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Justice for All: The Application of Law by Analogy in the Case of Zhou Fuqing

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I. INTRODUCTION

Perhaps the most outstanding feature of the Qing penal code (*Da Qing Lu Li*) is its emphasis on the principle that the punishment should fit the crime. This feature raises interesting questions concerning the limits placed on judicial discretion by a legal code as specifically and comprehensively drafted as the Qing code: how much latitude does the judicial decision-maker have in interpreting the law, and what leeway exists to argue the facts so as to reach the desired result? The more neatly the circumstances of a crime fall within the ambit of a statute or substatute, the less opportunity or need there is for interpretation.[1] In contrast, when there is no applicable law governing the circumstances of an act unquestionably detrimental to society, a judge is allowed

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1. Derk Bodde & Clarence Morris, Law in Imperial China 175 (1973).

seemingly unfettered opportunity for interpretation.[2] In these instances the Qing code provides for the application of law by analogy.

The application of law by analogy is defined by both statute and substatute. The statute states its legal basis:

> Article 44. *Deciding a Case Without a Precise Article.* All the laws and rules [ling] together do not completely provide a basis for deciding every [possible] case. If, in deciding on a punishment, there is no precise article, (*choose*) cite (*another*) law and decide the case by analogy. Decide whether the penalty must be increased or decreased and propose a name for the offence. ([The case] *is to be submitted to the superior*) and after deliberation, it will be memorialized to the Emperor. If [the official] decides in an arbitrary manner that results in mistakenly awarding a sentence that is excessive or deficient, then sentence [him] for intentionally or mistakenly [decreeing an excessive or deficient penalty. Art. 409].[3]

The substatute states in greater detail the procedural safeguards against the arbitrary use of analogy:

> When, because there is no precisely applicable statute or substatute, a statute or substatute which is most closely applicable is cited, the Board of Punishments will then assemble the Three High Courts to deliberate and determine sentence. This sentence will then be submitted to the throne with detailed explanation that inasmuch as the Code lacks a precisely applicable article, the present judgment is being pronounced "by analogy to" (*pi chao* [bizhao]) a certain statute or substatute, or that [if the offense is more or less heinous than the analogized statutory crime,] the judgment is

2. Shuzo Shiga, Criminal Procedure in the Ch'ing Dynasty—With Emphasis on its Administrative Character and Some Allusion to its Historical Antecedents—II, 33 Memoirs of the Research Dept. of the Toyo Bunko 115, 127 (1975). See also Chang Wejen, Retroactivity in Traditional Chinese Law 1, (unpublished paper delivered on Apr. 4, 1989) (on file with author).

3. William C. Jones, Great Qing Code, 74 (1994). Article 409, entitled "An Official Who Decreases or Increases Penalties [Erroneously]," sets forth in detail the penalties for intentionally or mistakenly increasing or decreasing an offender's sentence [erroneously]. The penalty is determined on the basis of the erroneously determined sentence and whether or not it has been executed. Id. at 381-92.

> being pronounced "by analogy to" the statute or substatute with a one-degree increase or reduction in the punishment. The imperial rescript will then be awaited and action taken accordingly.[4]

These safeguards notwithstanding, the application of law by analogy gives judicial decision-makers opportunity for discretion at three different stages: first, in the choice of another law; second, in the comparison of the facts pertaining to the unquestionably anti-social act with the facts contemplated by the other law; and third, in the determination of punishment.

The application of law by analogy under the Qing code has invited comparison with the principle of *nulla poena sine lege*, which states that "no person may be punished except in pursuance of a statute which prescribes a penalty."[5] This principle, which expresses the "limitation on penalization by the State's officials, effected by the prescription and the application of specific rules," encompasses the corollary *nullum crimen sine lege* that "no conduct may be held criminal unless it is precisely described in a penal law."[6]

Although he did not explicitly invoke this principle, P. L. F. Philastre, in commentary to his 1909 translation of the Nguyen Code of 1812, which reproduced almost exactly the 1740 edition of the Qing code, compared the Chinese use of analogy with the ability of French tribunals to adjust the punishment according to the special nature of the act and concluded: "But in the case of the French tribunals, it is the punishment that varies within the limits fixed by the law, whereas, for the Chinese tribunals, the punishment being fixed and invariable, it is in reality the substantive law that changes."[7] Philastre considered this manner of proceeding by analogy as indispensable in a legal system that provided such strict fixity of penalty as did the Qing.

Whether the use of analogy retroactively creates a new offense or fixes a punishment other than one provided by statute has been the subject of recent debate. Fu-mei Chang Chen has argued that the use of analogy rarely created new categories of crimes but instead allowed for

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4. Bodde & Morris, supra note 1, at 176. Fu-mei Chang Chen's correction of one phrase of the Bodde and Morris translation has been incorporated here. See Fu-mei Chang Chen, On Analogy in Ch'ing Law, 31 Harv. J. Asiatic Stud. 212, 223 (1971).

5. Jerome Hall, General Principles of Criminal Law 28 (1960).

6. Id.

7. P.L.F. Philastre, 1 Le Code Annamite 277-278 (Taiwan, 1967).

the elaboration of punishments "deemed most appropriate in the *particular* circumstances of each case."[8] Most of the analogy cases translated by Derk Bodde and Clarence Morris, for example, involved acts which were unquestionably criminal and which were "in most instances covered by a statute or sub-statute governing a *broad* category of crime."[9] Like Philastre, Chen has offered by way of explanation that analogy was a necessary method for determining the most fitting punishment because "Ch'ing [Qing] statutes, unlike most Western criminal laws, did not confer upon judges a broad discretionary power in sentencing."[10]

In contrast, Chang Wejen has argued that the traditional Chinese legal system did sanction the retroactive application of "man-made" law, the use of analogy being one such example. Chang asserts that traditional Chinese notions of legality were not offended by the retroactivity, which was justified by the general principle that "if people are to obey not just man-made law but also a much greater body of higher norms, which precedes man-made law in time, and supersedes it in comprehensiveness and authority, then whether an act is prohibited by a specific man-made law is of little significance."[11]

The commentary to the Qing statute on analogy suggests this concern regarding the inadequacy of the written law, manifested in large part by the tension between the requirement of fixed and specific punishments and the need for flexibility to address changing circumstances. It states that "the laws are limited, but the variations of circumstances and the nature of offenses are infinite."[12] The application of law by analogy is thus "the way in which one uses that which is limited to treat that which is infinite."[13] The serious nature of the endeavor also is expressed in the commentary: "The care of deciding

8. Chen, supra note 4, at 212 (emphasis added).

9. Id. at 216 (emphasis added). See also Fu-mei Chang Chen, Law in Imperial China, 29 Harv. J. Asiatic Stud. 274 (1969); Bodde & Morris, supra note 1, at 517-533.

10. Chen, supra note 4, at 216.

11. Chang, supra note 2, at 6-7.

12. 1 Ta-ch'ing lu-li hui-t'ung hsin-ts'uan [Comprehensive New Edition of the Qing Penal Code] 561 (Taipei, 1971) [hereinafter New Penal Code].

13. Id. This theme also is expressed in the commentary to the catch-all statute entitled "[D]oing what ought not to be done," which punishes minor infractions not specifically prohibited by the code with blows of the light or heavy bamboo: "As the disturbances of the world occur a hundred fold, and the sentiments of men are infinite, the laws are not able to include them all. Therefore this provision of doing what ought not to be done is set forth so as to supply what the laws have not yet provided." Id. at 3331.

[by analogy] increases or diminutions in punishment rests entirely on those who apply the laws, and they must infer from the spirit of law which accords with the nature of the case and weigh [the punishment against the offense] in the manner most equitable."[14]

The use of analogy to fill the lacunae in the law was recommended as early as the third century B.C. when Xunzi (b. 310 B.C.), recognizing the inadequacy of the law, wrote: "When there is a law, then apply the law; and when there is no [directly applicable] law, then cite one by analogy."[15] Although the law reformer and legal historian Shen Jiaben (1840-1913) would argue that the use of analogy did not become a fixed rule until the Sui dynasty (A.D. 581-618), he did trace the beginning of the application of analogy, at least in dubious cases, to a passage from the Treatise on Criminal Laws of the *Hanshu*, in which the Emperor Gao (206-195 B.C.) "had ordered the Minister of Justice that in dubious cases he might not give a decision, but should carefully prepare a memorial for the Emperor, adducing a law or ordinance which suited the case by comparison (analogy), and inform the Emperor."[16]

The principle of analogy was codified in the earliest extant Chinese code, the Tang Code (*Tang Lu Shuyi*), published in A.D. 753. The Qing statute on analogy, which replicates (with one minor revision) the statute under the penal code of the preceding dynasty, the Ming (1368-1644), descends from this Tang provision. Under Article 50 of the Tang Code, entitled "Sentencing of Crimes That Have No Formal Article," officials were instructed to "bring up a heavier offense in order to make clear a lighter punishment if the punishment should be decreased. If the punishment should be increased, then a lighter offense is brought up to make clear a heavier punishment."[17] Examples from the Articles on Violence and Robbery were given in the subcommentary to illustrate the principle of the statute. For instance, just as the heavier offense of a master of the house who kills an intruder during the night is not punishable, neither is the lighter offense of his wounding the intruder or

14. Id. at 561.

15. John D. Langlois, Jr., "Living Law" in Sung and Yuan Jurisprudence, 41 Harv. J. Asiatic Stud. 165, 168 (1981) (quoting Pieh-pen Hsing-t'ung fu chieh, rpt. by Shen Chia-pen, Chen-pi lou ts'ung-shu 13a-b (1913)). See also John D. Langlois, Law, Statecraft, and *The Spring and Autumn Annals*, Yuan Thought: Chinese Thought and Religion under the Mongols 89 (Hok-lam Chan & Wm. Theodore de Bary eds., 1982).

16. M.J. Meijer, The Introduction of Modern Criminal Law in China 195 (Hong Kong, 1967).

17. Wallace Johnson, 1 The T'ang Code 254-255 (1979).

breaking his limb, an offense which is not specifically covered by the code. Similarly, the offense of plotting the death of one's relative of a higher generation is "brought up" for comparison with the more serious offense of plotting *and* killing or wounding the same relative. As the former offense is punishable by decapitation, so is the latter.[18]

Just as these examples suggest, in addition to the issue of legitimizing punishment for an anti-social act not specifically prohibited under the Qing code, important questions are raised by the actual practice of applying the principle of analogy in particular cases: how much flexibility did the legal system allow by the use of analogy, and how were facts presented and arguments framed so as not only to reach an outcome desirable to the initial trier of fact but also to explain the application of law by analogy satisfactorily to the higher, reviewing authorities? In the hope that an exploration of these latter questions may give insight into the former issue, this paper will present the case of Zhou Fuqing, a Hanlin Academy scholar and secretary in the Grand Secretariat, who in September of 1893 was caught red-handed as he transmitted via his servant a letter, which sought to establish a collusive arrangement in the upcoming provincial examinations, to the Zhejiang chief examiner. This seemingly straightforward case became a more complex one in which the law was applied by analogy in an attempt to obtain a reduction in punishment from the one statutorily prescribed.

Three factors combined to make the case a difficult one for the Zhejiang governor and later for the Board of Punishments: first, the extreme severity of the substatute deemed to be most closely analogous; second, the very ordinariness of the events; and third, the fact that Zhou Fuqing had been caught red-handed. With seemingly little room to manipulate the facts, the judicial decision-makers argued the law. This paper will examine the findings of fact, the applicable laws, and the arguments advanced to distinguish Zhou Fuqing's case from the most closely analogous substatute with the purpose of learning how and why the Zhejiang governor, as the initial trier of fact, and the Board of Punishments, as the reviewing authority, applied the law by analogy to determine Zhou Fuqing's fate. In the end, was there justice for all?

18. Id. at 255.

II. THE FACTS AND THE FINDINGS

> *"Well, the imperial examiner will soon be coming to Shaohsing [Shaoxing], and there is a man called Chin Tung-yeh who has been a clerk in the Board of Civil Office for a number of years who wants his son to take the examinations. But his son Chin Yao is an absolute idiot. So now, with the examination coming, his father wants to find a substitute. The trouble is that this examiner is strict: we shall have to think out a new way. That's why I've come to talk it over with you.*
>
> *How much is he prepared to pay?*
>
> *To pass the examination in Shaohsing [Shaoxing] is worth a cool thousand taels."*[19]

In September of 1893, Zhou Fuqing allegedly came up with an idea to make some money, after ascertaining that Yin Ruzhang--one of the two hundred scholars who had passed the *jinshi* examination in the same year as he--had been appointed chief examiner of the Zhejiang provincial examinations and that he was en route to Hangzhou. A native of Guiji county in Shaoxing prefecture, Zhou had returned to his hometown only four months earlier in observation of the three-year mourning period for his stepmother, who had died on New Year's Eve 1892.[20]

The investigation conducted by the Zhejiang governor Songjun would determine that Zhou was in very poor financial straits in 1893.[21] Indeed, Wang Jixiang, an imperial official from Zhou's hometown, reported that Zhou was not financially well-off at least as early as the summer of 1890. In his diary, Wang noted that one evening in Beijing, Zhou had invited a group of fellow Guiji natives, who also worked as officials in the imperial capital, for drinks. Wang arrived unavoidably late at his host's cottage to discover that Zhou already had concluded the drinks and prematurely, Wang implied, had had the food served. Then, after dinner, Zhou did not ask his guests to stay to smoke. Wang's account leaves little room to doubt that the reason for this very simple

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19. Wu Ching-tzu, The Scholars 279, cited in James H. Cole, Shaohsing: Competition and Cooperation in Nineteenth-Century China 107 (1986).

20. Zhou Xiashou, Lu Xun de Gujia [Lu Xun's Hometown] 84 (1953).

21. Diyi Lishi Dang'an Guan [The Number One Historical Archives], 9 Qingdai Dang'an Shiliao Congbian [Miscellany of Historical Materials from Qing Archives] 261, 269 (1983) [hereinafter Miscellany].

dinner was lack of money. When another guest, insisting that he preferred to walk the long distance home, refused the diarist's offer of a ride in his carriage, Wang praised the guest for the consideration which he thereby had shown Zhou by saving his host the embarrassment of having failed, on account of his distressed economic circumstances, to provide his guests with adequate transportation.[22]

Whatever Wang's motives for writing such an unflattering account, the passage does indicate that Zhou was of limited means and therefore appeared unlikely to have partaken of much bribery, if any, as an official in Beijing. In any event, Zhou's economic situation would not have been enhanced by his stepmother's death, which would have caused him to incur travel and funeral expenses as well as to lose his government salary during his leave of absence.

However poor Zhou may have been in 1893, he had had sufficient funds in 1880 to purchase his position as a secretary in the Grand Secretariat. Born in 1835/1836, Zhou rose through the civil examination system in a steady, if relatively unremarkable, manner. Placing in the third and last category of *shengyuan*, he successfully competed as a *fusheng* in the 1867 provincial examinations and became a *juren* at age 32.[23] Four years later he earned his *jinshi* degree in the 1871 metropolitan examinations. Yin Ruzhang, the future Zhejiang chief examiner, placed first in the class. In contrast, Zhou placed in the top quarter of the lower third of the class, a sufficiently high ranking for an appointment as a *shujishi*, or bachelor, in the Hanlin Academy.[24] As a student in the Hanlin Academy, Zhou competed in the special triennial examinations held at the imperial palace but failed to attain a degree as either compiler of the second class or corrector, which would have permitted him to remain at the Hanlin Academy in Beijing. Instead, he was released from study and received an appointment as a county magistrate.[25]

Zhou's grandson, Zhou Zuoren, a prose stylist and younger brother of the writer Zhou Shuren, better known as Lu Xun, described his grandfather in several passages in *Lu Xun's Hometown*, providing insight into his personality as well as his times. Zhou Fuqing appeared to be a

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22. Zhou, supra note 20, at 85.

23. Zhou Fuqing's biography was compiled from two sources: Miscellany, supra note 21, at 267-269; Zhou, supra note 20, at 84-86.

24. H.S. Brunnert & V.V. Hagelstrom, Present Day Political Organization in China 73, (A. Beltchenko & E.E. Moran, trans., 1912).

25. Id. at 73-74.

confident, if not arrogant, scholar. As Zhou Zuoren wrote, a fellow Hanlin Academician, Ping Buqing, recalled that as soon as Zhou Fuqing had completed the triennial Hanlin examination, he began at once to fold up his bedding, saying that at the very least he had tested well enough to gain an appointment as county magistrate.[26] He was correct in his assessment: his first appointment was as magistrate to Rongchang county in Sichuan. Zhou Fuqing objected, however, to the distance, and his appointment was changed to Jinji county in Jiangsu.

It is unclear how long Zhou Fuqing served as county magistrate before he became the subject of an impeachment memorial, dated Guangxu 04.01.24 (1891), from Jiangnan governor Shen Baozhen. Shen stated that although Zhou handled matters in a muddle-headed and confused manner, his writing was still excellent in both its organization and coherence. Noting that Zhou was still within the six-month probationary period, Shen requested that he simply be reassigned as a county school instructor.[27] The Board of Personnel, however, looked into the matter and, finding that Zhou had served for longer than six months, required him to resign his post and to appear for an audience in Beijing prior to his reappointment to a teaching post.[28]

Zhou Zuoren's account of these events provides insight into the actual cause of his grandfather's impeachment. Hanlin Academy graduates were considered overqualified for their county-level positions outside the imperial capital and were known for their inflexible attitudes. Zhou Fuqing, his grandson surmised, was no exception. He most likely looked down upon his Jiangsu superior officials, who probably, as Zhou Zuoren explained, had obtained their positions by purchase rather than by examination, and thus quickly fell into disagreement with them. Not one "to sit on a cold bench to watch over the Confucian temple,"[29] Zhou Fuqing did not remain a teaching instructor for long, returning to Beijing, where he purchased the secretarial position that he still held at his stepmother's death thirteen years later.[30]

One can reconstruct fairly precisely Zhou Fuqing's actions in September of 1893 from two sources: the Zhejiang governor Songjun's findings of fact, reported in a memorial, dated December 17, 1893,[31]

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26. Zhou, supra note 20, at 82.
27. Miscellany, supra note 21, at 262.
28. Id. at 263.
29. Zhou, supra note 20, at 82.
30. Id. at 82-83.
31. Miscellany, supra note 21, at 267-269.

and Zhou Zuoren's account in *Lu Xun's Hometown*.[32] The discrepancies between the two versions can be reconciled, and although the former is the account of a provincial official, acting as the initial trier of fact, and the latter is the account of the culprit's own grandson, each account presents the facts in a manner most favorable to Zhou Fuqing. The following skeletal version of the events emerges.

Four months after he had returned to Guiji county, Zhou decided to return to Beijing to visit family and friends and borrowed for purposes of the journey a servant, Tao Ashun, from the Shaoxing prefect, Chen Xunxuan. Leaving Shaoxing prefecture on August 30, the two travellers arrived three days later in Shanghai, where Zhou made inquiries to learn that the Zhejiang chief examiner, Yin Ruzhang, was en route to the provincial capital, Hangzhou, to administer the provincial examinations scheduled for the first two weeks of September. The next day, on September 3, Zhou hired a boat and, accompanied by the servant, set sail for Suzhou, where they dropped anchor on the evening of the fourth.

In Suzhou, Zhou drafted a letter proposing a collusive arrangement with the chief examiner on behalf of his eighth son, Zhou Yongji, a certain Ma Guanjuan, and the younger members of four families with the surnames Gu, Chen, Sun, and Zhang, that they might succeed in the upcoming provincial examinations. In addition to the full names or surnames of the potential candidates, Zhou disclosed a form of four-character code to indicate how the chief examiner might identify their examination papers. Leaving the payee's name blank, Zhou enclosed with the letter a promissory note in the amount of ten thousand taels. Finally, he prepared a calling card, asking leave to visit with the chief examiner himself.

Two days passed from Zhou's arrival in Suzhou until the chief examiner's boat docked at Changmen gate on September 6. Zhou carefully instructed the servant to carry both the calling card and the letter on board the chief examiner's boat. The servant was to present first the visiting card and, only if the chief examiner were to refuse to

32. Zhou, supra note 20, at 84-86. The Board of Punishments relies solely on the governor's determination of fact, quoting it in its entirety before proceeding with an analysis of the law. Miscellany, supra note 21, at 270-272.

see Zhou, then the letter. Despite these specific instructions, the servant presented both the calling card and the letter simultaneously, whereupon the chief examiner took him into custody.

The servant was placed in the custody of the Suzhou prefect who conducted the preliminary interrogations. Upon learning that this case involved collusion and bribery, the Jiangsu judicial commissioner dispatched an official to escort the servant under guard and to transfer the case to his counterpart, the Zhejiang judicial commissioner.[33] Because the Zhejiang governor was about to enter the examination compound to supervise the provincial examinations, he instructed the civil and judicial commissioners to supervise the prefect in investigating the case and in obtaining the servant's confession.

By the time the Zhejiang governor exited the examination compound, it had been learned that Ma Guanjuan, whom Zhou had named in his letter, was in fact Ma Jiatan, a *lingsheng*, or a *shengyuan* receiving a government stipend, and the son of Hanlin Academy compiler, Ma Chuanxu. He had been enrolled on the examination list as had been Zhou's eighth son, Zhou Yongji, who, as his father before him, was a *fusheng*. Zhou Fuqing was still at large, having fled to Shanghai. He fell ill, though, and returned to his hometown; learning that he was wanted by the authorities, he surrendered to the county magistrate.

Zhou Fuqing then was transferred to Hangzhou, as were his son and Ma Jiatan. In his confession, Zhou stated that he had not consulted with his relatives and close friends, identified in his letter by only the surnames Gu, Chen, Sun, and Zhang, about his idea to contact the chief examiner. If the chief examiner had consented to his plan, he would have notified them to select a capable younger family member to enroll upon the list of examination candidates. He was well aware, according to the confession, that these friends and relatives were well-off and had assumed that an award would be forthcoming after the matter was successfully concluded.

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33. The case could have been held in either jurisdiction (Jiangsu or Zhejiang), but as the authorities only had the accomplice in custody, not the principal offender, and as most of the families mentioned in Zhou Fuqing's letter were from his native place, the more appropriate forum was Zhejiang.

At first glance, the governor's presentation of the facts in his December 17th memorial appears straightforward and evenhanded. A closer reading reveals, however, a subtle manipulation of the facts, most noticeably in two respects: first, in the omission of possibly relevant information, and second, in the description of Zhou's state of mind. A seemingly minor omission, for instance, was that of the fact, reported in the governor's earlier memorial less than one month after the servant's detention, that the servant, according to his confession, had worked for the Shaoxing prefect, Chen Xunxuan, before Zhou had borrowed his services. As an issue in the case would be whether Zhou acted alone or in concert with the potential candidates and/or their families, the fact that the servant's former employer, a prefect, shared the same surname, Chen, as one of the families listed in the incriminating letter, was not insignificant. This omission is all the more puzzling in light of the difficulty, which the governor would profess, in locating the families given only their surnames.

More curious still is the disjunction between the governor's two sentences which describe the critical moments surrounding the servant's transmission of the letter to the chief examiner. He simply states in both memorials: "Tao Ashun [the servant] presented both the calling card and the letter to the chief examiner on the boat. Thereupon the chief examiner detained him and sent him in custody to the Suzhou prefecture for confinement awaiting trial."[34] Significantly, the governor provides no explanation as to how the chief examiner knew to detain the servant, how he ascertained the unlawful nature of the letter, or what words may have been exchanged.

On the one hand, the chief examiner may have been alerted by the mere presence of the servant and his delivery of a *sealed* envelope. Two public notices posted by the Guangdong provincial education commissioner, Xu Qi, during the 1893 civil examinations strongly suggest that it may have become a customary practice in the late Qing to have servants deliver bribes enclosed in sealed envelopes. Both public

34. Miscellany, supra note 21, at 269.

notices stated that neither the provincial education commissioner nor his subordinates would accept any sealed envelope.[35]

Zhou Zuoren's version of those critical moments, however, suggests a sinister interpretation of the chief examiner's motives: "From what people say, at that time the assistant chief examiner was just then on board the chief examiner's boat, chatting about things in general. The chief examiner received the letter, but did not then immediately open it to read it. He first put it down and ordered the man, who had delivered it, to return."[36] Most likely to ensure that he would have proof of delivery against any charges of absconding with the letter's contents, the servant, whom Zhou Zuoren described as a rustic, "shouted out that there was money inside the envelope. How is that the chief examiner did not give him a receipt?"[37] Zhou Zuoren's clear, though unstated, assumption is that the chief examiner most likely would have accepted the letter (and its proposal) but for the unforeseeable disclosure of its contents in the presence of another official.

The questions as to whether the chief examiner had or would have accepted the letter thus were not addressed. The latter question was irrelevant. As for the former question, it was assumed that the chief examiner had *not* accepted the letter, especially as Zhou had been caught in the very act of establishing unlawful communication with the chief examiner for purposes of collusion and bribery. The omission of any critical analysis of this relevant question in the governor's final report served two purposes: it both avoided the implication of a highly ranked, imperial official in a controversial case and buttressed the facts to support a finding that Zhou had acted alone as well as abruptly and had concluded no agreement with a third party.

The second way in which the governor manipulated the facts also served to support this finding. He often characterized Zhou's state of mind by inserting a qualifying adverb or adjective in the presentation of

35. Xu Qi, 8 Lingnan Shishi Zhi [Memorials of the Events at Lingnan] 17a, 23a (1896) (on file with author). One public notice prohibited subordinate officials from praising or applauding the talents of specific examination candidates while meeting with the education commissioner in an official capacity, and a second notice prohibited relatives or friends from visiting an official or his secretaries during the examination period. Id. at 18a, 16a.

36. Zhou, supra note 20, at 85.

37. Id.

the facts. The capsule summary of the case appearing at the beginning of one memorial suggested how unexpected the act had been: "when the Zhejiang chief examiner Yin Ruzhang arrived in Suzhou, *suddenly* there was a man who delivered a letter."[38] The notion that Zhou had been impetuous and suddenly rendered foolish in Shanghai was implanted in the final investigatory report: when he had ascertained that the chief examiner was Yin Ruzhang, "with whom he had formed a friendship as fellow-graduates, Zhou Fuqing *at once* became *muddle-headed.*"[39] Further in the report, the governor emphasized that Zhou "*[o]n his own initiative* wrote the promissory note for silver and drafted the [incriminating] words."[40] Preparing the ground for the legal argument that Zhou was at most guilty of an "incomplete act," the governor described Zhou's actions in Shanghai in the following manner: Zhou "conceived the idea *to seek* to establish communication for collusive purposes" and at another point "came up with the idea of asking [Yin Ruzhang] to collude on behalf of his son and *at the same time intended* to ask [Yin] to use his influence on behalf of the younger family members of his relatives and friends, Ma, Gu, Chen, and Zhang."[41]

Given that the events allowed little room for manipulation, it would appear that the governor took every opportunity to align the facts with subsequent legal arguments. Unfortunately there is insufficient information to discern his real motives. By emphasizing the extent to which Zhou had acted alone or merely had intended or sought to enter into the collusive arrangement, the governor acted in the best interests of all parties: Zhou, the four families identified only by surname, and even the chief examiner.

Nothing in the skeletal version of the facts, however, inexorably leads to the governor's conclusions that Zhou had acted alone as well as abruptly and had concluded no agreement with a third party. One could have found as easily that Zhou and his close friends and relatives had arranged that he, as a fellow *jinshi* of the same year as the chief examiner, should proceed to Suzhou to ease the way for a collusive arrangement on everyone's behalf. Such a finding would have accorded

38. Miscellany, supra note 21, at 264 (emphasis added).
39. Id. at 268 (emphasis added).
40. Id. at 269 (emphasis added).
41. Id. (emphases added).

with Zhou Zuoren's account that "Zhou Fuqing enclosed in a letter the promissory note written out by those who offered to pay out the 10,000 taels."[42]

The governor's handling of the investigation also indicates the manner in which he shaped the collection of the facts of the case. Although Zhou Yongji and Ma Jiatan, specifically named in the letter, were brought to Hangzhou for interrogation, it apparently proved too difficult to locate the families Gu, Chen, Sun, or Zhang also implicated. No one by those surnames was enrolled on the examination lists. According to Zhou Fuqing's confession, however, these families counted among his friends and relatives in the vicinity of his hometown and were quite financially well-off.[43] Given this information and the authority granted officials to use torture to elicit confessions, the governor's assertion that he was unable to locate the families is difficult to believe.

In the end, the governor found that the facts of the case had been fully revealed: Zhou had acted alone without premeditation, and neither the servant nor the examination candidates, Ma Jiatan and Zhou Yongji, had had any prior knowledge of the details of his plan. As for the four unidentified families, the governor recommended that the investigation be abandoned in order to avoid implicating innocent persons. Since Ma Jiatan and Zhou Yongji already had been stripped of their *shengyuan* status, their cases were closed, as was that of the servant.[44] The most difficult case was still unsettled, and recommending an appropriate sentence for Zhou Fuqing would prove to require a painstaking analysis of the law.

III. THE LAW

The law governing corruption and bribery in the civil examinations appears under statute 52 entitled "Partiality in the examination of candidates for degrees" of the section of the Qing penal code devoted to the laws relating to the Board of Personnel. The statute metes out blows of the heavy bamboo to officials who promote unworthy candidates, or

42. Zhou, supra note 20, at 85.
43. Miscellany, supra note 21, at 268.
44. Id. at 269.

who refuse to promote worthy candidates, on the basis of the number of such candidates falsely promoted or not promoted.[45]

Statute 52 descended from the penal code of the preceding dynasty, the Ming Code, but the Small Commentary was added early in the Qing dynasty in 1647. From blows of bamboo for the improper use of official influence, the penalties increased dramatically under the Small Commentary as soon as bribery was involved.[46] Offenders who received a bribe in connection with the promotion of a candidate, according to the Small Commentary, were to be sentenced under substatute 344:02 entitled "Official employees who exact or accept money from interested persons to perform illegal action" of the section of the Qing penal code devoted to the laws relating to the Board of Punishments.[47] The punishments under this substatute, which were determined according to the amount received, began at seventy blows of the heavy bamboo for an ounce of silver, quickly increased for every five ounces to reach temporary and permanent banishment, and ended with death by strangulation after the Autumn Assizes for bribes received in an amount equal to or greater than 80 ounces.[48]

The direct ancestor of the substatute under discussion in the Zhou Fuqing case is the first of eight substatutes under statute 52. First issued as an imperial edict in 1659/60, the provision was not compiled as substatute 52:01 until 1741.[49] Entitled "Collusion among provincial and metropolitan examiners, as well as examination candidates, in cheating and other illegal activities," substatute 52:01 states, "Provincial and metropolitan examiners, who secretly communicate with each other, as well as with examination candidates, ask favors of persons in positions of influence, partake in bribery, collude, or commit other such corrupt practices, upon investigating and establishing the truth, shall be sentenced to immediate decapitation.[50]

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45. Hsueh Yun-sheng, 2 Tu-li ts'un-yi ch'ung-k'an-pen [Concentration on Doubtful Matters while Perusing the Substatutes] 191-194 (Taipei, 1970). For an English translation, see George Staunton, Ta Tsing Leu Lee [Statutes and Substatutes of the Great Ch'ing Dynasty] 55 (Taipei, 1966).

46. Hsueh, supra note 45, at 191.

47. Id. at 1032.

48. Id. at 1029. For an English translation, see Staunton, supra note 45, at 379.

49. Hsueh, supra note 45, at 191.

50. Id.

The draconian punishment of immediate decapitation under this substatute 52:01 of the Board of Personnel section stands in sharp contrast with the punishments carefully calibrated on the basis of the value of the amount received under the bribery and corruption statutes 344-354 of the Board of Punishments section. These latter statutes also differentiated among the stages in the commission of an offense as well as the types of offenders. The punishment varied, for example, depending upon whether the official: was salaried; offered or accepted the bribe; had contracted for or agreed to accept a bribe, but had not actually received it; or performed for money an unlawful or lawful act.[51] Four offenses as well as "other corrupt practices," by contrast, fell within substatute 52:01 on "Collusion among examiners and candidates."[52] Compounding the potential difficulty in applying substatute 52:01 was the comparative lack of definition as to what constituted each offense.

Substatute 52:08, which was determined to approach most nearly the Zhou Fuqing case, reads substantially the same as its ancestor with one very important exception:

> Provincial and metropolitan examiners, who secretly communicate with each other, as well as with examination candidates, ask favors of persons in positions of influence, partake in bribery, collude, or commit other such corrupt practices, upon investigating and establishing the truth, *regardless of whether or not they had selected the candidates [in question] to succeed in the examinations*, in all cases shall be tried and provisionally sentenced, applying the precedent of the imperial rescript respectfully received in connection with the Shuntian prefecture provincial examination case of Xianfeng 9 [1858], according to the original substatute and then shall await the imperial decree.[53]

The new language eliminated the possibility of determining whether or not an offender fell within the substatute, or of distinguishing degrees

51. Staunton, supra note 45, at 379-391.
52. Hsueh, supra note 45, at 191.
53. Id. at 193-194 (emphasis added).

of guilt, on the basis of whether or not the offender had carried out the objective of the collusion or bribery. It rendered an already severe provision even more severe.

Persons involved in collusion and bribery in the civil examinations, however, could be sentenced under either the above substatutes of the Board of Personnel section or the bribery and corruption statutes of the Board of Punishments section. Two cases recorded in an 1878 edition of the Qing code[54] provide a starting point in discerning how these two sets of laws were applied. In each case, the instigator of the collusive activity was sentenced to immediate decapitation by analogy to substatute 52:01 on "Collusion among examination officials and candidates."

One can surmise why these sentences were pronounced by analogy. Examination candidates were not punishable under the substatute, as it applied only to "provincial and metropolitan examiners." Therefore, the instigator who was an examination candidate was brought within the ambit of the substatute "by analogy."[55] Nor was the other instigator covered under the literal terms of the substatute: he was only a clerk in charge of the examination compound.[56] However, because he was found to be the mastermind, an aggravation of the punishment, which would be obtained by applying the substatute by analogy, most likely was considered appropriate.

All but one of the other offenders were sentenced under the bribery and corruption statutes of the Board of Punishments section. In one case, for example, those persons who had acted as middlemen, and through whom money had passed to the bribe-takers, were liable to the same punishment as provided under statute 344 on "Non-salaried officials who accept bribes, exceeding 120 ounces, for an unlawful object" and were provisionally sentenced to strangulation after the Autumn Assizes.[57] In another case, for reasons which are unclear, an examination candidate, who, at the instigation of the chief clerk, offered bribes to various clerks in order to arrange the exchange of examination papers, was sentenced under statute 348 on "Offering a bribes," which incorporates by reference the punishment prescribed under statute 344 on "Non-salaried

54. New Penal Code, supra note 12, at 691-694. The cases are dated 1784 and 1798.
55. Id. at 692.
56. Id. at 693.
57. Id. at 692.

officials who accept bribes, exceeding 120 ounces, for an unlawful object." He was sentenced to immediate strangulation.[58]

One offender's case, which closely resembles Zhou Fuqing's situation, may explain the governor's decision as to the applicable law, if any. At a candidate's instigation, the offender, a department prefect, used his influence with, and transmitted a bribe to, his personal secretary to arrange a substitution at the examinations.[59] The offender was not the instigator; however, more than a mere middleman through whom bribe money had passed, the prefect had used his influence to ease the way in establishing the crucial connection between the candidate and his substitute. Also, although the offender was not an examination official, he still was an official holding a post; as such, he should have known the enormity of his offense and the severity of the laws. Thus, he was sentenced to immediate decapitation by analogy to the Board of Personnel section substatute 52:01 on "Collusion among examination officials and candidates."[60]

The principal reason for the severity of the substatutes on "Collusion among examiners and candidates" of the Board of Personnel section was to uphold both the integrity of the civil examination system through which government officials were selected and promoted and the "equality of opportunity"[61] that it represented. The examinations were routinely referred to as "the great ceremonies by which the imperial court selects men of talent."[62] The imperial edict issued in 1657 in response to the corruption case that gave rise to the first substatute, 52:01, expressed the reason and anger behind the severity:

> It is necessary that the chief and associate examiners all be upright and impartial so that the truly talented can be selected from the very start. . . . If chief and associate examiners as well as all *juren* do not wash out their lungs and intestines and

58. Id. at 693.
59. Id. at 692.
60. Id.
61. Chang Chung-li, The Chinese Gentry: Studies on their Role in Nineteenth-Century Society 183 (1958).
62. Hsueh, supra note 45, at 194.

> resolutely abandon corrupt practices, if they do not value official titles and ranks, then do not spare their lives.[63]

The importance accorded the civil service examination system as the bulwark of the central government may account for the severity of the punishment meted out in the 1858 case that would serve as the basis for the second substatute, 52:08, on "Collusion among examination officials and candidates." This case was one of two major scandals involving corruption and partiality during the Shuntian provincial examinations of that year.[64] A brief examination of the facts will explain the insertion of language that would make a severe provision even more severe.

The case of associate examiner Cheng Tinggui emerged during the investigation of the first scandal, involving the chief examiner, grand secretary Bojun, who had been accused of passing one candidate at the expense of another. This investigation entailed the inspection of more than fifty examination booklets on account of irregularities, which in turn revealed that the son of associate examiner Cheng had received slips of paper from the sons of each of the president of the Board of War, two vice-presidents, and the Hunan financial commissioner, as well as from his private secretary and his family teacher.[65] The son then had ordered a servant to carry the slips into the examination compound and to hand them over to his father. Associate examiner Cheng did not pass the candidates as his son had entreated, but nor did he reveal his son's part in the forwarding of the slips of paper. Thus, at the associate examiner's trial for corruption and bribery, finding that Cheng intentionally concealed his son's crime, the Xianfeng emperor held that regardless of whether or not the examination candidates had been passed, the unlawful communication and collusion had been established, and he thereby condemned Cheng Tinggui to immediate

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63. 6 Da Qing Luli Tongkao [Historical Encyclopedia of the Qing Penal Code] 1b-2 (n.d.).

64. For a detailed examination of the 1858 cases, see Carsey Yee, The Shuntian Examination Scandal of 1858: The Legal Dissents of Imperial Institutions (Feb. 1994) (unpublished manuscript).

65. These slips of paper, called *tiao zi*, were a commonly used device: they had holes cut into them, which, when the slips were laid over a page of the examination paper, would reveal a preselected set of characters that in turn would reveal the identity of the candidate who had colluded with the examiner.

decapitation.[66] The extremely severe substatute arising from this case only could have appeared even more draconian thirty-five years later in light of the ordinary events of the Zhou Fuqing case.

IV. THE LEGAL ARGUMENTS

Although the Zhejiang governor Songjun was somewhat bold in manipulating the facts in the Zhou Fuqing case, he was so hesitant in applying substatute 52:01 on "Collusion among examination officials and candidates," even by analogy, that he failed to give a recommended sentence. At best he submitted for the emperor's decision a tentative proposal with a list of mitigating factors, stating, "as to whether or not we ought to determine the sentence by applying the substatute by analogy to grant a discretionary reduction in punishment, we respectfully memorialize the throne and await the imperial order."[67] The Board of Punishments later would defend the governor's action, excusing him for "not daring to take the lead hastily in recommending a sentence where there was no existing law."[68]

In his decision, the governor at least appears to attempt to lay a foundation for the application of law by analogy. The governor first cited the two laws most directly applicable, substatute 52:01 on "Collusion among examination officials and candidates" and the statute on "Mitigation of punishment,"[69] and then concluded, "After a

66. The summary of this case is derived from the following two sources: Hseuh Fu-ch'eng, Yung'an Bizhi [Diary of Yung'an] 52 (1937); Huang Kuang-ling, Ch'ing-tai k'o-chu chih-tu chih yen-chiu [Study of the Imperial Examination System of the Ch'ing Dynasty] 26-30 (1975) (unpublished Ph.D. thesis, Taipei).

67. Miscellany, supra note 21, at 269.

68. Id. at 271. Under statute 415, an official who fails to cite the articles of the law or the substatutes in deciding a case is punished with thirty blows of the light bamboo. Jones, supra note 3, at 396. This statute may account for the Board of Punishments' defense of the governor's action.

69. Staunton, supra note 45, at 13. This statute provides for a two-degree reduction in punishment for an offender surrendering himself to officers of justice upon hearing that an accusation is intended. A one-degree reduction in punishment entails the reduction of an entire category of punishment. If the statute on "Mitigation of punishment" had been applied to reduce the punishment of immediate decapitation under substatute 52:08, then Zhou's sentence would have been reduced to three years of penal servitude. For an explanation of increases and decreases in punishment, see Bodde and Morris, supra note 1, at 100-02.

thorough examination of the statutes and substatutes, we note that there are no special provisions for punishing this crime. We further note that said dismissed official was in the middle of seeking to establish communication for purposes of collusion [with Yin Ruzhang], but that he had not completed the communication. The circumstances appear to be distinguishable from those in which the secret communication and collusion are concluded, but the examination candidates are not passed."[70] He next distinguished the Zhou Fuqing case from the 1858 Cheng Tinggui case cited in substatute 52:08, stating only that the blank promissory note that Zhou wrote did not fall within the category of a written agreement to purchase a successful examination booklet but rather in the category of "an empty bribe written solely by oneself."[71]

As if this distinction alone were sufficient to take Zhou out from under substatute 52:08 governing "Collusion among examination officials and candidates," the governor then addressed, without specifically citing them, the applicability of the corruption and bribery statutes of the Board of Punishments section. Again his reasoning was brief: as the money was not given to anyone, it would be inappropriate to sentence Zhou on the basis of the amount of the bribe. Finally, as if sensing that a reduction in sentence was appropriate, but not knowing clearly the basis for the reduction, the governor ended his discussion regarding sentencing with reference to the statute on "Mitigation of punishment": "Judging from the fact that after the matter, upon hearing that he was sought by the authorities, Zhou Fuqing voluntarily surrendered, we consider that he still had a heart that feared the law."[72]

In contrast to the governor's tentativeness with respect to the applicable law, the Board of Punishments made a careful analysis of Zhou's case in a persistent effort to persuade the emperor of the distinction between it and the 1858 case underlying substatute 52:08 on "Collusion among examination officials and candidates." It never mentioned the applicability of the corruption and bribery statutes under the Board of Punishments section and disagreed with the governor as to

70. Miscellany, supra note 21, at 269.
71. Id.
72. Id.

the appropriateness of a reduction of sentence on the basis of the statute on "Mitigation of punishment."

The Board of Punishments' decision read in pertinent part as follows:

> If we study in detail the meaning of the substatute, it must be that the examining officials and the candidates have negotiated and agreed with each other, or have set forth clearly in writing the amount of the bribe or the words "to give away." There must be one person giving and another person receiving. Only under these circumstances can we establish "an unlawful communication and bribery." If a person only sends a letter suggesting bribery and collusion and is exposed, these circumstances do not accord with the above-cited substatute. As for the request alone, regardless of whether or not the examiner consents, it seems that it cannot constitute a completed crime.[73]

Appearing to rely on a form of "legislative history," the Board of Punishments interpreted substatute 52:08 to define what constituted a "completed" act of unlawful communication and bribery. Drawing from the customary practices of 1858, the present ones, or both, the Board specifically defined the elements of the offense as (1) an oral agreement, evidenced by negotiation, or (2) a written agreement in which is stated either the amount of the bribe or the words "to give you."[74] Under this interpretation, the essential parties to the offense were the examination official and the candidate, and, regardless of the participation of a go-between, any unlawful act under the substatute was not deemed completed without an agreement reached or a link established between these two essential parties.

This interpretation was consistent with the Xianfeng emperor's decision in 1858 that the law punished the collusion, not the accomplishment of the objectives of the collusion. It also established the analytical framework to apply the substatute by analogy to Zhou. Thus,

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73. Id. at 271.
74. Id.

the Board of Punishments did not send out as strong a warning to potential wrongdoers as it could have, perhaps slightly undermining the policy of upholding the integrity of the civil examination system.

Furthermore, the Board's interpretation made the governor's manipulation of facts as to Zhou's state of mind superfluous. On the other hand, it made the governor's failure to investigate further what actually had transpired between the servant and the chief examiner a more glaring omission than it first appeared from his December 17th memorial. Whether Zhou acted alone or with the consent of the examination candidates and/or their families was irrelevant under this interpretation: even if Zhou had had a prior arrangement with the potential candidates, no agreement had been reached, nor any link established, between the candidates and the chief examiner, for the latter had not accepted the sealed envelope.

Zhou nevertheless had committed an anti-social act. The application of the law "by analogy" thus served a dual function. First, as suggested by the two cases recorded in the 1878 edition of the Qing code and discussed above, it brought an official other than an examination official within the ambit of the substatute. Second, it provided a means to punish an act not covered under existing law. Thus, for his incomplete act, Zhou Fuqing was provisionally sentenced to a one-degree reduction in punishment, 100 blows of the heavy bamboo and exile to 3,000 *li*, by analogy to substatute 52:08 of "Collusion of examination officials and candidates."[75]

Despite the careful reasoning of the Board of Punishments, the emperor did not endorse its recommended sentence but did commute Zhou's punishment from immediate decapitation to decapitation after the Autumn Assizes.[76] Zhou never was executed. He languished instead in the Hangzhou prison for seven years until his release in 1901.[77] In the first Autumn Assizes following his sentencing, Zhou, however, was classified as *qingshi*, literally signifying "the events are true meriting execution." Surprisingly, though, his name was not checked for

75. Id. at 272.
76. Id.
77. Id. at 273.

execution. The imperial edict giving the reasons for the stay of execution repeated the Board of Punishments' language of two years earlier.[78]

V. CONCLUSION

Why did the Zhejiang governor and the Board of Punishments work so hard in both the presentation of facts and the interpretation of law to reduce Zhou Fuqing's punishment under the substatute on "Collusion among examination officials and candidates"? One will never know the extent to which Zhou's contacts within the central government, or his standing in Guiji county, Shaoxing prefecture, may have influenced the outcome. Nor will one know the extent to which the provincial, prefectural, and county officials as well as local gentry may have cooperated to protect each other's reputations. The governor Songjun, for one, already was known for the strong discipline maintained during his supervision of the provincial examinations.[79]

Other reasons also may explain the handling of the case. One important factor would have been the severity of the law governing corruption and bribery in the civil examinations. From 1740 until 1870, the Statutes Commission of the Board of Punishments undertook a small revision of the entire penal code every five years and a major revision every ten years, so important were consistent and well-calibrated punishments considered to the administration of justice.[80] For example, an 1800 memorial from the Board of Punishments proposing a new compilation of the code stated as one of several reasons for its recommendation that:

> Moreover we find that among the recently revised provisions there are some which impose heavy penalties because of particularly grave one-time circumstances involved in the cases on which they are based, and which have nevertheless

78. Id.

79. Shen Tongshen, 15 Guangxu Zhengyao [Important Policies of the Guangxu Reign] 11b-2 (1909).

80. Fu-mei Chang Chen, Private Code Commentaries in the Development of Ch'ing Law (1644-1911) 6 (1970) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

> continued to be used in cases which do not merit such heavy punishment.[81]

The generally widespread corruption in the civil examinations and the lack of enforcement of the laws also may have been contributing factors to the judicial decision-makers' efforts on Zhou's behalf. There may have been an unarticulated feeling that it was unfair to sentence so severely "muddle-headed" Zhou, who had failed even in carrying out a commonplace bribery transaction. Earlier, Feng Kuei-fen (1809-1874) had made the similar, though more formally expressed, point:

> Malpractices in examination are practiced by seven or eight out of ten men. Only one case in several years has been punished according to law. The sages in ruling the world emphasize justice. To have different punishments for the same crime is unjust. What would one say of punishing one out of a thousand guilty of the same crime? Everyone knows it except the Emperor.[82]

The ease with which cases of corruption such as Zhou Fuqing's case could expand into widespread purges also may have influenced the judicial decision-makers' determination to limit the scope of criminal responsibility as much as possible. As one of the successful candidates in the 1858 Shuntian examination, the Zhejiang governor Songjun would have been well aware of how widely the net of punishability could be cast. The investigations in 1858 resulted in the deaths of two persons in custody, five sentences of capital punishment, and nine sentences of military exile; as many as ninety other persons suffered administrative punishments such as loss of salary, rank, or position.[83]

Furthermore, two long-standing legal maxims may have affected the judicial decision-makers' predisposition towards leniency in this case. The first legal maxim, "keep cases to their lowest proportion"

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81. New Penal Code, supra note 12, at 21-25.

82. The Chinese Gentry, supra note 61, at 190 (quoting Feng Kuei-fen, Proposal to Permit Poem Writing to Convey Public Opinion).

83. Diyi Lishi Dang'an Guan [The Number One Historical Archives], 14 Qingdai Dang'an Shiliao Congbian [Miscellany of Historical Materials from Qing Archives] 189 (1983).

(*sheng shi*), was included in the advice on litigation given by legal secretary Wang Huizu (1731-1807) in his handbook entitled *Precepts for Local Administrative Officials* (*Zuozhi Yaoyan*), which was used by local officials until as late as 1991:

> If [a legal secretary] brings one person less into court, then one person less is involved in the proceedings. There is a saying: one red ink mark in court means a thousand drops of red blood among the people.[84]

Governor Songjun's failure to remark that the Shaoxing prefect, who had been Zhou's servant's former employer, shared thesame surname as one of the families listed in the incriminating letter, his professional inability to identify the four families given only their surnames, and his reluctance to pursue a fuller investigation into the chief examiner's participation succeeded in keeping the case to its lowest proportion. In accordance with the spirit of the maxim, Songjun brought before him only three persons, Zhou Fuqing, his son Zhou Yongji, and the candidate Ma Jiatan, thus sparing other "red ink marks in court."

Appreciation of a second legal maxim, "seek to preserve life" (*qiu sheng*), also may have accounted for the persistent efforts to construe the facts and the law in the light most favorable to Zhou Fuqing. Wang Huizu attributed the expression to Ouyang Xiu (1007-1072) and acknowledged its guidance in meting out justice in capital cases that often turned on nuanced interpretations:

> some cases can be regarded as something between trivial and serious, or possibly either way, and the point at issue is focussed at no more than a single sentence, the interpretation of which concerns a life-and-death matter. In such cases you have to put yourself in the other's place to search with sincerity for a way of forgiveness. If you sincerely search for it again and again, then there must be one thread that can be made use of to save life.[85]

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84. Sybille van der Sprenkel, Legal Institutions in Manchu China 139 (1971).
85. Id. at 140.

County magistrate Huang Liuhong (b. 1633) offered similar counsel in his magistrate's handbook, *A Complete Book Concerning Happiness and Benevolence* (*Fuhui Quanshu*), published in 1694. He advised officials first to seek to identify mitigating circumstances and, if unsuccessful, then to examine the statutes and substatutes "to see if they can be applied by analogy in a roundabout way," concluding that:

> [i]n general, one should always try to mitigate the punishment and avoid the death penalty if it is at all possible, and should not be deterred by the time consumed on seemingly trivial details.[86]

These maxims may have appeared more appropirate in the case of ordinary bribery such as Zhou Fuqing's case, one that did not smack of political overtones or national consequences.

Finally, perhaps the growing perception that the subjects tested in the civil examinations were fast becoming irrelevant to the qualities needed to govern in the late nineteenth-century undermined the importance of preserving the integrity of the civil examination system, the policy goal underlying the severe substatute on "Collusion among examination officials and candidates." Xue Yunsheng, who became President of the Board of Punishments shortly before the Board decided the Zhou Fuqing case, was of that opinion. He stated in his personal commentary directly following the draconian substatute:

> To select men of talent solely on the basis of their learning in art and literature . . . utterly lack conformity with the statutory purpose. What candidates study is not what they will apply in office, and, consequently, people recently have considered this a great shortcoming. Since scholars are selected on the basis of art and literature, it is natural that such corrupt practices as collusion and bribery would arise on

86. Huang Liu-hung, A Complete Book Concerning Happiness and Benevolence 405 (Djang Chu ed. and trans., 1984).

> account of this. But if one rashly recommends sentences of immediate decapitation, one cannot avoid being too severe.[87]

Returning to the concerns raised at the beginning of this paper, can one concluded that the application of law by analogy in the case of Zhou Fuqing violated the principle of *nulla poena sine lege*? The use of analogy in this instance did create a new crime retroactively: attempted collusion and bribery in connection with the civil examinations. Did it create, however, a new *category* of crime? Or did the application of law by analogy in this case represent "the minimal, 'normal' expansion of past decisions which is necessary in the maintenance of any system of law," a degree of expansion recognized by the principles of statutory construction in American criminal law?[88] Is the use of analogy such as in the case of Zhou Fuqing less troubling when it appears limited due to the specificity of the substatute deemed most closely analogous? Furthermore, the decision can hardly offend one's sense of justice: Zhou Fuqing knew or should have known that what he attempted to do was wrongful. The decisions was not founded, for example, upon "a greater body of higher norms" beyond the written law.

Finally, the application of law by analogy was used in Zhou Fuqing's favor to achieve one of the objectives historically shared by the principle of *nulla poena sine lege*: to mitigate the extension of a capital offense. Its rigorous application by both the governor and the Board of Punishments not only represented a form of advocacy on Zhou Fuqing's behalf but also may have served as an informal mechanism to limit the emperor's choice of final decision. Although the emperor meted out a punishment one degree higher than that recommended by the Board of Punishments, he did not impose the most severe punishment possible, nor did he insist on pursuing the issues of the identities of the four families or the extent of the chief examiner's participation. The sentence would not have precluded the emperor from cracking down in future cases of corruption in the civil examinations and most likely was intended to be perceived as an act of imperial benevolence while maintaining imperial authority. Nevertheless the emperor's final

87. Hsueh, supra note 45, at 194.
88. Hall, supra note 5, at 49.

judgment does raise interesting questions regarding the relationship between the emperor and the bureaucracy, both provincial and central, in judicial decision-making: in particular, how much leeway did the emperor have in reaching a decision in the face of the bureaucracy's ardent oposition (via the rigorous application of established law by analogy) to the imposition of a severe sanction, and how often was the seemingly double-edged principle of analogy used by either the emperor or the bureaucracy as a device to restrict the other's exercise of arbitrary power?

The tension between the fixity of laws and the need ofr flexibility would remain a subject of concern throughout the late Qing law reform movement. Only six years after Zhou Fuqing's release from prison, the use of analogy would be one of the five principal areas of reform proposed by Shen Jiaben, as commissioner for the Revision of the Laws, in his 1907 memorial presenting the first draft of the new Criminal Code. Recognizing on the one hand the constraint placed upon judicial decision-makers by fixed punishments and on the other the potential for bias and lack of uniformity in judgments inherent in the application of law by analogy, Shen would propose the abolition of the use of analogy and would recommend in its place that

> The law shall for every punishment determine the limits of maximum and minimum, the judge shall, basing himself thereupon, try and decide the case when it is subjected to his jurisdiction, and then he shall separately apply the rules for discretionary reduction, or reduction for extenuating circumstances, to mend the deficiencies (of the law).[89]

By giving judicial decision-makers greater discretionary power in sentencing, Shen would seek to obviate the need for analogy to address the particular, ever variable circumstances of each case. Although any conclusions drawn from one case are tentative at best, and more questions than conclusions may have been presented by this exploration, this case at least has demonstrated the flexibility with which facts could be manipulated and the laws interpreted, in the application of law by

89. Meijer, supra note 16, at 196.

analogy. The dexterity of the manipulation and the sophistication of the interpretation indicate a knowledge of both established laws and methods of application. More telling still is the light which the case sheds on the painstaking efforts taken with regard to such marshalling of the facts and interpretation of the laws, even in a case of such everyday bribery as Zhou Fuqing's case, and the attempt to achieve some form of justice for all.