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An Informal Death Penalty at the Ba County Jail? Magisterial Discretion and Criminal Procedure at the Grassroots in Qing Dynasty China

Prologue: A Child-Molester Dies in the Ba County Jail

In an 1852 case from Ba County, Sichuan, a beggar named Zhu Gaohua 祝告化, “beggar Zhu,” aged 36 *sui*, was arrested for trying to rape a young girl named Lei Liao Shi. Aged just 12 *sui* (i.e. 10 or 11 years old), this girl was the adopted daughter-in-law (*tongyangxi* 童養媳) of peasant Lei Wanfa and his wife. The assault took place when Zhu Gaohua was begging for alms in the girl’s village and noticed that she was home alone, her parents-in-law having gone to another village to attend a wedding. Zhu forced open the door of her house, dragged her outside, and began forcibly stripping off her clothes while she struggled and cried out. A neighbor man, Hu Xingfa, happened to be gathering herbs in the waste area behind the house and, responding to the girl’s cries, seized the beggar. With the help of neighbors, Hu tied up Zhu and then notified the girl’s parents-in-law what had transpired. The next day Lei Wanfa and his neighbors took Zhu Gaohua to Chongqing and turned him in at the Ba County yamen.

The presiding magistrate was Gioro Siyangcing 覺羅祥慶, a Manchu of the Plain Blue Banner who held the *jīnshi* degree and had served as magistrate of at least three other Sichuan counties before arriving at his current post.¹ He immediately ordered a hearing, at which Zhu Gaohua confessed what he had done; both Zhu and the girl testified that she had struggled and cried out, and that the attempted rape was “not consummated” (*wei cheng* 未成). The girl was otherwise not harmed, and the fact that she remained a virgin despite the assault was emphasized in the judgment and in the affidavits (*jièzhuang* 結狀) that concluded the case. Siyangcing found Zhu Gaohua guilty of “attempted rape” (*qiāngjian wei cheng* 強姦未成) and ordered him beaten and “held in jail, never to be released” (*shou ka*

¹ For Siyangcing’s career, see Matthew H. Sommer, *Polyandry and Wife-Selling in Qing Dynasty China: Survival Strategies and Judicial Interventions* (Berkeley: University of California Press, 2015), 356.

yongyuan bu fang 收卡永遠不放, literally “not to be released forever”). The girl’s father-in-law confirmed that he was satisfied with the magistrate’s judgment.

Five weeks later, the Ba County jailer reported that Zhu Gaohua had fallen ill and “was moaning day and night” (*riye shenyin* 日夜呻吟). The magistrate ordered medical treatment, but five days later the jailer reported that his prisoner was dead. The magistrate then ordered an inquest, at which the coroner testified that the beggar’s corpse was very thin, its skin was yellow, its eyes were sunken, and its lips were black; clearly, Zhu Gaohua had died of illness, and his remains showed no evidence of abuse (although the magistrate did note that the dead prisoner’s thighs bore scars from a beating with the heavy bamboo). The doctor who had treated Zhu confirmed his fatal illness to have been febrile “cold damage” (*shanghan bingzheng* 傷寒病症), and said that Zhu had not responded to medicine. The doctor further denied having used an incorrect prescription, and the jailer denied abusing the prisoner. In conclusion, the magistrate ruled that Zhu had died of natural causes and ordered that he be temporarily buried and that public notice be posted seeking relatives to claim his remains. None came forward to do so.²

Discretion in Sentencing: Whether to Apply the Code, Whether to Report the Case

Zhu Gaohua’s case illustrates several features of routine judicial practice in Ba County that may surprise scholars whose understanding of Qing law is based on normative texts such as the Qing code, or on major criminal cases reported by provincial governors to the imperial center for review in *Xingke tiben* (刑科題本, “routine memorials about criminal matters”). Most notable is the degree of latitude exercised by the county magistrate with regard to sentencing and treatment of the defendant.

First, let us consider how Zhu Gaohua’s sentence diverged from codified Qing law. For “attempted rape” (*qiangjian wei cheng* 強姦未成) of a girl aged 12 *sui* or under, a statute (*li* 例) in the Qing code mandated military exile (*chongjun* 充軍) in a “malarial district” (*yanzhang difang* 煙瘴地方) in Yunnan, Guizhou, Guangdong, or Guangxi.³ Sentences of military exile required review and confir-

mation up through the provincial level and notification to the Board of Punishment in the imperial capital; if the magistrate had applied this statute, he would have had to report his provisional judgment up the chain of command. But instead, as we have seen, Magistrate Gioro Siyangcing sentenced the defendant to a beating and life in prison. No such sentence can be found in the Qing code.

As is well known, the Qing judicial system formally divided legal cases into two broad categories, depending on the severity of penalties mandated by the code for any crimes that had been committed. In “major cases” (*zhongda anjian* 重大案件) involving homicide, robbery, rape, or other violent crime, the local magistrate had to find the facts, arrest the culprits, and make a provisional judgment of which laws and penalties should apply, after which he was to “report the case up the chain of command” for review (*shangshen* 上申). In principle, the more severe the penalties, the higher the level of the judiciary that passed final judgment; in theory, all death sentences had to be approved by the emperor himself, the taking of life being his sovereign prerogative. But in “minor matters of household, marriage, and land” (*hu hun tiantu xi shi* 戶婚田土細事), when the applicable penalties were no greater than a beating, the local magistrate was authorized “to act on his own authority” (*zhouxian zili* 州縣自理 or simply *zili* 自理), and he had wide discretion in doing so. Generally speaking, major cases were supposed to be judged strictly by the code, but minor cases could be handled more flexibly.⁴

Therefore, as I have shown elsewhere, local magistrates handled routine “minor” cases involving wife sales pragmatically and flexibly, on a case-by-case basis. Such cases were not subject to superior review, because they involved no crimes deserving penalties greater than a beating with the heavy bamboo. The Qing Code prohibited most wife sales under the rubric “to buy/sell a divorce, in order to take in marriage the wife of another man” (*maixiu maixiu he qu ren qi* 買休賣休和娶人妻), and the relevant statute (*li* 律) mandated a beating with the heavy bamboo for the woman, both husbands, and the matchmaker(s), confiscation of the bride price and any matchmakers’ fees, and divorce of the woman

發雲貴兩廣煙瘴地方充軍。See Xue Yunsheng 薛允升, *Duli cun yi chongkanben* 《說例存疑》重刊本 (Lingering doubts while perusing the statutes, newly edited version), ed. and punct. Huang Jingjia 黃靜嘉, 5 vols. (Taipei: Chinese Materials and Research Aids Service Center, 1970) (hereafter DC), 366–07 [statutes and statutes are cited by serial number here and in the following] and commentary. For the deadly “malarial environment” of southwest China invoked by this penalty, see David Bello, *Across Forest, Steppe, and Mountain: Environment, Identity, and Empire in Qing China’s Borderlands* (Cambridge: Cambridge University Press, 2016), chapter 4.

⁴ See, for example, Shiga Shūzō 滋賀秀三, *Shindai Chūgoku no hō to saiban* 清代中國の法と裁判 (Law and trial procedure in Qing dynasty China) (Tokyo: Sobunsha, 1984), 23–31.

² BX 4-4945, XF 2.10.7. BX refers here and in the following to the Ba County Archive 巴縣檔案, held at Sichuan Provincial Archive, Chengdu; each case is cited by serial number and date of earliest document in file.

³ The statute reads: “*Qiangjian shi'er sui yixia younū Weicheng shen you queju zhe minren gai fa Yun-Gui Liang-Guang yanzhang defang chongjun*” 強姦十二歲以下幼女未成審有確據者民人改

from both husbands to be returned to her natal family (*liyi guizong* 離異歸宗). There is no question that Ba County magistrates knew about this statute, because they often referred to it in rescripts to scold litigants who had engaged in such transactions: e.g., “Both ‘buying and selling a divorce’ are strictly prohibited by law!” (*maixiu maixiu jun gan li jin* 買休賣休均干例禁). But my analysis of nearly 300 judgments in routine cases of illegal wife sales shows that magistrates rarely enforced the statute in full. Instead they distributed penalties in an ad hoc manner, if they imposed any at all, and they allowed about one third of illegal wife sales to stand, in effect ratifying the resulting marriages. The best predictor of how a magistrate would handle any particular case was the specific reason that case had come to court. In these routine cases, magistrates’ top priority seems to have been the expedient solving of practical problems that had provoked disputes, rather than rigidly enforcing the Qing code.⁵ This pragmatic flexibility was the essence of *zili*, i.e. the handling of “minor matters” on the local magistrate’s own authority.

In contrast, Zhu Gaohua’s attempted rape of Lei Liao Shi constituted a “major case” that ostensibly required superior review, but the way Gioro Siyangcing treated it was anything but orthodox. Moreover, Zhu Gaohua’s case is not unique: the Ba County archive contains many similar examples involving major crimes such as rape, attempted rape, and child molesting that magistrates handled with the same sort of flexibility that characterized their judgment of routine cases involving only “minor matters.”

Several aspects of Zhu’s sentence deserve closer scrutiny. First, as noted above, the Qing code mandated a specific penalty for his crime that would have had to be approved by Siyangcing’s superiors before it could be carried out. But even though Siyangcing characterized Zhu’s crime as “attempted rape,” using the same language found in the Qing code, he did not cite the relevant statute, nor did he attempt to impose the penalty of “military exile in a malarial region” that it mandated. Instead, he simply ignored the statute. Moreover, he did not bother reporting this case for review, as required by the penalty of military exile.

5 Matthew H. Sommer, trans., Lin Wenkai 林文凱, “Qingdai xianya de maiqi anjian shenpan: yi 272 jian Ba xian, Nanbu yu Baodi xian anzi wei lizheng” 清代縣衙的買賣案件審判：以272件巴縣、南浦與寶坻縣案子為例證 (The adjudication of wife-selling in Qing county courts: 272 cases from Ba, Nanbu, and Baodi counties), in *Ming Qing falü yunzuozhong de quanli yu wenhua* 明清法律運作中的權利與文化 (*Power and Culture in Ming-Qing Law*), ed. Qiu Pengsheng 邱澎生 and Chen Xiyuan 陳熙遠 (Taipei: Lianjing chubanshe gongsi, 2009), 345–396; Sommer, *Polyandry and Wife-Selling*, chapter 11. For Gioro Siyangcing’s judgments, see Sommer, *Polyandry and Wife-Selling*, 356–360, 367–369. Wife sales were permitted only if a wife had committed adultery or run away (*ting qi qiliu* 聽其去留), but in such cases husbands were required to have their wayward wives prosecuted and to secure a magistrate’s permission before arranging a sale.

Instead, he simply acted on his own authority in a manner that he seems to have believed appropriate to the particulars of this case.

These acts of omission raise fundamental questions about Qing criminal procedure. Was there any mechanism that required a magistrate to apply the Qing code, or that monitored his compliance in doing so? Or was this for all practical purposes an “honor system” that simply relied on the individual magistrate to do the right thing? Was there any way for a magistrate’s superiors to find out whether he had properly reported all major cases to them, and did magistrates ever get in trouble for failing to do so?⁶ Personally, I have seen no evidence to that effect.

In a study of late-Qing robbery cases from Taiwan’s Danshui-Xinzhu archive,⁷ Suzuki Hidemitsu observes that local magistrates did not always follow strict procedure in reporting provisional judgments of serious crimes up the chain of command for review. Instead, they sometimes judged major cases on their own authority without obtaining approval from their superiors—i.e. they followed the procedure of *zili* instead of *shangshen*—and only later reported what they had done. Nor did they get in trouble for doing so. Moreover, Suzuki notes that in his previous studies of summary execution and the extraordinary penalty of “beating to death,” he found that magistrates on occasion were even praised by their superiors for having exercised independent judgment in this manner.

Therefore, Professor Suzuki argues, we cannot dismiss such judgments as violations of the rules or as a usurpation of authority. Instead, the Qing judicial system clearly accepted a certain amount of local autonomy and initiative even in major cases—and in exceptional circumstances, such autonomy might have been accepted even when it involved capital punishment. Suzuki concludes that what really mattered was for a local magistrate to anticipate and fulfill the “intent” (*ikō* 意向) of his superiors, so that even if they learned of his judgments after the fact, they would approve what he had done. This core principle was more important

6 In practical terms, there are two ways that superiors might learn about a local magistrate’s failure to report major cases. The first is that the involved parties might appeal his judgment to a higher yamen, and the second is that the magistrate’s successor might discover what he had done and impeach him for it. The latter seems to be the usual way that financial irregularities were exposed. See, for example, Nancy Park, “Managing Corruption in Code and Practice: The Prosecution of Jiang Zhou and Qian Du,” in *Dragons, Tigers, and Dogs: Qing Crisis Management and the Boundaries of State Power in Late Imperial China*, ed. Robert J. Antony and Jane K. Leonard (Ithaca, NY: East Asia Program Cornell University, 2002), 155–181.

7 Suzuki Hidemitsu 鈴木秀光, “Shindai keiji saiban ni okeru shūkenkan no taisei ni kansuru ichi kōsa—Danzin tōan no tōan no kakeijian o yichirei ni” 清代刑罰裁判における州県官の対応に關する一考察—淡新檔案の盜案の科刑罰案を一例に (A study of the local magistrate’s role in criminal trial procedure during the Qing dynasty: Robbery cases from the Danxin Archive), *Hō-seishi kenkyū* 62 (2013): 35–84.

than whether a magistrate strictly followed the formal rules about reporting major cases. But the question remains how a local magistrate would know in any given case whether he should strictly follow the rules or could get away with exercising discretion and acting on his own.

Professor Suzuki's argument may well apply to the case of Zhu Gaohua. Gioro Siyanging's superiors may not have regretted the beggar's fate, had they learned about it; Siyanging's unorthodox sentence may well have fulfilled their "intent," even if it diverged from the letter of the Qing code. But since Siyanging never bothered to report this case to his superiors, there is no way to know whether they would have approved his judgment after the fact. In that sense, his exercise of discretion seems to go beyond what Suzuki has in mind.

Without doubt, Ba County magistrates were capable of applying the Qing code to major cases and reporting them up the chain of command for review. A case from 1821 is especially pertinent to our discussion because its facts closely resemble the Zhu Gaohua case, but it was handled in a very different manner. It involved a peasant girl aged 11 *sui*, whom a neighbor from the same village tried to rape when she was outside cutting grass for pig fodder; she resisted and screamed, and her father (who was also working nearby) seized the man who had attacked her. The presiding magistrate handled this case in an absolutely orthodox manner, citing the statute against "attempted rape" of a girl aged 12 *sui* or under in order to sentence the culprit to military exile in a malarial region. The magistrate then submitted his provisional sentence to his superiors, and it was successively confirmed by the Chongqing Prefect, the Sichuan Provincial Judge, and the Governor of Sichuan, who finally secured the approval of the Board of Punishment in Beijing.⁸

The circumstances of this case were nearly identical to those in Zhu Gaohua's case, and there is no way to determine for sure why the two magistrates handled them so differently. But it seems likely that the 1821 rapist's status as a member of his community with family and friends made it prudent for the magistrate to handle his case more formally and carefully. In contrast, Zhu Gaohua was a homeless, friendless beggar and a stranger in his victim's community.

Also relevant is an 1853 case from Ba County that I have discussed elsewhere, in which a woman's adultery had apparently provoked her husband to commit suicide. Depending on the specific circumstances, this scenario might have warranted the death penalty for the wife, because the Qing Code's laws against "forcibly causing another person's death" (*weibi ren zhi si* 威逼人致死) extended culpability for

homicide to include some scenarios of suicide. The presiding magistrate in this case was Gioro Siyanging, and he handled it "by the book" in every detail.⁹

In sum, Ba County magistrates exercised wide discretion in how to handle even major criminal cases that ostensibly required superior review. Some they handled strictly according to protocol, but others received more expedient, ad hoc treatment without being reported up the chain of command. The decisive factor, it appears, was the specific circumstances of each case. In the case of Zhu Gaohua, family and community feeling seem to have played an important role. Terada Hiroaki has argued (in a study of Tongzhi-era *ming'an* 命案, i.e. cases involving human death, from Ba County) that even in major cases, a local magistrate's interaction with the parties immediately involved (and with their community) when the case was first reported and investigated would play a significant role in shaping how he handled such cases. In this sense, his judgments would reflect not only law *per se*, but also public sentiment.¹⁰ In Zhu Gaohua's case, a key priority for the family was to establish that the victim of attempted rape was still a virgin and also that she had proven her chastity by resisting to the best of her ability. In this way, they could publicly confirm that the girl's marital viability had not been compromised by the assault. With this priority satisfied, they were unlikely to complain about the magistrate's unorthodox treatment of the beggar – nor would anyone else do so.

Detention in Jail as an Ad Hoc Penalty

Another remarkable aspect of Zhu Gaohua's sentence is the magistrate's order that he be held in prison and "never released." Detention in jail was a gray area in Qing law: the Qing Code contained no official penalty of imprisonment, but also, as far as I can tell, there were no effective limits on how long prisoners could be detained in jail.¹¹ Certainly, there was nothing remotely like the doctrine of *habeas corpus* found in some modern legal systems, which is designed to prevent indefinite detention or unlawful imprisonment.

⁹ Sommer, *Polyandry and Wife-Selling*, 368–369.

¹⁰ Terada Hiroaki 寺田浩明, "Jiri to jōshin no aidā—Shindai shuken reberu ni okeru min'an shori no jittai" 自理と上申の間—清代州県レベルにおける命案処理の実態, in *Chūgoku soshō shakaishi no kenkyū* 中国訴訟社会史の研究 (Studies in the social history of Chinese litigation), ed. Fuma Susumu 夫馬進 (Kyoto: Daigaku gakujiutsu shuppankai, 2011), 427–477.

¹¹ Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases Translated from the Hsing-an hui-lan* (Philadelphia: University of Pennsylvania Press, 1967), 78–79.

At the apex of the judicial system, criminals sentenced to death might have their penalties repeatedly “delayed” (*huanjue* 緩決) at the Autumn Assizes (*Qiushen* 秋審), with the result that some criminals languished in prison for decades.¹² This situation resembles the dysfunctional capital punishment system in the United States today, where mandatory review and appeals may delay execution for decades. The result is that a *de jure* sentence of death may become a *de facto* sentence of life in prison.

But also, the Ba County archive shows that in practice, local magistrates could detain prisoners for as long as they liked, without citing the code or any other authority, and it was not unusual for magistrates to order a defendant to be “held in jail” (*shou ka* 收卡, *shou ya* 收押) without specifying any time limit. Similarly, when Ba County magistrates sentenced a defendant to be punished with the cangue (*jiahao* 枷號), they usually did not specify the duration of the sentence, at least not in writing. They might follow up later by emphasizing the “loathsome” (*kewu* 可惡) nature of a defendant’s crimes and asserting that he “cannot be casually released” (*buneng qing shi* 不能輕釋) (NB: All the prisoners I am considering here were male). The following rescript is typical: “This individual does not abide by the law and keep the peace, and I do not approve his release” (*fei anfen zhi tu, bu zhun kai shi* 非安分之徒, 不准開釋).¹³ No other justification seems to have been necessary.

Illness as an Integral Part of Detention

Gioro Siyangcing had ordered that Zhu Gaohua be held in jail “forever,” never to be released—and in the event, “forever” lasted little more than a month, because Zhu quickly became sick and died. In my opinion, this outcome was readily predictable and the magistrate may even have been counting on it.

From what I can tell (based on a survey of the cases I have on hand), prisoners confined in the Ba County jail for any significant length of time usually fell ill. If a prisoner was sentenced to wear the cangue (which meant sleeping in the jail until the sentence was completed) or was simply detained indefinitely, illness

¹² Most death sentences were provisional and subject to review at the annual Autumn Assizes, where (it appears) most were eventually commuted in light of mitigating circumstances. See Marinus Meijer, “The Autumn Assizes in Ch’ing Law,” *Young Pao* 70, no. 1 (1984): 1–17; and Sun Jiahong 孫家紅, *Qingdai de sixing jianhou* 清代的死刑監候 (Capital punishment with delay in the Qing dynasty) (Beijing: Shehui kexue wenxian chubanshe, 2007).

¹³ E.g. BX 1-1578, QL 50.5; BX 2-4128 & 4130, JQ 2.4; BX 6-45123, GX 25.5.

often came within a few weeks. In summer, prisoners would suffer from dysentery (*lij* 痢疾) and vomiting, no doubt due to poor sanitation and contaminated water and food; in winter, they contracted seasonal febrile illnesses labeled *hanbing* 寒病, *dong wen* 冬瘟, or *shanghan bing* 傷寒病.

When jailers reported prisoners ill, they used formulaic language that varied only in the details of the illness itself. The following is typical: “The prisoner has fallen ill in custody. He moans day and night and can take in neither food nor drink. I fear he may die” (*zai ya huan bing, ri ye shenyin, yinshi bu jin, kong you bu ce* 在押患病, 日夜呻吟, 飲食不進, 恐有不測). Reports go on to specify symptoms such as diarrhea, vomiting, and fever. This formulaic language clearly derives from the routine nature of such reports.

Most prisoners reported sick by their jailers would be released either temporarily or permanently (there are more details about this below); but if not, death seems to have been a common fate – it was certainly not unusual. Serious, life-threatening illness was such a common result of detention that magistrates and yamen personnel must have been aware of it. Indeed, I would go farther: the evidence suggests that a magistrate who ordered detention was implicitly using illness itself as a penalty.

On occasion, a magistrate would permit a defendant who had been sentenced to the cangue in summertime to be released under guarantee (*bao* 保) that he return to the yamen “to wear the cangue in the cool weather of autumn” (*yi qiu liang bu jia* 俟秋涼補枷).¹⁴ Chongqing is notorious for its brutally hot and humid summers, being credited as one of China’s “three furnaces” (*san da huolu* 三大火爐). Such a reprieve was intended to minimize the impact on the defendant’s health, and thus it is a startlingly candid admission that summer was an especially unhealthy season to be detained in the Ba County jail.

How to Deal with Sick Prisoners

If a prisoner did fall ill, a magistrate had several options. First, he might release the prisoner ahead of schedule on pledge of good behavior. When prisoners were released early, their families often played an important role—their incessant petitions and pleas, especially those submitted by the prisoners’ elderly mothers, seem to have been difficult for magistrates to resist. Magistrates would scold the petitioners, reminding them of the gravity of defendants’ crimes, but often acqui-

¹⁴ E.g. BX 3-8670, DG 13.2.

esced to their pleas.¹⁵ This fact underscores the vulnerability of prisoners who, like the beggar Zhu Gaohua, had no family or friends able to appeal their fate. Early release was perhaps the single most common option that magistrates exercised in dealing with sick detainees, and it may have been the most benign. But it is worth noting that these prisoners would be released only after becoming seriously ill, with what sound like life-threatening symptoms, and we know nothing of their fate after release.

Second, a magistrate might release a prisoner temporarily into the custody of a guarantor, to receive medical treatment either at home or at a local inn near the yamen, on condition that as soon as he recovered, he had to return to the yamen to be detained once again and/or to complete his sentence in the cangue. This policy conforms most closely to what the Qing code mandates, at least for prisoners liable for penalties no greater than penal servitude (*tu* 徒). A substitute from the early Qianlong era mandated that if such a prisoner fell ill, he was to be released under guarantee for medical treatment outside the yamen. After he recovered, he was supposed to return to the jail.¹⁶ Some magistrates would impose a time limit. For example, in an 1894 case, a monk who had been arrested for raping a boy was reported by his jailer to be dying, and the magistrate released the monk into the custody of his father for ten days. If, as expected, the monk died, then his father was to report that to the magistrate but if after ten days the monk remained alive, he was to return to jail regardless of his condition.¹⁷

A final option—and certainly the least benign—was the one illustrated by Zhu Gaohua's case: a magistrate could order that a sick prisoner receive medical treatment in jail. Evidently, every local yamen had a doctor on call, along with such other quasi-medical staff as midwives and coroners. I do not have enough examples for a formal quantitative survey, but my strong impression is that medical treatment in jail constituted a further sentence of misery for a prisoner and carried serious risk of death. If the main factor causing illness was the unhealthy conditions in the jail, then removal from the jail might have been necessary for a realistic chance at recovery. To be sure, not all prisoners treated in this manner died (at least not within the time frame covered by their case files, many of which are incomplete), but some of those who survived were reported chronically ill for

months and even years. If the jail's unhealthy conditions were purposely exacerbated by the jailers (perhaps with the magistrate's tacit approval), then a prisoner's prospects would be grim indeed.

Zhu Gaohua's death was ruled as due to natural causes, but that death was certainly convenient for everyone concerned, and nobody seems to have mourned him. Indeed, the magistrate's unusually emphatic order that this child-molesting beggar be held in jail "forever" raises the question of how his jailers might have interpreted that order. Here we must speculate, but every prison has rules, both formal and informal, that govern life inside, and the most important of those rules may never be written down. Normally, in the Qing, a prisoner's family was required to pay for their food and other necessities, and jailers were known to practice a certain amount of extortion in this context. But an indigent prisoner like Zhu Gaohua who lacked family support was supposed to be supplied with food and clothing at state expense.¹⁸ Under the circumstances, one can only imagine the quality of food and drink he was given, or the temperature and sanitary conditions in his cell. According to the British diplomat Sir Harry Parkes, who in 1860 was detained for three weeks in the Board of Punishment's jail in Beijing, prisoners "who had no means of their own were reduced by prison filth and prison diet to a shocking state of emaciation and disease."¹⁹ The same description might well apply to the Ba County jail. Moreover, jailers the world over know all sorts of ways to torment prisoners, ways that would not necessarily leave readable evidence on a corpse: providing contaminated food and water, deprivation of sleep, rendering a cell's temperature or sanitary conditions unbearable, encouraging cellmates to be abusive, etc. None of these measures would likely leave any trace in Zhu Gaohua's case file.

The role of magisterial discretion in Zhu Gaohua's fate stands out in sharper relief if we consider it alongside other cases judged by the same magistrate. Within

18 Indeed, the Qing code mandated penalties for jailers who failed to provide food and clothing to prisoners who lacked family to support them, for failing to provide medicine for sick prisoners, and for other mistreatment. See the statute governing "Clothing and Food for Prisoners" (*yuaqiu yi liang* 獄囚衣糧): "Fan yuqiu (wu jia shu zhe) ying qing gei yi liang, (you jibing zhe ying qing gei) yiyao er bu qing gei, huan bing (zhong zhe chu sizui bu kai suoni wai, qi yu) dang tuo qu suoni er bu (qing) tuo qu, (fan chizui zhe) ying baoguan chu wai er gu (qing) baoguan, (ji ji zhi weidu zhe) ying ting jia ren ru er bu (qing) ting, (yishang sui fei siyuguan dianyuzu suo zhu, dan bu shenqing shang si) siyuguan dianyuzu chi wushi . . ." 凡獄囚(無家屬者)應請給衣糧、(有疾病者)應請給醫藥而不請給、患病(重者)除死罪不開鎖杻外、其餘(苗)苗脫去鎖杻而不(請)脫去、(犯)犯苦罪者應保管出外而不(請)保管、(及)疾至危篤者應聽家人入視而不(請)聽、(以上雖非司獄官典獄卒所主、但不(請)上(司)、司獄官典獄卒管五) . . .

19 Cited in Bodde and Morris, *Law in Imperial China*, 106. For the vital role of customary fees in the Ba County yamen's operations, see Bradley Reed, *Talons and Teeth: County Clerks and Runners in the Qing Dynasty* (Stanford: Stanford University Press, 2000).

15 E.g. BX 5-7281, TZ 3.4.11.

16 See substitute #9 under "Mistreatment of Prisoners" (*lingnüe zuiqiu* 陵虐罪囚): "Tuzui yixia renfan huanbing zhe, yuguan baoming chengshenguan, jixing fu jian yankan shi shi, xing ling gai zuoling, difangguan, qu ju di bao, bao chu tiaozhi yi bingquan ji song jian shenjie." 徒罪以下人犯患病者、獄官報明承審官、即行赴監驗看是實、行令該佐領、號驛校、地方官、取具的保、保出醫治、依病痊即送監審結。

17 BX 6-24839, GX 20.3.

a single year during Siyangcing's term of office, at least four sex offenders died of illness in the Ba County jail, and since I have surveyed only a fraction of Siyangcing's cases, it seems likely that there were even more deaths on his watch. But in many other cases, Siyangcing granted sick prisoners early release, so his exercise of discretion is obvious.²⁰

Just three months before Zhu Gaohua's arrest, for example, Siyangcing had handled a very similar case in exactly the same way, with exactly the same outcome. In that case, the culprit was one Li Si, an impoverished laborer aged 30 *sui* who had neither brothers nor wife and whose parents were dead (note the resemblance to Zhu Gaohua's profile: both men were impoverished outsiders with no friends or family to care about their fate). Li Si was temporarily working for a peasant named Li Damo, and in the summer of 1852 he tried to rape a girl from his employer's village named Zheng Gu, who was just 12 *sui*, when she went to the well to draw water. The girl's mother intervened before the rape could be consummated, and the court midwife confirmed this key fact with a pelvic examination. Siyangcing found Li Si guilty of "attempted rape" and ordered him beaten and held in jail indefinitely. In this instance, Siyangcing did not specify that the would-be rapist should never be released, but the point was moot, because within three months Li Si had died. The jailer had several times reported Li to be sick, and each time Siyangcing had ordered medical treatment in jail. Finally, the jailer reported that Li Si was near death, "He eats and drinks very little and may die at any time" (*yinshi xian jin, ming zai danxi, kong you bu ce* 飲食鮮進, 命在旦夕, 恐有不測), and a week later he was dead. An inquest found the cause of death to be a cold damage (*shanghan bingzheng* 傷寒病症), i.e. the same illness that had killed Zhu Gaohua, and again there was no evidence of abuse.²¹

In neither of these cases did Siyangcing bother to cite the Qing code, despite ruling that both defendants had committed the crime of "attempted rape." But it is worth noting—indeed, it may be no coincidence—that the penalty mandated by the relevant statute was military exile in a "malarial district" in the southwest. The whole point of that penalty was the high risk of death by contagious disease, fostered by a fatally insalubrious environment—and that was precisely the fate met by these two criminals in the Ba County jail.²²

A case judged by Siyangcing the previous year, in 1851, reveals him exercising this sort of fatal discretion with regard to two defendants arrested at the same

time for the same crime. In this case, two laborers named Peng Xi'en and Lu En had persuaded a maidservant named Bigui to run away from the home of her master (who was also the men's employer); at their instigation, she also stole money, jewelry, and other items of value. Peng Xi'en was the main instigator of this adventure, but Lu En compounded his own guilt by having sexual intercourse with Bigui, who was just 14 *sui* (i.e. probably 13 years old), whereas Lu was in his thirties. The case record says nothing about what degree of coercion may have been involved in this sexual activity, but by modern standards it most certainly constituted rape. Suspicious runners on patrol arrested the three on the road to Chongqing where, it appears, the men had planned to sell the girl off.

Siyangcing ordered Bigui to be slapped and handed over to her master, and he ordered the two men beaten and held in jail without specifying the duration of their detention. Three weeks later, the jailer reported that Peng Xi'en was seriously ill and might die; in response Siyangcing ordered Peng to be released under guarantee of good behavior. A week later, the jailer reported that Lu En had also fallen gravely ill, but this time, Siyangcing simply ordered medical treatment in jail. Three days later Lu was dead—and, as usual, an inquest found that he had died of natural causes (again, cold damage) with no evidence of abuse.

The key point here is the discretion that Siyangcing exercised with regard to the two sick prisoners. His decision to release one but not the other suggests that he understood the likely consequences of continued detention, which he chose to inflict only on Lu En. The case record does not explain his decisions, but the only apparent difference between the two prisoners is that Lu had had sex with the girl whereas Peng had not.²³

It is worth noting that Gioro Siyangcing was a very successful magistrate. As a Manchu bannerman, he was not subject to the "rule of avoidance," which made it possible for him to be appointed to Ba County twice for a total service of five years (this is also the reason we have so many cases judged by him). The fact that he received such an important appointment in the first place shows that he must have performed well in his previous duties as magistrate of at least three other Sichuan counties. Moreover, he must have performed well in Ba County too, or he would not have been posted there a second time, nor would he later have been promoted to serve as prefect of Ningyuan Prefecture.²⁴

But also, Siyangcing was by no means the only or the first Ba County magistrate to exercise these kinds of discretion, both in imposing sentences and in handling sick prisoners. A telling example comes from 1785, when an elderly man

²³ BX 4-4926, XF 1.10.

²⁴ See Sommer, *Polyandry and Wife-Selling*, 356, and sources cited therein.

²⁰ For deaths in custody, see BX 4-4925, XF 1.10; BX 4-4926, XF 1.10; BX 4-4954, XF 2.7; BX 4-4945, XF 2.10; for early release, see (for example) BX 4-4939, XF 1.6; BX 4-4912, XF 1.8; BX 4-4958, XF 2.8; BX 4-9726, XF 3.5; BX 4-5081, XF 4.2.

²¹ BX 4-4954, XF 2.7.

²² See Bello, *Across Forest, Steppe, and Mountain*, 191.

named Shuai Weijun filed a complaint accusing one of his three sons, Shuai Guoxuan, of unfilial conduct. According to the complaint, Guoxuan had refused to obey his father, had stolen money and goods from him, and had defied and cursed him when reproached. Weijun had already reported his unfilial son to the yamen some years earlier, in response to which the magistrate had ordered the young man beaten and detained. On that first occasion, when Guoxuan had fallen ill in jail, his family petitioned for his release, and the magistrate acquiesced. But, subsequently, Guoxuan's misconduct had grown ever more egregious, and now his father had had enough. Shuai Weijun renounced his son absolutely: "An unfilial son like this, who is so evil and who refuses to reform, cannot be tolerated by the law!" (*si ci nizi hu e bu quan, fa suo nan kuan* 似此逆子怙惡不悛，法所難寬) Weijun turned his son over to the magistrate and filed an affidavit (*gieszhuang* 結狀) that stated: "I hereby request that your honor put my son to death, and I promise that I will feel no regret if you do so" (*yu en chu bu wu hui* 籲恩處斃無悔).

In response, the magistrate ordered Shuai Guoxuan to be held in jail indefinitely. After two months, the jailer reported that Guoxuan was seriously ill and unlikely to recover. The magistrate's rescript on the jailer's report is only two characters in length: *yixi* 已悉, which means "noted." The case file ends there, so we cannot determine Shuai Guoxuan's fate, but the fact that the magistrate declined even to order medical treatment for the prisoner, let alone release him, suggests that his fate must have been grim.²⁵

As in the case of Zhu Gaohua, this magistrate's treatment of Shuai Guoxuan involved two kinds of broad discretion. First, he did not cite the Qing Code, nor did he report the case up the chain of command for review. "Unfilial conduct" (*bu xiao* 不孝) was potentially a very grave offense, being listed as one of the "Ten Abominations" (*shi e* 十惡) at the beginning of every legal code since at least the Tang dynasty. Under Qing law, striking a parent or grandparent was punishable by beheading, and simple disobedience by 100 blows of the heavy bamboo. Moreover, a statute provided that a parent could report an incorrigibly unfilial son (*nizi* 逆子) to the authorities and petition to have him deported for military exile in a malarial district. Magistrates were expected to honor such requests.

As far as I know, however, no Qing statute or subordinate entitled a parent to request that an unfilial son be put to death.²⁶ But the point is moot because, in this case, the magistrate did not bother to cite any of the laws at his disposal; in

fact, as far as we can tell from the case file, he made no explicit decision as to punishment, instead simply ordering Shuai Guoxuan to be detained without specifying a time limit. But as should be clear by now, that order alone had dire implications for the defendant, and it would be naïve to imagine that the magistrate did not understand those implications.

The magistrate's discretion is further highlighted by the contrast with Shuai Guoxuan's previous experience of falling ill in jail, when his father had petitioned for his release, in hope that he would reform. In both instances, the magistrate followed the father's wishes, in the first by releasing Guoxuan and in the second by consigning him to illness and likely death in the Ba County jail.

Conclusion

Those of us who study the death penalty in Late Imperial China usually consult normative texts such as the Qing Code and published collections of documents related to the Autumn Assizes, or we read the reports on capital cases found in "routine memorials on criminal matters" (*Xingke tiben*). These texts convey an impression of an orderly, predictable, smoothly functioning judicial hierarchy in which major criminal cases were always reported up the chain of command to the imperial center, where the Emperor (in consultation with senior advisors) played his god-like role as arbiter of life and death. I do not mean to dismiss that perspective altogether, because it captures an important part of the truth. There is no question that the death penalty was subject to strict rules and careful review, making it a complex and cumbersome process to sentence criminals to death, and we see that process documented in the countless "routine memorials on criminal matters" that survive in the Qing archives.

Nevertheless, there was another side to Qing criminal procedure. By uncovering some of the unsavory realities of how it worked in practice at the grassroots level, I hope to render our image of the Qing legal system as somewhat more "three-dimensional." To draw an analogy: if one hopes to understand the modern American criminal justice system, it is not sufficient to read the Constitution and the collected cases of the Supreme Court. One must also reckon with, for example, the way police officers routinely treat Black motorists whom they stop for traffic violations, and with the unwritten rules that govern life inside our prisons.

It has long been known from the writings of Huang Liuhong and other officials that Qing jails were unpleasant places and that prisoners were subject to a fair degree of extortion and arbitrary treatment at the hands of their jailers. If anything,

²⁵ BX 1-1578, QL 50.5.

²⁶ Tung-tsu Ch'ü argues that in imperial law, the authority of the father over his children was absolute, including the power of life and death, but the most extreme examples he cites date from the early empire. Tung-tsu Ch'ü, *Law and Society in Traditional China*, revised ed. (Paris: Mouton, 1965), 27.

those authors—for self-serving ideological reasons—have probably exaggerated the corrupt and abusive behavior of sub-yamen personnel during the Qing.²⁷

In the evidence I present here, it is the discretion of the magistrate himself that stands out: it is the magistrate who ruled as arbiter of life and death, without openly admitting that he was doing so. My argument is to some extent speculative, because most of the evidence is circumstantial, and I cannot prove that any magistrate intended for any specific prisoner to die of illness. But this kind of discretion and the power it implies are exercised in unwritten and possibly even nonverbal contexts where wishes and instructions are conveyed by implication and nuance, and by insider understanding of customary practice. In such contexts, one must try to intuit what did not get recorded in the official case file—i.e. what attitude a magistrate might communicate to his staff without issuing explicit, written instructions. A jailer did not have to be psychic to perceive that a magistrate who ordered an impoverished, friendless child molester to be held in jail “forever” did not necessarily intend “forever” to last a long time. A month or so was just about right.

We should remember that Chongqing was not only the seat of Ba County, but also the seat of Chongqing Prefecture (*Chongqing fu* 重慶府) and headquarters of the East Sichuan Circuit Intendant (*Chuangdong bing bei daotai* 川東兵備道台). In fact, the three yamens were located next to each other, and as many Ba County cases show, it was a simple matter for unhappy litigants and petitioners to appeal next door to the magistrate’s superiors. Therefore, I believe, no Ba County magistrate could have gotten away with violating normative rules or standards for very long.²⁸ In other words, the flexibility and discretion shown by Siyangcing (and by so many other Ba County magistrates) must have been normal and routine parts of how the Qing judicial system actually functioned, and as long as a magistrate did not flaunt his autonomy, abuse well-connected prisoners, or mismanage the kinds of cases that really mattered most to the imperial center (namely, homicides and political crimes), then he could exercise a degree of practical power far in excess of what centrally-mandated protocols nominally allowed. This was certainly true for other aspects of routine administration at the grassroots, and we should not be surprised if it was true of criminal procedure as well.

Finally, it is well known that what might be called an “informal death penalty” is occasionally executed in the prisons of other societies altogether, including the modern United States. In a prominent example from 2003, the de-frocked

Catholic priest John Geoghan, who had sexually abused dozens of young boys over a period of decades, was murdered in his Boston prison cell by a fellow inmate. At the time of his death, Geoghan was 68 years old and in frail health, but he had been consigned to “protective custody” in a maximum-security prison, i.e. the sort of place usually reserved for dangerous violent offenders. His murderer, Joseph Druce, was a notoriously homophobic convicted murderer who had been sexually abused as a child. Druce just happened to be given a nearby cell in the same section of the prison and also just happened to have an opportunity to enter Geoghan’s cell, jam the door shut, and strangle him while all the guards just happened to be absent or looking the other way.

Presumably, no one acting in an official capacity explicitly ordered the death of Geoghan. In fact, an official inquiry exonerated prison officials of any purposeful wrongdoing. But somehow, a series of acts of both commission and omission created the ideal conditions for his murder to take place.²⁹ In other words, I submit, he received the equivalent of medical treatment in the Ba County jail. We will probably never know what went on behind the scenes in that incident, but if we are not shocked by the fate of John Geoghan, then neither should we be surprised by what happened to Zhu Gaohua.

²⁷ See Huang Liuhong 黃六鴻, *Fuhui quan shu* 福惠全書 (A complete book concerning happiness and benevolence) (Beijing: Beijing chubanshe, 1997 [1694]), *juan* 13 on “Prison Management.” For Qing officials’ self-serving discourse about yamen staff, see Reed, *Talons and Teeth*.

²⁸ See my discussion in Sommer, *Polyandry and Wife-Selling*, 14–15.

²⁹ <https://archive.boston.com/news/specials/geoghan/>, accessed June 15, 2017.

The Sinosphere and Beyond



Essays in Honor of Joshua Fogel

Edited by

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and Hugh Shapiro

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2024