrassment. If the two parties enter the court with opposite answers and predictions, whatever means the judge uses to evade the embarrassment, he cannot escape from the title of “corruption and disqualification” endowed by either party, let alone the lawyers. The two titles given by the officials and common people have now become two mountains over the legal professionals, which almost chokes them, and may ignite flaming tongues that pour criticism onto them.

It proves that the combination of knowledge barrier in the legal profession and power barrier in the judicial process is still too weak to guarantee the rule of law by legal professionals. Qiuju, who does not have the ability to predict the law but take for granted that she has, is actually not “puzzled” at all when she confronted Shangyang.³⁵ She will not reflect on her own faults, regret her ignorance, or feel shameful for her “identity and status as a ‘legal ignoramus’”.³⁶ To the contrary, she will doubt Shangyang’s interpretation of the law, and even doubt the judicial qualification of Shangyang and the legitimacy of rule of law by legal professionals.³⁷ All in all, authority can not be achieved only by power,³⁸ for the authority set up by power alone is

³⁴ See 苏力(Su Li), “秋菊的困惑和山杠爷的悲剧,” 《法治及其本土资源》, 中国政法大学出版社, 1996, 页26.

³⁵ Supra note, p30.

³⁶ See 冯象 (Peter Feng), “秋菊的困惑与织女星文明”, 《木腿正义》, 中山大学出版社, 1999, 页24.

³⁷ See Ling Bin, Legal Popularization, Legal Ignoramus and the Rule of Law, *Law and Social Development* 127-130 (2004.2).

³⁸ See Max Weber, *Economy and Society*, ed. By Guenther Roth and Claus Wittich 941 (University of California Press, 1978).

forever swayed by power. Hence, the institutions that aim at establishing legal power barriers will result in abatement of the legal professionals' credit rather than the common people's obedience and belief in them.

III. Experiment Analysis III: The Paradox of the Rule of Law by Legal Professionals

However, the firm believers of Shangyang always hold that professional autonomy and rule of law by legal professionals can be achieved as long as they acquire enough support from power. The subtext is that, since the aim of the strategy of legal popularization is contrary to the rule of law by legal professionals, they should clamp down all the legal practice directed in the spirit of legal popularization and carry out legal professionalization to the end, thus get rid of the threat posed by Qiuju thoroughly. For instance, they can increase the abstractness and complicatedness of the jurisprudence and legislation, whereby create a greater difficulty and higher opportunity cost for Qiuju to learn the law by herself so that she has to rely on judges and lawyers. Another strategy, following this logic, is to censor media's report and comment on legal issues, i.e., the news report on the judicial process must be censored and the authority on legal interpretation which has been lost to the media must be restored to the court.³⁹

If Shangyang were living in contemporary China, he would think that the chief problem of rule of law in China is not that Qiuju's "*shuo fa*" has been excluded from the logic of the "law", but that it has not, which undermines the certainty of law and subverts the power basis of the rule of law. He will therefore claim that "modernized rule of law" is "an artificial unity of contradictions", "which must ostracize Qiuju, who do not understand the law and can not acknowledge its judgements, out of the 'legal consciousness' or 'consciousness of right'",⁴⁰ and must take "Qiuju's perplexity" as the "indispensable prerequisite" for the construction of the "modernized rule of law."⁴¹ Hence, in the rule of law by legal professionals pursued by Shangyang, there is no room for Qiuju, but only for Wan Qinglai, as Shangyang knows deeply that if Qiuju holds the sway there will be no room for Shangyang. For Shangyang, one Qiuju counts for little; but what terrifies him is that all people become "Qiuju"! If this turns out true, namely, every one believes in his/her own interpretation of law, and takes his/her own "*shuo fa*" as the law, how can the judges still make judgement? How can the law rule? Who will still believe in law? And does the independence of the judiciary have any meaning? Taken this into account, Shangyang must line out the domain of legal professionals and develop Qiuju's awe to the authority of professionals

³⁹ One example, see 范立波(Fan Libo), *The Court and Freedom of News Report*, 169 *Finance & Economics*.

⁴⁰ See 苏力(Su Li), "秋菊的困惑和山杠爷的悲剧," 《法治及其本土资源》, 中国政法大学出版社, 1996, 页26.

⁴¹ See 冯象 (Peter Feng), "秋菊的困惑与织女星文明", 《木腿正义》, 中山大学出版社, 1999, 页24.

in order to tame her before she awakens. The primary issue for today's Shangyang, in the context of popularization of law, is still how to ostracize Qiuju and achieve the rule of law by legal professionals.

Shangyang does not think that to ostracize Qiuju is merely out of his private interest. In his eyes, this is also for the sake of Qiuju, viz. to "free ten thousands of people from danger."⁴² Qiuju, who has little difficulty in taking up the weapon of law, in fact does not understand law, and thus may easily get hurt by law, which is shown at the ending of *The Story of Qiuju*. According to Shangyang, the dispute between the village head and Qiuju and the "tragic" result is just because the entitlement to legal interpretation is not monopolized by the professional "judge", which hinders the officials and common people to form a habitual obedience to law. The village head and Qiuju are representatives of the cadres and the masses respectively. None of them is legal professional, nor have they consulted any lawyers, but both of them dare to predict and declare the "law". Qiuju believes that the law will necessarily bring her the "shuo fa" she desires, hence she appeals to a higher court again and again; the village head, on the other hand, takes himself as the deputy of the government who works for it, so he thinks that the law will not trouble him and he should have nothing to fear. Quoting the remarks of Police Li, they are two "stubborn persons", neither of whom takes law seriously or "takes right seriously", but views the law as a playgame. Neither of them are citizens obedient to law. When we show sympathy to Qiuju, we, in Shangyang's eyes, are also people whose pure minds of obedience to law are corrupted by the popularization of law. Qiuju's "perplexity" is the result of her impudence and contempt toward law. In this regard, the village head is no different from Qiuju. With their places changed, the village head will also demand the "shuo fa"; in other words, Qiuju is but another "village head", and will also be arrested.

Nowadays a growing number of people tend to believe the rationales above. Yet the problem is that Qiuju will not. Although she has never received any education in law school or taken any exam training, without any doctoral title or study experience overseas, she has grown up in the environment of legal popularization. She is, therefore, no longer an ignoramus, thus even the most eloquent tongue can not persuade Qiuju to ostracize herself. Since Qiuju and her peers have shared, though not monopolized, the entitlement to legal interpretation and have acquired interest which they will not give up easily. This is the human nature shown by a series of experiments and theories of "Endowment Effect" and "Loss Averse" in behavioral psychology⁴³. If we put ourselves in Qiuju's shoes, we may also find it hard to understand why it is our

⁴² 《商君书·定分》，页191.

⁴³ See Daniel Kahneman, Jack Knetsch, and Richard Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, *Behavioral Law and Economics*, Cass Sunstein(ed.) (Cambridge University Press).

personal best choice and also a Pareto improvement for the society that we should transfer our power to the competitors, make them the universal agent of our interests, and place our freedom, life and property in the hands of others. What will compensate the loss caused by a total abandonment of our initiative in legal cases and acceptance of others' domination? Therefore, even if Shangyang mobilizes all the means of propaganda by judicial-administrative department, media and internet to persuade or to terrify Qiuju, the battle for the entitlement to legal interpretation will still continue, as long as the divergence between Shangyang and Qiuju persists. Shangyang has a good saying, viz. law is "life of the people." Who will abandon his/her life?

Moreover, the legal order that relies on the support from power too much will inevitably encounter a total crisis of legitimacy. Legal professionals can employ power to exclude the officials and common people from sharing the legal knowledge, yet they can not deprive them of their original knowledge. Qiuju lacks legal knowledge, but she has "private knowledge" and common sense; she is not a "*tabula rasa*" without any knowledge. Though she, as K in Kafka's novel, can not enter the "castle" of law, she can still take the "law empire" as the object to attack. Hence Shangyang's institutional design can evade the erosion of the unity of law by the officials and common people and maintain the security of the internal legal order, yet it may easily lead to the instability of the basis of rule of law and a crisis of its legitimacy. Qiuju, like *Antigone*, can declare the invalidity of law with only her beliefs.⁴⁴ What's more, the advocates of Qiuju in the legal academia will help her question the "ideal of rule of law", the "capital truth", and criticize that "the formal legal system can not understand, nor does it not try to understand what Qiuju's '*shuo fa*' is... The logic of the legal system sets limit to the common knowledge and other possibilities". Further, "why bother understanding the formal law that is detached to their real life? What interests does the formal law bring to them? We demand the legal professionals to confess, for whom, and for whose sake is the formal law?".⁴⁵

If Shangyang cannot lay the legitimacy of the rule of law by legal professionals upon Qiuju's consent, then he can only employ violence to force Qiuju into submission to his governance, otherwise he will be suppressed by the united Qiujus. For the former, besides legal professional exams, Shangyang should prohibit any private interpretation of law as Napoleon did,⁴⁶ or censor the media as required by the Constitutional Court of Germany.⁴⁷ However, without the public

⁴⁴ Sophocles, *Antigone*.

⁴⁵ See 苏力(Su Li), "秋菊的困惑和山杠爷的悲剧," 《法治及其本土资源》, 中国政法大学出版社, 1996, 页26.

⁴⁶ See 卡内冈(R.C. van Caenegem): 《法官、立法者与法学教授》, 薛张敏敏译, 北京大学出版社2006, 页87.

⁴⁷ In 2001, the media are prohibited to enter into the court during the trial. See BVerfG, 1BvR 2023/95 vom

consent this kind of rule of law by legal professionals can only turn out “tyranny”, and judges become “tyrants” relying upon the coercive governmental power.⁴⁸ According to a common saying in the circle of legal professionals, though not precise, this kind of rule of law is just another version of “rule of men”. For the latter, we can see the example of “Liuyong Case.” Owing to the lack of legitimacy, the legal order carefully constructed by Shangyang can be quite vulnerable or even in danger of collapse as long as the dissent Qiuju have accumulated enough power.

E. Pro-Shangyang or Pro-Qiuju?

Although “Lord Shangyang vs. Ms. Qiuju” is just a scenario of thought experiment like “Napoleon vs. Montgomery”, what I refer to and concern is the real *status quo*, the actual problems and the ideal of rule of law in contemporary China. With aid of this thought experiment, we can perceive that the legal reform and popularization of law in contemporary China has made the rule of law by legal professionals, which is based on the intellectual division between experts and laypeople and the institutional guarantee of coercive governmental power, not only hard to succeed, but also contrary to its original aim.

To escape the paradox shown in the thought experiment, we must avoid the mutual estrangement and latent opposition between legal professionals and common people caused by the pursuit for legal specialization and judicial professionalization. The root reason for such a paradox is the theoretical premise of “turning to the rule of law by legal professionals”, viz. the mutual exclusion by Shangyang and Qiuju, professionals and laypeople in knowledge and power. Since the rule of law by legal professionals relies on the knowledge barrier created by specialized legal education and power monopolization in judiciary, the political and legal relationship between legal professionals and common people, the two parties divided by the barrier can only be a power relationship, which leads to the paradoxical logic shown in the experiment scenario above.

Due to the rapid growth of professional interest and ideological pursuit, the distance between legal professionals and common people in the real life enlarges, and it becomes much harder for people to stand at a neutral point. We tend to agree with either Shangyang or Qiuju when we watch the scene of “Lord Shangyang vs. Ms. Qiuju.” Those stand-bys often join either side unawaringly. If we find ourselves in total agreement with the rule of law by legal professionals,

24.1.2001, Absats-Nr.(1-110).

⁴⁸ Richard Posner, *The Problem of Jurisprudence* (Harvard University Press, 1990).

which holds that the judiciary power is naturally monopolized and the establishment of the rule of law must exclude laypeople from attempting any legal interpretation or involving with the judicial power, we have stood on Shangyang's side. However, even if we stand side by side with Shangyang, we will not necessarily succeed; perhaps the end of the story is but a tortured death for the legal reformer, just like what happened to Shangyang⁴⁹--we must keep awareness that what occurred to the legal professionals in "Liuyong Case" might repeat. On the other hand, if we find it difficult to accept Shangyang's logic and sympathize with Qiuju, applaud the courage of the "nail house", and feel indignant by the tyranny and despotism of legal professionals, we are standing on the ground opposing the rule of law by professionals. Yet at this moment what is worth our careful thinking is whether to allow Qiuju to hold the sway of legal practice is worse than to submit her to the law and whether the establishment of the rule of law would be blocked if all the laws give way to the "nail house". Furthermore, we have to think about whether there is a better alternative to the rule of law.

The thought experimental scenario of "Lord Shangyang vs. Ms. Qiuju" repeats a classical model in game theory, that is, the battle between male and female⁵⁰. It may be a coincidence that Shangyang is male and Qiuju is female. According to the model of sex battle, as set by the thought experiment in this article, Shangyang and Qiuju have different preferences: Shangyang prefers the rule of law by legal professionals in which judicial power is monopolized, while Qiuju thinks that every official or common people has the ability to understand the content of law and share the legal power through popularization of law. These analyses show that, without consensus and mutual consent, as long as they do not make choices cooperative with the opposite sides, they can achieve only mutual injuries instead of a win-win result even if they have made choices according to their maximized interest. The game theory model even shows that, unless they communicate with each other before they act, one side taking the move rashly or resorting to other solutions will only increase the possibility of disagreement and mutual injury to both sides.⁵¹

In fact, it is not my original intention to have readers choose either side, whether Shangyang or Qiuju. Those who participate in the game of rule of law and fight for the "entitlement" to legal interpretation should not entangle themselves in a "struggle of cliques" or become a narrow-minded partisan. I hope that we can achieve a better understanding of the complexity of the problem, the claims and beliefs of the both roles, their sharp divergence and fierce battle over the "entitlement" to legal interpretation and the predicament and opportunity created by

⁴⁹ 《史记·商君列传》，页2236-39.

⁵⁰ 拉斯缪森 (Eric Rasmusen): 《博弈与信息》，王晖等译，北京大学出版社，2003，页21-22.

⁵¹ 罗伯(Robert Mundell): 《博弈论导引及其应用》，柯华庆、阎静怡，中国政法大学出版社，2005，页231-232.

them for the establishment of rule of law in China. Because this problem demonstrates the character of the Chinese rule of law, and is the starting point for China to explore its own way to achieve the rule of law. It is also because that Shangyang and Qiuju are nobody else but us.

While arriving at the end of my thought experiment, the meaningful epilogue of *Story of Qiuju* reappears in my mind. After undergoing all the hardships, when the gate of the law finally opens to her, “the perplexed Qiuju” blurts out a question to every one’s surprise, “What I want is but a ‘*shuo fa*’, not to arrest him, how can the village head be arrested?!” Yet the legal professionals—perhaps Shangyang is behind them—leaves her nothing but an icy and incongruous answer, “we have just arrested the village head. I just come here to tell you this.” In Qiuju’s perplexed eyes, the road leads to the distant, to the city, and to the rule of law, with the shining snow, bleak wind, and a harsh siren of the police car.

F. Thought Experiment as an academic method

With my own thought experiment of “Lord Shangyang vs. Ms. Qiuju” illustrated, I would like to further discuss the elements of the thought experiment and what it may contribute to the legal study.

I. Elements of the Thought Experiment

Thought experiment contains the plain wisdom of life, yet not all the demonstration and reasoning by means of invented stories are thought experiments. As it consists of three necessary and substantial elements, thought experiment bears a cognitive function that is different from those methods based upon either experience or logic.

Firstly, thought experiment is always related to certain working hypothesis composed by conclusions or claims, and takes it as the experimental conclusion or proposition to be examined. Secondly, as its name implies, thought experiment is to construct a particular imaginary experimental scenario in the mind, or in the thought laboratory,⁵² whose essential effect is to concretize abstract working hypothesis into particular plots, and to set the premise for the playing of the plots. Just as the construction and control of experimental scenario is important to the physics experiment, the construct of an imaginary experimental scenario in the mind laboratory is also critical for the thought experiment. As an “experiment”, thought experiment is controlled and artificial, relying on the theoretical background. Lastly, experiment designer

⁵² James Brown, *The Laboratory of the Mind: Thought Experiments in the Natural Sciences* (1991).

should examine the fallibility of the proposition or justify the truth of the conclusion by inferring from the proposed conditions set in the experimental scenario.

Thought experiment is usually used to examine or to justify an argument. Hence whether the experiment designer puts forward an explicit conclusion, which is default at most times, there is always an experiment-oriented working hypothesis. When the hypothesis is in default, it needs and often is easy to be inferred from the experiment scenario itself. The working hypothesis is usually a hypothetical proposition, as thought experiment is mostly used to detect the causal relationship of things. In this situation, it can prove the falseness of the whole working hypothesis as long as it proves the falseness of the premise of hypothetical proposition under necessary conditions (pre-condition) or the conclusion of the hypothetical proposition under sufficient conditions (post-condition). This is the logic rationale of the fact that thought experiment can help us cognize the causal relationship.

What is key to a thought experiment is the construction of the experiment scenario which distinguishes thought experiment from other thinking methods and enables it to contribute to the legal study more than experience accumulation and abstract speculation. However, we must note that thought experiment is to facilitate, not to replace the abstract speculation for legal doctrine analysis. In addition, it needs pointing out that the design of a scenario in thought experiment is not totally similar to legal fiction which is also an important legal method, though they both consist of theoretical construction and hypothesis proposition that are different from the empirical world. Legal fiction is a kind of tool to clarify legal concepts, while thought experiment is a thinking method. The construction of an experimental scenario neither supposes a legal fiction, nor does it necessarily lead to a legal fiction as the conclusion.

Construction of experimental scenario in essence is the construction of a theoretical framework. A theory is composed is a working hypothesis and several preconditions. The core proposition of the working hypothesis corresponds to the basic content of the experimental scenario, and the preconditions for the validity of the working hypothesis lies in the preconditions of the experimental scenario, the demonstration of which is a pivotal step in constructing and understanding the thought experiment. One can suppose anything and any one can suppose, yet the question is whether the supposition can help deepen the understanding of the working hypothesis. Only when we have formed a theoretical framework that is sufficient to show the essence of the question, can we suppose preconditions with theoretical significance, on the basis of which we can construct a reasonable experimental scenario. Just for this reason, unlike the proposition hypothesis in the experiment scenario that is self-evident, the preconditions need to

be specially presented. However, this is not to say that the construction of the theoretical framework is necessarily ahead of the design of the thought experiment scenario; instead, they are always carried out simultaneously. Different from the theoretical construction by abstract speculation, thought experiment can draw inspirations from the empirical world more directly, and tallies with people's daily way of thinking, that is, from the concrete to the abstract, from the particular to the universal.

The materials for constructing experimental scenarios consist of "common sense" and "hypothesis". Thought experiment can and must employ experience and common sense, and the first default rule with which the constructing and understanding of a thought experiment must conform is that unless the experiment designer proposes a hypothesis explicitly, the content of the experiment must be understood according to common sense. But not all questions in theoretical thinking are based on the ground of common sense; we need theoretical thinking and hypothesis just because we have no common sense to follow. All the hypotheses except the working hypothesis are the preconditions of a thought experiment, and they constitute the precondition for the validity of the thought experiment. The experiment designer may fail to present all the hypotheses explicitly and at most times bring in some hypotheses that are not self-evident implicitly and unconsciously. Hence we need the second default rule to interpret the experimental scenario, that is, all the contents in the experimental scenario that is contrary to common sense and empirical experience must be understood as the designer's hypotheses. In fact, all prudent designers would demonstrate the hypothetic preconditions of their thought experiments clearly. For example, Hobbes has spent one fourth, in fact twelve chapters, of *Leviathan* to elaborate the precondition for "the Natural Condition" before he conducts the thought experiment of it.⁵³ Conversely, if the designer fails to recognize the preconditions which are introduced unconsciously and the readers fail too, such a thought experiment would be misleading, especially when the thought experiment is unfolded with magnificent eloquence.

Obviously, both hypothesis and common sense expedite thinking. The prominent merit of the thought experiment is to simplify discussion, for people can not wait, nor do they want to make judgment only after checking on everything. We can continue our theoretical exploration by supposing the existence of certain conditions, even when we fail to get the empirical facts. Thus reason finds a way to transcend the confinement of experience, and "the Owl of Minerva" can take its flight before the dusk falls. More importantly, on many occasions how we succeed to "discover" what preconditions must be satisfied in practice is just by means of revealing the preconditions in theory, which is the cognitive significance of thought experiment. Both

⁵³ Thomas Hobbes, *Leviathan*, Richard Tuck ed. (Cambridge University Press, 1996).

neglecting or taking for granted certain conditions in theory and totally ignoring or blindly assuming the existence of certain conditions in practice will lead to a false judgment. Those great thought experiments in history are just famous for their manifesting the blind spots in both theory and practice.

Given the precondition and the proposition, the following reasoning is a logical process. Thought experiment adopts both deductive and inductive approaches. The construction of the experimental scenario relies on an induction of experience, while the examination of the working hypothesis according to the precondition contained in the experimental scenario is a deduction. Logic reasoning, as the element of the thought experiment, distinguishes it from a merely symbolic “metaphor” or “allegory.”

II. The way of the Bee

Nowadays as more external perspectives, especially that of sociology, are adopted in legal research, almost all the legal departments have started to draw intellectual nourishment from other sciences, and thought experiment as a basic thinking and research method is thus introduced and widely adopted in the legal study. Great attention as it has received, there is still much potential in the application of thought experiment. Law, as Justice Holmes emphasizes, is a sphere of practice, yet it is more a subject which asks for a combination of reason and experience as Bacon depicts. Bacon once said, “Those who have handled the sciences have been either Empiricists or Rationalists. Empiricists, like ants, merely collect things and use them. The Rationalists, like spiders, spin webs out of themselves. The middle way is that of the bee, which gathers its material from the flowers of the garden and field, but then transforms and digests it by a power of its own.” An alliance of thought and experiment, reason and experience, is what characterizes the thought experiment and where its merits lie. A good thought experiment is just “the way of the bee”, “for it does not rely only or chiefly on the powers of the mind, nor does it store the material supplied by natural history and practical experiments untouched in its memory, but lays it up in the understanding changed and refined. Thus from a close and purer alliance of the two faculties—the experimental and the rational, such as has never yet been made—we have good reason for hope.”⁵⁴ Such is the hope that thought experiment brings to legal research and practice.

Not all the thought experiments, obviously, are perfect products. The honey the “bee” produces may be sweet, yet may also be bitter. The error that thought experiment makes most often lies

⁵⁴ Francis Bacon, *Supra* note 1.

in its logic reasoning, especially the counterfactual thought experiment which may easily lead to “thinking shortcut” or a cognitive error. But it is not a problem particular to the thought experiment, but is common to all the rational thinking. What is pivotal is whether the construction of the thought experiment can set the working hypothesis into the experimental scenario reasonably, demonstrate the preconditions for the working hypothesis sufficiently, and deduce the conclusion logically. That is exactly the main reason why we reflect on thought experiment and seek to further explore it.

Anyway, we can use the method of thought experiment to introduce different perspectives into law and create new disciplines, such as law and economic, law and literature, sociology of law, anthropology of law and so on. When law is studied from external perspectives and the study of law is enriched by other knowledge, or to put it in another way, when law is studied in its economical, political, historical or social context, the thought experiment may serve as a useful and comprehensive methodology. I hope that my research on the legal transformation in China, by the method of thought experiment, has proved this point.

As to the relationship between the external perspectives and law itself, I would like to further illustrate three points. Firstly, when facing and applying the classic thought experiments borrowed from other subjects, legal scholars should keep a reflecting and critical eye after a full understanding, as discovering the explicit and implicit preconditions is key to our understanding and making use of a thought experiment. Secondly, legal scholars should be capable of using thought experiments to understand and reflect on the abstract theories, for as we illustrated above, thought experiment as a thinking method has the advantage of combining inductive and deductive approaches, empirical analysis and theoretic reasoning. Lastly, legal research can and should contribute more good thought experiments that facilitate legal thinking and practice.