Editor's Introduction

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This introduction will begin with some background information and then turn to short summaries-commentaries of each article in the volume, before concluding with some general observations about what the different pieces share in common.

Background

Since 1988, I have turned my main research energies from rural social-economic history to legal history. A major reason for the change was the availability of large quantities of rich local government archival materials, especially legal case records, which had yet to be seriously explored. Before that, my studies had been based mainly on firsthand field survey reports, interview transcripts and quantitative data, especially the household- and village-level information gathered by Japanese researchers in the 1930s using modern social-science methods. Those kinds of materials are not usually available to scholars of West European history, given the fact that peasant economies had largely disappeared before the coming of modern social science, unlike in China where the peasant economy has persisted well into the 20th and the 21st century. When I came into contact with the local archival materials during my year-long stint in China in 1980, I realized that China researchers had a unique opportunity to draw on both social science research and local government records. The latter had propelled some of the path-breaking works of Europeanists, such as those of Georges Lefebvre ([1934] 1959; Huang 1985: 33) and, later, of the second-generation Annales scholar Emmanuel Le Roy Ladurie (1974). China researchers, I thought, could do more by drawing on both local government records and modern social science data. I therefore published an article in 1982 urging China scholars-colleagues to take advantage of the opportunity afforded by the even richer source materials available to us (Huang 1982).

By the late 1980s, my own work on rural social-economic research was coming to a natural pause, having completed *The Peasant Economy and Social Change in North China* (1985) and *The Peasant Family and Rural Development in the Yangzi Delta* (1990), and the follow-up article "The Paradigmatic Crisis in Chinese Studies: Paradoxes in Social and Economic History" (1991). I was also beginning to rethink the implicit materialism of my own earlier work.

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The special appeal of legal case records for me was that they contained rich information not only about behavior, but also representations, and the interactions between those two dimensions. As I wrote in 1998 in reflecting upon my own turn of research interests:

> Legal history has held special appeal for me precisely because it compels us to deal not only with actions but also with representations, and not only with practical realities but also with ideals. Legal documents [i.e. case records] arguably articulate more than most other kinds of sources the logics of both customary practice and official ideology and of the relationships between them. . . . Legal records have shown me the importance of representation, but they have also reminded me of the crucial difference between genuine evidence and fraudulent evidence and between truth and fabrication. . . . (Huang 1998: 200–201).

At the same time, I realized that earlier scholarship on Chinese legal history, due to the lack of case records, had tended to rely too much on sources explicating official ideology rather than legal practice. Even the best available research relied at best on collections of exemplary verdicts (e.g., Shiga Shūzō (1981, 1984), or compendia of selected major cases handled by the central-level Board of Punishment (e.g., Bodde and Morris, 1967). It lacked solid grasp of how the courts actually operated, especially with respect to so-called "minor matters" pertaining to "households, marriage, and land" (户婚田土, what we would today term "civil cases"). Most scholars simply accepted the official constructions, assuming that there were relatively few "minor matters" cases, or at least that those were of little importance—which is very far removed indeed from the realities shown by the case records. I have therefore emphasized especially the approach of starting with case records and legal practice, though certainly not to the neglect of codified texts and other legal sources.

In hindsight, my emphasis on attention to both representation and practice, and how they inter-relate, is related to my own background of studying household- and village-level rural social-economic history. Entering into legal history from this background, I naturally developed a historical perspective of attending to both—to material bases as well as thought and mentality, to social-economic context as well as agency, to historical tendency as well as individual choice, and to institutional design as well as actual operation. The Japanese field survey data, it turns out, also provide rich information on villagers' lawsuits, as well as community and kin mediation, to help supplement and contextualize official case records.

After deciding to enter into this field of research, I had the good fortune of meeting up with a group of outstanding colleagues and students. First was my spouse Kathryn Bernhardt, who too was just turning from the study of rural history to legal history, with special attention to what law meant to the common people. We in fact shared a remarkable amount in common. Then, the new Center for Chinese Studies which was founded in 1986 (in response to my offer from Princeton University), and of which I became founding director, soon attracted a critical mass of exceptional students who were also interested in this area of inquiry: Bradly Reed, Matthew Sommer, Christopher Isett, and Yasuhiko Karasawa,[1] and together we quickly formed a vibrant research community. Then, from 1991 on, Kathryn Bernhardt and I succeeded in obtaining a large Luce Foundation grant, which the Foundation was kind enough to allow us to spread over the course of ten years, lending us important support for the acquisition of research materials, conferences and student support over and above the institutional commitments from UCLA.

After the four students listed above, a "second generation" of outstanding students came, quite a number of whom were interested in legal history, including Jennifer Neighbors (who had taken an MA under Bradly Reed at the University of Virginia and was thus both in name and fact a second generation student), Elizabeth VanderVen, Lisa Tran, Margaret Kuo (who came with a JD degree and experience as an attorney), and Huey Bin Teng. In addition, between the two generations came Huaiyin Li (from China) and Danny Hsu. The seven of them formed a second critical mass after the first.

This volume contains selected representative works from the eleven former students mentioned above, along with Kathryn Bernhardt and myself. Every article is based on archival case records, gathered from months to years of research at Chinese local government archives, each amounting to no less than several hundred legal cases, and each with conclusions based on such evidence. To use Kathryn Bernhardt and myself as an example, we together collected the archival records of a total of 2200 cases. In 2005, after completing our own research and writing, we donated-sold the materials to the East Asian Library of Stanford University (where Matthew Sommer teaches), totaling 180 volumes of bound xerox copies (a total of 36,500 sheets) and 135 reels of microfilm (see the inventory list appended to this Introduction). We and James Cheng, at that time Curator of UCLA's East Asian Library, had ambitious plans to build on the basis of the research materials used by our students and us the largest collection of case records and local government archives outside

1 In addition to others in social and economic history.

of China, but unfortunately the plan had to be abandoned when James was subsequently hired away by the Harvard-Yenching Library. Interested scholars-students can, however, use the "Huang-Bernhardt Collection" at Stanford as a resource, the inventory list of which is appended to this introduction.

The Articles

Part One. Analytical Approaches: History of Practice, Women's History, Local Administration, Discourse Analysis, and Case Records as Ethnographic Evidence

Archival materials, of course, cannot be separated from the researcher's approach and sense of problem. This volume begins with five pieces that each contains broad discussions and illustrations of distinct approaches.

The first summarizes my own major research findings and understandings acquired from more than two decades of research into these archival records. Legal studies in general tend to emphasize codified texts more than actual legal practice. Ever since I found in the archival records a striking difference between how the legal system was represented in the code (and in official pronouncements) and how it actually operated, I have placed that disjunction at the center of my inquiry. I have sought to understand the implicit logics of each of the two dimensions, as well as how they interacted over time. What is included here had begun as a lecture to explain my "history of practice" approach, later revised and expanded into an article, and subsequently further revised to become the introductory chapter of the third volume of my trilogy on Chinese civil justice from the Qing to the present. I emphasize in particular how representation and practice are different or even contradictory, and yet together form a paradoxical and yet mutually defining whole to make up the legal system. One theme revealed by that combination is an abiding "practical moralism"—of high moral values along with practical considerations of what works and does not work—in Chinese legal thinking from the Qing down to the present. The article illustrates these larger points with concrete illustrations drawn from cases in several different spheres of civil justice.

Kathryn Bernhardt's work focuses on women's property rights from the Song through the Republic. On the basis of a large body (some 438) of Qing and Republican-period inheritance cases, plus relevant legal codes and court verdicts, and a collection of Song dynasty cases, she demonstrates a surprising finding. Most people have equated imperial China's property inheritance system with equal division among sons (household division 分家), and have viewed the patrilineal succession 承祧 system as but another manifestation of

the same principles and system, with little or no change over time. Bernhardt demonstrates, however, that when viewed from the standpoint of women, we find that inheritance and succession were in fact two very different systems. As many as one-third of all women either had no brothers (as a daughter) or no sons (as a mother). For those women, the household-division system (which involved only sons) mattered little, but the succession system was crucial. And that system went through hitherto un-recognized changes between the Song and the Republic. In the Song, women without brothers and women without sons could inherit the father's or husband's property. In the Ming, however, the law required that widows without sons must establish a nephew as the patrilineal successor/heir 过继, such that widows and daughters themselves no longer had the right to inherit the husband's/father's property. Widows now could only wield custodial rights on behalf of the adopted nephew heir. In the Qing, however, widows, especially "chaste widows" 守节孀妇, were allowed first in legal practice to reject her deceased husband's closest nephew as heir (termed 应继, or the "ought-to-be heir"), and could choose from among all the patrilineal nephews the one she most preferred (termed 爱继, or the "affectionate heir"). This expanded legal right of widows was written into law in the mid-Qing. Under the early Republican Supreme Court 大理院, the scope of choice for widows was further expanded, giving them broader discretion still in the choice of an heir. But then, with the coming of the Guomindang government's new Civil Code of 1929–1930, the patrilineal succession system was completely set aside, replaced by a new imported legal regime of equal inheritance rights for sons and daughters. But those new provisions of the law mattered little in actual practice in the countryside, where the old system of partible inheritance among sons continued to operate unchanged. Such changes, of course, have profound implications not only for the history of women in China, but also for the history of property rights in general. What is included in this volume is the introduction and conclusion of Bernhardt's monograph, which summarizes the analytical framework and themes of the entire monograph, as well as her views on women's history.

Bradly Reed's contribution examines the actual operations of local-level administration on the basis of the Baxian (Ba county) archives (on "internal administration" 内政). Past scholarship had been deeply influenced by official constructions, characterizing local government clerks and runners as "yamen vermin" 衙蠹. Reed demonstrates that in actual operation, these local government personnel were actually a paradoxical mix—though (the majority were) not formally recognized by the state and therefore "illicit," they were nevertheless indispensable functionaries of a bureaucratic apparatus almost in the Weberian sense of bureaucracy (hence "illicit bureaucrats"). In their

handling of official affairs like judicial administration and tax collection, they exhibited both the Weberian (modern rational) bureaucratic characteristics of division of labor, professionalization, institutionalization, and formalization, as well as the non-bureaucratic characteristics of "prebendal" offices (that come with property and income) and personalistic relations. These together made up a system that was neither completely formal nor completely informal, but somewhere in between. Our understanding of "corruption" in the Chinese administrative system had been limited to the binary of the statutory and the corrupt, to the neglect of what occurs outside the bounds of formal rules and regulations but were still widely accepted as customary administrative practices, to be distinguished from truly abusive corruption. The selection here comes from the preface and introduction of Reed's monograph.

The fourth article is by Yasuhiko Karasawa who, from the time he first entered our graduate program, was very much concerned with discourse analysis. What is included here is his work based on a study of cases from the local Beijing area that were under the jurisdiction of the Board of Punishment and "directly examined" 现审 by it. Those materials contain large numbers of transcripts of the initial oral testimonies of suspects along with the paraphrasing or recounting of those (especially in the final "confession" 招供) in the final written report on the case. They therefore permit a detailed analysis of the changes introduced in the transition from oral testimony to written record. Karasawa shows first how local dialects and colloquialisms, and coarse or crude language, are changed into concise official mandarin in the process of transcription. More important, for the final written report, contradictory testimonies are eliminated or altered to present a coherent narrative, even subjected to literary manipulations to form a consistent whole. As Wang Youhuai 王又槐, a well-known 18th-century private legal secretary advised in the chapter on "Narrating Testimonies" 叙供 of his *Important Points for Handling Cases* 办案要略, a magistrate must see to it that the information he sends upward supports the verdict he recommends, lest his handling of the case be questioned by upper levels of the judicial bureaucracy. In terms of analytical approach, Karasawa has long emphasized, in the manner of Kurosawa's film Rashomon, how "truth" may be highly elusive and represented differently in different versions.

This section concludes with the article from Matthew Sommer on abortion as practiced in the Qing, perhaps the best example to date of the use of legal case records as ethnographic evidence on the social lives of common people. Abortion has been quite widely studied in recent years in two distinct groups of scholarly literature (demographic studies and women's studies), each arguing that it was quite readily available and quite commonly used in the Qing.

But both bodies of literature have been based mainly on inferences from notations in medical treatises about abortion methods and drugs; neither contains any concrete case examples of actual abortions, not even one. What Sommer does, first of all, is to comb legal case records for contemporary evidence on how and why abortion was practiced. On the basis of 31 such cases from all over China, which record a total of 24 completed attempts at abortion, 3 interrupted attempts, and 4 situations in which the woman sought but failed to find a way to abort, Sommer shows that 17 of the 24 women who completed attempts died, and at least 2 others are recorded as having fallen seriously ill for months afterward (no details are available on the others). Almost all of the 27 women who attempted abortion did so for reasons of "social crises," 15 of them to maintain their "chaste widow" status (lest they be deprived of property claims, for example), and 11 to conceal forbidden incest. In addition, the costs recorded (in 8 of the cases) varied from 3 to 7 silver taels, this at a time when an agricultural laborer's annual wage ran 6 to 7 taels. In other words, abortion by pre-modern methods, most especially by the use of "abortifacients," was physically dangerous and monetarily expensive, and was usually a last-ditch resort in crisis situations. Evidence from the Republican period gathered in a 1928 study by J. Preston Maxwell, British medical missionary and Professor of Obstetrics and Gynecology at Peking Union Medical College confirms the above picture, as does anecdotal evidence on traditional abortion methods from post-1949 rural China. It is therefore not surprising that the Qing code contained a 1740 substatute that specifically punished those illicit sex offenders who caused the death of the woman involved by arranging for the use of abortifacients (substatute 299–11: 用药打胎以致堕胎身死): they would be punished by analogy to the statute on killing by administering poison 比照以毒药杀人. In Republican law, similarly, induced abortion was forbidden, leading Maxwell to title his study of abortion by traditional methods in general "On Criminal Abortion in China."

Overall, the evidence amassed by Sommer is so compelling that it can only leave us wondering how and why some scholars have managed to construct a picture so contrary to social realities. Putting matters positively, the article is a fine demonstration of how legal case records can serve as powerful material evidence for the social lives of common people in historical periods when such evidence is not otherwise available.

Part Two. Buying and Selling of Land, and Homicides

Christopher Isett employs the archival case records kept at the Liaoning Provincial Archives (of the joint court sessions of the Shengjing Board of Revenue 盛京戶部 and the Imperial Household Department in Shengjing

盛京内務府) and at the Jilin Municipal Archives (of the Bodune 伯都納 military yamen) to detail the practice of land buying and selling in northeast China (Fengtian Prefecture 奉天府 in the Qing), originally a protected preserve for the ruling Manchus prior to immigration by the majority Han people. By official court order, the land of Manchu bannermen could not be sold, only leased out (to local Han people). In actual practice, however, "conditional selling" 典卖 of land occurred very frequently, with the dian-maker (seller) and the dian-holder (buyer) representing the transaction as renting/leasing land, and the added payment(s) that came with market appreciation of land values 找价 as rent increases. The "legitimacy" (and enforceability) of the transactions relied not on the laws of the state but rather on the customary practices of society—community recognition, the use of middlemen, and kin or community mediation in the event of disputes. However, if disputes should go on to the official courts, the two parties would then be faced with possible suppression or punishment. From the point of view of the judicial officials on the scene, they were faced with two simultaneous concerns: one was to follow the letter of the law, and the other was to make allowances for people's livelihood and the maintenance of social stability. Under the unavoidable tensions between the two concerns, local officials followed different strategies of action depending on the circumstances: they may enforce the letter of the law strictly (confiscate the land and punish the offender), act flexibly (confiscate the land but not punish the offender), or allow appropriate compromises (allow the offender to continue to farm the land, or do so for a given period of transition). What we see, therefore, are not only the disjunctures between law and practice, but also the interactions and accommodations between the two.

Jennifer Neighbors' dissertation studies in detail homicide-related laws of the Qing and the Republic, focusing especially on the differences between the two systems in their conceptualizations of homicidal intent and the legal practices stemming therefrom. It proceeds along two axes of comparison: between the codified texts of Qing law and of Guomindang Republican law (practically the same as modern Western Continental law), and between codified text and legal practice. What is included in this volume is her analysis of "negligent killing." It demonstrates first how very different the two conceptualizations were: Qing law included under negligent killings 过失杀 completely accidental killings, or what "the ears and eyes could not reach, and what contemplation could not attain" 耳目所不及, 思虑所不到, while Republican law, under the influence of (Western) Continental Law's conception of negligence, included only acts with some degree of fault. What is demonstrated here is not only Qing law's broader conception of responsibility in such "killings," but more importantly Qing law's finer distinctions of intent, under

its "six killings" categorization: premeditated murder 谋杀 (as with poison), intentional killing 故杀 (as in the heat of the moment), killing in an affray 斗殴杀 (further differentiated by the nature of the weapon used), killing at play 戏杀 (further differentiated by whether dangerous games were involved, as in fencing or boxing), mistaken killing 误杀, including killing from negligence (as in playing with fire or bow and arrow), and, finally, accidental killing 过失杀 (as by a runaway horse or cart). It was precisely because Qing law drew finer and more concrete distinctions in degrees of intent than the newly imported concepts and their two simple categories of intentional and negligent killing that Republican judges tended in actual legal practice to continue to rely more on Qing categories than the new Republican ones. Such a finding about Qing legal thinking, of course, runs directly counter to the conventional (and Weberian) notion that traditional Chinese law tended to be limited to concrete descriptions of fact situations and was unable to engage in abstract conceptualization.

Part Three. Tax, Education, and Local Governance

Parts three and four of this volume are studies of the late Qing and the Republic, mainly in the first four decades of the 20th century. The three articles in Part Three are concerned mainly with issues of local governance, raising questions and criticisms of the conventionally employed binary between state and (rural) society to demonstrate a very different historical reality.

Huaiyin Li has engaged in a book-length study of Huailu 获鹿 county of Hebei province, using its rich late-Qing and Republican archival materials, especially those pertaining to tax collection, to explore in detail rural governance in that critical transition period between the old and the new. What is included here is a revised version of Chapter 5 of his monograph, focusing on three different methods of tax collection used in the county: in one, the local *xiangdi* 乡地 (comparable in functions to the *xiangbao* 乡保 elsewhere, but here staffed by villagers in rotation) first advances the tax payments due (using village public funds or loans) 乡地垫款 and then collects monies from the local tax-paying households. In the second, taxed households pay directly to the county government (at its collection station 自封投柜), and the xiangdi's role is limited to that of collecting delinquent payments 催粮乡地. In the third, used for village land owned by people outside the county (called 寄庄地, or non-resident land / enclaves), taxes are collected by the supra-village *sheshu* 社书 (responsible for maintaining tax registers) in a tax farming 包买 arrangement with the government. Of the three, Li demonstrates that the first was the most effective and engendered the fewest disputes, mainly because it was based on "village regulations" 村规 and the voluntary

participation of the villagers. For Li, this model tells about "substantive governance" (in contrast to formalistic governance by bureaucratized state organs and officials) and demonstrates the inadequacies of the conventional binary of state vs. society.

Elizabeth VanderVen similarly uses a late-Qing and Republican-period county archive (Haicheng 海城 county in Liaoning province of the northeast), but her focus is on village education. The article here comes from her monograph's chapter on the financing of village education. On the basis of surprisingly rich source materials, she demonstrates that in this sphere, at least, the relationship between state and village at this time was not a simple one of resource extraction or state control, but two-way cooperation, in which the villages demonstrated active agency propelled by their own community interests. Haicheng county established village-level "public (community) primary schools" at the beginning of the 20th century in response to calls for such from the government (already by 1908, there were 333 such schools in the county), but those village schools received no government funding and relied on their own community resources, including land, public fund raising, private donations, and student tuition. (The taxes paid by the village to the government, including the extra-statutory special levies 摊款, all went into the county government coffers, of which only small amounts were spent for higher-level public schools, all well above the level of the village). VanderVen provides rich information about both funding and expenditures of the village schools, culled mainly from the dispute "cases" involving education handled by the county government, and also from the reports submitted by the county government's Education Promotion Bureau 劝学所 that drew on the participation of local elites. On the basis of such evidence, VanderVen demonstrates the cooperation between state and society and the active agency of village communities, so very different from what a state vs. society dichotomy might lead us to expect.

Danny Hsu's article draws on county archives to study administrative litigation in the Republican period. Unlike most other research on administrative litigation, Hsu's focuses on the sub-county level. It is based on the archives (a total of 11,000 *juan* [bundles] of materials) of Xinmin 新民 county, kept at the Liaoning Provincial Archives in Shenyang, and 200 corruption cases of the early Republican period contained therein, and another 50 cases of the later Republican period from the provincial Civil Administration Department 民政厅 of Sichuan, kept at the Sichuan Provincial Archives. Xinmin county established the sub-county qu 区 or "ward"-level administration in 1908, whereas Sichuan did not do so until 1935. As Hsu demonstrates, what is shown by these archival records of administrative litigation involving official corruption is not a simple matter of tensions stemming from the penetration of gov-

ernmental authority into society with "modern state-making" (as is assumed by many), but rather the more complex interplay between governmental authority and different village-level interest networks, some of which were opposed to the new ward heads (and township heads) while others supported them. What the records show are crisscrossing tensions and conflicts among multiple power groupings and interests that go beyond any simple opposition between state and society. For this reason, Hsu advocates using a power network analysis rather than a state vs. society frame to analyze the process of modern state-making.

Part Four. Concubinage, Spousal Abuse, and Transnational Families

Lisa Tran studies concubinage under Guomindang law, in comparison with Qing and early Republican law. In the Qing, in both law and in social practice, concubines 妾 were "minor wives," though lesser in status than the main wife, but still recognized by law and given certain rights—for example, when the main wife died, if there were no son, the concubine who remained "chaste" could enjoy the powers of choosing an heir and wielding custodial power over the husband's property. Guomindang law, by contrast, adopted the legal principle of monogamy, this despite the widespread social practice of concubinage, especially among the upper classes. By the letter of the new law, concubines had no status, becoming almost non-persons; they were legally not a wife, not even a minor wife such as under the Qing. Yet, at the same time, the law must somehow deal also with the social realities of large numbers of mistresses and de facto concubines in addition to wives. Law-makers (a number of whom had concubines themselves) attempted to erect a workable principle for differentiating between legal and not legal marriages by focusing on the wedding ceremony: if a public ceremony were held with at least two witnesses, then the ceremony was legal and the woman was a wife; if not, then not. This standard helped to distinguish between those ceremonially married and those not, but it also had multiple consequences that were not intended: since, in social practice, some kind of ceremony usually accompanied the taking of a concubine by a man, the concubine could use the fact of a ceremony to claim legal status as a wife; at the same time, however, she faced the prospect of conviction for bigamy for that very same reason. Thus, codified law and unintended legal practice both serve to illustrate the confusing and contradictory realities of a transitional period between the old and the new.

Margaret Kuo's evidence, mainly from cases of the Hebei Superior Court, tells first of all about how very difficult it was for a woman to obtain divorce under Republican law, despite its allowance for "intolerable cruelty" as legally acceptable grounds for divorce. Of the five divorce lawsuits she narrates in

detail, three were denied, despite clear evidence of physical abuse (in two of the three; the other involved a husband who gambled and was an opium addict while the wife had to work in a factory to support the family), and also despite the persistence of the wives in appealing to the Superior Court. Of the two cases in which the plaintiff wives obtained court approval for divorce, one involved a woman who was nearly killed by her husband and had wounds to prove the abuse. In the other, the husband was a repeat offender, having previously agreed to a court-mediated settlement (after severely injuring his wife) to refrain from any further abuse. Republican judges, as Kuo observes, tended to sympathize with the husbands' arguments that they had paid a heavy bride-price and should not be left without a wife for just "minor or occasional injuries." And judges, as Kuo further notes, imposed strict standards of proof and a very narrow definition of what constituted sufficient cruelty, accepting only abuse "of the direst conditions" as grounds acceptable for divorce. Therefore, only a small minority of women seeking divorce on grounds of abuse succeeded in gaining court approval. Nevertheless, it does seem clear that these women could not have made similar claims in the Qing, much less persist with appeals to upper-level courts. To that extent, Kuo is justified in her argument that the coming of the new Republican law shows new rights consciousness on the part of women, rights that accompanied the arrival of the "modern, liberal form of conjugal patriarchy."

Huey Bin Teng's article is about "two-headed families" (*liangtoujia* 两头家) formed by married men from Fujian who migrated to Malaya to work and then married a local wife there. Those two-headed families were subject to two legal systems: at one end in Fujian, they were governed first by the Qing code and then by the Guomindang code. By the Qing code, the original wife was the main wife, and the second wife, a concubine or minor wife, each with different legal rights (for example, if the husband died and there were no son or only a minor son, the main wife enjoyed custodial rights, even if the son were the issue of the concubine and not herself. If the main wife died, then the minor wife enjoyed those rights.) As for the Guomindang law that followed, the second wife had no legal status or claims at all. At the other end of these two-headed families in British-ruled Malaya, on the other hand, the operative British colonial law was based partly on British common law, but also deferred in principle to pre-existing local custom. The pertinent result here under those twin principles was that both wives were treated as legal wives, giving them equal rights, without distinction between main and minor wife. Under those conflicting laws, once the husband died, conflicting claims between the two ends of the family were inevitable. There arose as a consequence the institution of the (clan or community) mediator (*gongqin*, 公亲) who tried to work between the two sides and

the two conflicting legal systems to arrive at compromises acceptable to both. Teng's sources include lawsuit records, mediation records, and private documents and letters. Her materials show graphically the complex differences and points of conflict between the two legal systems, thereby illuminating both. They also provide rich ethnographic information on the social lives of these distinctive "transnational" families. It gives us the most finely textured look to date at the distinctive social-legal phenomenon of the liangtoujia.

Part Five. Past and Present: Local Administration and Court Mediation

The fifth part contains research that is concerned with both the past and the present. American historians studying Chinese history rarely engage with major contemporary issues the way many American U.S. historians do—perhaps in part because of a sense of marginality (of "foreign area studies"), the more so among Chinese-Americans, and also perhaps in part because of "ivory tower" values of pure scholarship. In the China field, moreover, post-1949 China is generally considered the exclusive domain of social scientists, most especially political scientists, and historians who stray across that divide face the problem of being seen as "interlopers." Perhaps for those reasons, very few of our students in the UCLA program have ventured to study contemporary China. Even I myself, despite a strong emotional attachment to China, generally only thought about but did not write about contemporary China. However, in this past decade of teaching in China after retirement from UCLA in 2004, I have turned to writing mainly in Chinese and for a Chinese audience, and have found myself drawn irresistibly into contemporary issues, in part because of the sense that the research in which I am engaged is of central concern and importance to China and in part because of my own conviction that a historical perspective is the best one from which to think about the present. This does not mean that I have come to write public commentaries, but that my scholarly concerns have now taken on a deeper engagement with questions of immediate contemporary relevance. The two articles included here are among my early efforts to join history to the present.

The first article begins by summarizing the evidence that my students and I have accumulated about basic-level Chinese governance in the past to demonstrate that "centralized minimalism" 集权的简约治理 has been a major and abiding method of Chinese rule, with highly centralized administrative power at the top but minimalist approaches at the bottom. The latter tendency is shown by the broad reliance on semi-official personnel who were nominated by the localities (and confirmed by the county government) and who operated without salary or bureaucratic paperwork. Those quasi-officials, at the critical

juncture of the state and the village, were in fact identified with the interests both of the government and of their communities. The county government as a rule left them to function on their own, intervening only in the event of complaints or disputes (or change of personnel). It was an approach to administration that was very judicial—with the government intervening only in the event of disputes—something evident in the spheres of taxation, public security, and judicial administration. It is evident even in the way the Qing county magistrate related to the different offices of his yamen (intervening only to resolve disputes). It is also evident in the "village heads" 村长 system introduced at the beginning of the 20th century and in the establishment of new public village schools at that time. In (what Chinese historians term) the "modern" 现代 (i.e., 1912–1949) and the contemporary 当代 periods (i.e., since 1949), the apparatus of the state did undergo a considerable degree of elaboration and "bureaucratization" (in the Weberian sense). But, at the same time, much has remained of the old approach, even in the contemporary period, as can be seen in village governance during the collective era (with village heads and party-branch secretaries coming generally from the village community itself and funded by the community). In the Reform era, the same basic method remains all the more evident with the withdrawal upward of party-state control and the increasingly widespread resort to the "letters or visitations / appeals upward (to higher levels of the administrative apparatus)" 信访、上访 system for handling tensions between local society and the government. This "centralized minimalism" method of local administration cannot be understood in terms of mainstream Western theories that do not as a rule consider the overlapping intermediate realm between state and society. This method of minimalist governance, most especially the use of state-initiatives with community participation for public services, is something that may yet find much contemporary relevance—a useful resource in the search for a distinctive path toward Chinese "modernity."

The second article is an overview synthesis of Chinese use of court mediation, past and present. The article first distinguishes between genuine mediation that is voluntarily accepted by the disputants and ostensible mediation that is imposed against their will. This distinction places into perspective the much exaggerated propagandistic claims made for court mediation in the Maoist period. By examining genuinely mediated cases, we can discern how very different the operative judicial principles and legal reasoning for mediation are from formalist law. The latter proceeds from certain given premises (e.g., individual rights), employs deductive reasoning to make them applicable to all fact situations, and sets up an unavoidably adversarial system of right vs. wrong, winner vs. loser. The former, by contrast, emphasizes the mediatory

ideal of peace-making compromise, insists on illustrating abstract principles with concrete fact situations, and is always concerned with practical, workable solutions. This kind of approach can avoid the absolutizing tendencies exhibited by legal formalism and also the simply retrospective tendencies of some strains of legal pragmatism or empiricism. Such Chinese mediation has in fact been a source of inspiration for the pursuit in recent years in the West for modes of "alternative dispute resolution" (ADR). It has shown the strength of avoiding the polarizing tendencies of the Western adversarial legal system, but also the weakness of fuzzying up clear-cut cases of right and wrong (dubbed in Chinese "mixing up wet mud" 和稀泥). The modern court mediation system—a legacy of the Maoist period—has proven to be of much broader use than Western ADR, but it has also exhibited a tendency toward excessive resort to high-handed methods, such as the coercive "mediated reconciliations" in divorce cases of the Maoist period, which since the turn of the century have largely fallen into disuse. Nevertheless, the Chinese court mediation system (as well as extrajudicial mediation) still demonstrates much vitality, and might yet be able to combine well with newly imported formalist law. One useful approach, I suggest, might be to employ the following principle: in disputes that do not involve fault, use mediation; in those that do involve clear-cut right and wrong, use the Western mode of legal thinking to adjudicate and protect individual rights. Such an approach, of course, would be consistent with the practical-moralism mode of thinking in that it begins with the concrete fact-situation.

The inclusion in this final section of only my own contributions is something forced by circumstances and not selected by choice. I hope that in the years to come, more and more Chinese as well as Western students will take on such historically based contemporary research. The volume to follow this one, based on students and younger scholars I have taught in China this past decade, will include more examples of such work than does this volume.

The last article, by Chenjun You, a leader of the younger generation of Chinese scholars, provides a Chinese perspective on the work of our UCLA group. YOU is sophisticated beyond his years, is well acquainted with research outside the mainland, most especially in the U.S. and in Taiwan, and reflects that new tendency among the younger generation of Chinese scholars. He places our group's work into the larger context of globalized studies of Chinese legal history and exhorts his Chinese colleagues to develop new materials and methods to advance mainland Chinese research. I would echo his exhortation here with an observation I made elsewhere earlier: the future vitality of Chinese legal history research depends very much on what happens with such research inside China: just imagine a situation in which American scholars

no longer pay attention to American legal history, leaving its study to just a (relatively small) group of Chinese specialists who write only for one another! The vibrancy of the field of Chinese legal history, in other words, depends very much on the engagement and quality of Chinese research.

Some Common Threads

In the context of the 1980s, there seemed little need to articulate just what it was that we were doing; it seemed enough to just do it. What we dug out from archival materials went counter to much that had been assumed about Chinese legal history. Most of us simply assumed that the evidence we gathered would speak for itself and that other scholars, like us, would form empirical judgments on the basis of the evidence.

We were aware, of course, of the new theoretical fad of postmodernism, a central tenet of which is the denial of the possibility of proof for being a positivist claim predicated on faulty modernist assumptions about the truth-seeking capacities of scientific research. Such postmodernist sensibilities, without doubt, have contributed much that is positive, and we ourselves have been deeply influenced by its insights about the neglect of subjectivity and its influence on one's perception of evidence, the faulty belief in supposedly "scientific" quantitative data, the denigration of tradition and its continued relevance, and the implicit Western-centrism of modernism. But we never thought that those very sound critiques would be carried to an extreme—to the denial of the relevance of evidence and the reduction of all "facts" to subjective constructions. Clifford Geertz in fact likens the American court process to just contestations between two opposed sides and their hired guns, without consideration of the presence of a judge and a jury who more often than not act in good faith to arrive at conclusions about what is true on the basis of the evidence (Geertz 1983). And Edward Said, likewise, went to the extent of reducing all Western research on the non-Western world as just exercises in self-validation of the West and the modern, arguing that all assertions of "fact" are finally but representations of different varieties and degrees of subjectivity (Said 1978, especially pp. 272–273). Those extremes, we thought, were passing fads that would soon give way when good common sense returns. Little did we know that they would be powerfully reinforced by other major tides: the explosion of available information to an extent that cheapens all information as little more than what can be accessed by a click of the computer; the powerful alliance with neo-conservative orientations that share with postmodernism a similar disregard for evidence, even if for different reasons (once God's

revealed fundamental truths or other kinds of faith-based truths have been grasped, there need be no attention to mere worldly evidence—such as on the supposed presence of weapons of mass destruction in Iraq).

Even then, I personally was to be surprised even more by how those powerful tendencies in the U.S. would come to be magnified many-fold in China. First because of the political system's continued insistence on ideological control, resulting ironically in a strong tendency to either ideologize all academic theories or else to reject them in toto for being ideological. Then also because of the novelty of many Western theoretical ideas and methods such that many who are influenced by them exhibit the kind of absolutist belief only the newly converted cling to. Indeed, many neo-liberals in China today make their neo-conservative brethren in the U.S. look sophisticated and open-minded. And postmodernism would be propelled in China not so much by a genuine epistemological questioning of modernist assumptions, but rather by the deeply felt nationalistic impulse to "de-center the West." The combination of those powerful currents have made for an academic environment in China even less inclined to careful examination of evidence than in the U.S.

Add to that the material conditions of Chinese academic life: so underpaid as to require dependence on royalty payments by the thousand words (*gaofei* 稿费) to supplement one's income, over-controlled by an education bureaucracy that understands only countable quantity and not genuine quality, imposed not just on professors but even on graduate students (in quotas for publication in bureaucratically graded journals), and the bureaucratic organization of learning into compartmentalized spheres that separate, for example, "legal theory" 法理 and "legal history" 法史 into segmented, mutually exclusive pursuits. Together these and other factors have made for an academic environment in which American fads turn into ideologies, American weaknesses into institutionalized bureaucratic practice, and American epistemological excesses into nationalistic commitments. The result is an even more pervasive neglect of careful attention to evidence.

Even so, many good Chinese (as well as American) scholars continue to abide by their sense of truth and reality, and much good work is produced, despite an incredibly adverse environment. Such scholars, however, rarely engage in explaining just what it is that they do, and most steer clear of theory-ideology. The result is the tendency for the unscholarly and the bureaucratic to dominate theoretical and methodological discussions.

Given the current academic climate in China, and also in the U.S. if to a lesser degree, I have felt keenly that we need very much to sort out and articulate just what is it that we do and why. As part of that endeavor, I have paid even more attention to the available theoretical literature than I had in the

past (even though some empiricist historians, I know, had already found my work overly engaged with theory). I attempted at first to identify an established school of legal theory that would be consistent with our own tendencies, but my review of the existing literature past and present has not turned up any school that spells out what our own group have come to take for granted through our scholarly practice: a basic commitment to the ideals of scholarship and of truth-seeking, an emphasis on legal practice even more than theory, a basic sense of the importance of both historical background and social context for understanding law, as well as an engagement with theory and with contemporary relevance. The publication of this volume, the first in a series of such, is intended to illustrate what we do and what implications it might carry for legal theory and for present-day law-making.

Let me just summarize briefly some of the basic commonalities in the work included in this volume. First and most obviously, the researches begin with archival case records. That tells about a basic outlook that the study of legal texts alone is not enough; law must be seen in conjunction with what is actually done. Only thus can we grasp what law really means for people's lives. The latter concern, in turn, requires that we examine the social context and social bases of what we study, to grasp how law could have different meanings for peasants as opposed to the urban elite, for women as opposed to men, for the underclasses as opposed to the privileged.

From that approach and perspective comes our view of legal change, historically and in the present. Abstract texts can disregard social realities, but legal practice cannot. No law can function well if it runs counter to social practices or is far removed from social reality. In those situations, there is either simply disuse or a process of accommodation of one to the other. Equal inheritance rights for male and female, for example, could not operate in a social-economic context of a peasant economy in which most women married out of the village and the parents in their old age could only depend on their sons for support. Yet it is also the disjunction between legal ideal and legal practice that can propel both social and legal change in a two-way interaction between law and society.

For these same reasons, legal case records are major sources for ethnographic evidence about the daily lives of common people, evidence that would not otherwise be available for historical periods when the common people themselves, in contrast to the literate elites, left little record of what they thought and did. Thus, Kathryn Bernhardt is able to prove conclusively how women's property rights changed greatly during the imperial era, when most past literature assumed no change. And Matthew Sommer is able to prove conclusively that abortion could only have been a dangerous and expensive option chosen

only in crisis situations, this despite the two bodies of influential literature that have insisted otherwise.

Case records, we have seen, have also provided new insights into the operations of local government, land transactions, village taxation, and education reform. Thus Bradly Reed provides conclusive evidence that yamen functionaries, long denigrated as corrupt and abusive by official representations, in fact provided regular and necessary services under customary standards that fell somewhere between the statutory and the unacceptable. And Christopher Isett is able to demonstrate how bannerland was regularly bought and sold conditionally in northeast China, this despite their false representations as rental transactions. As for villages, Huaiyin Li, Elizabeth VanderVen, and Danny Hsu have together demonstrated the inadequacies of a binary construction of state vs. society when it comes to Chinese village taxation, education reform, and power relations. The evidence points to a large intermediate sphere where communities and the state could cooperate and to power networks that criss-cross both.

Tran and Kuo, again on the basis of case records, demonstrate how very differently the law operated vis-à-vis women seeking divorce and concubines pursuing their interests, despite the formal provisions of the law. And Huey Bin Teng, finally, shows the true social and legal implications of two different legal systems operating in conflict upon the transnational families of Fujian and Malaya.

Finally, the first of my own two articles demonstrates a basic operative principle of Chinese administrative practice, that of using judicial methods in minimalist administration—one manifestation of the continued inseparability of law and administration 政法 in Chinese history, past and present. The second shows how Chinese community and court mediation operate by judicial principles very different from modern Western law, how that system changed over time, and how it has continued to remain vital down to the present.

The heart of our method, and what we share in common, is perhaps the very simple point that these research findings should be judged by their evidence, regardless of what one's theoretical and ideological persuasions might be. Unspoken here is also the conviction that arguments and concepts need to be built from evidence, rather than driven by theoretical "hypotheses" that then seek out evidence in support. Our method is to go from evidence to theory and back to evidence, not the reverse. As for fuller articulation and illustration of (what I would term) the "historical-social study of legal history" and of "historical-social jurisprudence" (i.e., the theoretical implications of such historical-social study of law) than what has been roughly outlined above, we leave to the volumes to follow this one.

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Appendix

"Philip Huang-Kathryn Bernhardt Collection Checklist,"
Stanford University East Asia Library
(斯坦福大学东亚图书馆藏黄宗智-白凯档案库清单)

县级档案

巴县档案。土地、债务、婚姻（奸情）、继承类，1760–1859年，共300 起案件。复印件，20卷，共3,996 页。

顺天府宝坻县档案, 1810年代到1900年代。缩微胶卷。 共135 盘, 333卷 。

顺天府宝坻县档案。土地、债务、婚姻（奸情）、继承类。118起案件。1810年代到1910年代。复印件，8卷，共1621页。

淡水－新竹档案。"民事"档案（据戴炎辉分类编目）。1830年代到1890年代。复印件，30卷，共6915页。

民国时期（四川）宜宾县、（浙江）乐清县、（江苏）吴江县民事案件。120起案件。复印件，2132张。

顺义县档案，1910年代到1930年代。67卷，9305页。包含128起民事案件、刑事案件、有关区-村政府档案、司法统计材料、区政府按户登记材料以及各种社会经济调查报告。多年来用作研究生档案使用锻炼材料。

双城县档案目录, 1912–1937年。2万卷档案的案件目录。4卷，909页。

小计：120 卷, 24878页, 135盘缩微胶卷

北京市档案馆:

北京市地方法院， 1920年代到1940年代。告状与判决书。

离婚案件，225起，11卷，2025页。
婚姻案件，96起，4卷，490页
继承案件，156起，19卷，3300页
赡养案件，55起，3卷，300页

小计：532起，37卷，6415页。

第二历史档案馆：

大理院案件（判决书）

离婚与婚姻案件，1914–1918， 83起，3卷，515页。
继承与赡养案件，58起，3卷，525页。

京师高等审判厅案件（判决书）

离婚与婚姻案件， 1913–1925年，233起，8卷，1660页

大理院与京师高等审判厅

有关物权案件（多是继承案件，也有债务和典权案件），1912–1924年，246起（大理院107起，京师高等审判厅139起），13卷，2540页。

小计：620起，27卷，5240页。

总计：共180卷，36533页，135盘缩微胶卷。