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RESEARCH ARTICLE

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Sentencing and computation of punishment
—On "computerized sentencing"

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Abstract Sentencing has long been a neglected area of analysis by both China's academic and judicial circles. Nominally, there are no specific prescriptions in China's criminal law regarding sentencing; in practice, however, courts arbitrarily integrate sentencing into the conviction proceedings of criminal trials. This lack of established specificity, when coupled with variation in the practice of different courts in various localities, has led to a general lack of transparency and substantial discrepancies in sentencing. Though some critics of the current system propose to unify the sentencing practice by adopting "computerized sentencing", it is important to keep in mind that a sentencing system must necessarily be a dynamic process. As such, the focus and goal of sentencing should not merely be to compute a final punishment; rather, the system must justly reflect the society's final evaluation of the offender and the crime. It is difficult to imagine that one-dimensional system as computerized sentencing can take into account the multitude of factors in considering a crime. Therefore, although it is necessary that the sentencing process should be separated from the conviction process, a "computerized" system may not be the best alternative.

Keywords sentencing, criminal justice, conviction, penalty, restorative justice

摘要 量刑问题长期以来被学术及司法界所忽略。理论上，中国刑事法没有对量刑问题做细致的规定；实践中，法院将量刑问题并入定罪的审理程序中一并考量，加上各地法院做法各异，造成量刑不透明和巨大的差异性。有人主张为了统一量刑采用电脑软件程式化量刑诸因素，但量刑并非刑期的量化，不应该仅仅以如何具体化刑期为中心。量刑实际反映社会对犯罪人最终评价的动态过程，理应考虑更多因

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素，将量刑从定罪程序中独立出来。

关键词 量刑，刑事司法，定罪，刑罚，恢复性司法

1 Issues put forward

Sentencing and conviction are two of the most critical phases of any criminal justice system. If conviction is the basis or justification, sentencing serves as the society's final evaluation of the offender's behaviors and the conclusion of criminal procedure based on this justification. Justifiably, it can be argued that sentencing proceedings hold even more significant than the conviction phase. This is because the primary purpose of conviction is to determine criminal responsibilities—this purpose can only be implemented through a sentence that denounces and penalizes the offender accordingly from the standpoint of social morality. Try to imagine the aftermath of a complicated and lengthy conviction process in which various evidences are employed to confirm by a high standard of proof that the accused is guilty—if the applicable punishment for this guilt is dictated by a seemingly arbitrary standard, then the importance and authority of the conviction would be seriously diminished. In essence, the conviction would even appear to lose meaning, potentially giving rise to doubts regarding the legitimacy of the conviction and sentencing process.

Traditionally, the reason why sentencing has not attracted sufficient attention in China's criminal proceedings is that it has long been considered a realm of substantive law. Sentencing proceedings have been deemed of low importance because the general belief is that judges only concretely and automatically apply particular sentences when they are specified within substantive law. The reality of the situation, however, is quite different. By carefully investigating specific provisions of China's substantive criminal law, we find that the law only suggests loose penalty ranges for many offenses; for some crimes the punishment may even range from the most minor penalties, observation or community service; to the harshest, the death penalty.[1] Another reason for the lack of discussion is that in China's criminal proceedings, conviction and sentencing, which are completely different in nature, are nonetheless handled through a single process. Arguably, it can be said that the

[1] For example, clause 1 of article 234 of the Criminal Law of China provides: "For those who injure the body of other people, fixed-term imprisonment less than three years, penal servitude or public surveillance can be imposed." But in the following clause 2 it is provided: "For those who commit the crime stated in the previous clause … cause death of other people or seriously wound other people causing them severe disability in extremely cruel way, fixed-term imprisonment of over 10 years, life-imprisonment or death penalty can be applied." This provision of blurry wording literally grants the judge or the court unlimited discretion in punishing the offender in any way they want.

legitimacy of a separate sentencing is seemingly lost within the process of conviction.

In recent years, however, the issue of sentencing has gradually attracted the attention of scholars and the judicial agencies. Furthermore, through investigation and research on sentencing in foreign courts, the Supreme Court has also come to realize that China's sentencing system differs tremendously in various areas and taken efforts to standardize sentencing criteria via judicial interpretation.[2] For instance, certain local courts have formulated sentencing criteria on common cases, hoping to resolve the issue of excessively subjective judicial discretion in sentencing.[3] (Zhu, 2006) In March 2006, the Zichuang District Court of Zibo city in Shandong Province ceremoniously launched a computerized sentencing software that it had jointly developed with a rising technology company. The court's rationale was that, with sentencing now being computerized, the entire process would become more consistent and uniform. (Guo, 2006) Nonetheless, this reform brings with it questions of effectiveness, as such a system completely eliminates human subjectivity from sentencing. Clearly, the issues of China's sentencing system and types of reform that need to be discussed in details and deliberated carefully.

The author hereby hopes to explain the uniqueness, independence, and complexity of sentencing with an in-depth discussion of the critical sentencing process. Also, the discussion will briefly introduce the current and historical situations of the sentencing system within the UK and the US as modes of comparison. The final proposition is to separate the sentencing process from the rest of criminal litigation procedure. This is necessary in order to understand and apply penalties on a fair and case-by-case basis, but equally importantly, it is necessary to better realize the social and penological functions of punishing crime—future crime deterrence and the reintegration of criminals into the society.

2 Predicament of sentencing

Sentencing is not a mere mathematical problem; as such, simple one-dimensional

[2] Since the promulgation of the Criminal Law of China in 1997, the Supreme Court has formulated a series of interpretations regarding the sentencing of different criminal offenses, trying to increase the stability of sentencing through defining the circumstances. For example, The Supreme Court's Interpretation on Several Questions Concerning Application of Law in Trying Criminal Cases relating to Secretly Organizing or Transporting People across the National Border (2002) provides the definition of "a large number of people" mentioned in article 318 and article 321 of the Criminal Law of China, providing restrictions in the consideration of sentencing by courts of various levels.

[3] Shanghai High Court has promulgated the Shanghai Courts Sentencing Guideline, and Jiangsu Provincial High Court officially adopted the Guiding Rules of Sentencing on May 9, 2004 and enforced it throughout the provincial area.

calculations can not solve the complex social web of considerations covered by criminal justice. There have always been different opinions on whether the same penalties should be applied to the same types of crimes; even more debate arises when these same types of crimes have dissimilar situations or circumstances. For instance, in the developed coastal areas of China (such as Shanghai city), a theft causing RMB2,000 worth in damages inflicted upon a family of middle income is regarded in a completely different manner from a similar theft to a similar family in a remote area. Even when it is considered within the same area, a theft inflicted upon a wealthy family is not comparable with a similar loss to an impoverished family. Therefore, it is absolutely necessary for the substantive criminal law to grant the judge certain discretion in sentencing in light of such extenuating circumstances. On the other hand, however, to consider a situation in which two people both engage in the trafficking of 500 grams of illicit drugs, one in Yunnan city and the other in Shanghai city. If the defendant in Yunnan city is sentenced to death while the defendant in Shanghai city gets only a 10-year imprisonment, the public will undoubtedly have misgivings regarding the credibility and legitimacy of this kind of application of punishment. Due to the arbitrary disparity in sentencing, individuals will question the extent to which the sentences actually reflect social justice. To further illustrate the capriciousness of the system, even a few years' time may make the difference between life and death: A case in 2000 saw a defendant sentenced to death for the embezzlement of RMB5 million; while in 2006, an individual who embezzled the same amount of money was only sentenced to a fixed-term imprisonment. If it is not justified by appropriate validation, such disparity in sentencing will naturally provoke fervent criticism.

Clearly, it can be seen that the application of punishment in specific cases needs a necessary level of flexibility; however, this does not mean that sentencing should be plagued with the discretional application of judicial power. To what extent the flexibility and uniformity of sentencing should be balanced depends on the overall penological and social purposes that the society expects to fulfill through the application of punishment. In other words, a society must not only consider the satisfaction of gaining retribution for a crime. Instead, the society must also take into consideration the need to deter future crime and assume the moral responsibility of rescuing criminals from the edge of darkness to lead them back to light. Therefore, any society will always be faced with the uncertainty of maintaining both flexibility and stability in terms of sentencing, a delicate balance that must always be preserved.

A key question that then arises is: What criteria can be used to determine the proper social balance of flexibility and stability? There may not be a standard answer to this question—because we live in a diversified society, a society in which we can not establish even absolutely correct values, let alone perpetually

correct values. In many cases, we can not expect that the problem of sentencing can be solved through legislation by judicial agencies as there are too many drawbacks. Specifically, such legislation will over-simplify many factors that need to be carefully considered in the sentencing phase, and historically, similar attempts in this aspect within various countries have proved that it is not a feasible or effective solution.[4]

3 Theoretical basis for criminal penalty

Criminal penalty has various theoretical bases which can be categorized into three main ideas: The first is retribution-ism (the revenge basis), the second is utilitarianism, the consideration of preventing and stopping future crimes, also called the social function of "crime deterrence" (special deterrence vs. general deterrence), and the third is "restorative justice", the idea that criminal punishment should take into consideration the offender's ultimate return into the society and repair the damaged social relations.

It is said in the Bible that if any person attacks and kills someone, he should be sentenced to death; any person who injures someone should pay the same cost of injury. This is the retribution ideology of the so-called "eye for eye, tooth for tooth" morale.[5] The Inquisition of the Medieval Ages also continued this concept of criminal penalty, which has influenced both ancient and modern theories of crime and punishment. Even today, we can still see that retribution is one of the key bases for arguments supporting criminal penalty in many different legal systems. (Ma, 1995) In retribution theory, in addition to the fact that the offender needs to pay the same cost to the victim (which in a broader sense includes the society as a whole), there is the idea of the criminal's moral blame for the offender. In essence, the offender's behavior must have blame worthiness, and by executing punishment, the society makes it clear to the world that the behavior of the offender is evil and will not be tolerated. According to the opinions of various scholars, only through the punishment can the negative social impact of the crime committed be balanced out and eliminated. (Skolnick, 2005) Nonetheless, this theory of retribution has encountered severe challenges in practice. Firstly, if retribution is only to satisfy the needs of revenge of the victim, does this necessarily mean that if the victim forgives the offender, there is no need for punishment? Moreover, if the victim is essentially a society as a whole, then who can represent all the society as to request appropriate punishment or issue forgiveness?

A closer examination of retribution theory also finds further problems;

[4] This issue will be covered in the following discussion of the US Sentencing Guideline.
[5] See Leviticus of the Bible, Chapter 24, 17–22.

abstractly, the theory seems to be constructive, but when used to analyze specific cases, it becomes plagued with loopholes. As far as blameworthiness is concerned, criminal behaviors of certain offenders are largely abominable and entail grave consequences; hence avenging a crime appears to be fully justified. However, if we carefully study the reasons for committing crimes of those people and the environment in which they live, we may have totally different conclusions. For example, considering an individual who grows up in a family wrought with drug abuse, who is sexually abused through childhood, and who is forced to drop out of school due to economic reasons. Faced with crime as a commonplace occurrence in his entire life, that individual finally breaks the law himself. In such a case, to what extent should the offender individually be held fully responsible for his crimes? It is only fair to say that the whole society is partially reprehensible for allowing this kind of circumstance to take root in the first place.

The second basis for punishment theory is the theory of crime deterrence and prevention based on utilitarianism. Most criminal law scholars admit that one of the important penological functions of punishment is to prevent future crimes of similar nature. Prevention of crimes can further be divided into the categories of general deterrence through examples and special deterrence through incapacitation. General deterrence serves to warn potential criminals through fear so as to achieve the aim of deterring future crimes, while special deterrence serves to stop and prevent future offenses by a specific offender through punishment and incapacitation. Here the functions of punishment are largely based on utilitarian considerations, so this logic is often referred to as the utilitarian function of punishment.

The third main basis for punishment is the so-called “restorative justice” consideration. Certain legal scholars contend that in the design of criminal judicial systems of the past, “people” (both the offender and the victim) were the center of consideration; as a result, ideas such as the crime prevention design of retribution and utilitarianism came into being. Shifting the focus, however, an alternate approach is to treat the “problem” of crime occurrence as the focal point of the criminal judicial system. Essentially, if we treat each crime as a problem for consideration instead of concentrating on whose interests have been damaged or who has damaged another’s interests, the dynamics that we must consider become completely different. To quote a famous scholar, restorative justice is a process in which “all the stake holders (such as the victim, the offender and the community) are gathered to seek repairing the damages caused by the crime, rather than a process to react to the damage caused with more damages.” (Braithwaite, 1999)

Although the campaign of restorative justice seeks to separate itself from the punishment theory of utilitarianism, many have pointed out that it is essentially a

variant of the school of utilitarianism. The difference is that restorative justice seeks to view offenses as problems that a united society must combat in order to reduce crime, rather than take the standard penological view. In the opinion of restorative justice theorists, punishment is not the most important factor in resolving the problem of crimes; instead, what is critical is to repair the social damage brought about by the crimes in an effective way that benefits all the society. Ultimately, this means that society must reduce the possibility of the offender committing crimes in the future to the greatest extent possible, and to enable criminals to reintegrate into the society effectively. This viewpoint comports to a great extent with the theory of "rehabilitation", popular in the US before the 1980s. Based on the research results of social psychology and sociology studies, the rehabilitation theory deems crime as a disease. The difference between restorative justice theory and rehabilitation theory is that the former has wider considerations of the society in general, while the latter is limited only to consideration regarding the offender.

Prevailing punishment theories and justifications of various countries all generally take into consideration the three theories discussed above. In the process of sentencing, not only must the moral blame and negation of the criminal's behavior be considered (retribution-ism), but the rehabilitation of the offender and the deterrence of other potential offenders from committing the same crime (utilitarianism) should all be factors that are considered. Meanwhile, in determining the severity and the type of punishment, the possibility of the offender's return to the society should also be weighed—a minor sentence may allow the offender to return to the society and stay out of crime, thus enabling the society to return to the status prior to the crime as closely as possible, i.e. restorative justice.

4 Developing history of sentencing model: Taking Anglo-American countries as examples

In historical retrospect, there have been many different kinds of punishment in different phases of human civilization and development. Before the modern imprisonment system was set up, the major means of punishment were exile and death penalty (other minor punishments entailed the imposition of fines). Before corporal punishment was abolished, the whipping and other cruel bodily tortures had also been used for especially heinous crimes. As there were no substitutes for such torture, the death penalty was applied to almost all significant felonies. By the time the imprisonment system was established in Britain in the 18th century, the application of justice was plagued with draconian punishment; according to statistics, no less than 200 kinds of crimes were subject to capital punishment.

In the 17th and the 18th centuries, the application of punishment was largely subjective in Britain. Although at that time the death penalty was applicable to most crimes, an Italian philosopher Cesare Beccaria and an English philosopher Jeremy Bentham both reported that it was not a frequently-employed punishment. In most cases, a judge would simply ask the king to mitigate the capital sentence, and based on various considerations the king generally granted the condonation. As held by Beccaria and Bentham, this practice of granting condonation through arbitrary executive power not only undermined the authority of the law, but also served to negate the deterrence aspect of criminal punishment. (Feeley, 2004) As such, they argued for restriction on discretionary sentencing and condemned any factors (including King's condonation) that might contribute to such capriciousness in the legal system. Although the two scholars had gained the support of certain individuals with substantial power at that time, it was not until the end of the 19th century that concrete substantive reform occurred—the appearance of the modern imprisonment system in Britain and America. What follows is a brief introduction to the three major sentencing systems in British and American histories.

4.1 Legislative model

Through over a hundred years of experience, the British and American societies gradually came to realize that a "fixed model" sentencing system entailing sets of fixed imprisonment terms based on the severity of crimes would be a relatively appropriate punishment practice. Moreover, the rise of the prison system made the imprisonment system and deprivation of freedom possible, and it led to the stratification of criminal punishment into different levels of severity over time. More specifically, the legislative model is largely based upon retribution theory, which requires the consideration of the "appropriateness" of punishment, i.e. that the punishment adheres to the principle of proportionality. Under this system, it is generally the duty of the legislative body to fix the imprisonment terms for various crimes by implementing sets of laws that judges must adhere to. Overall, this approach is heavily reliant on the legislature, and judges simply are instructed to apply the sentences by law because the issue of sentencing has mostly been resolved by written legislation.

In general, this sort of legislative sentencing model provides the least arbitrary discretion to those who dictate the sentences.

4.2 Judicial model

Upon deeper analysis, the practice of legislative sentencing gradually exposes many weaknesses; in particular, it is impossible to list all the circumstantial

differences of each criminal case in a predefined legal document. For this reason, there is generally a certain sentencing range incorporated into legislation, which provides room for the judge to weigh various mitigating or aggravating factors. Under this model, the law only specifies maximum and minimum punishments, and the judge will determine the final specific sentence case by case. This "judicial model" is a relatively popular sentencing model due to its balance of stability with flexibility.

4.3 Administrative model

In the beginning of the 1920s, the prevailing punishment model in the UK and the US, and even a majority of the European continent was the so-called "uncertain sentencing" system. According the emerging sociology and psychology studies of the time, the crime was considered to a large extent as a disease; thus the sentencing of criminals depended largely on when "the disease would be cured." In this situation, only criminology experts truly understood and were able to dictate punishment guidelines. As a result, these experts decided final sentences based on the level of correctional "transformation" of the offender.

The actual practice proceeds as follows: A judge will determine a sentence that is relatively uncertain and flexible, and it is then up to the reform agency (such as a prison) to decide on the final sentence in light of the actual situation of the offender's rehabilitation. Clearly, this practice is largely based on rehabilitation theory, and such a judgment by the reform agency was common in the early 1920s. In most cases of this model, the legislative agencies do not stipulate specific sentences for a certain crime, and the judge only gives a range of sentencing after the conviction. In the end, it is the probation officer or the prison authority figure that decision on the final sentencing, which is to be carried out according to the performance or behavior of the offender while in prison.

After the 1960s, uncertain sentencing encountered serious criticism for its violation of the equality principle of punishment; in many cases, different people committing the same crime would receive largely disparate sentences as a result. At the same time, people also accused judicial officers (especially judicial administrative officers) of wielding almost unlimited discretion, as they could make uncertain sentences to basically any effect they wished. Furthermore, as the sentence execution agency, the prison authority was also entitled to a huge amount of discretionary power, which was seen as inconsistent with the legal principle of punishment. With the constantly rising tide of criminals, the US society underwent a fundamental change in the attitude towards crime, and the voices calling for a severe crack-down on offenders grew increasingly numerous. Under these circumstances, a new system of punishment reform was introduced: Legislative agencies were to dictate fixed punishments through legislation, thus

totally depriving the administrative agencies of discretion and even curbing the punishment options of judges. The most prominent example of such a system is the *Federal Sentencing Guidelines* of the United States and similar guidelines in most states.

This final campaign to fix sentencing achieves a profoundly negative outcome —it completely segregates criminals from the society. As a direct consequence, the number of criminals incarcerated in prisons increased drastically, which, as mentioned earlier, was also an indicator of a doctrine of heavy punishment.

In summary, there have been three sentencing models in the human history: A legislative model, a judicial model and an administrative model. It is obvious that among the three models, the legislative model of which represents social values that is skewed towards punishment stability and embraces the idea of retribution. On the other hand, the administrative model reflects the basic inclination to seek flexibility in sentencing, and is also the extreme expression of the doctrines of crime prevention and rehabilitation. Finally, the judicial model falls in between the two aforementioned models and strikes a certain balance between the two values of retribution-ism and utilitarianism.

5 Sentencing guideline and three strikes law

As discussed above, the Anglo-American sentencing system has been swaying between a retribution-ism theory that stresses punishment and a utilitarianism model that stresses crime prevention. In the past twenty years in the US, cracking down on crime has always been a focal point of social attention. It can be evidenced that at the critical time of any prominent political election, the candidates' attitudes towards crime have become an important indicator of whether they can win or not. From the 1970s till the present day, the US's criminal policy can be summarized in one phrase: severely punish crimes. This harsh doctrine is reflected in most sentencing status, the most prominent ones being the *Federal Sentencing Guidelines* introduced in the 1980s, and the "Three Strikes Law" are also extremely popular during the same time period.

From the 1970s to the 1980s, a long period of heated debates was exacerbated by the publishing of *Criminal Sentences*: *Law without Order* by the US's famous conservative judge Marvin E. Frankel, which fiercely attacked the unfair and discretional sentencing power of judges in the US system. Frankel's viewpoint focused on the need to eliminating discretional sentencing and administrative authority, a view that gradually prevailed. (Frankel, 1973) In 1984, the US Congress officially adopted the rules of revised sentencing through law, formulating the extensive and detailed *Federal Sentencing Guidelines*. These guidelines deprive judges and probation officers of their former sentencing

powers, and specify very specific sentences for almost every crime. The practice sets up a vertical axis and a horizontal axis according to the severity of the crime and the history of the offender; the point of intersection of a defendant's crime judgment and his criminal history determine the appropriate sentence—the judge retains almost no discretional power at all. If the judge seeks to deviate from the sentencing guidelines according to certain circumstances permitted by the law, he must carefully and clearly explain his justification. Clearly, the federal guidelines have completely revamped the issue of sentencing power in the justice system.

In order to more readily reflect actual changes resulting from the *Federal Sentencing Guidelines*, an independent Sentencing Commission has since been established. Members of the Commission are nominated by the President and approved by the Senate. The Commission consists of seven members, with the clause that at least three must be judges, whose task is to evaluate the execution of the *Sentencing Guidelines* annually. In doing so, the Commission must regularly revise the *Sentencing Guidelines* according to ever-changing circumstances and report to the Congress, enabling the system to suit shifting social conditions.

Based on the *Federal Sentencing Guidelines*, many states in the US have also followed to establish similar sentencing guidelines. However, there are fairly significant variants in guideline systems among the states. For instance, sentencing guidelines in some states are simply used for reference, where the judge does not necessarily have to follow the guideline policies word by word.

It is worthwhile to note that after over 20 years of implementation, the *Federal Sentencing Guidelines* have given rise to many disputes in the judicial and academic circles of the US. Many judges and scholars are very critical of the system, citing that it ties the hands of judges, rendering them incapable of incorporating special circumstances in specific cases into the sentencing procedure. Furthermore, critics contend that excessively heavy sentencing is a result of the guidelines, which are responsible for today's overcrowded prisons in the US. Along the same lines, other scholars believe that the sentencing guidelines abandon the rehabilitation function of punishment and only adopt imprisonment policy, which can not effectively prevent and stop future crimes, thus causing grave social problems. These arguments have accompanied the *Federal Sentencing Guidelines* from the beginning until January 5, 2005, when the Supreme Court officially announced by a narrow majority (5:4) in Booker that the *Federal Sentencing Guidelines* would no longer be mandatory legal rules, but only serve as advisory tools in the judge's sentencing process.[6] Since then, the *Federal Sentencing Guidelines* have no longer been binding on the

[6] 543 U.S. 220 (2005).

sentencing discretion of judges. However, according to the latest scholarly survey of the sentencing of 54,624 federal cases, in the year (from January 13, 2005 to December 21, 2005) after the Supreme Court judged that the *Federal Sentencing Guidelines* would no longer be a mandatory criterion, many judges still habitually followed the guidelines, and there was reportedly no significant difference in the substantive sentencing.[7] This may be due to a slow-to-change system, however, and the post-Booker era of sentencing practice is yet to be observed.

Another sentencing system similar in harshness to the sentencing guidelines is the so-called "three strikes law", which originated in the state of Washington and was further promoted in California. The law derived its name from the US baseball rules—just as the name implies, the law provides that if a criminal has committed three felonies (normally severe or violent crime), he must be severely punished. In most states that implement the three strikes law under normal circumstances, if a criminal commits the third felony (three strikes), life imprisonment automatically applies ("out of the game"). As probation opportunities for three strikes offenders are only available after 25 years, this punishment is clearly quite severe.

In many cases, the definition of a felony in the state concerned arose controversy as a result of the three strikes law. It is understood that in US law and common law, any crime that deserves an incarceration sentence over one year is defined as "felony". Felonies referred to in the three strikes law are generally serious crimes (such as burglary) or violent crimes (such as robbery, assault, or murder). However, in some states, especially in California, criterion for felony crime is very loose—the crime does not necessarily have to be a serious or violent one, and ordinary and petty felonies can also subject a criminal to conviction under the three strikes law.

In 2003, the Supreme Court maintained by a narrow majority of 5:4 California's existing three strikes law in *Lockyer v. Andrade*.[8] In this case, the accused Leandro Andrade had committed a few serious crimes in his past, and was finally arrested stealing $68 worth of goods from a supermarket. According to the law of California, however, regardless of whether his last crime is a serious or violent crime or not, the three strikes law applies as long as it is technically a felony. Therefore, Andrade was sentenced to two fixed-term imprisonments of 25 years each and a life imprisonment sentence. This case illustrates the ridiculousness of the three strikes law—even a petty theft can lead to life imprisonment. This begets several questions: Should such three strikes laws

[7] A year after Booker: Most sentences still within guideline, 2006–2. Newsletter of the Federal Courts, 38(2). http://www.uscourts.gov./tth/02-06/indepth/index.html.
[8] 123 S. Ct. 1166 (2003).

excessively consider the specific crimes that have been punished in sentencing? Does such punishment violates the "double jeopardy" rule forbidden by the Fifth Amendment of the Constitution or the generally recognized principle of "*non bis in idem*" of international law? Finally, will this heavily arbitrary punishment policy without any discrimination encourage ordinary criminals to risk elevated danger in face of desperation? All these questions are that the three strikes law needs to face.

6 Sentencing—A comprehensive process of evaluating penalty factors

As discussed above, sentencing reflects the competition and integration of various conflicting values, and as such, there is no universally correct sentencing result. However, a "correct" sentencing procedure must fulfill key factors—foremost, it should not be a static process to compute a penalty; rather, it should be viewed as a dynamic process that integrates the multiple factors of each and every case are considered. Simple mathematical methods such as the *Federal Sentencing Guidelines can* be used to compute a sentence, and this objective sentencing can even be somewhat ameliorated by adding clauses regarding external factors. However, ultimately this sort of one-dimensional sentence computation can never provide a just verdict that takes into account all factors that need to be considered in determining the offender's criminal responsibility to the society.

In recent years, some courts in China have attempted to unify sentencing, reflecting an acknowledgement of the fact that the range of sentencing is too wide in China's existing substantive criminal law. Also, the courts have recognized that differences in sentencing between various geographical areas are too large. These efforts deserve praise, but reflection on reality often illustrates that reform efforts often "exceed the proper limits in correcting the wrong". The aforementioned case of the Zichuan District Court of Zibo City that currently conducts computerized sentencing is a clear example of how the system has forced itself too far in the other direction of little flexibility.[9] (Liu, Zhang, 2004) We still do not know of the specific parameters and the rules of the computerized sentence correlation calculations, yet from initial reporting, the Zichuan District Court firmly believes that relatively accurate sentences can be concluded by such one-dimensional analysis input of a case's circumstances. As such, the court plans to use these kinds of sentences as references of standard. Based on the historical precedents of criminal sentencing law, however, the author has serious

[9] Although software sentencing by the Zichuan court was reported in 2006, in fact such experiment was specially covered and reported by the relevant media as early as in 2004.

misgivings about such a computerized system. It is obvious that the practice of Zichuan District Court to a large extent equates sentencing to the mere "computation" of punishment. To simplify sentencing as simply "computation" neglects the social function of sentencing, and also makes the lofty assumption that descriptive considerations such as "serious circumstances", "severe impacts", "objectively malicious", and "obviously minor"—can be quantified or mechanically determined and calculated by computer programs. In other words, the history has shown that the above-mentioned descriptive consideration factors for sentencing necessarily require human subjectivity to weigh and confirm—evidencing that the function of the computer to provide a simple mathematical calculation is not nearly enough. In fact, the U.S. *Federal Sentencing Guidelines* has already provided such a computation function even without use of a computer program.

Simply put, what needs to be solved in terms of sentencing is not how to compute sentences, but rather how to determine the most appropriate punishment for the offender through comprehensive consideration of all factors of each case (including individual and social factors). Punishment concluded this way can reflect the overall balance of various goals of the criminal justice system, including the society's needs for criminal retribution, prevention and deterrence, and correction and reconciliation. Such a complex comprehensive balancing process is more than what an objective machine like a computer can handle, and as such should be dealt with by human subjectivity.

Nonetheless, the motivation behind computerized sentencing is still an issue worthy of discussion. People who propose computerized sentencing correctly recognize a key sentencing flaw that exists in the current criminal judicial system. Namely, at present, China's sentencing system to a great extent is simply part of the conviction process. Objectively speaking, the judge does not spend much time thinking why the sentencing should be done this way; according to reports, the sentencing process of many courts can be said as "comprehensive estimation model", whereby the judge often estimates sentences according to the conviction and the legal circumstances. Afterwards, the estimation will be submitted to the chief judge or the competent president of the court for approval. (Yu, 2004) This sentencing process has several flawed characteristics as follows:

Firstly, without the involvement of both the parties of the prosecution and the defense, there is no trial or deliberation regarding sentencing. Although both parties may have made some generic expression regarding appropriate punishment in the conviction phase, the prosecution and the defense are mostly excluded from the determination and justification of specific sentences. This practice is neither in line with adversarial litigation nor in compliance with the principle of the court's inquisitorial activities. The practice of drawing conclusions for certain issue without trial deliberation is in fact an administrative

procedure, which is the complete opposite of the necessary trial procedure.[10] (Fuller, 2001)

Secondly, the sentencing process is opaque and plagued with a lack of accessibility. No one knows the grounds on which the court's final sentencing is based, or even how that critical decision is made. The adversarial parties can only infer from the words and phrases of the verdict why the judge has made such a judgment, unless an internal archive of the court is accessible (in which it is often recorded why the trial panel or a principal decides on a particular punishment).

Thirdly, there is a general lack of justification for the sentence given in the conviction verdict. For many years, the Supreme Court has been requesting courts at various levels to add descriptive reasoning to support the verdict. In most cases, this urging has been successful, as basic courts' verdicts have begun to increasingly include reasoning for conviction and sentencing. However, upon closer examination, this kind of reasoning often turns out to be a mere formality, and few cases have seen true concrete and irrefutable reasoning for sentencing in the verdict. Due to this absence of reasoning, it is almost impossible to determine the basis on which courts make their sentences. As the prosecution holds a certain extent of legal supervision power, it can sometimes question the court sentencing through internal mechanism or even protest the ruling in which the court decision is not accepted. On the other hand, however, the defense can only gaze at the verdict in despair, as there is almost no chance for protests of the defense against the excessive sentencing.

In conclusion, there are many issues on sentencing in China's criminal procedure (arguably even in civil procedure); specifically, the excessive discretionary power wielded in sentencing by courts and judges without restriction needs immediate attention. However, the proper and effective fix for this flaw is yet to be studied further and determined. The author strongly believes that computerized sentencing is not a positive solution at all, and it is not at all possible for simple formulae or computer objectivity to effectively solve the problem as the issue of sentencing involves the conflicting judicial targets of sentencing flexibility and consistency. Deriving knowledge from the experiences of countries like the UK and the US, the author believes that the following measures may perhaps "cure" the chronic disease in China's sentencing.

Firstly, China's legal system must separate conviction and sentencing. Based

[10] Regarding the difference between administrative, judicial and legislative procedures, the US famous jurist Fuller has an insightful analysis. He believes that there are at least three factors in the trial procedure: An unbiased judge to make the judgment, parties to present evidence and conduct debates, and the judge's final verdict needs to be justified. In his opinion, the administrative agency only mechanically and directly applies law provisions according to the routine policies, and the legislative agency makes decision—legislation—by voting after the debate.

on the existing conditions, we can not even segregate the conviction and sentencing procedures of even simple cases involving minor criminal acts. At the very least, the conviction and sentencing processes of serious criminal misconduct (such as those applicable for imprisonment over 10 years, life imprisonment, or death penalty) should be separated.

Specifically, the decision that needs to be determined in the conviction phase is simply whether the accused has committed the charged crimes. What is submitted to the court by adversarial parties should only be evidence related to the facts of the crime, while factors including the background information of the accused, assessment of the societal living conditions of the accused, and other environmental factors can not be used to argue whether or not the accused has actually committed the crime. Then, what needs to be solved in the sentencing phase is what kind of social evaluation and punishment should be given to the accused upon conviction. Only in this process can the factors, such as personal character, potential for future hazard of the accused to the society, and the victim's rehabilitation attitude, be considered in determining an appropriate sentence. Perhaps some may argue that China is a country seeking to adopt continental law; as such, judges have been well-trained and have the capability to distinguish the effect and functions of various types of evidence, thereby eliminating the need to separate matters of conviction and sentencing. This logic is inconsistent not only with large amounts of research results in the field of behavioral science, but also with the reality of the situation in China's justice system. In particular, judges and ordinary citizens have no key differences in many respects. Even though judges may be very well-trained, they nonetheless have emotions and desires, and it is hard for them to avoid the influence of human subjectivity coming into play when making decisions. As such, it is difficult to imagine that after a prosecutor submits evidence on a crime to the court and also lists in details a long string of previous misdeeds of the accused, the judge or the juror would be able to ignore the background information when making "internal conviction" to the judge whether the accused has actually "committed the crime". Thus, it can not be determined how much of the decision of the court results from actual case evidence, and how much is a reflection of disapproval in response to the defendant's criminal record and previous misdeeds. At least in other countries including the US, the influence of the criminal history and the past misdeeds of the accused are seen to clearly impact decisions. Thus, the law must exclude the character evidence from the conviction procedure, as it is unnecessarily related to the truth of the case.

At the same time, separating the conviction and the sentencing is also required for individualized sentencing. Giving different punishments to people who may have committed the same crime due to different extenuating circumstances is in line with the ideals of modern penology and a humane judicial system. Moreover,

in recent years various countries have paid increasing attention to the social purpose of punishment, and the studies has reflected that more lenient sentencing and individualized punishments are among critical measures to successfully help an offender return to the society.

Secondly, in addition to separating the sentencing procedures from conviction procedures, a deliberation process should be held regarding sentencing procedure, i.e. holding hearings for the sentencing where the adversarial parties have the opportunity to provide evidence and debate what kind of punishment is the most suitable for the accused. Only after such a deliberation process should the court make a decision on the sentencing. The importance of such a discussion is that during this phase, the opposing parties can present evidence and conduct debate regarding the defendant's character, background information, and potential future hazard of the accused to the society, whereas it is not appropriate to deliberate these types of evidence in the conviction phase. Moreover, a more reliable and fair judgment determining the future danger that the accused poses can be made through communication with the victim and the community. Only in this way can the court make a proper decision, after having an overall understanding of key evidence and arguments explicitly related to sentencing. At the very least, this negotiation process gives both parties a chance to participate in sentencing, which will undoubtedly improve the justice of sentencing accordingly.

Thirdly, the courts must make sufficient statements of justification regarding specific sentencing in any verdict. A verdict without reason is arbitrary. In addition to statements showing sufficient argumentation for conviction, the verdict must state the ultimate decision on sentencing and on what grounds the decision was made. Furthermore, this statement must be based on the court sentencing deliberation, and should list the different parties' arguments and evidences including the background information of the accused, the attitude of the victim, and the opinions of the community. The involvement of various outside parties is conducive to enhancing public credibility of the court's judgment, increasing the justice system's transparency and the public's confidence in law.

Ultimately, what the legal system in China needs to recognize is that conviction and sentencing should be separated, and that sentencing should be set up to the hearing and deliberation procedure. It is necessary due to the completely different natures of the two issues of conviction and sentencing that need to be resolved by criminal litigation law. To sum up, what needs to be solved in conviction is a matter of fact (whether the accused has committed relevant crimes), proving this solution thus requires evidences that are related to the fact. On the contrary, what needs to be solved in sentencing is what kind of punishment is appropriate for the accused after taking into account all the

circumstances. If retribution is to be the sole and primary motivator of justice, perhaps the court only needs to automatically apply blanket provisions of criminal law, such as the stipulations of detailed sentencing guidelines. However, modern countries have all realized that in addition to simple retribution, criminal penalty has other key comprehensive social purposes, especially the function of preventing crimes and helping the offender reintegrate into the society. Therefore, such a simple and one-dimensional application of criminal penalty is no longer the elixir vitae of the justice system. We need a new way of thinking.

In the end, it needs to be understood that judges also have natural weakness as ordinary human beings and are apt to make mistakes. As such, key restrictions should be imposed on judicial power, rather than granting judges tremendous, unlimited discretion. Such arbitrary subjectivity inevitably leads to the abuse of power, hence causing variances in sentencing and the miscarriage of justice. Nonetheless, as evidenced, the restrictions should not be an objective computer software, nor should it be a sentencing guideline that ties the hands of judges; rather, it should be a procedural set-up that takes into account all facets of justice.

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