

The Adjudication of Wife-Selling in Qing County Courts:

220 Cases from Ba, Nanbu, and Baodi Counties

由巴縣、南部縣與寶坻縣 220 件案件看清代法庭

對典賣妻妾行為的審理

Matthew H. Sommer 蘇成捷

Department of History, Stanford University

Abstract

This paper analyzes the logic of local court adjudication during the Qing dynasty based on 220 cases of wife-selling from the archives of three different counties (Ba 巴 and Nanbu 南部 Counties, Sichuan, and Baodi 寶坻 County, Zhili). This sample includes decisions by more than 60 different magistrates from the mid-eighteenth through the early twentieth centuries. The study is further refined by a focused examination of 25 judgments by a single magistrate, Jueluo Xiang Qing (覺羅祥慶) of Ba County.

By “wife-selling,” I refer to the direct sale of a wife by her husband to another man to become the latter’s wife or concubine. During the Qing, the sale of wives was a widespread survival strategy motivated by poverty and framed, like the traffic in women as a whole, by the unbalanced sex ratio and concomitant shortage of wives among the poor. A well-known body of customary practice guided these transactions throughout China proper. Despite this social reality, the Qing code criminalized most wife sales as a variation of “illicit sexual intercourse” (犯姦), and imposed significant penalties for the parties involved (return of the wife to her natal family, a beating for both husbands, the wife, and the matchmaker, and confiscation of bride price and matchmakers’ fees).

Given this contradiction between the pressures of social reality and the ideological mandates of formal law, how did local magistrates judge wife selling when it appeared in their courts? The Qing code notwithstanding, judicial practice varied quite a bit; magistrates certainly did not apply the relevant statutes in any consistent way (although they knew them and often cited them). On the contrary, the best predictor of a magistrate's approach was the specific nature of the problems that brought each case into court. Why were litigants unhappy, and what did they want? What was the most expedient way to solve their problems, without making things worse?

Nearly half of wife selling cases entered local courts because the seller or his family attempted to extort more money out of the buyer (a practice that parallels the demand for supplementary payments 找價 after land sales). A slightly smaller proportion of cases entered local courts because the wife herself and/or her own natal family objected to the transaction. These two causes account for the great majority of cases. In general, magistrates handled the two categories differently, according to the practical logic of each. At the same time, magistrates remained aware of ideological priorities such as female chastity and the integrity of marriage, even if they did not enforce specific mandates of the code.

Qing legal theory and vocabulary had no equivalent for the Western dichotomy of “civil” versus “criminal,” and that dichotomy is of little use in explaining the adjudication of wife-selling. Instead, the Western legal concept that comes closest to capturing the practice of routine adjudication is “equity,” according to which English judges softened the harshness of formal law in light of mitigating circumstances found in particular cases. (In the secondary scholarship on Qing law, Kishimoto Mio's concept of “balance” 中 probably comes closest to capturing this reality.)

To put routine adjudication at the county level in its larger context, this paper makes a brief comparison between the county case sample and a separate sample of more than 240 *xingke tiben* (刑科題本). The *xingke tiben* also involve wife selling, but as a secondary offense (the primary offense in most instances being homicide, which required central review). These cases come from all provinces of China proper and date from the seventeen-thirties through the eighteen-twenties. In the cases reported in *xingke tiben*, county magistrates nearly always sentenced wife-selling strictly according to the code, in stark contrast with normal procedure in routine cases. This contrast suggests that for understanding county-level adjudication as a whole, the most useful analytical dichotomy is the one Qing jurists themselves used: “trivial matters” (細事) that were handled locally and flexibly, vs. “major cases” (重大案件) that were prepared for superior review by the central judiciary.

Introduction:

During the Qing dynasty (1644-1912), the sale of wives was a widespread survival strategy motivated by poverty and framed, like the traffic in women as a whole, by the unbalanced sex ratio and concomitant shortage of wives among the poor. Despite this social reality, the Qing code criminalized most wife sales as a variation of “illicit sexual intercourse” (犯姦) and mandated serious penalties for the parties involved, including compulsory divorce of the wife from both husbands.

Given this contradiction between the pressures of social reality and the mandates of formal law, how did local magistrates judge wife-selling when it appeared in their courts?

This paper analyzes the logic of local court adjudication during the Qing dynasty based on an overview of more than 220 cases of wife-selling from the archives of three different counties. This sample includes 158 wife-selling cases from Ba 巴 County, Sichuan, dating from the 1750s through the 1900s; 50 cases from Nanbu 南部 County, Sichuan, dating from the 1800s through the 1890s; and 15 cases from Baodi 寶坻 County, Zhili, dating from the 1810s through the 1900s.¹ The sample includes cases judged by more than 60 different county magistrates.

These routine cases drawn from county archives were all handled at the local level; few received any direct oversight or review by superior officials in the judicial hierarchy. In this respect, they are typical of the “minor matters” (細事) that comprised the bulk of a local court’s workload. After discussing them on their own terms, I shall attempt to place these routine cases in broader context by comparing them with a separate sample of more than 240 *xingke tiben* 刑科題本 that also involved wife sales (albeit as a secondary offense – the main crime in nearly all the *xingke tiben* being homicide, which required central review). The *xingke tiben* in my sample come from all provinces of China proper and date from the 1730s through the 1820s.²

Xingke tiben are memorials submitted by provincial governors to the imperial center for approval of provisional judgments made initially at the local level and subsequently reviewed at the prefectural and provincial levels. The heart of each memorial is a report prepared by a county magistrate on a “major case” (重大案件), the gravity of which required central review. Therefore, these documents present the other side – the non-routine side – of county level adjudication, in which a magistrate faced

¹ Eighteen cases date from the eighteenth century; most of the rest date from the first half of the nineteenth century. The original documents are held at the Sichuan Provincial Archives, the Nanchong Municipal Archives, and the First Historical Archives (respectively).

² The original *xingke tiben* are held at the First Historical Archives.

not only his inferiors within his own jurisdiction, but also his superiors in the judicial hierarchy right up to the emperor himself.

Social Reality Versus The Qing Code:

By “wife-selling,” I refer to the direct sale of a wife by her husband to another man to become the latter’s wife or concubine. During the Qing, the sale of wives was a widespread survival strategy among the poor; if other resources were exhausted, a husband could sell his wife as a last resort.

Wife-selling represents just one dimension of a pervasive traffic in women and children that affected almost every aspect of Qing society and economy. This traffic was closely linked with the imbalance in the ratio between the sexes that prevailed in China at that time: a shortage of women and a surplus of single men that most severely affected poor rural villages (which might have a 15% or greater surplus of single adult males).

One cause of this imbalance was the crisis strategy of infanticide. Some scholars (for example James Lee 李中清 and Kenneth Pomeranz) argue that perhaps 25% of female infants were killed in eighteenth-century China,³ although this estimate is controversial and may be too high. Whatever the actual rate of infanticide, there is strong consensus that overall childhood mortality was far higher for females than for males, because of the strong cultural preference for sons.⁴ But the traffic in women *exacerbated* the raw imbalance in poor communities by transferring countless girls and young women out to more prosperous households, where they became servants and concubines. At the same time, other practices within the traffic in women *responded* to the shortage of wives in poor communities by making a relatively small number of women available to a much larger number of men. Polyandry (known colloquially as “招夫養夫”)⁵ and prostitution are examples of the latter phenomenon; wife sales and widow remarriage served a similar function, by recycling women through more than one marriage.

We have surprisingly little scholarship on *any* aspect of the traffic in women in China; most of what we have focuses on domestic servants and concubines who were purchased by elite households from their parents (usually through brokers).⁶ Most elite men had concubines (妾), in addition to a main wife (妻); and all elite households had many female servants. It is important to note that the elite had a vital stake in the traffic

³ See Pomeranz’s citations of James Lee’s work (Pomeranz, 2000: pp. 38 & 41).

⁴ See, for example, Wolf, 2001.

⁵ See Sommer, 2005 and Kishimoto, 1998.

⁶ Past studies of wife-selling include my own previous work (Sommer 1994: chapter 5 & 2000: pp. 54-64); Kishimoto, 1998; and Hu, 2002. For the traffic in concubines and maidservants, see Bray, 1997; Jaschok, 1988; Sommer, 2000: pp. 45-54; Watson, 1991.

in women – something that everyone knew, but that was seldom explicitly acknowledged in normative discourse.

Elites aside, it is clear that the routine form of marriage practiced by most peasants was simply to sell a daughter to the groom's family – even if, for reasons of face, the transaction was not explicitly labeled a “sale.” In other words, the bride price paid by the groom's family far exceeded any dowry, which was usually trivial in material value.⁷ (The reason dowry served as an important status symbol for wealthy people is that most people simply could not afford it; a lavish dowry, publicly displayed, was one means by which the elite converted material capital into symbolic capital, to show that they were rich enough and moral enough not to sell their daughters – *unlike* the poor majority.)

Furthermore, most widow remarriage constituted a simple sale of the woman to her new husband. The proceeds might well be used to pay off the first husband's debts, or even to buy his coffin. Widow remarriage, although stigmatized by neo-Confucian morality, was nearly universal among the peasantry.⁸

Given this larger context, it would be a mistake to imagine that there was any clear conceptual boundary between “marriage” and “traffic” in late imperial China: on the contrary, the two categories overlapped and were mutually implicated to a very large degree. Wife-selling should be understood as a variation of the dominant pattern rather than a deviant exception, its formal illegality notwithstanding.

A well-known body of customary practice guided wife sales – *xingke tiben* and other sources show the same basic procedures and contractual forms being employed all over China proper throughout the Qing era. The transaction was nearly always negotiated through a matchmaker and formalized with a contract written in the voice of the first husband (i.e. the seller) to which he affixed his hand print (sometimes his foot print as well). This contract would remain in the buyer's possession to prove his title to the woman, in the same way a land sale contract served as a buyer's deed to the land he had bought; most important, a wife sale contract proved that her first husband had sold her willingly (i.e. the buyer had not abducted her), and listed a series of witnesses and guarantors who could mediate any dispute that might follow.

Despite this social reality, the Qing code criminalized most wife sales as a form of “illicit sexual intercourse” (姦) and mandated significant penalties for the parties

⁷ See Gates, 1996, especially pp. 128-147; Gates bases her conservative calculation of the extent of “marriage as sale” primarily on data collected by John Buck and Arthur Wolf; both data sets almost certainly underestimate the incidence of this practice. Buck's survey was heavily biased in favor of well-to-do households (Huang, 1985: p. 38); Wolf's data were collected through interviews with elderly women, a sample that would also likely include a disproportionate number of relatively prosperous people (because, other factors held constant, the poorest people would be least likely to survive to old age).

⁸ See Sommer, 2000: chapter 5.

involved. The main statute cited to punish wife-selling can be found in the “illicit sexual intercourse” section of the code. It prohibits “buying and selling of divorce” (買休賣休):

If money is used to buy or sell a divorce, so that one man, with consent, takes in marriage the wife of another, then the first husband, the wife, and the man who bought the divorce shall each receive 100 blows of the heavy bamboo; the wife shall be divorced [from both men] and returned to her natal lineage, and the bride price shall be confiscated. [...]

If the woman in question is a concubine [rather than a wife], then the penalties shall be lowered by one degree. In all cases, any matchmaker shall receive a penalty one degree lower than that of the principal offenders.

If a husband does not report [his wife’s] adultery [to the authorities], and instead sells her in marriage to the man who engaged in illicit sex with her, then the original husband shall receive 100 blows of the heavy bamboo, and the man and wife who engaged in illicit sex shall each be punished according to the basic statute [on illicit sex].

若用財買休賣休因而和同娶人妻者，本夫本婦及買休人，各杖一百；婦人離異歸宗，財禮入官。 [...] 妾，減一等，媒合人各減犯人...罪一等。其因姦不陳告，而嫁賣與姦夫者，本夫杖一百，姦夫姦婦各盡本法。（讀例存疑：367-00）

This statute dates from the Ming dynasty; the Qing code preserved it, adding only the interlinear “small character” commentary (小註, shown here in a smaller font) for clarification.

A second statute found in the “marriage” (婚姻) section of the code (讀例存疑: 102-00) specifically prohibited conditional wife sales (典) and fraudulent wife sales (in which a wife was represented as her husband’s sister: 將妻妾妄作姊妹嫁人⁹); but *xingke tiben* show that it was rarely applied. Instead, the statute against “buying or selling a divorce” was generally cited to punish the gamut of illegal wife sales, including fraudulent ones.

The rationale for classifying “buying or selling a divorce” as a form of illicit sex (and therefore placing the relevant statute in that section of the code) was that even if adultery had not *preceded* the transaction, the union that *resulted* from such a transaction was itself illicit, and therefore fundamentally the same as adultery. In fact, the merits of this rationale had been extensively debated during the Ming; opinion was sharply divided. In the mid-sixteenth century, the central judiciary ruled that only a wife sale actually motivated by the wife’s prior adultery with the buyer should be punished under this statute. By the founding of the Qing, however, the stricter

⁹ In fact, archival records show that by far the most common fraudulent strategy was to pose the wife as her husband’s widowed sister-in-law.

interpretation had prevailed, so that for the central judiciary, at least, the motive for sale became irrelevant to whether the statute applied. The inclusion of the small character commentary in the first edition of the Qing code was intended to clarify precisely this point, i.e. to show that prior adultery was only one of the possible scenarios to which this statute applied.¹⁰

In sum, the orthodox position of the Qing central judiciary was that wife-selling should be considered a form of adultery, in which the first husband abetted his wife's illicit union with her buyer. Poverty was no excuse. As the magistrate of Xinfeng 信豐 County, Jiangxi, commented in 1774, in a *xingke tiben* that reported a secondary offense of wife-selling: "Chen Yide sold his wife only because he was pressed by both illness and poverty, and the couple agreed to seek separate routes to survival; be that as it may, to sell off one's wife for cash constitutes the crime of 'selling a divorce' (得錢嫁賣即屬賣休)."¹¹ From this perspective, the wife herself was a kind of adulteress, so she deserved corporal penalties along with the men; moreover, in order to repair the damage, the wife should be separated from both husbands and returned to her natal family for them to dispose of appropriately (i.e., in marriage to some third man who was not complicit in the transaction).

This orthodox position partook of the well-known Qing obsession with female chastity; but it had little bearing on the social reality of wife-selling, which in more than 80% of my county cases and 75% of my *xingke tiben* were motivated by simple poverty. According to the missionary Arthur Smith (writing at the end of the nineteenth century), "the frequency of such sales may be said to bear a direct ratio to the price of grain" (1899: p. 295). In most cases I have seen, the husband and wife agreed to separate in order to survive.

Wife-selling served a number of purposes for the concerned parties, each of whom had somewhat different stakes in the transaction. From a husband's point of view, his wife constituted an asset that could be liquidated in time of pressing need. With the proceeds of a sale, he could pay off debts, redeem pawned property, and buy food, medicine, or perhaps a parent's coffin. For a wife, on the other hand, to be sold offered an exit from difficulty and a second chance at life with a new husband who would likely be better able to support her. In other words, the transaction provided her with a divorce and a new marriage; occasionally, a sold wife also received a share of her sale price.

A desperate couple might negotiate to have their children accompany the wife into the new marriage, to be supported by her buyer for a fixed period before returning to their father's household. In this kind of situation, the couple shared a desire to secure their children's survival, and the woman's sale price would be lowered, to defray the

¹⁰ For a detailed account and documentation, see Sommer, 1994: chapter 5, and Sommer, 2000: pp. 59-61.

¹¹ XT #1338-12

cost of feeding them. But sometimes children would be sold outright, along with the wife, and then the sale price would be higher.

Most buyers were poor, single men: from their point of view, the transaction provided a relatively inexpensive way to marry and start a family. Given the risks associated with wife sales (which, after all, were illegal), a wife acquired in this manner usually cost the buyer significantly less than a remarrying widow, let alone a never-married virgin. (Consequently, the main motive for fraud was to get a higher price for the woman.) These men sought to form families, and their main criteria for choosing a wife (aside from affordability) were a woman's abilities to bear children and to help run a household. In a minority of cases, prosperous men paid higher than usual prices to buy other men's wives for concubines; in such cases, the key criteria seem to have been youth and beauty (although fecundity also played a role – sometimes a man who could afford it would take a concubine if his wife had failed to bear a son).¹² But the great majority of buyers were poor, single men who had saved long or borrowed in order to afford the purchase. The amount paid for the wife usually constituted a very substantial sum for the individuals involved: as much as (or even exceeding) a couple of years' wages for an agricultural laborer, or the cost of a couple of years' subsistence grain for an adult male, or the price of a couple of head of cattle.

Despite Qing prohibition, the practice of wife-selling persisted, being driven by worsening material pressures beyond the dynasty's competence to suppress. This sharpening contradiction between judicial imperatives and the logic of social practice made wife selling a prominent feature of the caseloads of Qing dynasty courts, whose rich records survive to this day.

Why Did Wife-Selling Cases Come to Court?

The first step in analyzing routine adjudication of wife-selling in the county courts is to understand why these cases came to court in the first place. Given the illegality of the transaction (which appears to have been well understood by most people), one would assume that the parties shared a common interest in avoiding official attention. Indeed, whereas contracts for *legal* transactions were written in order to be taken to court if necessary to have their terms enforced, wife-selling contracts were written with the clear purpose of forestalling such a maneuver; they often list as witnesses and guarantors members of all three families (the seller's, buyer's, and wife's) along with matchmaker(s), the intent being that these people would mediate any dispute that might

¹² This high end of the traffic in women to a certain extent resembles that part of American slavery known as "the fancy trade," in which rich men paid exorbitant prices for beautiful, light-skinned women to exploit for sexual pleasure instead of for the usual economic production. Such slaves were luxury goods and status symbols – see Johnson, 1999.

arise. To take a wife-selling contract to court was to risk having it confiscated and the transaction cancelled – witness the large number of such contracts that survive in county archives.

Under the circumstances, why did wife-selling cases end up in court? We know the reason in 204 of my local cases. They fall into three basic groups (more than one reason applied in a few cases):

A. Extortion & other money disputes:

- 1) extortion by seller (usually aimed at getting more from buyer): 80
- 2) extortion by natal family (usually aimed at getting share of bride price): 11
- 3) extortion by seller's family (usually aimed at getting more from buyer): 9
- 4) other extortion (by matchmaker, etc.): 4
- 5) other money dispute (division of bride price, failure to pay, etc.): 8

B. Objections to sale:

- 1) wife is unhappy and/or natal family object to sale: 70
- 2) seller's family objects to sale: 5
- 3) buyer in fraudulent sale discovers fraud: 4

C. Miscellaneous:

- 1) runners arrest people on suspicion of trafficking: 7
- 2) dispute over child custody: 2
- 3) seller or buyer petitions to get official approval for sale: 2
- 4) other: 13

Two reasons account for the vast majority of litigation over wife sales. The most important reason cases came to court was extortion by the seller or his family (89 cases, or 44% of the total), a practice that parallels the demand for supplementary payments (找價) after land sales. The second most important reason was that the wife herself or her natal family objected to the sale (70 cases, or 34%).

The reasons why cases came to court help to explain how magistrates judged these cases; they also tell us a great deal about the differing perspectives, or subject positions, of the three main participants in wife-sales: the seller, the buyer, and the woman who was sold.

The Patriarchal Perspective on Wives and Land:

Cases that came to court because of extortion by the seller reveal a remarkably close parallel between male peasants' attitudes toward wives and their attitudes toward *land*. (NB: the vast majority of people involved in wife-selling cases are peasants.) To

clarify the perspective of a man who sold his wife, it is necessary first to explain briefly the customary practice of land sales in the peasant economy.

In theory, land sales were either “conditional” or “absolute.”¹³ In a “conditional sale” (典賣, 活賣), the sale price would be somewhat less than the land’s full market value; the seller had the right to redeem (贖回) the land by refunding its original sale price within a fixed period of time. If he failed to do so (a frequent occurrence, given that peasants typically sold land out of desperation and having done so would find it difficult to save up enough capital to redeem it), then in principle, the buyer could convert a conditional sale into an absolute sale by making one final “redemption payment” (找貼) that would cover the difference between the original sale price and the current market value of the land. Given inflation, the more time passed the more expensive this would be, so converting a conditional sale to an absolute one was often not to the buyer’s advantage. In short, many land sales resulted in an ambiguous situation (the land neither redeemed, nor converted to absolute sale) that might continue indefinitely.

Instead of actually redeeming the land, it was common for a seller to demand a series of smaller “supplementary payments” (找價), sometimes long after a transaction was nominally complete; the seller would *threaten* to redeem the land (at original sale price) unless the buyer agreed to the supplementary payment. Buyers usually agreed, because the more time went by, the bigger the gap between the original price and the current market value. As Kishimoto Mio has shown, demands for supplementary payments tended to correlate with the increase of land values, which sellers felt entitled to share (1997).

In theory, land transferred by “absolute sale” (絕賣, 死賣) was not redeemable, and after paying the agreed price the buyer owed the seller nothing more. In practice, however, nearly all land sales were treated as conditional (even by magistrates, when such cases came to court), regardless of whether they had been explicitly defined as such by contract. Sellers and their descendants would demand repeated supplementary payments from buyers and their descendants, sometimes over a period of decades, and also claimed a permanent right to redeem the land if they chose to do so. Where the seller (and his descendants) felt a continuing sense of entitlement, the buyer (and his descendants) would resent being the object of what felt, as time passed, more and more like extortion. Not surprisingly, these negotiations provoked much litigation and many headaches for Qing magistrates.

Peasant land sales are relevant here because we find exactly the same vocabulary and a number of analogous practices in wife sales, including the distinction between conditional and absolute sale and the practice of demanding supplementary payments.

¹³ For conditional land sales and supplementary payments, see Schurmann, 1956; McAleavy, 1958; Kishimoto, 1997; Huang, 1996 & 2001: chapter 5; and Isett, 2004.

Very few wife sales were explicitly termed “conditional” (none of my county cases involve conditional sales, and the practice appears in only two of my *xingke tiben*, although it is mentioned in the Qing code). A typical wife-selling contract states in no uncertain terms that the entire bride price (or “body price” 身價) has been paid, that the buyer owes the seller nothing more, and that the seller’s relationship with the sold wife has been irrevocably severed. Nevertheless, as in ostensibly “absolute” land sales, many men who sold wives repeatedly demanded supplementary payments (sometimes using the same term, 找價, seen in land transactions), and buyers would often pay a couple of times at least before the matter went to court. If a buyer refused to pay, the seller might file charges against him, and as we have seen, such “extortion” is the single most common reason for a wife sale to end up in court. In courtroom testimony, buyers would complain of “extortion” and “blackmail” (索, 訛詐, etc.); in land sale disputes, they complained in exactly the same way.

What is the shared logic here? The logic framing land sales was an ideal of permanence in landholding, that reflected (among other things) all the labor the seller had put into the land prior to the sale; it was this logic that held land to be indefinitely redeemable, and also emboldened sellers to demand repeated supplementary payments. The conditional nature of land sales and the availability of supplementary payments implied limits on the alienability of land; they extended survival credit to poor peasants, and gave sellers an indefinite opportunity to recover their land. Some scholars suggest that these customs constituted a rudimentary safety net at the community level.¹⁴

Land carried a meaning and value very different those usually associated with commodities in a capitalist economy. As Philip Huang has eloquently explained,

Land was much more than just a piece of property to be bought and sold. It was more even than the source of a man’s livelihood. It was the very basis for his sense of dignity, and for his status in the village community. It was what separated him from the sorry lot of the homeless who were forced to drift from place to place, and it embodied the very continuity of his patrilineal ancestry and descent, concretized in the family gravesite. Sales of land could thus be acts of profound symbolic meaning for the seller (2001: p. 81).

Moreover, the usual reason for a peasant to sell land was economic desperation. For this reason, a land sale was seldom seen as a truly equal exchange. The buyer had benefited from the seller’s misfortune; thus the buyer would traditionally hold a feast to

¹⁴ E.g. Isett, 2004.

thank the mediators and witnesses to the sale – he was seen as having something to celebrate. The seller, on the other hand, was an object of pity.¹⁵

Practically everything said here about *land* would apply equally to a *wife*. In peasant society, social status and economic viability depended above all on family farming, for which a man required both land and a wife; moreover, a man had to have sons in order to fulfill his duty to ancestors. Land was vital for material maintenance of a patriarchal family; equally, a wife was vital for that family's biological and social reproduction. (I have also seen cases in which men who had sold children later demanded supplementary payments from their buyers.) Moreover, in Chinese society full social adulthood came with marriage and reproduction (some might say that this continues to be true today). Therefore, a man driven by poverty to sell his wife would inspire both pity and contempt – the latter sometimes expressed in organized community hazing.

The shared vocabulary of land sales and wife sales, and the demands for supplementary payments found in wife selling cases, seem to reflect an attitude about wives fundamentally similar to peasants' attitude about land.¹⁶ It is as if an asset as vital as land or a wife could *not* be alienated absolutely, no matter what superficial form a transfer may take: there was a fundamental connection, tied up with status, identity, and morality, that could not be severed by the payment of money.

In other words, to “sell” a wife (or a piece of land) did not sever one's connection to that wife (or land) so much as it initiated a new and ongoing relationship between seller and buyer – a relationship in which the buyer was seen as morally obligated to assist the seller, whose misfortune had benefited him. This imbalance between buyer and seller also means that the buyer had more to lose by going to court than the seller did. That is why buyers sometimes paid off sellers two or three or more times over a period of years after the wife sale had taken place; these payments could be substantial: sometimes adding up to as much as the original bride price. This is the logic of the negotiation between men that framed wife sales and fueled the related litigation.

The Perspectives of the Wife and Her Natal Family:

¹⁵ See Huang, 2001: pp. 71-85. Huang suggests that the Qing code's statutes related to conditional land sales were informed by “an ethic of sympathy for those whose survival was threatened,” i.e. poor peasants who sold land – see 2001; p. 73.

¹⁶ The parallel between land and a wife is also seen in folk proverbs, for example “有錢不娶活人妻，要地不要順道的”; buying a wife with a living husband was risky, and so was buying roadside land (because crops would be vulnerable to damage and theft). Variations include “買地不買河灣地，娶妻不娶活人妻” and “有錢不種无粮地，有錢不娶活人妻”; in the latter version, the logic seems to be that both wives with living husbands and land with no tax rice quota are seemingly cheap deals with suspicious strings attached.

As we have seen, the second most common reason why wife selling cases came to court was that the wife herself or her natal family objected to the transaction. The woman's interests often coincided with those of her natal family, and the latter were her most reliable source of support in a dispute with her husband and in-laws. But a woman's interests and those of her natal family were not necessary identical, and occasionally they conflicted. To understand how these dynamics fueled litigation in county courts, we need to consider these interests and subject positions more closely.

For a husband to sell his wife would seem to be the very epitome of patriarchal exploitation of women, and the traffic in women has understandably been lumped together with foot binding and concubinage as part of the 20th century nationalist stereotype of "the victimized woman of old China."¹⁷ The image of the sold wife as a commodity exchanged by men for cash would seem to reinforce this view. But the evidence from my case records reveals something both more complex and more interesting than mere victimization.

In most of my cases, the question of agency needs to be understood from at least two angles. Wife-selling was a generally family strategy, collectively decided and undertaken in order to solve family problems; but there was also opportunity for the wife to assert herself at a number of points in the process. In the most basic terms, it was an opportunity for individual women to pursue their own interests by escaping hopeless situations in favor of potentially more secure ones. A husband might be more reluctant than his wife to take the drastic step of selling her; indeed, it was sometimes the wife who demanded that her husband sell her, so that she could have a chance for a better life with a different man. As noted above, women often took their children with them into the new marriages, in which case it is their *husbands* who would be left alone. A man who had sold his wife was seen as the loser in this transaction, because he would thereby sink into the ranks of "bare sticks" (光棍) – i.e., the underclass of rogue, surplus males outside the family system at the bottom of Qing society. It was unlikely that he would ever recoup the resources necessary to marry again.

Even a wife who was not enthusiastic about being sold might well agree to it, as the least bad choice in a situation with no good ones. Missionary Adele Fielde recounts that one of her female converts who had been sold by her husband confided the following perspective:

[My husband] said to me: "You have a hard time with me; the children are thin, and you are miserable; it would be much better for you to be married to some kind man who would give you enough to eat. I will find such a one, and marry you to him, [along with our children]"... I assented to this, for I saw that the children would otherwise starve... I did not cry at all

¹⁷ Cf. Ko, 1994: introduction.

when he left me, for I thought I could be no more wretched than I had been with him (Fielde, 1887: p. 183).

We find nearly identical accounts in the testimony of sold wives in legal case records.

As a practical matter it was very difficult for wife-selling to work without the wife's cooperation, in part because such transactions were illegal, and nobody involved wanted trouble that might attract a lot of attention. For that reason, the wife herself usually participated in the decision, and if her husband and the matchmakers were wise, they would consult the wife's natal family as well, often promising them a share of the bride price in exchange for their cooperation. A wise buyer would attempt to ascertain whether the natal family had agreed to the sale before he would commit. Successful transactions usually involved participation by representatives of the wife's natal family as witnesses and guarantors (her father, brothers, or uncles), and their names often appear on the wife sale contract itself.

But even after agreeing in principle to be sold, a wife might exercise a veto over subsequent negotiations if she felt they did not suit her interests. Some wives would cut off their hair, complain to the neighbors, scream and cry in the street, and threaten or even attempt to commit suicide. This sort of reaction was taken very seriously by the men. Most important, if the wife raised a fuss and made a scene, the buyer would probably get cold feet, because he did not want legal trouble, and he also did not want to marry a shrew; nor did he want to end up with an angry ghost on his hands.¹⁸ I have a handful of cases in which women were forcibly sold against their clearly expressed wishes; but these cases are unusual, and they must be set against the many other examples in which women exercised an effective veto over whether or to whom they were sold.

But also, if a wife were unhappy about the situation, she could ask her natal family to go to court and file charges to prevent or cancel the sale. Sometimes a woman would run away to her natal family in order to preempt the sale, and then she might petition the magistrate herself; but it was better to have her natal family act on her behalf, so she could avoid the appearance of impropriety that would attend filing charges against her own husband. Various versions of this scenario account for about a third of the county-level cases in my sample.

¹⁸ American slaves, in far more constrained circumstances, would engage in analogous strategies to influence prospective buyers, based on an estimation of what kind of masters they would be. When slaves were put on display, their manners, body language, and answers to questions all made a strong impression on buyers; sellers were anxious to secure their slaves' cooperation so that the sale would succeed. To avoid being sold at all, slaves might threaten to mutilate or kill themselves, thereby ruining their own cash value. See Johnson, 1999.

I do not want to exaggerate the degree of female agency in these situations; we should not pretend there was something to celebrate in situations where, in fact, there was probably nothing to celebrate. For example, when a woman was divorced from both husbands and returned to her natal family by court order, she almost always lost custody of her children – it was a basic principle of patrilineal descent, enshrined in law, that children belonged with their fathers. In many instances when a magistrate appears to be protecting a woman's interests, he is simultaneously severing her connections and claims to her children.

In some cases, too, there is an ambiguous quality to the natal family's involvement and especially their motivation. To be sure, a woman's natal family often acted to protect her interests, to make sure that she was not abused or sold against her will. On the other hand, the natal family often stood to gain financially from these situations; if they were cut out of the wife sale, they could file suit to regain custody of the woman, with the expectation of getting the full bride price for her in the new marriage they would later arrange themselves. If the natal family was consulted in the negotiations, then they would typically be paid for their cooperation; and I have seen no case of natal relatives filing charges in defense of a woman if they had already been paid to cooperate. In such situations, an unhappy woman's only resource might be her own *chutzpah*.

Patterns of Routine Adjudication:

Given the contradiction between the pressures of social reality and the ideological mandates of formal law, how did local magistrates judge wife selling when it appeared in their courts? A basic question is to what extent (if at all) magistrates enforced the mandates of the Qing code. One reason this question matters is that Philip Huang, in a path-breaking study of county adjudication based on a large sample of archival case records, argues that magistrates nearly always judged routine "civil cases" according to the code (1996). How well does Huang's argument stand up, when tested against my sample of wife-selling cases?

As we have seen, the statute against "buying or selling a divorce" mandates that both husbands, the woman, and the matchmaker(s) all be beaten, that the woman be divorced from both husbands and returned to her natal family, and that the bride price and any matchmakers' fees be confiscated. We can use these three elements – the fate of the wife, who if anyone was beaten, and the fate of the money – to assess how strictly magistrates abided by the code when judging wife sales, and how and why they deviated from it.

1) The Fate of the Wife:

In these judgments, the fate of the wife was the one factor most fundamental to the ideology of female chastity and sanctity of marriage that underlay the statute against “buying or selling a divorce.” Was the illicit union allowed to continue? If it was canceled, would the wife be separated from her first husband as well? If the wife was not divorced from both men and returned to her natal family, then we may fairly conclude that both the letter and the spirit of the statute were being violated.

We know the fate of the wife in 148 judgments. They fall into two groups. The first consists of 79 outcomes that can be considered more or less consistent with the statute (although the third item in this group may be a slight stretch):

Returned to natal family 62

No natal family, sold in marriage by official matchmaker (官媒) 9

Transaction not yet completed, returned to first husband 8

The second group consists of 69 outcomes that clearly violate the statute’s mandate:

Returned to buyer, second marriage allowed to stand 55

Returned to first husband 14

In sum, nearly half of all judgments violated this aspect of the statute. It is especially striking that more than a third of all judgments in effect ratified illegal wife sales by allowing the second marriage to stand.

In addition, we know the fate of the wife in 18 cases in which the magistrate formally approved a mediated settlement:

Returned to natal family 3

Transaction not yet completed, returned to first husband 2

Returned to buyer, second marriage allowed to stand 11

Returned to first husband 2

13 of these mediated settlements violated the statute’s mandate.

Can we discern any logic in these judgments? Specifically, what factors influenced a magistrate’s decision about what to do with the wife?

If the wife objected to the sale herself, here is what happened (in 26 judgments for which we have information):

Returned to natal family 20

Transaction not yet completed, returned to first husband 5

Sold by official matchmaker 1 (NB: this woman had committed adultery with a third man after the sale was completed)

The most significant point here is that in *no* instance when the wife herself objected to the sale was she returned to the buyer and the second marriage allowed to stand. In the five cases in which the wife was returned to her first husband, the wife (or her natal family) had filed suit to prevent the transaction from taking place.

If the natal family (but not necessarily the wife) objected to the sale, here is what happened to her (in 28 judgments for which we have information):

- Returned to natal family 19
- Returned to buyer, second marriage allowed to stand 7
- Transaction not yet completed, returned to first husband 1
- Returned to first husband, despite sale 1

The seven judgments that ratified the second marriage are worth considering in more detail. In three, the woman herself testified that she wanted to stay with her buyer; in two she and her buyer were far away at time of trial and could not be summoned; in one, the sale had taken place seven years before and the woman had already given birth to two sons for the buyer; in one, the wife had been sold because of adultery, and the magistrate found this acceptable even though the first husband had failed to seek authorization before taking such action. The one judgment that returned the wife to her first husband despite his having sold her is unusual, too: the magistrate found that the wife had provoked her sale through her own bad behavior, and he clearly sympathized with her first husband; therefore the magistrate returned his wife to him with an admonition to discipline her better instead of selling her.

We can conclude that if the natal family objected to the sale, then in most instances the magistrate would cancel it and return the wife to her natal family. In the exceptions, there were particular circumstances that seemed to justify other measures. Often, the attitude of the woman herself had a decisive influence on her fate.

What if neither the wife nor her natal family objected to the sale? As mentioned above, the single most important reason wife-selling cases came to court was that the seller or his family attempted to extort more money out of the buyer after the sale had taken place. In most of these cases, we find little evidence that the seller really wanted to get his wife back; what he wanted was money. Under these circumstances, how did magistrates dispose of the wife? (out of 58 judgments for which we have information)

- Returned to buyer, second marriage stands 36
- Returned to natal family 12
- Returned to first husband 6
- Sold by official matchmaker 2

In 12 cases that went to court because of extortion by the seller or his family and ended in mediated settlements approved by the magistrate, we find the wife disposed of in the following manner:

- Returned to buyer, second marriage stands 11
- Returned to first husband 1

The same pattern prevails in the judgment of cases that went to court because of extortion by some other party, when neither the wife nor her natal family objected to the sale (14 cases):

Returned to the buyer, second marriage stands 11

Returned to natal family 3

It is clear from this information that magistrates were much more likely simply to ratify a wife sale if neither the wife nor her natal family objected to it, and if the seller's real goal in causing trouble were money.

2) The Fate of the Money:

In judgments for which we have information (118 cases), what was done with the bride price?

Kept by seller: 95

**in 13 of these cases, magistrate orders buyer and sometimes matchmaker to pay seller extra in addition to bride price

Returned to buyer: 13

Confiscated: 7

Awarded to natal family: 2

Awarded to wife (to be dowry for remarriage): 1

In more than 80% of judgments, the magistrate allowed the seller to keep the bride price he had received for his wife. (No doubt this lenience stemmed, in part, from practical considerations, given that most of these men had already spent the money.) Moreover – and this was highly unorthodox – in 13 of these cases, the magistrate ordered the buyer to pay the seller an additional sum of money in exchange for letting the second marriage stand (these 13 cases include more than one example from each of the three counties in my sample). Magistrates enforced the statutory requirement to confiscate the bride price in only 7 judgments, less than 10% of the total.

If the case went to court because of extortion by the seller or his family, how did the magistrate dispose of the bride price? Since the goal was to obtain more money, how often did they succeed? (56 cases for which we have information)

Kept by seller 49

(in 8 of these, the buyer was ordered to pay the seller extra)

Returned to buyer 5

Confiscated 2

In nearly 90% of these judgments, the seller kept the bride price – and in 8 cases, the seller actually achieved his goal (with the magistrate's help) of extracting more money out of the buyer!

3) Corporal Punishment:

How often were the mandated beatings imposed on those complicit in wife-selling? Here are the data for the 148 cases that went to judgment for which we have information:

Seller	86 (almost 60%)
Buyer	52 (35% -- NB: in five cases, a buyer had not yet been found)
Matchmaker	48
Wife	23 (about 15%)
Other	5 (in which none of the above were punished)
No-one	27

As we can see, in the great majority of cases that went to judgment (but not all), someone did get punished; but magistrates did not impose punishment with anything like the uniformity or consistency mandated by the statute. On the contrary, they applied punishment differentially, depending on the particular circumstances of each case. The seller/first husband was most likely to be beaten; the wife was least likely to be beaten.

In addition, the corporal punishment most often imposed was “slapping” (掌責) with a leather strap or the bare hand, rather than the “heavy bamboo” (杖), and the number of blows in practice was often less than the mandated number. In other words, corporal penalties, when imposed, were generally somewhat lighter than those mandated by statute.

Given this lack of uniformity, how common were different combinations of penalties?

Seller only	34
Seller, buyer, and matchmaker	13
Seller and matchmaker	12
Seller and buyer	10
Buyer only	9
Matchmaker only	7
Seller, buyer, wife, and matchmaker	6
Buyer and matchmaker	6
Buyer and wife	4
Wife only	3

As we can see, it was very unusual for all four of the main parties in a sale to be punished as prescribed by statute. Instead, magistrates seem to have weighed the degree of responsibility and culpability of each party.

The frequency of beatings imposed on the seller (and the relatively high number of cases in which he alone was beaten) reflects the fact that so many cases came to court because of extortion by the seller and/or his family. Such men were viewed as trouble-makers, and with good reason. Rarely did they admit the facts up front, because to do so would constitute admitting their own complicity in the crime of wife sale. Instead, they would file false charges (of abduction, rape, etc.) against the men who had bought their wives after the latter had refused to make supplementary payments (often they

filed charges against other parties too, e.g. the matchmaker). Filing false charges was a way to raise the pressure on the buyer, on the assumption that the buyer had more to lose by going to court than did the seller – after all, the seller had already lost his wife and usually he would already have spent the bride price before demanding supplementary payments. In many instances, the seller who filed false charges clearly had no intention of actually sticking with the lawsuit all the way to a formal hearing before the magistrate. But sometimes either the buyer or the magistrate himself would call the seller’s bluff by forcing a hearing.

The Wife–Selling Judgments of Gioro Siyangcing:

A skeptic might wonder if the variation in judgments simply reflects the idiosyncrasies of individual judges – after all, the entire sample includes cases of more than 60 different magistrates in three separate counties. Perhaps some magistrates consistently ruled “by the book,” while others ruled leniently or according to sheer whim.

Fortunately, we have 40 wife-selling cases handled by a single magistrate, Gioro Siyangcing (覺羅祥慶), who served two stints in Ba County for a total of six years (DG 29-30 and XF 2-6). Siyangcing was a Manchu of the Plain Blue Banner who received a *jinshi* (進士) degree in 1835 and subsequently served at various posts in Sichuan. He was unusual, but by no means unique: a number of other bannermen (Manchu, Mongol, and Han) served as magistrates in Ba and Nanbu Counties over the course of the Qing. There are gaps in what I have been able to find out about his career, but by the time he began his first term in Ba County, Siyangcing had already served for a total of at least six years as magistrate of Wan County 萬縣 (DG 16-17), Xinning County 新寧縣 (DG 24-25), and Yingshan County 營山縣 (DG 25-29), all of which are in Sichuan. (So far, I cannot account for DG 18-23 or XF 1.) In XF 6 or 7, he was promoted to serve as prefect of Ningyuan Prefecture 寧遠府, also in Sichuan.¹⁹

Therefore, Siyangcing’s tenure in Ba County followed 13 years of preparatory service, much (perhaps all) of it spent in Sichuan. He came to Ba County as an experienced magistrate and something of a Sichuan expert. He also carried the prestige of both his top examination degree and his pedigree as a descendant of one of Nurhaci’s brothers (indicated by his surname “Gioro”). In other words, Siyangcing probably knew his job as well as, or better than, most county magistrates; and he was less likely than most to be intimidated by the local scene. Moreover, we can assume that he performed

¹⁹ Many thanks to Mark Elliott for providing the Manchu Romanization of Gioro’s name, and to Karasawa Yasuhiko for helping me trace his official career. Karasawa’s research (in progress) shows that it was common for a magistrate to be rotated among different counties of Sichuan province, presumably so he could develop regional expertise without putting down roots in any particular place.

his job well: otherwise, his superiors would not have kept him in the strategically vital post of Ba County for six years, let alone promoted him.

Bearing these facts in mind, let us examine Siyangcing's 40 wife-selling cases.²⁰ They date from DG 29 through XF 5. Poverty motivated the wife sale in every case for which we know the motive (36 cases).

We know Siyangcing's judgments in 25 of the cases, so let us focus on those. Here is how they break down:

Fate of the wife:

Wife returns to natal family:	14 cases
2 nd marriage stands:	8
Returned to first husband:	2
Sold by official matchmaker:	1

Disposal of bride price:

Kept by seller:	21 cases
[Kept by seller, plus magistrate orders extra payment:	2]
Refunded to buyer:	2
Unclear (probably kept by seller):	2

Who received a beating:

Seller:	14 cases
Buyer:	10
Wife:	8
Matchmaker(s):	6
No-one:	9

To sum up, Siyangcing's approach to wife-selling cases exemplifies what we have seen in the larger sample as a whole. He allowed the second marriage to stand about a third of the time (8 out of 25 cases), which is close to the overall rate (55 out of 148, or 37%). He ordered the wife returned to her natal family somewhat more often than average (14 out of 25, or 56%, as compared to 62 out of 148, or 42%); but since he confiscated the bride price in not a single case, and allowed the seller to keep it in at least 21 out of 25, he can be considered slightly more lenient than average with regard to money. In two cases, he ordered the buyer to make an extra, final payment to the seller in exchange for being allowed to keep the wife – this proportion also roughly follows the larger sample, in which extra payments were ordered by magistrates in 13 out of 122 cases. In most cases he ordered corporal punishment, but he distributed it

²⁰ I take for granted that like other magistrates, Siyangcing probably benefited from the professional advice of one or more legal secretaries 幕友 on his personal staff; but such individuals are generally invisible in the case records.

selectively: as in the larger sample, the party most likely to be beaten was the seller. Magistrate Siyangcing often admonished litigants that “both buying and selling of divorce are strictly prohibited by law” (買休賣休均干例禁, 買休賣休均有應得之罪, etc.). Nevertheless, in practice he ruled flexibly on a case-by-case basis – and in this respect, he is typical of our larger sample.

If we examine Siyangcing’s 25 judgments according to the reason each case came to court, we again find a familiar pattern. Here I focus on the fate of the wife as the decisive aspect of a magistrate’s judgment.

Why did cases come to court, and what was the fate of the wife for each category?

Extortion by seller or his family 14 cases (in 7 cases, the second marriage stands; in 5, the wife is returned to her natal family; in 1 case she is returned to seller; in 1 case, she is ordered sold by the official matchmaker)

Wife unhappy 5 (in 4 cases she is returned to her natal family; in 1 case she is returned to seller)

Natal family objects 2 (in both, she is returned to natal family)

Extortion by natal family 1 (returned to natal family)

Other 3 (in 1 case, the second marriage stands; in 1, the wife is returned to her natal family; in 1, she is returned to seller)

As in the larger sample, the two most common reasons that wife selling cases came before Siyangcing were (1) extortion by the seller or his family, and (2) objection by the wife or her natal family. Generally speaking, Siyangcing handled these two categories of cases differently. Most important, he never allowed the second marriage to stand if the wife or her natal family objected to the sale; instead, he would cancel the transaction and return her to her natal family or (in one case) to her first husband. He followed the same policy in another case when the natal family filed charges in an apparent attempt to extort part of the bride price from the seller.

Let us examine one of these cases more closely. In XF 2.4, Li Farong (26) arranged through two matchmakers (his neighbors) to sell his wife Long Shi (22) to one Wang Shuchuan (28) as concubine for a bride price of 55 taels. Li was very poor, and he needed the money to clear his debts. This transaction was somewhat unusual, because unlike most wife-selling cases, it represents the high end of the traffic in women, in which a prosperous man who already had a wife paid top dollar for a young, desirable woman to be his concubine. We have no evidence of Long Shi’s physical appearance, but at the age of 22 sui she had already given birth to at least one child of each sex, so she fit Wang’s needs perfectly – he was looking for a woman of proven fecundity, because his main wife had failed to give birth, and his mother had instructed him to take a concubine in order to secure their posterity.

The matchmakers told Wang that Long Shi's natal family had approved the sale, but this was a lie; in fact they had not been consulted at all. Wang paid 10 taels up front to seal the deal, promising to pay the balance when Long Shi was delivered. But Long Shi was very unhappy with the situation; she protested to her adoptive mother, the widow Long Peng Shi (36), who filed charges at the Ba County yamen to preempt the sale. The case went to a formal hearing, at which Long Shi accused her husband Li Farong of abusing her and also protested the proposed sale; Wang Shuchuan testified that he was willing to cancel the deal, but wanted his 10 taels back. Siyangcing ordered both marriages canceled and awarded custody of Long Shi to her adoptive mother; he refrained from punishing anyone, and allowed Li Farong to keep the down payment. In exchange, Li pledged not to harass Wang or to attempt to extort money from anyone (BX 4-4952).

This ruling gave the wife and her natal family what they wanted. But it also suggests considerable sympathy for the seller-as-loser: in effect, Siyangcing fined the more prosperous Wang Shuchuan 10 taels in order to compensate Li Farong for the loss of his wife. Siyangcing does not explain this maneuver in the case record, but obviously he decided that Li Farong needed the money and that Wang Shuchuan could afford to lose it.

The second most common reason why wife-selling cases came into Siyangcing's court was extortion by the seller or his family. In these cases, Siyangcing exercised greater flexibility in disposing of the wife, because she and her natal family did not object to the transaction *per se*. In half of these cases, he simply let the second marriage stand, thereby ratifying the sale. Let us take a closer look at two examples.

(1) In XF 1.3, Jiang Xuekui and his wife Pan Shi found themselves in great difficulty because of poverty; so Jiang engaged matchmaker Yu Chengyi to sell her to one Jiang Xingfa (no relation to the seller) for 8000 cash. This was a fraudulent sale; Pan Shi was represented to the buyer as a widow. Some weeks later, seller Jiang Xuekui showed up at the buyer's home in Chongqing, revealed that he was Pan Shi's husband, and demanded an additional 6000 cash. A neighbor, Che Xingshun (who worked as a runner in the circuit intendant's yamen) mediated the dispute, advising Xingfa to pay; after some haggling, Xuekui agreed to accept 2000 cash in exchange for a new wife sale contract in Xuekui's name (to replace the fraudulent original). But on XF 1.6.9 Xuekui again showed up at Xingfa's home, invited him out for tea, and demanded 4000 cash (i.e. the balance of the 6000 cash he previously asked for). This time Xingfa refused to pay; so that same night Xuekui came to Xingfa's home, caused a noisy scene in the street, and finally slashed his own throat with a knife and collapsed on Xingfa's doorstep. This commotion brought out all the neighbors, and soon the night watch arrived and arrested everyone. Xuekui's wound proved superficial; his

dramatic gesture had been intended to attract attention rather than to inflict self-destruction, and in that respect it certainly succeeded.

Siyangcing judged the transaction to be an illegal instance of “selling divorce,” but opted to punish no-one. Instead, he allowed the second marriage to stand, and ordered buyer Xingfa to pay seller Xuekui a final sum of 1000 cash in exchange for a pledge to cause no more trouble (BX 4-4914).

(2) In XF 3.7, an unemployed laborer in Chongqing named Zhang Zhengming ran out of money and became desperate, so he arranged to sell his wife Li Shi to another laborer named Zhao Tingfu for an unspecified price. A couple of months later, Zhang had spent the entire bride price, so he persuaded Zhao to pay him an unspecified additional sum in exchange for a written “pledge of submission” (服約) promising to demand nothing more. Regardless of this promise, in XF 4.1, Zhang demanded even more money, but Zhao refused, and they had an altercation in the street. In response, Zhang filed a plaint at the county yamen accusing Zhao of abduction, adultery, and theft, and attached to his plaint a list property that Zhao had supposedly stolen from him.

In court, Zhao produced both the wife sale contract and the submission pledge to disprove Zhang’s charges, which Zhang admitted were spurious. Siyangcing ordered both men slapped, and made them pledge to cause no more trouble; but he allowed the second marriage to stand without bothering to summon either wife or matchmaker to testify (BX 4-5083).

In these two cases, Siyangcing split the difference: no one got everything he wanted, but everyone got something. Both buyers were allowed to keep the bride price and supplementary payments, while both sellers were allowed to keep the wives they had illegally purchased. In other details, however, the two rulings differed. In the first, the magistrate punished no one and awarded what amounted to a 找貼 payment to the buyer, to forestall further demands for more money; but in the second, he ordered the buyer and seller beaten. There is no certain way to account for these differences, because in routine cases, magistrates seldom justified their rulings in any detail, and Siyangcing was no exception. But they do not seem purely arbitrary. Rather, Siyangcing felt a sympathy for the first buyer (perhaps because of his dramatic self-inflicted wound), that did not extend to the second (perhaps because of the elaborate lies in his plaint).

If we set aside the two main causes of wife-selling litigation and examine the three cases that came to court for other reasons, we find that Siyangcing ruled in three different ways, depending on the unique facts of each situation:

(1) In the first case, the wife and her buyer’s mother quarreled after the sale, prompting the mother to file charges against her son. Siyangcing canceled the transaction and ordered the wife returned to her natal family; he also ordered both buyer and wife slapped for having offended the mother. No-one else was punished, and the

seller kept the bride price. In this instance, the buyer had arranged to purchase the wife against his mother's wishes, and the magistrate obviously considered the new marriage untenable (BX 4-5170).

(2) In the second case, the buyer made a down payment in exchange for the wife, but failed to pay the balance owed, prompting the seller to file charges accusing him of abduction. Siyangcing canceled the transaction, ordering the wife returned to her first husband (who was required to refund the down payment), and had the buyer, seller, matchmaker, and wife all slapped for being untruthful in their initial testimony. We do not know what happened next, but one can speculate that the husband looked for another buyer who could afford to pay the entire bride price up front (BX 3-9639).

(3) In the third case, Siyangcing had previously authorized a poor man with an unhappy wife to divorce her. But instead of doing so, the husband had engaged a matchmaker to arrange a fraudulent sale (passing the wife off as a widow). The buyer later resold the woman to a third husband – whereupon the matchmaker from the first, fraudulent transaction filed false charges against this third husband in an attempt to extort money from him. Siyangcing left the wife with her third husband (according to her wishes), and punished no-one for either sale. But he did order the matchmaker slapped for extortion and filing false charges (BX 4-4987).

In these three decisions, Siyangcing set aside the code in favor of solving the concrete problems of the litigants, applying sanctions selectively according to his own sense of different individuals' degree of culpability, and disposing of the wife in whatever manner seemed appropriate to the circumstances. Often what he punished was not the wife sale *per se*, but some other misconduct (extortion, false charges, unfilial conduct, breach of contract) that had brought the wife sale to his attention.

To sum up, the best way to explain Siyangcing's judgments is to examine the concrete reasons each case came to court. It would be inaccurate to conclude that wife-selling was not a crime, or that Siyangcing personally found it acceptable. On the contrary, he repeatedly condemned the practice in his rescripts to litigants, stating in the strongest terms that it violated the formal law of the dynasty. He usually punished at least some of the parties involved in these cases. But he ruled flexibly, because he was aware of the social realities that framed wife-selling. Many of his rulings imply considerable sympathy for men driven by poverty to sell their wives, but also for women who were unwilling to be negotiated as liquid assets and wanted out of both marriages.

This seasoned magistrate's approach in 25 judgments confirms the larger pattern of routine adjudication seen in the case sample as a whole. It reveals a pervasive logic

of judicial practice that guided dozens of different magistrates in three different counties over more than a century.²¹

Non-Routine Adjudication – Wife Sales in *Xingke Tiben*:

The picture of Qing justice found in *xingke tiben* could not be more different from that found in the routine cases from county archives. The heart of each “routine memorial on criminal matters” is a report prepared by a county magistrate on a “major case” (重大案件), the gravity of which required central review. Therefore, these documents present the other side – the non-routine side – of county level adjudication, in which a magistrate faced not his inferiors within his own jurisdiction, but his superiors in the judicial hierarchy right up to the palace, ostensibly including the emperor himself. In reading *xingke tiben*, therefore, one must imagine a humble county magistrate writing his report with the emperor himself looking over his shoulder – nothing could be less routine than that. In these texts, one really sees county magistrates (to borrow Philip Huang’s words) in their role as “functionaries working at the bottom of a bureaucratic hierarchy with elaborately articulated rules and review procedures,” their “actions subject to regular review by upper levels” and their “much vaunted discretionary authority in fact severely constrained” (1996: pp. 107-108).

The most striking difference is that in *xingke tiben*, every offense is precisely identified, matched to a statute or substatute in the Qing code, and sentenced accordingly. The law being applied is quoted in full; if more than one law seems relevant, the magistrate will quote them all and then reason his way to an appropriate sentence. If a magistrate believes it appropriate to modify the sentence mandated by the code, he will explain his reasoning with care and deference, as if expecting to be rebuked. The entire judgment is provisional, and presented to the magistrate’s superiors in the manner of a suggestion, offered for correction or approval.

The following four cases all come from *xingke tiben* from the year 1762. They illustrate the general range of scenarios prosecuted as “buying or selling a divorce” when that crime appeared as a secondary offense in a major case prepared for central review. Their specific circumstances are quite diverse, yet they all fell within the scope of this statute.

1) An Incomplete Transaction:

In the following case from Shanxi, Wang Tianchen (37) decided to sell his wife, Liu Shi (27), to Zhang Degong (36). The couple were migrant laborers who had

²¹ NB: the pattern seen in Siyangcing’s cases and in the larger sample as a whole is borne out in the sub-samples of all three counties; I do not have space here to demonstrate this fact with examples.

finished planting crops in another county and were on their way home. Zhang encountered them one evening on the road and brought them home to spend the night; as he later confessed:

At first, I had nothing else in mind. But...Wang Tianchen explained that all along the road no-one had hired them, they really had nowhere to find anything to eat, and the weather was getting cold. Back home they were poor, too, so there was no way for them to survive. So he asked me to find someone to whom he could sell his wife Liu Shi in marriage – that way, they could go their separate ways to survive. I said that I had no wife myself and wanted to get married, so he and I agreed on a bride-price of 50 taels; the next day I planned to...borrow the money and pay him, and Wang Tianchen said that once he had been paid he would write a marriage contract. At the time, Liu Shi and my mother were both with us there listening, and Liu Shi didn't say anything.

The next day, the two men went to borrow the money from Zhang's relatives; on the way, Zhang tried in vain to persuade Wang to lower his price: "I thought to myself that I didn't have that much money, and even if I asked my relatives there was no way I could borrow 50 taels of silver on the spur of the moment. It suddenly occurred to me that it would be better just to kill Wang Tianchen and get his wife for free..." He lured Wang onto a remote path and murdered him.

Returning home, Zhang told his mother and Liu Shi that Wang had already received his money and had proceeded directly home. Liu Shi was skeptical, so Zhang showed her an old letter written on red paper, claiming that it was the marriage contract Wang had given him; illiterate, Liu Shi was convinced by the red paper. As she later confessed: "Since my husband had said in front of me that he was going to sell me to Zhang Degong, and since he showed me the marriage contract, that night I consummated the marriage (成了親) with him." Interestingly, Zhang's own confession employs the phrase "consummated illicit sexual intercourse" (成了姦) in place of "consummated the marriage"; whether this phrase represents Zhang's own word choice or that of whoever drafted the case report, it underscores the illegitimacy of a sexual union effected through wife-selling and deception.

When the homicide was exposed, the wife-selling came out as well. Zhang himself was sentenced to immediate beheading in analogy to the substatute on "a man who engages in illicit sex, plans the murder of the husband, and later abducts the woman with whom he has engaged in illicit sex to be his wife or concubine"; the use of this measure by analogy reflects the theory that wife-selling was an extension of adultery. We find the same logic in the judgment of Liu Shi:

She did not engage in illicit sex with Zhang Degong in advance; nor had she any knowledge of the premeditated murder. Nevertheless, when Wang

Tianchen first discussed selling his wife with Zhang Degong, she was beside them listening, and later, after Zhang Degong showed her the fake marriage contract, she slept with him (同宿); so she was already willing to have her divorce sold (情願賣休). Liu Shi should be sentenced according to the statute which prescribes that “a wife whose divorce is sold shall receive 100 blows of the heavy bamboo”...

It was the woman’s “consent” to being sold that defined her as unchaste. The magistrate ordered Liu Shi “returned to her natal lineage,” and a brother was summoned to take her in custody (XT 177, Qianlong 27.8.29).

2) An Open Transaction Negotiated with the Woman’s Natal Family:

A second homicide with a background of wife-selling was reported by the governor of Jiangxi. This sale involved more formal negotiations, conducted in good faith, that included the woman’s natal family. Peasant Wu Rongliang (25) had decided to sell his wife, Chang Shi (22), because “we were poor and my wife often quarreled with me”; she agreed with his decision, so he notified her family, who also agreed, contingent upon receiving a share of the bride-price. Wu then engaged two matchmakers to find a buyer; they were concerned that the woman or her family might protest, so, as one later confessed,

I went to ask Chang Shi and her grandmother...about it, and they both said that they had agreed. Only then did I approach Xiao Qinbei, who offered a bride-price of 53 taels. On the 20th, Xiao Qinbei paid 29 taels in advance, and Wu Rongliang drew up a marriage contract. At that time his wife’s brother, Chang Kongjian, was present; he wrote his mark on the contract, and Wu Rongliang gave him 5.2 taels of silver. It was arranged that the rest of the bride-price was to be paid over on the 22nd at the Wu lineage’s ancestral temple, and a day would be chosen for [Chang Shi] to go to [Xiao Qinbei’s] home to consummate the marriage (過門成婚).

At the next meeting, however, Chang Kongjian suddenly demanded that Wu Rongliang pay him an additional 2000 cash. Wu refused, telling Xiao to take his load of strings of cash (the balance of the bride-price) back home and to pay him another day. Chang became angry and grabbed Wu, who struck him in the chest, injuring him—fatally, it turned out. The transaction was never completed and the woman never transferred to her buyer.

Wu Rongliang was sentenced to strangulation after the assizes for “homicide in a fight.” His wife, the man planning to buy her, and the matchmakers were all sentenced according to the statute on “buying or selling a divorce”:

Chang Shi was willing to be remarried to another man (聽從改嫁); therefore she, together with Xiao Qinbei, who was to take her in marriage, shall each receive 100 blows of the heavy bamboo... [The matchmakers] shall each receive 90 blows of the heavy bamboo according to the statute's provision that "any matchmaker shall receive a penalty one degree lower than that of the offenders"... In addition, Chang Shi shall be divorced and returned to her natal lineage.

This case is notable for the conscientious effort of both husband and matchmakers to satisfy his wife's natal family, even to the point of sharing the bride-price with them. In spite of the natal family's involvement, the judiciary defined the negotiations as a sale transacted between husband and buyer: Wu Rongliang had received the payment directly, later giving his brother-in-law a share—that is why the brother-in-law's demand for more money was directed to Wu, instead of the buyer. Also, Chang Shi had not been returned to her natal family, as she should in a legal divorce; had the transaction gone through, she would have been transferred directly from first husband to second. These seem to have been crucial elements defining the crime of "buying or selling a divorce"; all were present in the previous case as well (XT 179, Qianlong 27.3.13).

3) Giving Away a Wife:

A third example was reported by the governor of Shanxi in 1762. Zhang Xian (59) and Cai Shi (58) had been married for more than 40 years; for most of that time, they had been able to get by, but they had no sons, and after their three daughters married out the couple had fallen on hard times. Cai Shi resented her husband's increasing poverty and began to demand that he let her marry out to someone else.

One day, an acquaintance named Li Fukui overheard them quarrelling and urged them to stop. As Zhang Xian later confessed:

He said, "The two of you have spent a long time together... Ever since my wife died, there has been no-one to take care of things at home, and life has been very hard for me"... When I heard this, I thought: "Well, he has no wife; Cai Shi isn't willing to pass her days peacefully with me, and I really can't win an argument with her; anyway, I can't even support her myself. I might as well give Cai Shi to him to be his wife—that will take care of everything (倒也乾淨)"...

At first [Li] refused, but I repeated several times that I wanted to give her to him, and since Cai Shi was also willing to follow Li Fukui, he finally agreed. He gave me 400 cash, which I used to redeem two pawned pieces

of clothing for Cai Shi... I didn't get any bride-price, nor did I write a marriage contract. There was no matchmaker, either.

When the skeptical magistrate questioned Zhang more closely about the money, he elaborated: "...When I heard her say she was willing to follow Li Fukui, [it was the last straw]. So in my anger and spite, I didn't care about the consequences; I just used the 400 cash Li Fukui gave me to redeem Cai Shi's clothes, and told her to go away with him." But later that year,

I was cold and hungry to the point that I couldn't take it anymore, and there was nowhere I could go to borrow anything. It occurred to me that even though Cai Shi had gone with Li Fukui, still, after all, we had spent several decades together as husband and wife. So I went to ask her to lend me something to pawn, so that I could survive... [But] as soon as Cai Shi saw me her expression changed, and she started cursing me. I begged her again and again, but when she saw I wasn't leaving, she pulled out a knife and came at me... I saw that she didn't have even the slightest bit of wifely feeling left for me...

In his anger, he snatched the knife away and stabbed her to death.

The homicide was the principal crime in this case, but the transfer of Cai Shi from one man to the other was critical to determining how the killing should be punished—since lighter penalties generally applied to the killing of a wife by her husband. In his own mind, Zhang Xian had simply given his wife away: he did not consider the 400 cash received from Li Fukui to be a bride-price, since it had all gone to redeem Cai Shi's clothing, which she had taken with her. But since the money had been paid to Zhang, it did not matter, technically, what he had done with it; for purposes of law, the transaction counted as "buying or selling a divorce." Therefore, as the judicial summary explains, "Zhang Xian had already sold the divorce of his wife Cai Shi, so the bond of moral duty (義) between husband and wife had already been broken (絕) [before the homicide]. For purposes of sentencing they should be treated as unrelated persons (同凡論)." It was this "breaking of the bond of moral duty" inherent in wife-selling which justified the statutory provision that a sold wife be separated from both buyer and seller and be returned to her natal lineage. In the present case, the woman was dead, but the broken bond still determined that her killer not be treated as her husband. Zhang Xian was sentenced to strangulation after the assizes according to the basic statute on "homicide in a fight."

The remainder of the judgment completes the fitting of the facts to the requirements of the statute on "buying or selling a divorce":

Li Fukui bought Cai Shi to be his wife; he shall receive 100 blows of the heavy bamboo, according to the statute on "using money to buy a divorce and marry the wife of another with consent"... The 400 cash that Zhang

Xian received from Li Fukui were used to redeem Cai Shi's pawned clothing; since Cai Shi is already dead, it is requested that this money not be pursued for confiscation.

In other words, for legal purposes the payment to Zhang constituted a bride price, which would have been confiscated had Cai Shi remained alive (XT 185, Qianlong 27.6.16).

4) A Fraudulent Sale:

A case from Linyou 麟遊 County, Shaanxi, also memorialized in 1762, illustrates the application of the statute against “buying or selling a divorce” to a case of fraudulent wife-selling. Yang Shi (30) was the wife of a poor peasant named Li Liangde. At the end of the winter of 1761 they ran out of food, so (in Yang Shi's words) “my husband led me out of the village to beg for something to eat.” On the road, they encountered another beggar, Liu Manxing, and “my husband proposed that they say I was a widow who wanted to get married [and sell me].” In a nearby village they found a buyer, Wang Shoutong, who lacked a wife, and was willing to pay 1700 cash for Yang Shi. The transaction was completed in an empty temple outside the village, the money being exchanged for the woman without the formality of a written contract, and Yang Shi went home with Wang Shoutong to be his wife. Li Liangde and Liu Manxing went off and were not heard from again.

Now as far as Wang knew Yang Shi was a widow, but he learned otherwise when Li Liangde's brother and three cousins came to demand more money; they were outraged when they heard how little Liangde had gotten for Yang Shi, and since she had been the only wife in their whole generation of the Li family, they collectively felt they deserved more for her. But Wang protested that “Yang Shi was a widow I married through a matchmaker, I had no idea she was the wife of a living man (活人妻)”; moreover, as a poor laborer, he had no extra money to give. So they went to confront a more prosperous relative of Wang's, and got into a fight which produced a homicide.

The significant point is how the fraudulent wife-sale was judged. Li Liangde and the other beggar who acted as matchmaker had disappeared and could not be found. But Yang Shi and her buyer, Wang Shoutong, were both sentenced to 100 blows of the heavy bamboo according to the statute against “buying or selling a divorce,” and Yang Shi was ordered returned to her natal lineage. Wang had been duped into buying a married woman; nevertheless, the magistrate ruled, “he did not investigate her background,” and “there is really no difference between this conduct and ‘buying a divorce.’” This judgment was confirmed upon review, as were the judgments in the other three *xingke tiben* discussed above (XT 175/Qianlong 27.10.18).

These four judgments exemplify the strict, rigid application of the statute on “buying or selling a divorce” found in *xingke tiben* throughout my century-long sample,

from the early Qianlong through the early Daoguang reign. It must be emphasized that these judgments were as much products of county adjudication as were the routine cases in my sample from county archives. The same magistrates who handled routine cases flexibly, depending on the concrete reasons they came into court, also prepared these non-routine cases for review up through the chain of command.

In *xingke tiben*, we occasionally do find local magistrates extending lenience or modifying the terms of the statute. For example, in a handful of cases, magistrates waived confiscation of the bride price (if the seller were very poor, and seemed to deserve pity), or allowed the sold wife to remain with the buyer (if she had no natal family to return to, and especially if the buyer had been the victim of a fraudulent sale). But any such deviation from the code had to be carefully justified and proposed as a suggestion, for superiors to reject or approve as they saw fit. Such suggestions usually were approved without comment.

But there were limits to how far a magistrate could go. For example, in a 1736 case from Xuyong Independent Subprefecture 敘永廳, Sichuan, one Zhao Ying sold his wife openly because of poverty and illness; later, a dispute over Zhao's demand for supplemental payments to support his children provoked the buyer to kill him. The local magistrate initially ruled that since Zhao and his wife had been willing to separate, the wife sale could be considered legal under the code's provision (in the statute on "expelling a wife" 出妻) that "if husband and wife are both willing to separate they shall not be liable for punishment" (夫妻兩願離者不坐). On that basis, the magistrate absolved the wife and matchmaker of any crime (the seller was dead, and the buyer sentenced for homicide). But the Sichuan provincial judge (按察使) overturned this ruling, and sent the case back to the subprefectural magistrate with the following admonition:

With regard to "buying and selling of divorce," the code's chapter on "illicit sex offenses" contains a different law which is the correct one. According to that law the wife, matchmaker, and other parties should all be punished (查買休賣休, 犯姦律內另有正條, 本婦並媒合人等均有應得罪名). But the subprefectural magistrate has instead cited the statute on "expelling a wife," and this does not conform to the code (以出妻之律擬議亦未符合).

Not surprisingly, the magistrate issued a new sentence that strictly applied the statute against "buying or selling a divorce"; the wife and matchmaker were ordered beaten, she was returned to her natal family, and the bride price was confiscated. The new sentence was approved on review (XT #15-3, Qianlong 1.7.19).

Another example of the strictness of protocol in non-routine cases comes from a *xingke tiben* dated 1754. The magistrate of Yanshi County 偃師縣, Henan, had previously reported a homicide case that included wife-selling, and he had sentenced the

latter strictly by the code, including ordering that the bride price be confiscated. This judgment had been confirmed at all levels of the review system, eventually receiving a vermilion rescript (on an earlier *xingke tiben*) expressing the emperor's approval.²² But the seller, one Ma Zhongrong, was dirt poor and simply could not come up with the money, so he finally petitioned the county magistrate to have mercy and waive confiscation of the bride price. The magistrate was inclined to agree, but the vermilion rescript had already converted his provisional judgment into an imperial edict, so he felt unable to act on his own. Instead, he sent his own petition up through chain of command, recounting the entire case, and requesting a new vermilion rescript authorizing him to waive confiscation of the bride price. Eventually, the provincial governor forwarded that petition to Beijing packaged as a new *xingke tiben*, and it was duly approved by vermilion rescript. The edict came back down to the county, and confiscation of the bride price was officially waived (XT #542-3 & 534-2).

Did the Seller's Poverty Justify Lenience?

The ideology of the code and the rigidity of protocol notwithstanding, senior officials knew full well that the social reality of wife-selling was poverty, not lasciviousness. At different points in the Qing, some senior officials attempted to take this fact formally into account in order to mitigate the harshness of the statute. For example, in 1737 the governor of Fujian approved a proposal that in wife sales motivated by poverty or illness of the seller, and involving no adultery or "any other factor," lenience should be shown by allowing the second marriage to stand and the seller to keep the bride price. In addition, the governor agreed to reduce corporal penalties in such cases from the 100 blows of the heavy bamboo mandated by the statute against "buying or selling a divorce," to 80 blows of the heavy bamboo (for the seller) and 40 blows of the light bamboo (for the buyer), by applying instead the statute against "doing inappropriate things" (不應爲而爲) for "severe" (情重) and "less severe" (情輕) cases respectively. Matchmakers would receive a penalty one degree lower than sellers. In recommending this change, the governor's advisors cited a similar policy apparently already effect in neighboring Zhejiang. The governor ordered that officials throughout the province be notified of the lenient policy, and it was formally incorporated into the provincial regulations.²³

²² The vermilion rescripts on *xingke tiben* were written neatly by (I assume) some secretary, rather than the emperor himself; they are very different from the autograph rescripts found on secret palace memorials (硃批奏摺). Since the rescripts are absolutely formulaic, I doubt that emperors themselves actually read *xingke tiben* – instead, I suspect they postponed their personal involvement in the judicial process until the Autumn Assizes (秋審).

²³ 福建省例, 1: pp. 864-865; also see p. 860 for a preliminary discussion of this approach.

The new policy seems crystal clear. It is curious, however, that several *xingke tiben* from Fujian and Zhejiang that post-date this ruling show no sign of its effect (e.g. XT #1318-6; #1851-11; #2074-14). Instead, these *xingke tiben* (which report wife sales motivated by poverty) follow the usual protocol by rigidly applying the statute against “buying or selling a divorce.” It appears, therefore, that the provincial ruling was intended to apply only to “minor cases” handled at the local level, and did not affect the preparation of “major cases” for review at the imperial center.

By 1818, however, the Board of Punishment itself issued a similar ruling that presumably applied throughout China proper. In that year, the governor of Henan asked the Board for its opinion of his decision in the following case:

Wang Heigou sold his wife Hu Shi to Li Cunjing to be his wife; interrogation reveals that he did so because of poverty and illness, and that he had no alternative. This is different from “selling a divorce” for no reason. Hu Shi has no relatives on her mother’s side, so if she is divorced [from both men] as provided in the statute [on “buying or selling a divorce”], then she will just end up losing her chastity (失節) anyway. Weighing the circumstances of the case, I have ordered that Hu Shi be handed over to her second husband, Li Cunjing, for him to take home as wife. Also, it is requested that the bride-price money received by Wang Heigou not be confiscated.

The Board approved, and this ruling was later included in the officially authorized casebook *Conspectus of Penal Cases* (刑案匯覽).²⁴

Again, however, there is almost no evidence that the Board’s lenient policy had any real effect. In my sample of post-1818 *xingke tiben* that report poverty-motivated wife sales, I find only a single one (from Jiangxi, dated 1819) that applies this policy.²⁵ In contrast, I find at least nine others in which the statute against “buying or selling a divorce” is strictly applied.

Even more telling, perhaps, is an “immediate examination” (現審) case from Beijing judged by the Zhili Bureau (直隸司) of the Board of Punishment in 1884. “Immediate examination” cases originated in Beijing and were forwarded directly to the Board of Punishment (which served as court of first instance) by the gendarmerie without going through the usual bureaucratic chain of command. The various provincial bureaus of the Board were each responsible for handling a certain quota of these cases.²⁶ These cases are distinctive – indeed they are unique – for covering the

²⁴ 刑案匯覽, 52: p. 18a.

²⁵ XT #2698-18; cf. #2712-19, in which this judgment was approved by the vermilion.

²⁶ “Immediate examination” cases comprise part of the “Board of Punishment Archive” 刑部檔 held at the First Historical Archives in Beijing. Nearly all the surviving cases date from the last thirty years or so of the dynasty.

entire gamut of mundane matters, yet lacking any of the flexibility found in routine cases from county archives. The Board judged even the most trivial cases strictly by the book, as if everything were a *xingke tiben*.

In the 1884 case, a peddler of fried dough named Pan Ba (26) sold his wife Hu Shi (19) because of their poverty and her misbehavior (she was apparently unhappy about their poverty, among other things). Her natal family agreed to the sale, because she was unhappy and often ran away from her husband's home. The matchmaker arranged for another peddler, Zhang Si, to buy her as wife for 80 strings of "small cash"; by all accounts, Hu Shi gladly agreed to the sale, and she received 16 strings of cash out of the bride price for the purpose of redeeming some of her clothing that had been pawned. Later on, however, she found it difficult to get along with her new husband (he would beat and scold her for her supposed laziness), so she personally went to the gendarmerie, reported the sale, and accused Zhang Si of planning to resell her.

The Board's ruling on this case quotes the statute against "buying or selling a divorce" and sentences the buyer, seller, matchmaker, and wife to the full beatings that it mandates; it further orders that Hu Shi be returned to her natal family. The one concession to lenience is that the seller was not required to hand over the bride price, because he had already spent it and was so poor that there was no reasonable hope of recovering it. This ruling may have given Hu Shi the main thing she wanted, in that it ordered her separation from both husbands; but in this context that result would appear to be coincidental. As far as we can tell, the Board simply applied the code (XB/ZL #01119, Guangxu 10.8.12).

It appears, then, that the 1818 ruling by the Board of Punishment had little effect on the non-routine cases handled at the imperial center (including cases from Beijing that the Board handled itself). Moreover, the ruling had no effect whatsoever on the flexible handling of routine cases in my three-county sample. I can discern no difference in the way magistrates handled cases before and after this date; there is certainly no noticeable shift to lenience because of poverty. I find not a single case from county archives in which a magistrate cited the Board's 1818 ruling, but in many cases they cited the statute against "buying or selling a divorce" (even if they did not enforce it in the rigid manner found in *xingke tiben*). Throughout the entire period, magistrates handled routine cases according to their specific circumstances, and the best predictor of the outcome was the concrete reason a case came to court.

Explanations of Local Adjudication in the Qing:

There has been considerable debate on the subject of local court adjudication in the Qing. The most controversial question is deceptively simple: on what basis did magistrates decide cases? Several hypotheses can be reassessed in light of the findings

of this paper. For the sake of space, I will focus on those of two scholars who have made major contributions in this field, Philip C. C. Huang and Kishimoto Mio.

1) Philip Huang's hypothesis of civil adjudication according to the code:

Philip C. C. Huang (黃宗智), in his path-breaking 1996 study of several hundred cases from three counties (Ba, Baodi, and Danshui-Xinzhu), argues that magistrates routinely judged “civil cases” according to the Qing code. This argument presents a radical challenge to the conventional understanding of both routine adjudication and the Qing code itself. A crucial part of Huang's argument is that “civil law” constituted a fundamental part of the Qing legal system, and his use of this concept is closely linked to his argument about how magistrates applied the Qing code in their judgments. Qing judicial theory and vocabulary included no precise equivalent for Western legal term “civil,” so it is important to identify as precisely as possible what Huang means by this term in the Qing context.²⁷

Basically, Huang equates the Western legal category of “civil cases” with the Qing category of “minor matters related to household, marriage, and land” (戶婚田土細事), which the Qing code states should be “adjudicated by department or county magistrates on their own” (州縣自行審理).²⁸ (In this respect, he follows a line of thinking previously laid out by Dai Yanhui and David Buxbaum.²⁹) This equation rests primarily on the subject matter of the cases: in the Qing context, “civil cases” were mundane disputes about marriage, inheritance, land, debt, and the like, that did not involve any major offenses of a violent, sexual, or political nature, and that were handled by local courts without superior review.³⁰ Huang demonstrates that such cases constituted a major part of the routine work of county courts, and that many were adjudicated without anyone being punished. By making this point, Huang has overthrown a longstanding stereotype that Qing law in both theory and practice was exclusively penal.³¹

Huang does not argue that Qing courts had a formally separate procedure or body of written law that covered such cases. Instead, he argues that magistrates judged civil

²⁷ In an otherwise positive and respectful review, William Jones suggests that Huang's use of the term “civil” in the Qing context is not helpful because it obscures more than it illuminates (1997).

²⁸ 讀例存疑, see statutes under statute 334-00.

²⁹ Dai Yanhui organized the Danshui-Xinzhu Archive (one of the three sources for Huang's 1996 book), and in the process divided its legal cases into “civil” and “criminal” categories that did not exist in the Qing system; see Buxbaum, 1971. Both Buxbaum and Huang accept Dai's categorization and labels uncritically.

³⁰ Huang, 1996: pp. 1-2, 5-10.

³¹ This argument was anticipated by Buxbaum (1971), but Huang is more convincing because his evidence includes a much larger sample of cases from three different regions of China.

cases according to principles that were *implicit* within certain penal statutes and statutes of the Qing code. (He appears to assume, by contrast, that criminal cases were judged according to the *explicit* meaning of these written laws.) He concedes that magistrates rarely cited the relevant laws, nor did they impose the corporal penalties mandated by those laws. In other words, his “civil” rulings almost never make any explicit reference to the code whatsoever. Nevertheless, he feels confident in *deducing* from these rulings the same implicit principles that he deduces from the code, and since they are consistent with one another, he concludes that magistrates nearly always “adjudicated unequivocally according to the Qing code.”³²

In effect, this hypothesis envisions a strong state and a weak society: Huang appears to see the magistrate as the local instrument of a centralized legalist machine, enforcing the mandates of the imperial center.³³ It seems to me, however, that in the “civil” subject areas that Huang has singled out (land, inheritance, debt, etc.), the implied principles that he deduces from the code can also usually be found in widespread customary practices and expectations. A good example is the principle of “equal division between sons” that governed household division and inheritance: this was common practice for all social classes all over China in the late imperial era, and it was also enshrined in the Qing code (to violate the principle was a crime). Not surprisingly, Huang finds (as does David Wakefield³⁴) that when inheritance disputes came to court, magistrates adjudicated them according to the principle of equal division between sons.

Huang’s finding that county adjudication was not arbitrary or guided by whim, but instead systematically corresponded to implied principles of the code, is a major contribution. It highlights a connection and coherence between center and periphery that had not been fully appreciated before. But I wonder if he has proven the direction of influence that he assumes. If all three levels – customary practice, local adjudication, and the Qing code – were mutually congruent, then how can we be sure that magistrates were “applying the code”? Perhaps influence flowed in the opposite direction, and it is *society* that was strong, while the *state* was weak.

In Western law, the heavily loaded term “civil” always comes as part of a dichotomy – and Huang seems to have in mind the dichotomy of “civil” versus

³² Huang, 1996: pp. 78-79, 81; cf. pp. 86-87: “My ordering [of cases] by statute is based almost wholly on *my own interpretation* of what laws obtained, not on the texts of the magistrates’ judgments... The relevant statutes are *implicit but obvious* in virtually all these judgments.” (emphasis added)

³³ Huang argues that since local magistrates continued to judge by the code even in the late Qing, the imperial state was stronger and continued to exercise greater control over local officials than had previously been realized (1996: pp.).

³⁴ Wakefield, 1998.

“criminal.”³⁵ In singling out what he calls the civil cases, he assumes there was a separate body of criminal cases as well – presumably involving offenses of a violent, sexual, or political nature.³⁶ He further appears to assume that the criminal cases were judged by applying the code; his innovation is to argue that civil cases, too, were judged systematically in the same way (by applying positive civil law principles that were implicit within the negatively-phrased penal statutes). But in Huang’s usage, this civil/criminal dichotomy is not very precise; the boundary between these categories is never clearly defined. For example, he discusses a number of supposedly civil cases in which individuals were ordered beaten for filing false charges and other offenses, and he includes cases of abduction, adultery, and wife-selling in his discussion of marriage cases.³⁷ It is not at all clear what makes such cases “civil” rather than criminal – sometimes the category “civil” seems to include any case judged at the county level, regardless of content or outcome.³⁸

The ideal test of Huang’s hypothesis about the basis of local adjudication would be a category of legal case in which social practice contradicted the mandates of formal law. Then we could see whether magistrates attempted to reform society by imposing the code, or yielded to the inexorable pressure of social reality, or perhaps attempted to engineer some sort of practical compromise between the two.

Wife-selling is precisely this sort of problem. The ideologically-driven conceptualization of the crime as a form of “illicit sexual intercourse” sharply contradicted the social reality of poverty-driven survival strategies, and the practice was very widespread in spite of its formal illegality.

2) Kishimoto Mio’s theory of balance:

Of the secondary scholarship on Qing law that I have read, I believe that Kishimoto Mio’s (岸本美緒) concept of “balance” comes closest to capturing the reality of routine adjudication that I find in my sample of county wife-selling cases. She developed this concept in part through her own study of how Qing magistrates handled wife-selling cases, entitled “Is It Forbidden to Sell a Wife? The Custom of Absolute/

³⁵ Two alternatives would be the *civil* law of the state versus (for example) the *canon* law of the church or the *customary* law of the community; and the continental European *Civil* Law tradition versus the Anglo-American *Common* Law tradition. Huang clearly has neither of these definitions of “civil” in mind.

³⁶ Huang, 1996: pp. 1-2; but also see pp. 218-220, where he explicitly addresses the difficulty of distinguishing “criminal” from “civil” cases in a system that lacked any such theoretical distinction.

³⁷ Huang, 1996: pp. 93-97. Cf. Huang, 2001, in which illicit sex and wife-selling are discussed under the general heading of “civil justice.”

³⁸ NB: The category “minor matters” (細事) as used in the Qing code is somewhat ambiguous; sometimes “brawling” (鬪毆) and “gambling” (賭博) are included, along with household, marriage, land, and debt; e.g. 讀例存疑, 332-11

Conditional Sale of Wives in the Ming-Qing Era” (妻を売ってはいけないか？ 明清時代の売妻・典妻慣行). This outstanding piece of scholarship depends on published sources such as magistrates’ handbooks and collected judgments, i.e. sources that are one or two steps removed from the actual cases they discuss. Nevertheless, it is striking how well her argument stands up when tested against archival case records.

To summarize, Kishimoto argues that local magistrates were guided *less* by the formal mandates of the Qing code than by the imperative to “protect the weak and punish the wicked,” while trying to prevent further disputes. When judging wife selling cases, magistrates looked at particular circumstances, especially the feelings and economic condition of the individuals involved. For this reason, she argues, in cases of wife selling motivated by poverty, the transaction was usually allowed to stand. Judicial practice had the effect of decriminalizing wife sales, as long as they resulted from poverty. In sum, the guiding principle was to balance “human feeling and circumstances” (人情) with “the formal law of the state” (國法).

Lest there be any confusion, I am *not* suggesting that Qing magistrates acted as “mediators”; nor, I believe, has Kishimoto Mio suggested any such thing. (Clarity on this point is important, because the foil for Philip Huang’s argument that magistrates judged by the code is his claim that Shiga Shuzo and others have mistakenly believed them to be mediators.³⁹) To say they “mediated” would imply that they sought the willing agreement of litigants to compromise solutions. That is certainly *not* what magistrates did. Rather, magistrates decided what to do and then used the authority of their office to impose their decisions. If they opted for lenience, it was granted with paternalistic condescension.

Nor do I believe that magistrates adjudicated on the basis of local custom. In this respect, I agree with Jérôme Bourgon, whose examination of published primary texts has turned up no convincing evidence that custom was a source of judicial rulings in the Qing (2002). I have never seen any case from the archives in which a magistrate explicitly cites custom as the reason, let alone authority, for his ruling. I believe, however, that magistrates often felt the influence of customary expectations, even if they did not formally cite them in their rulings. Such expectations helped shape their evaluation of the concrete circumstances of particular cases. For example, when a magistrate ordered the buyer to make one final payment to the seller in exchange for keeping the wife, in the manner of the 找貼 payment that converted a land sale from conditional to absolute, he demonstrated sympathy for the popular sentiment that sellers were the losers in these transactions.

From what I have seen, the archival case records confirm that in routine adjudication, magistrates weighed formal law against human feeling and the particular

³⁹ Huang, 1996: pp. 11-12, 77-78.

circumstances of each case, much as Kishimoto suggests; they certainly did not enforce the code in any automatic or consistent way. At very least, my sample of routine cases from county archives does not support Huang's hypothesis that magistrates judged civil cases "unequivocally by the code." To find that kind of adjudication, one must look at *xingke tiben*. In routine cases, magistrates often made explicit reference to the statute against "buying or selling a divorce"; but in fact their judgments often contradicted both the letter and the spirit of that statute.

Kishimoto's concept of "balance" strikes me as an accurate characterization of what Qing magistrates strove to accomplish through their flexible response to individual cases, at least in the area of wife-selling. If we want to borrow a concept from the Western legal tradition to approximate this approach, it might be the principle of "equity." Under the Common Law, judges cited the principle of "equity" in order to soften the harshness of abstract formal law by taking into account the mitigating circumstances found in actual cases (in fact, for a long time there existed a separate system of "equity courts" to provide redress against the undue harshness of Common Law court rulings). Qing magistrates often did the same sort of thing when deciding how to handle a wife sale: letting the seller keep the bride price, even when ordering him slapped, is a good example of equity at work.

Conclusion – Two Modes of Adjudication:

As much as I admire Kishimoto's argument, I believe her suggestion that wife sales were decriminalized goes too far. In most of my routine county cases, someone ended up with a beating. Even though more than 80% of the wife sales were motivated by poverty and involve no adultery, the transaction was canceled more often than not; the most common decision was to return the wife to her natal family. The second marriage was allowed to stand in a sizeable *minority* of judgments, not the majority. Magistrates took the poverty of the seller for granted (because sellers were almost always poor); it was not the decisive factor in how these cases were judged.

Instead, as we have seen, the decisive factor was the reason why a particular wife-selling case came to court. The two main reasons were extortion by the seller or his family, and the fact that the wife or her natal family objected to the sale. Magistrates handled these two categories of cases differently, especially with regard to the fate of the wife. Often, the attitude of the wife herself was decisive: in not a single case was the second marriage allowed to stand if the wife objected to it.

In my sample of *xingke tiben*, too, the great majority of wife sales were motivated by poverty. Nevertheless, these memorials show that when wife-selling was prosecuted in connection with a homicide or other major offense that required central review, it was nearly always sentenced strictly by the code. Such sentencing was explicit: the statute

was cited verbatim, and the penalties it mandated were rigorously applied. Any deviation from the letter of the statute (and there are only a few examples) had to be carefully justified by the magistrate and offered as a suggestion subject to rejection by his superiors. The irony of Philip Huang's claim that magistrates "adjudicated unequivocally according to the Qing code" (p. 78) is that it is based on routine case records from the county level, whereas I believe it is a far more accurate description of how magistrates prepared the cases for central review that we find in *xingke tiben*. It is also an accurate description of how the Board of Punishment adjudicated "immediate examination" (現審) cases from Beijing.

As we have seen, the Board of Punishment's 1818 policy of lenience had little effect on the treatment of wife sales in *xingke tiben*; it had no effect whatsoever on routine adjudication at the county level. The overall pattern of judging flexibly on a case-by-case basis continues right through the nineteenth century, and sometimes cases were judged harshly. For example, I have an 1862 case from Nanbu County in which a wife sale motivated by poverty came to court because the seller filed false charges against the buyer in an attempt to extort a supplementary payment. Something in this case must have provoked the magistrate's ire, because he quoted the statute against "buying or selling a divorce" verbatim and applied it strictly to the last detail: everyone involved was beaten, the wife was returned to her natal family, and the bride price and matchmaker's fee were confiscated by the court (NB 6-28-291).

The civil/criminal dichotomy derived from the Western legal tradition does not help me to understand the evidence that I have collected. Far more helpful is the dichotomy that Qing jurists *themselves* used, of "minor matters" versus "major cases." A comparison of routine cases from county archives with *xingke tiben* highlights the gulf that separated the 1500 or so courts of first instance from the apex of the system at the imperial capital. But that comparison also highlights the two very different modes of adjudication practiced in those courts of first instance. What stands out is the striking contrast between how local magistrates handled routine matters that stayed local, and how the same magistrates prepared major cases destined for central review. In the routine mode of adjudication, the decisive factor was the concrete reason a given case came to court; magistrates acted flexibly and expediently to solve practical problems. In non-routine adjudication, the decisive factor was the Qing code.

BIBLIOGRAPHY

Legal Cases from Chinese Archives:

BX – Ba County Archive 巴縣檔案, held at Sichuan Provincial Archives 四川省檔案館, Chengdu; cases are cited by serial number

BD – Baodi County Archive 寶抵縣 (順天府) 檔案, held at First Historical Archives 中國第一歷史檔案館, Beijing; cases are cited by bundle number and date

NB – Nanbu County Archive 南部縣檔案, held at Nanchong Municipal Archives 南充市檔案館, Nanchong; cases are cited by serial number

XB – Board of Punishment Archive 刑部檔, held at First Historical Archives, Beijing; the case cited is from the records of the Zhili Provincial Bureau 直隸司, and is cited by serial number and date.

XT – *Xingke tiben* 刑科題本, held at First Historical Archives, Beijing; cases collected before 2000 are cited by bundle number and date; cases collected since 2000 are cited by serial number; all are from the category “marriage and illicit sex” (婚姻姦情)

Gazetteers:

同治會理州志

同治萬縣志

同治營山縣志

同治新寧縣志

Other primary sources:

Fujian Provincial Regulations 福建省例 (台灣文獻叢刊 #199), Taipei: Taiwan Yinhang, 1964.

XA – *Conspectus of Penal Cases* 刑案匯覽

Xue Yunsheng 薛允升, Qing: *Lingering Doubts While Perusing the Substatutes* 讀例存疑重刊本, punctuated and edited by Huang Jingjia 黃靜嘉, Taipei: Chinese Materials and Research Aids Service Center, 1970; statutes cited by serial number.

Secondary sources:

- Bourgon, Jérôme, 2002: "Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing," *Late Imperial China*, 23: 1, pp. 50-90.
- Bray, Francesca, 1997: *Technology and Gender: Fabrics of Power in Late Imperial China*, Berkeley, California: University of California Press.
- Buxbaum, David C., 1971: "Some Aspects of Civil Procedure and Practice at the Trial Level in Tanshui and Hsinchu from 1789 to 1895," *Journal of Asian Studies*, 30: 2, pp. 255-279.
- Fielde, Adele, 1887: *Pagoda Shadows: Studies from Life in China*, London: T. Ogilvie Smith.
- Gates, Hill, 1996: *China's Motor: A Thousand Years of Petty Capitalism*, Ithaca, New York: Cornell University Press.
- Hu Zhongsheng 胡中生, 2002: "Wife Sale Contracts and the Problem of Marriage and Population among the Lower Strata of Ming-Qing Huizhou Society" (賣身婚書與明清徽州下層社會的婚配和人口問題), *明清人口婚姻家族史論*, Tianjin: Tianjin Guji Chubanshe, pp. 1-20.
- Huang, Philip C. C., 1985: *The Peasant Economy and Social Change in North China*, Stanford, California: Stanford University Press.
- Huang, Philip C. C., 1996: *Civil Justice in China: Representation and Practice in the Qing*, Stanford, California: Stanford University Press.
- Huang, Philip C. C., 2001: *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared*, Stanford, California: Stanford University Press.
- Isett, Christopher, 2004: "Village Regulation of Property and the Social Basis for the Transformation of Qing Manchuria," *Late Imperial China*, 25: 1, pp. 124-186.
- Jaschok, Maria, 1988: *Concubines and Bondservants: A Social History*, London: Zed Books.
- Johnson, Walter, 1999: *Soul by Soul: Life inside the Antebellum Slave Market*, Cambridge, Massachusetts: Harvard University Press.
- Jones, William C., 1997: review of Huang, *Journal of Asian Studies*, 56: 4, pp. 1060-1061.

- Kishimoto Mio 岸本美緒, 1997: “‘Additional Charge and Redemption’ in Land Disputes in Ming and Qing China” (明清時代における「找価回贖」問題), 「中国—社会と文化」, No. 12, pp. 263-293.
- Kishimoto Mio 岸本美緒, 1998: “Is It Forbidden to Sell a Wife? The Custom of Absolute/Conditional Sale of Wives in the Ming-Qing Era” (妻を売ってはいけないか? 明清時代の売妻・典妻慣行), 「中国史学」, No. 8, pp. 177-210.
- Ko, Dorothy, 1994: *Teachers of the Inner Chambers*, Stanford, California; Stanford University Press.
- McAleavy, Henry, 1958: “Dien in China and Vietnam,” *Journal of Asian Studies*, 17: 3, pp. 403-415.
- Pomeranz, Kenneth, 2000: *The Great Divergence: China, Europe, and the Making of the Modern World Economy*, Princeton, New Jersey: Princeton University Press.
- Schurmann, H. F., 1956: “Traditional Property Concepts in China,” *Far Eastern Quarterly*, 15: 4, pp. 507-516.
- Smith, Arthur, 1899: *Village Life in China: A Study in Sociology*, New York: Fleming H. Revell Company.
- Sommer, Matthew H., 1994: *Sex, Law, and Society in Late Imperial China*, Ph.D. dissertation, University of California, Los Angeles.
- Sommer, Matthew H., 2000: *Sex, Law, and Society in Late Imperial China*, Stanford, California: Stanford University Press.
- Sommer, Matthew H., 2005: “Making Sex Work: Polyandry as a Survival Strategy in Qing Dynasty China,” Bryna Goodman and Wendy Larson, eds., *Gender in Motion: Divisions of Labor and Cultural Change in Late Imperial and Modern China*, New York: Rowman and Littlefield Publishers, Inc., pp. 29-54.
- Wakefield, David, 1998: *Fenjia: Household Division in Qing and Republican China*, Honolulu, Hawaii: University of Hawaii Press.
- Watson, Rubie, 1991: “Wives, Concubines, and Maids: Servitude and Kinship in the Hong Kong Region, 1900-1940,” Rubie Watson and Patricia Ebrey, eds., *Marriage and Inequality in Chinese Society*, Berkeley, California: University of California Press.
- Wolf, Arthur, 2001: “Is There Evidence of Birth Control in Late Imperial China?” *Population and Development Review*, 27: 1, pp. 133-54.