
A Review of Geoffrey MacCormack, The Spirit of Traditional Chinese Law

Geoffrey MacCormack, *The Spirit of Traditional Chinese Law*. Athens, Georgia: University of Georgia Press, 1996.
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Reviewed by Jonathan Ocko

Struck by the hold of patriarchy on Chinese society, historian Patricia Ebrey recently observed that “[a]lthough all historians today reject the old view of a ‘changeless’ China, we should not overcompensate for past failings and deny that, in comparison to other major civilizations, Chinese history is marked by some rather remarkable continuities”¹ Geoffrey MacCormack identifies one of these continuities as the conservative, hierarchical and patriarchal spirit of traditional Chinese law. Indeed, with a Confucian morality unchanged in its fundamentals for over two millennia as its matrix, this law maintained a stunning consistency in substance as well as in procedure. It was a law with written codes that, while not coextensive with morality, nonetheless prescribed punishment for violating the standards of behavior articulated in the Confucian classical texts.²

As MacCormack explains at the outset of *The Spirit of Traditional Chinese Law*,³ he purposefully chose to draw on the most accessible and best-known segment of Chinese law: the penal codes from the T’ang (617-926), Ming (1369-1644) and Ch’ing (1644-1911) dynasties and the published appellate cases of the Ch’ing.⁴ Inevitably, then, the spirit that he depicts is the relatively narrow one of the spirit of tradi-

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² P. Ebrey, *The Inner Quarters: Marriage and the Lives of Chinese Women in the Sung Period* (Berkeley: University of California Press, 1993) at 271.

³ Compare Jack Langlois, “‘Living Law’ in Sung and Yuán Jurisprudence,” (1981) 41 Harv. J. Asiatic Stud. 165 at 180 (“Chinese codes do not set forth the definition of the criminality that they enforced. This is found instead in the classics and in the norms of the society as set and interpreted by the elite”).

⁴ (Athens, Georgia: University of Georgia Press, 1996) [hereinafter MacCormack].

⁵ Since MacCormack uses Wade-Giles romanization throughout his book, I have followed suit in the above-line text except for the names of current P.R.C. leaders, for which I use pinyin romanization.

tional Chinese law as embodied in its codes. MacCormack's characterization of this spirit as profoundly hierarchical is generally accurate. Readers should understand, however, that they will be missing out on the more lively, more complex (even contradictory), and less constant spirit (or spirits) of "living law", of "law in action". MacCormack does an admirable job of relating vigorous debates which took place among officials and between officials and emperors about the law — indeed, the best parts of this book are his lucid presentations of complicated debates about "hard cases". What the reader will not find in this study, however, is any reference to the mutually interactive process described by Clifford Geertz by which conversations among ordinary people and between ordinary people and the law (as well as the "official" conversation) construct a society's legal sensibilities.⁵ This review will therefore set out the principal elements of MacCormack's work, while offering in addition a critical commentary designed to alert readers to alternative perspectives on traditional Chinese law and legal scholarship. In addition, this review will highlight, on occasion, the relevancy of the "spirit of traditional Chinese law" to China and Hong Kong today.

In chapter 1, "An Historical Overview of the Traditional Chinese Legal System", MacCormack examines the way in which Confucian and Legalist perspectives shaped the spirit of the law. The author tries to tease out those influences that, while not specifically Confucian or Legalist, were distinctively Chinese. He locates the essence of the Legalist spirit in the figure of the ruler, who, while delegating his authority, nevertheless retained final control over rewards and punishment and who relied on penal law and the "imposition of heavy punishment" as his chief instruments of governance.⁶ This law was to be applied with certainty, consistency and uniformity, without attention to the hierarchies of age, gender, social status or family relationship. By contrast, Confucianism, as articulated between the fifth and third centuries B.C. by Confucius, Mencius and Hsun-tzu, emphasized "teaching and moral guidance" as the key instruments of governance.⁷ When teaching failed and law had to be applied, it was to be invoked in a manner that upheld the fundamental human relationships that shaped society: ruler and minister/subject; husband and wife; older and younger brother. Moreover, the law was to encompass the ruler's concern for the moral and physical welfare of his people by allowing mitigation of punishment for the aged, young, infirm, impoverished and repentant.⁸

⁵ See C. Geertz, *Local Knowledge* (New York: Basic Books, 1983) at 167-234. As Zheng Qin, a leading P.R.C. scholar of the Ch'ing judicial system, observes, "[...] even under a unified legal system, in different regions, and under a variety of circumstances, there may appear many 'systems' that are not provided for by the texts of the legally established system." He further notes that the variety of actors, the appearance of extra-legal measures to deal with social disorder, and the persistence of uncoded but long established practices, meant that the judicial system was in fact always more complicated in reality than it was on the books (*Qingdai sifa shenpan zhidu yanjiu* [An investigation of the system of adjudication in the Ch'ing] (Changsha: Hunan jiaoyu chubanshe, 1988) at 5-6).

⁶ MacCormack, *supra* note 3 at 4.

⁷ *Ibid.* at 6.

⁸ *Ibid.* at 7-9.

MacCormack's summary for the most part is concise, lucid and accurate. However, I am less certain than he that Legalism in practice actually managed to insulate itself from concern with familial relationships.⁹ I also remain sceptical toward his effort to discern distinctive ("non-Western") attributes of spirit that are neither Legalist nor Confucian,¹⁰ such as non-Confucian conservatism and the inclusion in codes of rules that were not expected to be enforced. MacCormack's first distinction strikes me as particularly problematic. He argues that "[t]he respect for the past and the decisions of the ancestors, deeply ingrained in traditional thought, in itself entailed a reluctance to change" and thus should not be treated specifically as Confucian.¹¹ Granted, this notion can be found in varying degrees prior to Confucius, but Confucius's writing so firmly establishes it in Chinese thinking, that MacCormack's very phrasing strikes one as quintessentially Confucian. Indeed, MacCormack subsequently says that the "generally conservative inclination" of the Chinese was attributable to Confucianism.¹² Moreover, the inertia that arises from a reluctance to change out of respect for past decisions is probably characteristic of every legal system. In the Anglo-American system, for example, *stare decisis* is seen as integral to social and political stability. As the majority of U.S. Supreme Court justices (quoting Cardozo) wrote in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "no judicial system could do society's work if it eyed each issue afresh in every case that raised it."¹³ Thus, the case for China's uniqueness might be better made in terms of the depth of its reverence for the past, rather than in terms of the reverence itself. Similarly, I am unpersuaded by MacCormack's assertion that successive dynastic penal codes' preservation of rules with "symbolic" rather than "practical" functions is somehow distinctive. Few legal systems — past or present — do not have laws whose continued existence conveys "a certain message" rather than an intent to enforce.¹⁴ More cogent, I would suggest, is MacCormack's case for the distinctiveness of the somewhat paradoxical way Chinese codes attached value to both victims' and perpetrators' lives.¹⁵

Before proceeding to his detailed examination of penal law, MacCormack uses chapter 2 to consider briefly other types of law. He divides traditional Chinese law into "official" law, chiefly comprised of penal and administrative law, and "unofficial law". MacCormack correctly notes that penal law is better known in the West and has been more systematically studied by Western scholars. His statement that "[u]nofficial

⁹ See e.g. A.F.P. Hulswé, *Remnants of Ch'in Law* (Leiden: Brill, 1985) and K. McLeod & R. Yates, "Forms of Ch'in Law: An Annotated Translation of the Feng-chen shih" (1981) 41 *Harv. J. Asiatic Stud.* 111.

¹⁰ MacCormack, *supra* note 3 at 12-14.

¹¹ *Ibid.* at 12.

¹² *Ibid.* at 41.

¹³ 505 U.S. 833 at 854, 112 S. Ct. 2791. The court found that overruling the central premises of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, was unjustifiable under *stare decisis*, would lead to a loss of confidence in the court, as well as damage the court's legitimacy and the stability rule of law gained from its predictability.

¹⁴ MacCormack, *supra* note 3 at 13. For a recent concept of the concept of desuetude, see M. Henriques, "Note: Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws" (1990) 76 *Va. L. Rev.* 1057.

¹⁵ MacCormack, *supra* note 3 at 13-14.

law seems to Western scholars a peripheral matter of small interest in comparison with the official, especially penal law,"¹⁶ is misleading, however, as it overlooks a recent shift in scholarship, the beginnings of which are represented in his bibliography. As local archival material has become increasingly accessible over the last ten to fifteen years, scholars have begun to look more deeply at the issues of marriage, property, debt and contract that were minimally covered by the codes and that were ostensibly regulated to a large extent by "unofficial law" or customary practice.¹⁷ This research has raised several questions that are currently at the heart of scholarly debate among American and Chinese scholars of traditional Chinese law, including: the relationship of this "civil law" to code provisions; the role of magistrates in the processing of these cases; and the extent to which the processing of these cases was done through adjudication, conciliation or some intermediary form of dispute resolution.¹⁸ Again, one cannot fault MacCormack for choosing to focus on penal law, but as I argue more fully below, it is dangerous to think that one can understand the spirit of traditional Chinese law through penal law alone.

The "conservative and symbolic spirit" of the penal law is the subject of chapter 3, in which MacCormack demonstrates the extraordinary degree to which the

¹⁶ *Ibid.* at 20.

¹⁷ One of the first scholars to argue that "civil" law was a discrete category in late imperial judicial practice was D. Buxbaum. See his "Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895" (1970) 30 *Journal of Asian Studies* 255 and his more recent "Contracts in China During the Qing Dynasty: Key to the Civil Law" ((1993) *Journal of Oriental Studies* 195). In the late 1970s, Fu-mei Chen and R. Myers published a two part article, "Customary Law and the Economic Growth of China During the Ch'ing Period" (1976) 3(5) *Ch'ing-shih wen-t'i* 1, and (1978) 3(10) *Ch'ing-shih wen-t'i* 2. Using a similar body of materials, R. Brockman, published "Commercial Contract Law in Late Nineteenth Century Taiwan" in J. Cohen, R. Edwards and F. Chen, eds., *Essays on China's Legal Tradition* (Princeton: Princeton University Press, 1980) 76. In 1986, Madeleine Zelin, the first Western scholar to gain access to the rich Baxian County archive materials in Sichuan, used records of landlord-tenant lawsuits for her article, "The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives" (1986) 45 *Journal of Asian Studies* 499. Prof. Zelin and I continue to use this and other archival materials for an ongoing Luce Foundation project on "The Concept of Contract in Chinese Economic Culture". See as well M. Allee, *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century* (Stanford: Stanford University Press, 1994), and D. Wakefield, *Household Division in Qing and Republican China: Inheritance, Family Property, and Economic Development* (Ph.D. thesis, U.C.L.A., 1992). This is not the place to provide a comprehensive bibliographic essay, so this footnote provides only some examples.

¹⁸ William Jones argues, for example, that civil law "as the law which deals with the private concerns of citizens" was not dealt with in the Code, which addressed all matters from the ruler's point of view (*The Great Qing Code* (New York: Oxford University Press, 1994) at 7). See also: the essays by K. Bernhardt and P. Huang and by H. Scogin in K. Bernhardt and P. Huang, eds., *Civil Law in Qing and Republican China* (Stanford: Stanford University Press, 1994); P. Huang, "Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice" (1993) 19 *Modern China* 251; and P. Huang's recent book, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996). Some of this debate has taken place since the publication of MacCormack's work. See for example, Liang Zhiping, *Qingdai xiguanfa: shehui yu guojia* [Qing Customary Law: Society and State] (Beijing: Zhongguo Zengfa daxue Chubanshe, 1996) especially at 11-20.

T'ang, Sung, Ming and Ch'ing codes were similar in organization, substance and procedure. As MacCormack walks us through a comparative reading of T'ang and Ch'ing statutes on rebellion, theft and homicide, he notes that where "political or ethical considerations" played a relatively minor role, language and penalties underwent little change.¹⁹ Thus, the statute on theft remained largely unchanged over time and the Ch'ing statute on accidental homicide added little of "real substance". The Ming-Ch'ing punishment for rebellion was harsher than in the T'ang, however, because of the intervening development of Neo-Confucianism that emphasized the importance of the bond between ruler and subject.²⁰ While acknowledging that he may be begging the question, MacCormack again recalls "the generally conservative inclination of the Chinese people" to explain this perdurance of tradition.²¹ This time, though, MacCormack explicitly links the inclination to Confucianism's emphasis on "rites", that is, the ritually approved forms of behaviour "believed to reflect and reinforce the fundamental human duties."²²

More problematic is MacCormack's discussion of two other facets of China's putative legal conservatism: the "phenomenon of the nonenforceable" and the symbolic value of enforced rules. As I have already suggested, the persistence of vestigial, anachronistic laws is hardly peculiar to China. Moreover, MacCormack fails to distinguish between laws that could not be enforced because the underlying social reality had changed,²³ laws left unenforced because of fluctuations in the mood of the times or the legal sensibilities of a particular emperor, and laws left unenforced because specific circumstances demanded it.²⁴ As demonstrated by a case MacCormack himself presents, officials sometimes left ostensibly core rules, such as a ban on marriages between persons of the same surname, unenforced because the offending practice was so deeply rooted in a community that to have punished it would have undermined rather than maintained social order.²⁵ This case demonstrates the way in which law and society are mutually constructive. It also reveals the existence of a different sort of conservatism, in which officials actually reinforced the continuation of local customs that were "illegal" but that were not viewed as a threat to the fundamental interests of the state. I should note, however, that this official tolerance was neither a universal nor uniform practice. Indeed, sources on "unofficial law" reveal that the spirit of traditional Chinese law sometimes had a strong local flavor.²⁶ Even the enforcement

¹⁹ MacCormack, *supra* note 3 at 36.

²⁰ *Ibid.* at 36-39.

²¹ *Ibid.* at 41.

²² *Ibid.* at 42.

²³ Including, for example, the change in the nature of land ownership after the T'ang.

²⁴ A further difficulty in assessing the strength of MacCormack's argument is that he does not always provide specific evidence. Thus, he says that provisions on dissolution of marriage were largely ignored but offers no supporting examples (see MacCormack, *supra* note 3 at 47).

²⁵ *Ibid.*

²⁶ See *supra* note 17. See also *Chung-kuo min-shang shih-hsi-kuan tiao-ch'ao pao-kao lu* [Report on the actual civil and commercial customs of China], 1930 (reprinted by Taipei: Kuting shushi, n.d.). This national survey was conducted in the late 1910s by the Republic of China's Ministry of Justice to help with the drafting of the new Civil code. The collection was published in 1930 when the new

of code provisions on such matters as contracts and debts was disparate. Whereas the Taiwan magistrates to whom MacCormack refers may have sought to settle debt disputes by compromise rather than "through the imposition of statutory punishment",²⁷ local officials elsewhere might have detained or beaten people as provided by the Code.²⁸ Enforcement therefore appears to have varied over time, region and person.

Does the fact that the magistrates left laws on debt unenforced mean that they had only symbolic value? MacCormack correctly dismisses Jean Escarra's view that Chinese penal law was meant to be a guide to proper conduct rather than a set of enforceable rules. MacCormack nevertheless finds value in the notion that one of the drafters' objectives was "the expression of certain goals to which the ruler in particular and society as a whole should aspire."²⁹ Thus, even if a rule were not enforced, it was retained in the Code because of its "symbolic value". There is a certain logic to this argument. Recent scholarship suggests, however, that the allegedly unenforced laws on family that MacCormack offers up as examples were in fact frequently enforced by adjudication.³⁰ Furthermore, as MacCormack notes, enforced laws may themselves be interpreted on a symbolic level.³¹ MacCormack is addressing an important issue, but the reader will most likely be left hoping for a deeper consideration of the problem of the symbolic content of law in general and of the uniqueness of the Chinese situation in particular. That which has symbolic value for one group or person may mean nothing to another group or individual. In light of MacCormack's acknowledgment in his preface that the "rules enshrined the codes, considered as a whole, constituted an ideal standard for the elite" but that "the extent to which they were known to, or observed by, the rural masses is uncertain",³² some additional clarification as to whether the symbolic content resonated only with the elite or with the population as a whole would have been desirable.³³

In chapters 4 and 5, MacCormack explores the inextricably linked questions of the "Ethical Foundations of the Penal Law" and "The Fundamental Family Roles."

Civil code itself was promulgated. For a brief discussion of this work, see MacCormack, *supra* note 3 at 26.

²⁷ *Supra* note 3.

²⁸ See, for example, other nineteenth century cases from Henan province, in *Panyu lucun*, original preface 1833, at 2.19-20, 31-22 and 4.46.

²⁹ MacCormack, *supra* note 3 at 48.

³⁰ See J. Ocko, "Hierarchy and Harmony: Family Conflict as Seen in Ch'ing Legal Cases" in K.C. Liu, ed., *Orthodoxy in Late Imperial China* (Berkeley: University of California Press, 1990) 212. I am further puzzled by MacCormack's drawing a distinction between "strict application of the penal code" and treating cases by "adjudication or mediation" (see MacCormack, *ibid.* at 49-50). Adjudication might well encompass mediation but it could also mean strict application of the Code.

³¹ MacCormack, *ibid.* at 51.

³² *Ibid.* at xv.

³³ It is unlikely, for example, that the symbolic content in a ruler's dispensation of mercy was always read by people in the manner intended. On eighteenth century China and England, see respectively, J. Ocko, "Red Then Dead", an extended study of the Ch'ing system of capital punishment that is part of a longer work in progress: "A Question of Balance: Concepts of Justice in Late Imperial China" [unpublished] and D. Hay, "Property, Authority and the Criminal Law" in D. Hay *et al.*, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975) 17.

He argues that although “[o]ne of the principal objects of the penal law in traditional China was to secure enforcement of fundamental Confucian morality,”³⁴ it would be wrong to conclude that “the whole sphere of the moral was reinforced by penal sanctions”³⁵ or that the penal codes were concerned with enforcing “morality as such.”³⁶ Rather, the penal codes were concerned with ensuring that “the subjects of the emperor complied with the behaviour inherent in the fundamental human roles expressed in the Three Bonds,” including the father-and-son (or more generally, parent-and-child) and husband-and-wife relationships that structured the family.³⁷ As MacCormack accurately summarizes, the dominant view in traditional China was that a society functioned properly only “when its members behave[d] in accordance with the roles they occup[ie]d within it” and that the state had an obligation to enforce the underlying moral prescriptions by punishing those who behaved improperly.³⁸ Thus, as with almost everyone who has spent time with the codes and has been struck by the “congruence between [their] rules and the standards of behavior advocated by Confucianists,”³⁹ MacCormack finds it difficult to decide where to draw the line between law and morality.

There are three additional issues dealt with in these two chapters that require a critical response. First is the nature of the “catch-all” article, which provided that “conduct which ought not to be done” be punished by a beating.⁴⁰ MacCormack argues that at least during the Ch’ing, this provision does not appear to have been used “as a blanket instrument for the enforcement of moral conduct as such.”⁴¹ Instead, he suggests that until a wider range of case material has been studied, the word “ought” should “not be understood as having a purely moral reference.”⁴² As MacCormack states, the article was invoked to punish those “who had in some ancillary way” contributed to someone else’s commission of a specific crime.⁴³ I would argue, however, that it was also invoked to punish those who failed to discharge their moral obligation to regulate their behaviour in a manner conducive to social order. For example, in applying the statute in question, a nineteenth-century governor appears to have judged the following actions in relation to a generalized moral standard rather than a positive legal norm: failing to break up a fight and boasting about being a criminal;⁴⁴ police

³⁴ MacCormack, *supra* note 3 at 54.

³⁵ *Ibid.* at 61.

³⁶ *Ibid.* at 68.

³⁷ *Ibid.*

³⁸ *Ibid.* at 71.

³⁹ Jones, *supra* note 18 at 17. Jones concludes that despite this congruence, we should be cautious in assuming that “because a certain ruling is consistent with the teachings called Confucianist, it is necessarily derived from those teachings.” As an illustration, he points to the congruence between the Roman concept of *paterfamilias* and Confucian practices.

⁴⁰ See MacCormack, *supra* note 3 at 61.

⁴¹ *Ibid.*

⁴² *Ibid.* at 61-62.

⁴³ *Ibid.* at 62.

⁴⁴ Han Wenqi, *Gongshou tang zouyi* [unpublished] at 6.24.

frightening the family of suspects;⁴⁵ and inciting a quarrel by "rudely and abusively" refusing a request for a loan.⁴⁶

Interestingly, although there is no explicit catch-all provision in the current law of the People's Republic of China ("P.R.C."), the vagueness of constitutional and statutory provisions combined with the ideological monopoly of the Party makes it relatively easy for the party/state to draw on party policy and/or socialist morality and determine that an act in some way "infringes impermissibly on the interests of the state or society."⁴⁷ The tendency of the P.R.C. to find some way to punish "doing what ought not to be done" has led to fears in Hong Kong that under pressure from Beijing, article 23 of the Basic Law of the Hong Kong Special Administrative Region⁴⁸ may become a vehicle for the new Hong Kong government to limit rights by creating this sort of catch-all provision.⁴⁹

A second issue deserving comment relates to MacCormack's conclusion that

[t]hose rules which we have described as being merely or largely of 'symbolic' significance, in that they expressed moral desiderata but were not intended regularly to be en-

⁴⁵ *Ibid.* at 9.84.

⁴⁶ *Ibid.* at 7.39.

⁴⁷ L. Guo, "A Human Rights Critique of the Chinese Legal System" (1996) 9 Harv. Hum. Rts. J. at 8. In the passage cited, Guo was addressing the question of freedom of speech, but his observation is generally applicable. For example, in the more stringent ideological atmosphere following Tiananmen, several engineers and scientists who had used university or research institute labs after hours to develop and commercialize products had been convicted of economic crimes and sentenced to prison terms. There were no clear guidelines at the time, and in essence, what drove the prosecutions was a sense that these scientists had done what they "ought not to have done." In 1992, when Deng Xiaoping toured southern China to revive economic reform, he spoke directly to their cases and argued that their work had been socialist rather than selfish/capitalist in character. Deng stated that the criteria for judging the socialist character of economic activity should be whether or not it was conducive to 1) development of socialism's productive capacity; 2) increasing China's national strength; 3) improving people's standard of living. These became known as the "three conduces." See M. Gao and Y. Qian, "Lun keji renyuan yeyu jianzhi huodongzhong zui yu feizuide jixian" (1993) 1 Faxuejia at 19.

Of course, vagueness is hardly peculiar to either traditional or contemporary Chinese law. See G. Hadfield, "Void for Vagueness: Weighing the Value of Vagueness. An Economic Perspective on Precision in the Law" (1994) 82 Calif. L. Rev. 541.

⁴⁸ 3d Sess., 7th N.P.C., 4 April 1990, reprinted in 29 I.L.M. 1511 [hereinafter Basic Law].

⁴⁹ Article 23 of the Basic Law, *ibid.*, states: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government." Journalists in particular have expressed concern that under pressure from Beijing, the new Hong Kong government will interpret the reference in article 23 to subversion very broadly and will pass laws that will in essence criminalize any behavior that Beijing thinks "ought not to be done." See, for example, the following articles by K. Richburg: "Media will now find out the power of Article 23" *South China Morning Post* (1 July 1997) 50; "Hong Kong Journalists Fear Free Press May be the First Casualty" *The Washington Post* (25 June 1997) A21; "One Man's Anti-Communist Crusade" *The Washington Post* (30 June 1997) A14. For a review of human rights in the new Hong Kong, see M.C. Davis, "Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis" (1996) 34 Colum. J. Transnat'l L. 301.

forced, concerned matters more peripheral to the maintenance of the fundamental human relationships than the core duties encompassed in the Three Bonds.⁵⁰

Upon examination of the application of punishment (sentencing) as opposed to punishment as set out in legal texts, it becomes rather difficult to accept this assertion. As MacCormack repeatedly demonstrates, even in cases involving core duties such as violence by an inferior against a superior, death sentences were often nominal. While the formal sentence had to "express the full disapproval of the law, ... a way was found to prevent its actual implementation."⁵¹ This would appear to be inconsistent with MacCormack's attempt to posit a meaningful differentiation of enforced (core) duties from merely peripheral, symbolic provisions. Moreover, it is not always clear where MacCormack draws the line between core and periphery. On the one hand, he states that "any kind of sexual act outside marriage" was both "immoral and illegal" and thus a violation of a core duty to be "prohibited and punished".⁵² On the other hand, he later suggests that the "general prohibition against sexual permissiveness" was a rule that was "not normally enforced" and merely "a solemn statement of the wickedness of indiscriminate sexual activity outside marriage."⁵³

The characterization of sexual permissiveness leads us to the third issue to be canvassed: code provisions concerning women. MacCormack correctly emphasizes that under the influence of Neo-Confucianism, the reciprocal aspect of the husband-wife relationship ("[T]he wife was to obey, but the husband was to respect her position as wife") became less important in law and society than the duties of the wife (inferior) toward the husband (superior).⁵⁴ As MacCormack effectively demonstrates in his discussion of the husband-wife relationship, however, the Ming and Ch'ing codes contained certain provisions that were more liberal than their T'ang antecedents, as well as some that were considerably more severe. In the context of betrothal, for example, men and women were valued the same way;⁵⁵ Ming-Ch'ing law was also more tolerant of spouses who refused to separate after one of them committed an act that "broke the bond";⁵⁶ finally, the Ch'ing Code allowed a widow the freedom to decide whether or not to re-marry, though, as MacCormack implies, this may have represented merely a shift from a focus on filiality to chastity,⁵⁷ rather than the emergence of a more enlightened attitude toward women.

In chapter 6, MacCormack continues his examination of the way hierarchy suffused traditional Chinese law in his discussion of the nature of relationships between

⁵⁰ MacCormack, *supra* note 3 at 68.

⁵¹ *Ibid.* at 80-81 and see also 67-68, 84.

⁵² *Ibid.* at 57.

⁵³ *Ibid.* at 94. My own view on this matter is that rules against sexual permissiveness, especially those concerning husband and wife, touched on core duties. Even if rules against adultery were not always enforced and offenders not always punished, as MacCormack notes (*ibid.*), adultery and/or sexual permissiveness precipitated other crimes. The fact of the sexual offense aggravated the harshness of the punishment for the ensuing one.

⁵⁴ MacCormack, *supra* note 3 at 63-64, 77.

⁵⁵ *Ibid.* at 88-89.

⁵⁶ *Ibid.* at 91.

⁵⁷ *Ibid.* at 96.

ruler and minister/official, ruler and subject, and among the various social classes. MacCormack observes that in the T'ang, for example, official wrongdoers were granted various privileges, such as the right to have the emperor himself deliberate on their punishment and the right to redeem their crime monetarily.⁵⁸ By the Ch'ing, however, the officials' privileges were circumscribed, since emperors, under the influence of Neo-Confucianism, viewed their officials as servants rather than associates. In particular, the crime of corruption could no longer be redeemed.⁵⁹ While MacCormack provides little explanation on this point, works by Joanna Waley-Cohen and Nancy Park reveal a somewhat schizophrenic attitude toward corruption on the part of the Ch'ing. On the one hand, Waley-Cohen demonstrates, Ch'ing emperors regarded large-scale corruption as a form of sedition that destabilized society.⁶⁰ Yet as Park shows, punishment of corrupt officials was often less severe than imperial rhetoric would have suggested: "The laws governing bribery theoretically left little opportunity for interpretation," but "the actual operation of the law was more variable."⁶¹ In fact, the law appears to have been enforced in a selective and flexible manner as a consequence of imperial intervention that "was not the exception but the norm."⁶²

Even today, despite the prison sentences and even executions that have been imposed on corrupt P.R.C. officials over the last two years, there remains a lingering sense that selective enforcement remains the norm rather than the exception for the influential and well-connected.⁶³ Former Beijing mayor Chen Xitong, notorious both for his role in prompting the use of troops in June 1989 and his avaricious influence-

⁵⁸ *Ibid.* at 102-103.

⁵⁹ *Ibid.* at 107-108.

⁶⁰ See J. Waley-Cohen, "Politics and the Supernatural in Mid-Qing Legal Culture" (1993) 19 *Modern China* 330.

⁶¹ N. Park, *Corruption and its Recompense: Bribes, Bureaucracy, and the Law in Late Imperial China* (Ph.D. thesis, Harvard University, 1973) at 204.

⁶² *Ibid.* at 173.

⁶³ This was one of the reasons that delegates to this spring's National People's Congress voted against the report by Chief Prosecutor (see A. Ngai, "Lawmakers Angry at lack of enforcement" *South China Morning Post* (15 March 1997) 9). There have been a number of recent high-profile corruption cases: "Two Hainan senior officials investigated, penalized" *Ming Pao* (30 March 1997) (available in LEXIS News/BBCSWB (16 April 1997)). One of the most interesting was a case from the city of Tai'an in Shandong in which there were highly disparate sentences: "Corruption purge in east Chinese city" *Agence France Presse* (16 December 1996) (available in LEXIS News/Cumwvs); "Deputy Mayor gets 2 year suspended death sentence" *B.B.C. Summary of World Broadcasts* (24 March 1997) (available in LEXIS News/BBCSWB). The variant sentencing drew the attention of *Liaowang [Outlook]*, a weekly published by the Party itself. In a highly sardonic article, two of its reporters accused the lucky defendant's lawyers of using bribes to elicit the leniency. In turn the lawyers sued the reporters for libel but subsequently settled out of court (see H. Huang & C. Zhao, "Yi Chang Zhengyi Yu Xie'e de Jaoliang — Tai'an Da An Ji Shi" ["A trial of strength between justice and evil — report on Tai'an case"] (1996) 32 *Liowang Zhoukan [Outlook]* at 6-8; Ying Lei, "Lüshi zhuanggao Liowang Zhoukan — Tai'an da an'yijie, Mingyu jiu fen yougi" ["Lawyers sue Outlook — As soon as the Tai'an case is concluded, the fight over reputation begins"] *Zhongguo lüshi bao [China Lawyer News]* (18 September 1996) 1; Ying Lei, "Liang lüshi zhuanggao Liowang yi 'an yi tiaojie gao zhong" ["The case of two lawyers suing Outlook ends through negotiation"] *Zhongguo lüshi bao* (4 December 1996) 1.

peddling, provides just one example. He now seems likely to avoid criminal sanctions and merely be dismissed from the Communist Party.⁶⁴ This result will not only exacerbate cynicism on the mainland but will also heighten concerns in Hong Kong that its own recent successes in attacking corruption may be undermined as well.⁶⁵

In chapter 7, MacCormack shifts his argument away from its emphasis on hierarchy toward values that he sees as "not specifically linked to family, political, or social roles," but that nonetheless exercised a "considerable effect on the law."⁶⁶ These values include: respect for life, benevolence or humanity (*jen*), repentance and sexual restraint. This somewhat disjointed chapter anticipates his subsequent case-based discussion in chapter 10 of the role and justification of punishment, although no explicit connection between the two is established. It may be noted, however, that the values discussed in this chapter are arguably still inherently related to the hierarchical structuring of relationships. Status, age, gender and, I would add, character, all affected the way in which respect for life, benevolence, repentance and sexual restraint were used to weigh the value of one life against that of another. To take just one example, sexual restraint was valued because female sexuality was seen as a fundamental threat to male superiority and therefore to social order. Thus, this value may be viewed as founded on hierarchical social ordering. It is this value which lay at the foundation of rules relating to rape where, even as a victim, the woman was deemed to bear a measure of guilt given the use of the woman's prior sexual history as a factor in determining the nature of the rapist's punishment.⁶⁷

Turning to chapter 8 and to procedural aspects of traditional Chinese law, MacCormack argues that its technical qualities reflected the Legalist preoccupation with "effective government" and "the need for a clear and systematic exposition of the penal rules, for the production of a legal instrument that was readily intelligible and capable of efficient use."⁶⁸ The influences were therefore very different, MacCormack suggests, from those of the Confucian-inspired substantive provisions of the Codes. Whether or not the concern for systematic rules was purely Legalist, MacCormack's characterization has merit and is shared by scholars such as William Jones, who has argued that in form and function, the "Code was a directive to the magistrate telling what penalties to administer for actions that were regarded as legally significant." It

⁶⁴ "Former Beijing Party Secretary to be expelled from party" *Agence France Press* (11 July 1997) (available in LEXIS, News/Curnws). This past spring, a novel, *The Wrath of God*, created a stir when it was published in Beijing, for it purports to be a barely fictionalized, accurate narrative of Chen's corruption and machinations to avoid prosecution. See Liz Sly, "Chinese Scandal Reads Like a Good Novel — and Vice Versa: Sexy Account of a Scandal has Beijing Agog" *Chicago Tribune* (21 March 1997) and Henry Chu, "Novelization of Scandal has Beijing Agog" *Los Angeles Times* (9 June 1997). A Hong Kong newspaper, *Hsin Pao*, serialized portions of the novel (available in LEXIS News/BBCSWB, 1 July 1997 and 5 July 1997).

⁶⁵ See e.g. T. Poole, "Hong Kong handover: Rising fears of slow invasion of corruption from across the border" *The Independent* (3 July 1997) 9.

⁶⁶ MacCormack, *supra* note 3 at 121.

⁶⁷ *Ibid.* at 64-65, 142. For a superb, insightful analysis of sexuality in Ch'ing law, see M. Sommer, *Sex, Law, and Society in Late Imperial China* (Ph.D. thesis, U.C.L.A., 1994).

⁶⁸ MacCormack, *ibid.* at 145.

was "a giant grid on which any legally relevant act ... could be located" and "the precise punishment ... discovered."⁶⁹ MacCormack characterizes this set of rules as "rational", with the notable exception of the use of torture to extract evidence and confessions.⁷⁰

Rationality is, however, a loaded word, and in my view, MacCormack would have been better served by simply evaluating the Chinese system on its own terms, rather than basing his analysis on a very cursory exposition of the "Western" vision of rationality.⁷¹ MacCormack's explanations of the interlocking structure of code rules regarding the classification of offences and determination of punishment offers insight into the legal reasoning used and into the historical/social context.⁷² As a fellow regular reader of the Ch'ing Code, I am less persuaded than MacCormack, however, that its drafters displayed an "economy of means" and a balanced combination of the general and specific in their formulation of code provisions.⁷³ These characterizations seem more apt for the T'ang Code than for its progeny. Indeed, MacCormack himself notes that the Ch'ing contained a much larger proliferation of new sub-statutes than its predecessor codes. This indicates a reduction in use of the rule of analogy, which permitted an official deciding on punishment to cite the provision of the code that was most analogous to the facts before him when existing rules did not seem to cover precisely the case at hand.⁷⁴

As MacCormack explains in chapter 9, "Lawmaking and Legal Reasoning", judgment by analogy seems at first glance to have vitiated the dynasties' efforts to have the central government retain control over the administration of justice.⁷⁵ Legis-

⁶⁹ Jones, *supra* note 18 at 12.

⁷⁰ MacCormack, *supra* note 3 at 146. MacCormack unfortunately perpetuates the idea that legal proceedings in the Ming and Ch'ing required confession in all cases regardless of the strength of the evidence (*ibid.* at 147). A confession was not required in every case: certain classes of people could not be interrogated under torture, and in these cases the weight of evidence had to be used to establish guilt (see T.C. Huang, punctuated and edited edition of Hsueh Yungsheng, compiler, *Tu-li Ts'ui-i [Doubts on reading the code (a compilation of statutes)]* (Taipei: China Materials and Research Aids Service Centre, 1970) 404-00 at 1219); the weight of evidence could be used to convict someone in flight (*ibid.*, 31-00(02) at 120); on approval of either the emperor or the Board of Punishment, someone who though apparently guilty refused to confess under torture could be found guilty, presumably on the weight of the evidence (*ibid.*, 31-95 at 125).

Though there were rules about under what circumstances, to whom, and with what instruments torture could be applied (*ibid.*, 396-01 at 1202 and 404-00 at 1219), I agree with MacCormack that use of torture in legal proceedings marks a "failure in rationality". However, legal systems, such as Israel's, that most observers would agree possessed a largely "modern Western perspective" have legitimized the use of torture in "exigent" circumstances (see "Lawyer criticizes Israel court on use of force" *Reuters* (29 November 1996, available in LEXIS News/Cumews); see also E. Wilcox, "Book Note" (1996) 9 *Harv. Hum. Rts. J.* 343).

⁷¹ On the problems of trying to capture another system's "spirit" in our terms, see Geertz, *supra* note 5 at 218-28.

⁷² MacCormack, *supra* note 3 at 154-159.

⁷³ See *ibid.* at 145.

⁷⁴ *Ibid.* at 160, 166. For the reproduced language of the statute, see Jones, *supra* note 18 at 74, art. 44.

⁷⁵ MacCormack, *ibid.* at 163-66.

lators tried to “formulate the constituents of the offense as precisely and fully as possible” so that officials could identify the legally relevant act and apply the appropriate punishment.⁷⁶ In addition, local officials were required to cite the statute or sub-statute on which they had based their decision and were subjected to administrative sanctions for erroneous decisions. Magistrate’s decisions were subjected to review by superior levels of administration.⁷⁷ Yet while the central government exercised “effective” control over its subordinate officials, magistrates in practice might well have exercised substantially more discretion than we have previously assumed. In considering cases, magistrates had first to determine the relationship between the parties — by fixing them in the hierarchies of family, social status, gender, age, ethnicity and character — that defined the nature of the crime, indeed that determined whether a “crime” had even been committed. The magistrate’s arrangement of the “facts” and circumstances of the case could significantly influence the characterization of the act in question. And, as the recent work on law and storytelling reminds us, great control over the outcome of a case lies in the hands of the person who orders the facts and thereby shapes the narrative that describes the parties’ motives and intentions.⁷⁸ Indeed, magistrates in the T’ang and Sung took pride in the literary quality of their decisions.⁷⁹ Ch’ing magistrates were not granted such latitude and had to confine their literary expression to privately published collections of what one suspects were *ex-post-facto* embellished decisions.⁸⁰ However, since appeals had to be based on an alternative reading of the facts rather than of the law, the magistrate’s initial account still framed the case until his narrative was superseded by an alternative one.

Generally, once a magistrate had established and “arranged” the facts, he could find an appropriate provision under which they could be subsumed. If not, he could apply a rule which covered circumstances analogous to the case at hand. MacCormack properly emphasizes that magistrates did not wield discretion in an untrammelled fashion, since a decision reached by analogy was reviewed by superior levels, with the emperor having the final say.⁸¹ The author is equally perceptive in his rejection of the idea that having recourse to analogy violated the principle *nulla poena sine lege*, for the point of analogical reasoning was not to create a new crime but to find

⁷⁶ *Ibid.* at 164.

⁷⁷ *Ibid.* at 164-65.

⁷⁸ See, for example, the collected essays and comments from a recent symposium held at Yale: P. Brooks & P. Gewirtz, eds., *Law’s Stories: Narratives and Rhetoric in the Law* (New Haven, Conn.: Yale University Press, 1996).

⁷⁹ One of the T’ang’s criteria for selecting officials was their ability to write decisions (see Liang Zhiping, “Wenren pan [Literati judgments]” in *Fayi yu renqing* (Shenzhen: Haitian chubanshe, 1992) 104).

⁸⁰ Some collections seem to include unembellished comments and opinions. See e.g. Fan Zengxiang, *Fanshan pipan [Magistrate Fan’s comments and judgments]*, original preface 1894, reprinted in *Fanshan chengshu [The political writings of Fan Tseng-hsiang]* (Taipei: Wenhai ch’u-pan she, 1971). Most, however, appear to have benefited from revision by the magistrate himself or his editors. See Kuaie Demo, *Wuzhong pandu [Wuzhong judgments]*, original preface 1833 [unpublished] and Lan Dingyuan, *Luzhou gong’an [Cases from Luzhou]*, original preface 1729, reprinted in 1985 (Beijing: Qunzhong Chubanshe, 1985).

⁸¹ See MacCormack, *supra* note 3 at 164-165.

the right punishment.⁸² That the fact pattern was often less important than the appropriate punishment explains why we may sometimes find the analogies strained. In seeking to determine the appropriate punishment, judicial officials, at least in the Ch'ing, were working with relatively formalized — albeit by custom rather than code — rules of interpretation.⁸³ In his discussion of analogy, MacCormack argues that Chinese judges had no such rules,⁸⁴ though the rules he identifies as guiding thinking about punishment in fact applied to analogy as well, since the object of analogy was to find the right punishment. As MacCormack notes, the object was to balance (*p'ing*) the facts (*ch'ing*) with both principle/reason (*li*) and the law (*fa*) in order to produce an equitable result.⁸⁵

Given the Chinese reverence for the past, it should not surprise us that “legal innovations ... tended to be justified by appeals to what had been done or decided in the past.”⁸⁶ MacCormack uses the word precedent to describe this process. He takes appropriate care, however, to distinguish the word from its Western sense. What is lacking from the discussion, however, is an exploration of the distinction between the way in which central government officials and magistrates dealt with “precedent”. On the whole, MacCormack is correct in his assertion that leading cases (*ch'eng an*)⁸⁷ were known only to the originating province and the Board of Punishment.⁸⁸ He could have usefully considered additional sources of information. In the Ch'ing, for example, both the official and unofficial versions of the *Peking Gazette* often published copies of official documents that were not intended for the public.⁸⁹ There was also

⁸² *Ibid.* at 173-74. See article 79 of the soon to be superseded 1979 Criminal Law of the P.R.C. (reproduced in (1982) 73 J. of Crim. L. and Criminology 138), which provided for the use of analogy and was criticized for violating this principle. Chinese commentators argued that great care was taken to insure that the rule on analogy was not abused. On the review process, which operated separately from the procedures for appeal and adjudication supervision, see Zhang Zhonglin, ed., *Xingshi susong fa xinlun [New Views on the Code of Criminal Procedure]* (Beijing: Zhongguo renmin daxue, 1993) at 508-20. The new Criminal Law, which was passed in March 1997 and takes effect on 1 October 1997, no longer contains the provision. Article 3 of the new law stipulates that “behaviour explicitly defined by the law as criminal is to be punished according to law; conduct which is not explicitly defined in law as criminal, may not be punished as a crime” (*Zhonghua remin gongheguo xing fa [The Criminal Law of the P.R.C.]* (Beijing: Falü Chubanshe, 1977) at 6). For an article by article comparison of the 1979 law and the amended 1997 version, see X. Xu, Q. Wang & N. Wang, eds., *Shiyong xingfa duizhao biao [A practical comparative chart of the criminal laws]* (Beijing: Remin Chubanshe, 1997).

⁸³ See for example the sub-statutes on people who lived on alluvial sand banks at the mouth of the Yangtze and gathered in armed gangs to resist officials (*Tu-li Ts'un-i*, *supra* note 70, 268-00 at 637); on people from the border area of Shanxi, Sichuan and Gansu who engaged in armed robbery, see *ibid.*, 269-31 at 670; on eunuchs who fled the palace and engaged in extortion, see *ibid.*, 273-03 at 710; on lawless Taiwanese, see *ibid.*, 273-09 at 713; on Guangdong bandits, see *ibid.*, 273-21 at 719; and on bands of Muslims see *ibid.*, 302-05 at 894.

⁸⁴ MacCormack, *supra* note 3 at 173.

⁸⁵ *Ibid.* at 203.

⁸⁶ *Ibid.* at 175.

⁸⁷ Individual decisions by the Board of Punishment lacking any general authority.

⁸⁸ See MacCormack, *supra* note 3 at 176.

⁸⁹ See J. Ocko, “The British Museum’s Peking Gazettes” (1973) 2:9 *Ch'ing-shih wen-t'i* 35.

considerable horizontal communication among officials and among their "legal secretaries". These secretaries were legal experts who advised officials on statutory interpretation and sentencing. They rarely spent their entire careers with a single official, and as they moved around the bureaucracy they carried their highly portable knowledge with them. Officials and their secretaries also had access to a myriad of unofficial legal treatises, collections of cases and magistrate's handbooks.⁹⁰ Thus, even though a "leading case" or another magistrate's decision could not be officially cited, the reasoning therein may well have informed other judgments. There was arguably, then, a larger conversation about the spirit, if not the letter, of the law than the one described by MacCormack between members of the Board and the Code.⁹¹

MacCormack's concluding chapter on the role and justification of punishment is perhaps the best chapter in the book. He effectively dismisses the notion that the penal process was simply a disciplinary one whose purpose was the punishment of subordinates (officials and commoners) for disobedience of the their superior's (the emperor's) orders.⁹² Instead, MacCormack finds a system of punishment that combined deterrence, retribution (which "focuses on the wickedness of the offender"), requital (which "focuses on the harm done to the victim") and reform /renewal.⁹³

MacCormack expresses uncertainty about whether Ch'ing legislators drew the same analytical distinction he does between retribution and requital. His hesitation, however, is unfounded. Late imperial materials may not speak specifically about the distinction, but they clearly understood and relied on it. MacCormack's own brief discussion of insanity is illustrative.⁹⁴ If in a fit of madness a junior relative fatally injured a senior relative, Ch'ing law treated the offender as having acted without malice or

⁹⁰ See e.g. *supra* note 80. Also see *Ta Ch'ing lü-li tseng-hsiu tang chi-cheng hsuan: fu'k'an hsing-an hui-lan* [Collected commentaries of fundamental laws and subordinate statutes with court cases for review] (Suchou: Lao-tung shih shan-fang, 1845); Djang Chu, *Fuhui ch'üan-shu* [A complete book concerning happiness and benevolence: A Manual for local magistrates in 17th century China], trans. and ed. Huang Lihung (Tucson: University of Arizona Press, 1984).

⁹¹ The same is true of the P.R.C.'s continental legal system, which has no formal rule of precedent, but which provides ample numbers of examples of guiding cases. The Supreme People's Court issues an irregular bulletin of its advisory cases (*Zuigao renmin fayuan gongbao*), the Court's applied law research centre (*Zuigao renmin fayuan zhongguo yingyong faxue yanjiuso*) annually issues collections of cases and analysis from lower cases (*Renmin fayuan anli xuan* [Selection of cases from the People's courts] (Beijing: Renmin fayuan chubanshe, serial)). Also, the Higher Judges Training Centre (*Zhongguo gaoji fa guan peixun zhongxin*) and the Law School of People's University (*Zhongguo renmin daxue faxuejan*) jointly edit an annual collection of cases and analysis: *Zhongguo shenpan anli yaolan* [A compendium of China's Judicial decisions] (Beijing: Zhongguo renmin daxue chubanshe, 1993-1996). Moreover, municipal and provincial court systems convene annual conferences to review "model" cases submitted for peer review by the deciding judge. As one judge who has compiled these materials and participated in the conferences has commented: "Although those 'model cases' do not have the force of common law precedent, they certainly 'guide' the subsequent decisions of judges who have been exposed to them" (Interview (September 1995) Durham, N.C. (name withheld at request of interviewee)).

⁹² See MacCormack, *supra* note 3 at 213.

⁹³ *Ibid.* at 189.

⁹⁴ See *ibid.* at 202.

intent. Nevertheless, because the act had injured not only the victim but also basic human relationships, it had to be requited by the execution of the offender. My own research on capital punishment in the Ch'ing⁹⁵ also demonstrates that although Ch'ing officials themselves carefully distinguished requital from retribution by applying well-established standards of motive and intent, they also understood that ordinary people expected injury to be requited with injury and might not forego private vengeance unless the state's justice in some measure accommodated their expectations.⁹⁶

Where I differ with MacCormack, however, is over the world views underpinning these multi-faceted conceptions of the role of punishment in traditional Chinese law. I would argue that the reason Ch'ing officials attended so carefully to the fine-tuning of punishments was because at some level they all accepted the notion that proper punishing of offenses helped maintain cosmic harmony. MacCormack acknowledges that there may be a "core of truth" to the theory that emperors and officials connected egregious injustice to floods and droughts "in the sense that [the theory] focuses on the need for a response to an offense that can be described in terms of 'requital' or 'retribution'."⁹⁷ He argues, however, that nothing in the recommendations of officials or the decisions of the throne betrays any sign that cosmic harmony was an explicit concern in the day-to-day administration of the judicial system.⁹⁸ My own research has produced quite opposite findings, including: frequent expressions by senior officials that imbalances between strictness and forgiveness would impede "calling forth heavenly harmony" and imperial concern that officials' reluctance to impose death sentences would jeopardize cosmic harmony.⁹⁹ Moreover, the timing of amnesties and indeed the timing of executions were usually explicitly linked to cosmic harmony.¹⁰⁰ Clearly, the debate over the truly fundamental aspects of the spirit of traditional Chinese law is still far from being resolved.

In conclusion, and in light of the focus in this issue of the *McGill Law Journal* on the legal implications of Hong Kong's return to China, it seems appropriate to consider the relevance of traditional Chinese law to contemporary Hong Kong. According to much of the pessimistic commentary in the press, an unhappy relevance does exist, given the predictions that Hong Kong will revert to a Singapore-like, Confucian patriarchal authoritarianism and relinquish its commitment to rule of law.¹⁰¹ For those who seek to understand at least certain elements of the Confucian paternalism and authoritarianism that some would suggest characterizes Hong Kong's new chief executive, Tung Chee-hwa, MacCormack's work is a useful place to start.

⁹⁵ Ocko, *supra* note 33.

⁹⁶ See *ibid.*

⁹⁷ MacCormack, *supra* note 3 at 211.

⁹⁸ *Ibid.*

⁹⁹ See Ocko, *supra* note 33.

¹⁰⁰ Whenever possible, executions were postponed until after the first frost so as to avoid taking life during the spring and summer seasons of birth and growth.

¹⁰¹ Fairly typical is Philip Stephens' commentary in *The Financial Times*: "Western rule of law... is to give way to Confucian social order" (31 January 1997), available in LEXIS, News/Cumwvs).

All is not continuity, however, and remarks applicable to traditional Chinese law, such as “[t]he slightest acquaintance with the penal codes reveals the fact that the principle of equality before the law did not operate in traditional China,”¹⁰² are largely irrelevant in China today. Whatever role favouritism and connections may play in the Hong Kong courts in the future, the *formal*, institutionalized particularist inequalities of traditional Chinese law will not be present. Article 25 of the Basic Law¹⁰³ stipulates that “[a]ll Hong Kong residents shall be equal before the law,” and article 4 of China’s new Criminal Law¹⁰⁴ provides that all offenders will be treated equally. Indeed, even in the late 1970s and 1980s when Chinese scholars looked to their imperial legal heritage for potential lessons regarding how to build a new socialist legality, one of the elements that, as former victims of the Cultural Revolution’s classist “justice”, they unanimously rejected was particularism.¹⁰⁵

There is, however, one part of traditional Chinese law that has immediate and practical relevance in Hong Kong: the sections of the Ch’ing Code dealing with inheritance. As development has spread into the New Territories, land held in trust by lineages has become incredibly valuable and, not surprisingly, there has been increasing litigation over how to manage and/or dispose of that land. Since 1898, when the New Territories first came under the control of the British, Hong Kong courts have drawn on the Ch’ing Code and customary practice to help them decide these cases. In recent years, scholars such as Chang Wejen (of the Academia Sinica’s Institute of History and Philology in Taiwan) and Zhieng Qin (of the China University of Political Science and Law in Beijing) have been retained by Hong Kong lawyers to serve as expert witnesses on the Ch’ing Code, and in making judgments the courts of Hong Kong have relied on their interpretations of traditional Chinese law.¹⁰⁶ Since article 8 of the Basic Law¹⁰⁷ stipulates that the customary law as well as the common law and rules of equity previously in force in Hong Kong “shall be maintained”, the letter and spirit of Ch’ing inheritance law will be preserved in the otherwise very un-Confucian courts of Hong Kong.

This discussion of inheritance leads me back to my initial caveat about MacCormack’s work. While he effectively introduces us to a select set of legal norms set out in writing, the product of over two millennia of moral reflection and rationalization, the portrait he paints of the spirit of Chinese law is incomplete. As Patricia Ebrey has said with respect to understanding “Chinese culture and its connections with social behavior”, a valid conceptual framework must also encompass norms “that had to be

¹⁰² MacCormack, *supra* note 3 at 69.

¹⁰³ *Supra* note 48.

¹⁰⁴ *Supra* note 82.

¹⁰⁵ See J. Ocko, “Using the Past to make a Case for the Rule of Law” in K. Turner, J. Feinerman & R.K. Guy, eds., *Law and Legality in China: Critical Reflections* [forthcoming from University of Washington Press in 1997 or 1998].

¹⁰⁶ See, for example, the case of *Tang Ying Loi v. Tang Ying Lam et al.* (H.C. Action No. A6464 of 1988) in which the court drew on Prof. Chang’s testimony to reject an unconventional inheritance claim.

¹⁰⁷ *Supra* note 48.

expressed in more fragmented and ambiguous ways.”¹⁰⁸ To get at these ideas and to complete our understanding of the spirit of traditional Chinese law, or any body of law for that matter, we need to move beyond the codes, beyond the interpretation of the codes, toward the stories of the living subjects of the law. Such is the project of the scholars of “unofficial Chinese law” whose work may be viewed as an important complement to the more traditional code-based scholarship found in Geoffrey MacCormack’s work on the spirit of traditional Chinese law.

¹⁰⁸ Ebrey, *supra* note 1 at 271.