THE UNIVERSITY OF CHICAGO

LEGAL AND EXTRALEGAL FACTORS AFFECTING SENTENCING: THE DOMESTIC NATURE, JUDICIAL TRANSPARENCY, AND TYPES OF COUNSEL

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE LAW SCHOOL
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF JURISPRUDENCE

BY

YALI PENG

CHICAGO, ILLINOIS

JUNE 2022

For my family and friends.

ACKNOWLEDGMENTS

In a flash, I became one of the most senior students in our school. I found it very refreshing since I was usually among the younger students in my class. I took it as a sign that I should graduate soon. A “nudge” was also provided by the fact that JSDs do not qualify for free tuition after five years. In spite of this, I felt nostalgic and reluctant when it came time to submit my dissertation.

I would like to take this opportunity to express my deep appreciation for my supervisors before moving on to my fond memories of my time at the school. It is always a pleasure to work with Prof. Richard McAdams and Prof. William Hubbard. The comments they provided were insightful, creative, and invaluable. I would not have been able to complete my dissertation without their input. In addition, I would like to thank Prof. Rory Truex from Princeton University for his advice regarding my empirical research on China. I mention this not to pass the buck: all errors are my own.

Throughout my time at the school, I have received a great deal of assistance. Prof. Tom Ginsburg is extremely caring and responsive, and I will never forget the surprise when I received his response to my questions at 2 AM. Former Director Richard Badger assisted me with my plan to study simultaneously at Oxford University. Justin Swinsick is very helpful in coordinating finances and graduation arrangements. I have also received great support from my JSD colleagues. This list is endless.

Finally, I would like to thank my parents for supporting their only child to study abroad for six years. May you always be healthy and happy.

ABSTRACT

The purpose of this dissertation is to examine three factors that can influence sentencing: the domestic nature of the crime, the type of attorney, and the level of judicial transparency. Normatively, the part on the domestic nature examines how it should be approached. In contrast to other sentencing factors, such as criminal histories for which jurisdictions adopt a uniform approach, each jurisdiction treats the domestic factor differently. The domestic nature may serve both as a mitigating as well as an aggravating factor. There has been a shift in attitudes concerning family values in society. In spite of the potential legislative developments, I have argued in this part that traditional mores widely shared across the criminal justice system tend to result in a lack of deterrence of domestic violence offenders. Consequently, the progressively aggravated sentence scheme is introduced as a second-best solution in order to counter the backlash from the legal enforcement side and to enhance the effectiveness of punishment as a deterrent. The remaining two parts are empirically based on econometric models. In the segment of the dissertation dealing with the impact of judicial transparency, a complete dataset for all intentional injury judgments from a Chinese court before and after the introduction of mass publication requirements (2012-2017) was analyzed. Upon mass publication, judgments have become longer, sentences have become more consistent, and the severity of sentences has decreased. The part which examined the influence of different types of counsel on sentencing utilized a hand-coded dataset of Chinese murder cases. It was found that the sentences of cases represented by private lawyers and legal aid attorneys were not significantly different. Furthermore, it rejects the hypothesis that the type of lawyer has played a major role in sentencing.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF FIGURES

CHAPTER ONE: DOMESTIC PUNISHMENT PARADOX

Abstract

As a result of piercing the veil of the family to manage individuals and protect victims during the 1970s, domestic violence has acquired a wider recognition as a true crime. The crime remains, however, largely undeterred. It is not uncommon for the criminal justice system to defer to family concerns. In sentencing domestic violence cases, judges must consider two competing interests, the protection of victims and the preservation of the interests of the family. Generally, victim safety dictates a more severe punishment, while family concerns dictate a more lenient punishment.

This paper argues that the current sentencing framework does not adequately capture the complexity of domestic violence. Victim safety and family considerations are zero-sum games that demonstrate the tension between traditional and progressive family values. Philosophically, there is no clear answer to this question, since sentencing rationales justify the domestic nature of the crime as both aggravating and mitigating, as evidenced by the wildly contrasting sentencing laws related to this issue. Progressive feminists may successfully compel legislators to prioritize victim safety: some jurisdictions explicitly identify domestic violence as an aggravating factor. Despite the legislative progress, the criminal justice system has proven reluctant to adhere to it, as demonstrated by the sticky leniency enjoyed by domestic violence offenders. Because of the relatively low severity of sentences, as well as the low likelihood of domestic abusers being convicted, domestic violence is not deterred sufficiently.

Towards the end of the paper, I suggest a progressively aggravated sentence scheme tailored to the particularities of domestic cases. This is a second-best solution meant to overcome the resistance caused by traditional values widely shared by the existing criminal justice system, while focusing on the need to deter domestic violence offenders and protect the victims from repeat offenses. While the scheme recognizes that it is impossible to reconcile these two competing objectives simultaneously, it accommodates them sequentially. For the first few offenses, and only for those few offenses (the "credit" stage), offenders will receive a light-severity fine in order to increase the certainty of punishment. When they fail to learn a lesson and reoffend after passing a threshold (the "debit" stage), they will receive a mandatory minimum custodial sentence.

Introduction

"Treatment of domestic violence as a crime developed alongside deliberate efforts to dismantle a public-private divide that placed the latter off-limits."

—Deborah Tuerkheimer, "Confrontation and the Re-Privatization of Domestic Violence"[1]

"The criminal justice response to these crimes [is] ineffectual, like 'putting Band-Aids on bullet wounds.'"

—The New York Times[2]

---

[1] Deborah Tuerkheimer, *Confrontation and the Re-Privatization of Domestic Violence*, 113 MICH. L. REV. FIRST IMPR. 32, 39 (2014).
[2] Ellen Barry, *The Woman on the Bridge*, THE NEW YORK TIMES (2021), https://www.nytimes.com/2021/11/28/us/domestic-violence-law-enforcement.html (last visited Apr 18, 2022).

Criminal law has failed to deter and remedy domestic violence.[3] The Anglo-American common law granted the husband prerogatives as a master of the household that he "could command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority."[4] By the 1870s, the prerogatives were no longer recognized by the courts due to the temperance movement and the women's rights activism, as well as changing attitudes towards corporal punishment and gender roles.[5] While "the rule of love has superseded the rule of force,"[6] the demise of chastisement had not rendered battered woman protection. Despite the passing of the "gone era," formal and informal immunities enjoyed by men of that period were still largely preserved because courts used marital privacy and domestic harmony as alternative rationales.[7] Domestic violence did not gain widespread recognition as a true crime until the late 1970s.[8]

---

[3] In this paper, domestic violence is defined as physical violence between intimate partners. As well, though domestic violence can affect anyone, the focus in this article is on battered women since domestic violence is a highly gendered crime.

[4] Reva B Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE LJ 2117 (1995).

[5] *Id.*, at 2122-2129. A Kentucky court in their judgment stated that "to say that a court of law will recognize in the husband the power to compel his wife to obey his wishes, by force if necessary, is a relic of barbarism that has no place in an enlightened civilization." Carpenter v. Commonwealth, 92 Ky. 452, 456-7 (1892) (affirming the husband's conviction for cutting his wife's throat with knife intentionally).

[6] JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT 59 (1895).

[7] *E.g.,* State v. Rhodes. 61 N.C. (Phil. Law) 453 (1868) ("Not because those relations are not subject to law, but because the evil of publicity would be greater than the evil involved in the trifles complained of, and because they ought to be left to family government.").

[8] Henry F Fradella & Ryan G Fischer, *Factors Impacting Sentence Severity of Intimate Partner Violence Offenders and Justification for the Types of Sentences Imposed by Mock Judges*, 34 LAW PSYCHOL. REV. 25 (2010).

Traditional mores dictate that family considerations should be respected. However, this stands in direct conflict with the government's responsibility to provide a safe environment for women and children. In response, activists pushed for formal state control, and measures aimed at criminalizing domestic violence have been largely accepted, including mandatory charging and no drop policies, specialized courtrooms for domestic violence, and the inclusion of the domestic nature as an aggravating factor during sentencing.[9]

In spite of the progressive movement and profound social change, domestic violence remains a serious problem in our society. During the period 1980 to 2008, two out of five female murder victims were murdered by an intimate person.[10] Eleven times more females were murdered by a male they knew than by a stranger.[11]

Although batterers do not enjoy formal immunity today, the discourse of domestic privacy and harmony persists even after the social movements in the late 20th century. In *Michigan v. Bryant*,[12] the Supreme Court revived the public-private divide between domestic violence and other cases.[13] It posited that "[d]omestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety."[14] Furthermore, by way of contrast, it noted "Hershel Hammon was armed *only* with his fists when he attacked

---

[9] Ronit Dinovitzer & Myrna Dawson, *Family-Based Justice in the Sentencing of Domestic Violence*, 47 BR. J. CRIMINOL. 655 (2007).
[10] Alexia Cooper & Erica L Smith, *Homicide Trends in the United States, 1980-2008*, BUREAU OF JUSTICE STATISTICS (2011), https://bjs.ojp.gov/content/pub/pdf/htus8008.pdf (last visited Apr 18, 2022).
[11] Violence Policy Center, *When Men Murder Women: An Analysis of 2018 Homicide Data*, VIOLENCE POLICY CENTER (2020), https://vpc.org/studies/wmmw2020.pdf (last visited Apr 18, 2022).
[12] 131 S. Ct. 1143 (2011).
[13] *See* Tuerkheimer, *supra* note 1.
[14] Michigan v. Bryant, 131 S. Ct. 1143, 1158 (2011).

his wife (emphasis added)" and "removing [the victim] to a separate room was sufficient to end the emergency."[15] While such arguments are aligned with traditional values, they often ignore the imminent danger of the primary victim (the abused) being the potential victim again, discount the patterns of domestic violence that escalate over time, and offer little consideration to the injury that may occur in the domestic arena.[16]

This Article points out that the current sentencing framework poses difficulties in protecting victims effectively. The current scheme attempts to strike a balance between family interests and deterrence/victim protection. This article discusses how the domestic factor is viewed differently across jurisdictions, each providing a different answer to the question of balance. This is followed by an analysis of the sentencing rationales for treating domestic violence as both an aggravating and mitigating factor. With reference to the global sample, the author demonstrates why it is difficult to find a uniform solution to the dispute philosophically.

I contend that an optimal balance is not possible. In short, the two competing sets of values (traditional versus progressive, or family values versus victim protection) cannot be reconciled, and advances made by women activists in the legislative arena are opposed by traditionalists in the judicial arena. The progressively aggravated sentence scheme is therefore introduced as a second-best alternative to combat backlash from the legal system. There are two stages, each emphasizing a distinct goal. The first phase emphasizes family concerns, lowers the severity of punishments in order to improve the certainty of punishments, and with greater certainty comes more documented prior records that can be used by judges to gradually reduce the influence of

---

[15] *Id.*, at 1159.
[16] *See* Tuerkheimer, *supra* note 1, at 34-40.

family concerns so that at the second phase they can focus more on victim protection regardless of their traditionalist viewpoints. It is based on the assumption that family considerations fall under the law and justice umbrella and that judges and the justice system cannot readily discern the issue and make appropriate adjustments without external scrutiny. The second stage emphasizes victim protection, and if the offender fails to learn a lesson at the first stage and moves to the second stage, all "leniency credits" they enjoyed at the first stage will be "debited" by a mandatory minimum sentence. By doing so, the progress made on the legislative side to protect victims of domestic violence will not be subtly undone by the traditionalists from the legal enforcement side.

Researchers have noted that scholarly discussion from the criminal justice system on domestic violence focuses primarily on police enforcement, the post-arrest recidivist rate, and the experiences and reactions of victims at different stages.[17] Likewise, the author's research found very few publications focused on judicial sentencing decisions in domestic violence cases. Only a handful of studies have examined the disparity in sentencing outcomes between domestic and non-domestic violence offenders empirically,[18] and "there has been minimal theoretical engagement with broader sentencing research."[19]

---

[17] *See generally* Christine EW Bond & Samantha Jeffries, *Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases*, 54 BR. J. CRIMINOL. 849 (2014); Fradella and Fischer, *supra* note 8; *See also* Steven Cammiss, *The Management of Domestic Violence Cases in the Mode of Trial Hearing: Prosecutorial Control and Marginalizing Victims*, 46 BR. J. CRIMINOL. 704 (2006); Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence*, 40 BR. J. CRIMINOL. 14 (2000).
[18] In Section III, they will be introduced in greater detail.
[19] Bond and Jeffries, *supra* note 17, at 853.

This Article contributes to the neglected field of sentencing in domestic violence cases. Sentencing is important because it is the ultimate product of a criminal case, which is probably what the offenders care the most about,[20] and it is an ideal arena to observe the conflict between the two sets of competing values. Because pre-sentencing decisions and sentencing are interactive in nature,[21] any change in sentencing will have a ripple effect throughout the criminal justice system, meaning that an improvement to the sentencing scheme will have a great impact with a low cost.

This Article first presents an examination and discussion of the conflicted sentencing strategies for domestic violence cases, and illustrates that there is no consensus on the subject at a philosophical level. Section I gives an overview of the different approaches that jurisdictions have taken when treating the domestic nature as a sentencing factor: silence, mitigation, at least not mitigation, aggravation. In Section II, two arrays of sentencing rationales are presented that identify domestic factors as both aggravating and mitigating, therefore concluding that the issue cannot be resolved philosophically. The Article then presents a more practical perspective on the sentencing of domestic violence offenders. Section III describes the sticky leniency domestic abusers enjoy across jurisdictions and the patriarchy embedded in the criminal justice system, which results in the underdeterrence of domestic violence. The Article then discusses how domestic violence cases can be dealt with. Section IV finds the current tool kit insufficient and offers a second-best framework specially designed for domestic violence offenders that punish

---

[20] For instance, a plea bargain can be successful based on the prosecutor's threat of severe post-trial sentences. *See* Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. LEG. ANAL. 737 (2009).

[21] Sonja B Starr & M Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE LJ 2 (2013).

less, but only (as necessary) for the first few offenses, with the objective of increasing expected sanctions by increasing certainty.

I. Domestic Context as Sentencing Factor: Disparate Rules

A method to recognize domestic violence is to consider the fact that the conduct occurred in a domestic setting as a sentencing factor.[22] While the treatment of certain sentencing factors - such as criminal history - is uniform across jurisdictions, my research found that attitudes towards the domestic nature/family relationship are varied. Along with the evolution of society's norm toward domestic violence, criminal justice responses have gradually evolved. From a field of "less law," domestic violence has gradually attracted "more law".[23] Nevertheless, the direction of "more law," *i.e*., aggravation or mitigation, can differ depending on a jurisdiction's priorities. It is true that not all jurisdictions specify aggravating or mitigating factors. For instance, Russia

---

[22] This article focuses on the aggravation/mitigation divide, while there is another important form recognizing domestic violence during sentencing process, which is to include the broader course of family violence related conduct as a sentencing factor:

> Perhaps there is space for evidence of a pattern of domestic violence to be a factor in sentencing. By this I mean that the standard assault charges be laid, but when it comes to sentencing, evidence that establishes a pattern of domestic violence would result in a premium being added to whatever sentence is assigned to the proved assault. This way there is no diminishing of the seriousness of the assault charge by putting it in a special category of 'domestic violence' but the fact that it is not a simple one-off assault is also taken into account.

See Australian Law Reform Commission, *Recognising Family Violence in Sentencing*, ALRC (2010), https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/13-recognising-family-violence-in-offences-and-sentencing-3/recognising-family-violence-in-sentencing/ (last visited Apr 20, 2022).

[23] *See* Myrna Dawson, *Intimacy, Homicide, and Punishment: Examining Court Outcomes over Three Decades,* 45 AUST. N. Z. J. CRIMINOL. 400 (2012) (hypothesized that intimate partner homicide defendants would be subject to "less law" than defendants in other criminal cases, but that this disparity should gradually decrease over time. The regression results revealed that there were differences in treatment at some points, and although "more law" was indeed introduced, plea agreements remained more common for intimate partner killers).

does not provide any guidance on how to handle the domestic factor.[24] For those who have dealt with it, there have been three types of jurisdictions: treating it as an aggravating factor, preventing it from being considered a mitigating factor, or treating it as a mitigating factor in sentencing.

Figure 1 Visual presentation of the disparate treatment

1. Aggravating factor

It has become increasingly popular to mandate the domestic nature as an aggravating factor. In Canada, section 718.2(a)(ii) has been in force since 1996 and mandates an enhanced penalty if there is "evidence that the offender, in committing the offense, abused the offender's spouse or common-law partner." Canada has enjoyed a similar legal history to that of its American counterpart. Domestic violence has traditionally been regarded as less serious than violence against strangers, and it has attracted little judicial attention due to the privacy of the family.[25] To respect the sanctity of marriage and family, lenient sentences were imposed on

[24] The Russian silence may be interpreted as an endorsement of traditional values. *See* Iryna Chatsverykova & Vadim Volkov, *Does the 'Family Factor' Really Matter? Sentencing Offenders in Domestic and Non-Domestic Violence Cases in Russia* (revealing that Russia's domestic violence offenders receive lenient punishment), *available at* https://ssrn.com/abstract=3131737.

[25] *See e.g.*, R. v. Deschamps, 1989 CarswellOnt 2922 (a conditional discharge was granted based on the argument that the crime was committed privately inside the family).

domestic violence offenders.[26] The safety of the victim was largely neglected.[27] However, in the 1980s, in response to the feminist movement, some appellate courts began to recognize that domestic violence is more serious than the crime of violent crimes in the public domain.[28] For example, the Alberta Court of Appeal argued as follows in 1992:

> In cases of assault by a man against his wife, or by a man against a woman with whom he lives even if not married, the starting point in sentencing should be what sentence would be fit if the same assault were against a woman who was not in such a relationship…Then the court should examine the circumstances which are peculiar because of the relationship. When a man assaults his wife or other female partner, his violence toward her can be accurately characterized as a breach of the position of trust which he occupies. It is an aggravating factor. Men who assault their wives are abusing the power and control which they so often have over the women with whom they live. The vulnerability of many such women is increased by the financial and emotional situation in which they find themselves, which makes it difficult for them to escape.[29]

In 2015, the Liberal Party of Canada reaffirmed the position that "we will … specify that intimate partner violence be considered an aggravating factor at sentencing, and increase the maximum sentence for repeat offenders."[30]

---

[26] *See* R. v. Goose, [1984] NWTR 56 (Terr Ct) (the trial judge imposed a fine of $1000 in this case after explaining that marriage is not a license to beat up one's wife because he was concerned that an extended period of imprisonment would negatively impact the accused's marriage and the accused might blame his wife for the imprisonment).

[27] See R. v. Acorn, [1986] PEIJ No 30 (CA) (as a condition for a suspended sentence, the trial judge ordered that the offender purchase his wife a gift worth at least $50, a requirement that was upheld by the PEI Court of Appeal. The case vividly illustrated the trivialization of domestic violence).

[28] *See e.g.,* R. v. Stanley, [1986] BCJ No 965 (CA); R. v. Julian, [1990] BCJ No 2775 (CA); R. v. Inwood, 1989 CarswellOnt 79.

[29] *See* R. v. Brown, 1992 ABCA 132, at paras 20-1.

[30] LIBERAL PARTY OF CANADA, *Preventing Domestic Violence and Sexual Assault*, *cited in* ISABEL GRANT, SENTENCING FOR INTIMATE PARTNER VIOLENCE IN CANADA: HAS S. 718.2 (A)(II) MADE A DIFFERENCE? 10 (2017), *available at* https://oaresource.library.carleton.ca/wcl/2018/20180207/J4-50-2017-eng.pdf (last visited Apr 20, 2022).

The same process was followed by another common law jurisdiction. In 2016, Queensland, an Australian state, amended its Penalties and Sentences Act. Under the new law, domestic violence must be treated as an aggravating factor, unless it is unreasonable in exceptional circumstances.[31]

There are some states in America that adopt a similar policy.[32] As an example, Alaska specifies that the court may aggravate the presumptive sentence for offenses "committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant."[33] California approves additional prison time if "any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony."[34] Other American states, such as Illinois and Arizona, chose to create a series of aggravated crimes rather than list the domestic nature as an aggravating factor.[35] I do not address these jurisdictions in this paper since aggravated crimes have elements and procedures that can be essentially different from non-domestic crimes, making comparisons difficult.

---

[31] These exceptional circumstances have yet to be clarified. *See* Laura Hidderley, Samuel Jeffs & Lauren Banning, *The Impact of Domestic Violence as an Aggravating Factor on Sentencing Outcomes, available at* https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0003/685308/research-brief-impact-of-domestic-violence-as-an-aggravating-factor-on-sentencing-outcomes.pdf

[32] A detailed description of each state's code can be found here: Eve Zamora, *Enhanced Penalties for Domestic Violence* (2005), https://www.bwjp.org/assets/documents/pdfs/enhanced_penalties_domestic_violence_2005.pdf. (last visited Apr 20, 2022).

[33] Alaska Stat. § 12.55.155(c)(18)(2020).

[34] Cal. Pen. Code § 12022.7(e)(2020).

[35] Zamora, *supra* note 32.

Iceland, a civil law jurisdiction, has also institutionalized harsher punishments for domestic violence cases. In 2006, the General Penal Code was amended to include the following provisions: "If the action was directed against a man, woman or child closely related to the perpetrator, and the relationship between them is considered as having aggravated the seriousness of the offense, this shall normally be considered as aggravating the punishment."[36] In 2016, a special article was added to the Constitution which addresses domestic violence, Article 218(b).[37] As in Canada, domestic violence developed as a social problem in this Nordic country via the general women's rights movements in the 1970s, and it established its first women's shelter in 1982.[38]

Despite the fact that it is not spelled out in statutes, some jurisdictions include domestic violence as an aggravating factor in their case law. The Tasmania Supreme Court observed in 2016 that "domestic or family violence is particularly unacceptable because of its insidious

---

[36] *See* the General Penal Code, https://www.government.is/lisalib/getfile.aspx?itemid=dd8240cc-c8d5-11e9-9449-005056bc530c (last visited Apr 20, 2022); Act Amending the General Penal Code (domestic violence), https://www.althingi.is/altext/stjt/2006.027.html (last visited Apr 20, 2022).

[37] Article 218 b:

> Any person who… poses a threat to the life, health or wellbeing of his or her present or former spouse or cohabiting partner, to his or her descendant or the descendant of his or her present or former spouse or cohabiting partner, to an older person in his or her direct blood-line, or to other persons who live with him or her in the home or are in his or her care, by means of violence, threats, deprivation of freedom, coercion or in another manner, shall be imprisoned for up to 6 years. A gross violation may be punishable by up to 16 years' imprisonment. When the seriousness of the violation is assessed, particular consideration shall be given to … whether the perpetrator grossly abused his or her superior position vis-à-vis the injured party.

See Act amending the General Penal Code, no. 19/1940, with subsequent amendments (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence), https://www.althingi.is/altext/stjt/2016.023.html (last visited Apr 20, 2022).

[38] Guðný Björk Eydal & Ingólfur V Gíslason, *Family Policies: The Case of Iceland*, *in* HANDBOOK OF FAMILY POLICIES ACROSS THE GLOBE 109, 114 (2014).

nature, the difficulty in detection and the impact on the victim, broad family units, and the wider community."[39] This statement was interpreted in *Director of Public Prosecutions v Karklins* to imply an endorsement of the domestic nature as an aggravating factor.[40]

In the meantime, proxy sentencing factors can essentially aggravate the punishment for domestic violence. Also in 2016, the New South Wales Court of Criminal Appeal ruled in *Jonson v. R.* that it was an aggravating factor if the crime "was committed in the home of the victim or any other person."[41] It used the sanctity of home as a proxy factor.[42] Generally, in common law, the aggravating factor that an offense "was committed in the complainant's own home where she was entitled to feel and to be safe" did not apply to spouses.[43] *Jonson* overruled this limitation by stating that "any offense committed in the home of the victim, even if it is also the home of the accused, or in the home of another person, violates that person's reasonable expectation of safety and security."[44] This approach, however, covers only offenses that occurred within the victim's home.

In addition, some jurisdictions highlight domestic violence as an aggravating factor under discretion. Regarding the offense occurring in a domestic setting, the Victorian Court of Criminal Appeal ruled in *R. v. MFP*:

---

[39] Price v Tasmania, [2016] TASCCA 22.
[40] Director of Public Prosecutions v Karklins, [2018] TASCCA 6 ("The crimes were committed in the context of a domestic relationship. This is also an aggravating factor: Price v Tasmania [2016] TASCCA 22 at [39] per Estcourt J.").
[41] Jonson v. R., [2016] NSWCCA 286.
[42] Jonathan Michie, *Sentencing: Domestic Violence Now an Aggravating Factor*, BAR NEWS J. NSW BAR ASSOC. 14 (2017).
[43] R. v. Gazi Comert, [2004] NSWCCA 125.
[44] Jonson v. R., [2016] NSWCCA 286.

> Moreover, I think it can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes and dislikes, the fears and pleasures of their spouse, which might enable them not only to affect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish … The matter need not be examined any further, for in truth the advantages that he had, including that of surprise, justified the judge in holding that it was proper to view more seriously this attack occurring in the domestic context of this family.[45]

2. Non-mitigating factor

Throughout the period 2006-2018, England and Wales viewed the domestic factor as non-mitigating. As a result of the new definitive guideline on domestic abuse issued in 2018, however, the domestic nature is now regarded as an aggravating factor. This shift in legislation represents a profound change in social attitude. The 2006 sentencing guideline provided that "as a starting point for sentence, offenses committed in a domestic context should be regarded as being no less serious than offenses committed in a non-domestic context,"[46] but the 2018 guideline elevated its tone by stating, "the domestic context of the offending behavior makes the offending more serious."[47] The new guideline noted that domestic violence violates the trust and security that normally exists between people in an intimate or family relationship, and "there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them," which should heighten the gravity of this crime.

---

[45] R. v. MFP, [2001] VSCA 96, at para 20. *See also* Australian Law Reform Commission, *supra* note 22.
[46] Sentencing Guidelines Council, *Overarching Principles: Domestic Violence*, https://www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf (last visited Apr 20, 2022).
[47] Sentencing Council, *Overarching Principles: Domestic Abuse – Sentencing*, https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/ (last visited Apr 21, 2022).

Likewise, case law in some jurisdictions supports the non-mitigating proposition. The South Australian Court of Criminal Appeal in *R. v. Lennon* ruled that "[t]he court has said consistently that it must do what it can to protect women from violence by men. This applies *just as much* to violence within a domestic relationship as it does to violence in other situations (emphasis added)."[48] The New South of Wales Court of Criminal Appeal further stated that "a violent and pre-planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation."[49]

As well, the Australian Legal Reform Commission moved back from formally recommending the domestic nature of the crime as an aggravating factor, and instead recommended using a non-mitigating approach.[50] The Commission believed that sentencing factors should apply equally to domestic and non-domestic contexts. In other words, if abuse of trust or authority is a factor for aggravating domestic violence sentences, such a factor would also apply to non-familial violence.

3. Mitigating factor

The Supreme People's Court of China (hereinafter referred to as "the Court") stipulated in 1999 that the treatment of murder cases resulting from the intensification of civil conflicts, such as divorce and family disputes, should be different from other murder crimes, and that the death penalty should be applied with greater care.[51] The policy is seen as a formal endorsement of a

---

[48] R. v. Lennon, No. [2003] SASC 337.
[49] Raczkowski v. R., [2008] NSWCCA 152 (furthermore, the Court noted that the seriousness of domestic violence had been highlighted multiple times in R. v. Edigarov, [2001] NSWCCA 436; R. v. Dunn, [2004] 144 A Crim R 180; R. v. Burton, [2008] NSWCCA 128).
[50] Australian Law Reform Commission, *supra* note 22.
[51] Zuigao Renmin Fayuan Guanyu Yinfa <Quanguo Fayuan Weihu Nongcun Wending Xingshi

mitigating approach to domestic violence. It was initially devised to deal with the rising crime rate among farmers caused by "internal conflicts" resulting from agricultural production as well as neighborhood, marriage, and family disputes. The emphasis on "internal conflicts" is due to the nature of Chinese rural society, in which farmers usually have close and multidimensional relationships with each other.[52] In such a community, one was believed to have a reason for committing a crime. The Court was thus concerned that criminal punishments would exacerbate the situation and damage rural society's harmony and stability.[53] However, the policy has now been generalized and does not apply solely to rural communities. In 2010, the Court issued an opinion to "maximize differentiation and disintegration of criminals, and minimize social opposition" during sentencing. It stated "for crimes that are caused by the intensification of civil conflicts such as …marriage and family…we must focus on harmony and stability and make great efforts to resolve conflicts."[54] The sentencing guiding opinion issued during the same year further prescribed that the sentence for assaults resulting from marriage and family disputes should be mitigated by no more than 20% of the benchmark sentence.[55]

Shenpan Gongzuo Zuotanhui Jiyao> de Tongzhi (最高人民法院关于印发《全国法院维护农村稳定刑事审判工作座谈会纪要》的通知) [The Minutes of the Forum on Criminal Trial Work in Maintaining Rural Stability by Courts], Fa [1999] No. 217 (法 [1999] 217号).

[52] Hao Che (车浩), *Cong Li Changkui An Kan Lingli Jiufen yu Shouduan Chanren de Hanyi (从李昌奎案看"邻里纠纷"与"手段残忍"的涵义) [The Meaning of "Neighborhood Dispute" and "Cruelty" in the Light of Li Changkui's Case]*, 8 FAXUE (法学) [LEG. SCI.] 35 (2011).

[53] *Id.*

[54] Guanyu Chongfen Fahui Xingshi Shenpan Zhineng Zuoyong Shenrui Tuijin Shehui Maodun Huajie de Ruogan Yijian (关于充分发挥刑事审判职能作用深入推进社会矛盾化解的若干意见) [Several Opinions on Giving Full Play to The Function of Criminal Trial to Promote the Resolution of Social Conflicts] (hereinafter referred to as "Several Opinions"), FaFa [2013] No. 63 (法发[2010]63号).

[55] Renmin Fayuan Liangxing Zhidao Yijian (Shixing) (人民法院量刑指导意见(试行))[People's Court Sentencing Guiding Opinion (Trial)], Fafa [2010] No. 36 (法发[2010]36号).

Several judicial opinions have reaffirmed such a position. In *Fan Hailong* murder case, The Qingyang Intermediate People's Court accepted the defense opinion that this case involved indignation resulting from family disputes and marital conflict. Accordingly, it held that the defendant Fan Hailong should be given a lighter punishment.[56] Similarly, according to *Wang Zhicai* murder case, issued by the Supreme People's Court as the fourth guiding case for the application of law, treating marriage conflict as a mitigating factor can aid in resolving social conflicts and promoting social harmony.[57]

In other jurisdictions, courts may likewise endorse a mitigating approach in their cases. In Croatia, the Varaždin County Court determined that the fact that the victim was a close and significant person (wife) of the offender was a mitigating circumstance.[58] Meanwhile, in the landmark *Opuz v. Turkey* case decided by the European Court of Human Rights, the Turkish court was cited to mitigate sentences of domestic violence offenders on the grounds of custom, tradition, or honor.[59]

This section does not purport to provide an exhaustive list of jurisdictions that have addressed the mitigating or aggravating question in some way. Rather, it offers an illustration of the range of positions that a jurisdiction can adopt after carefully reviewing the ideas of its

---

[56] Fan Hailong Guyi Sharen An (范海龙故意杀人案) [Fan Hailong Murder Case], (2013) Qin Zhong Xing Chu Zi No. 18 ((2013) 庆中刑初字第18号).
[57] Wang Zhicai Guyi Sharen An (王志才故意杀人案) [Wang Zhicai Murder Case], (2010) Lu Xing Si Zhong Zi N0. 2 ((2010) 鲁刑四终字第2号).
[58] Mirjana Kondor Langer, *Familicide – Aggravated and Mitigating Circumstances,* https://www.violence-lab.eu/news/familicide-aggravated-and-mitigating-circumstances/ (last visited Apr 21, 2022).
[59] European Court of Human Rights, *Chamber Judgment Opuz v. Turkey 09.06.09*, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-2759276-3020932%22]} (last visited Apr 21, 2022).

brightest minds. It is imperative to examine the rationales that underlie the different approaches in order to comprehend why they exist.

II. Traditional or Progressive: Sentencing Rationales

How can a sentencing factor both be mitigating and aggravating? To answer this question, the following section examines the sentencing rationales for both approaches. Some explanations have been provided by judges, such as promoting social harmony in the case of the mitigating approach,[60] and the breach of trust for the aggravating approach.[61] Judges intuitively give these reasons in order to justify their sentencing calculations, but rarely discuss the rationales, definitions, scopes, or extent of adjustment of these concepts.[62] However, intuitions may be misguided.[63] In addition, those concepts do not necessarily influence the quantum of the sentence.[64]

This section discusses two sentencing rationales. There are two justifications for punishment, according to Andrew von Hirsh.[65] One is the natural relationship between punishment and desert (retribution). The official balance of praise and blame is communicated by the state through sentences, primarily to the offender and to the victim, but also to society as a whole.[66] However, censure alone is insufficient due to the fallibility of human nature. It is likely

---

[60] Sentencing Council, *supra* note 47.
[61] Several Opinions, *supra* note 54.
[62] Allan Manson, *The Search for Principles of Mitigation: Integrating Cultural Demands*, MITIGATION AND AGGRAVATION AT SENTENCING 40 (2011).
[63] Julian V Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, MITIGATION AND AGGRAVATION AT SENTENCING 1 (2011).
[64] Manson, *supra* note 62, at 41.
[65] ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1996).
[66] ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1986).

that violence will be rampant in a society without police, courts, and a penal system. As a result, the second concern is the need to prevent future crimes from occurring (deterrence). These are also the primary focal concerns that influence judges' sentencing decisions (blameworthiness and harm, and risk/community protection).[67] The consequences of punishments on the family, in addition to deterrence, are also relevant from a consequentialist perspective in the context of domestic violence.

The purpose of this section is to illustrate the impasse resulting from sentencing rationales which do not offer an adequate solution to the question of how domestic circumstances should be treated during sentencing. From a retributivist as well as a consequentialist perspective, there is merit to both the mitigating and aggravating approaches. It depends on the perspective of the judge whether domestic violence offenders are more or less culpable and whether they cause more or less harm. The need for deterrence may be greater or lesser for them, and less punishment may be advantageous for short-term family relationships, while longer punishment may be advantageous for long-term relationships. Since these rationales are the primary justifications of sentences, the sentencing process can duplicate the conflict.

---

[67] Known as the focal concerns perspective, it is an influential theory that posits that judges' sentencing decisions are affected by three focal concerns: 1) blameworthiness and harm; 2) risk (community safety), and 3) practical consequences of the sentence. The focal concerns reflect the judge's pursuit of two objectives: retribution and deterrence. In addition, the perspective notes that the pursuit is limited by practical constraints (e.g., prison capacity). *See generally* Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998); Mona Lynch, *Focally Concerned about Focal Concerns: A Conceptual and Methodological Critique of Sentencing Disparities Research*, 36 JUSTICE Q. 1148–1175 (2019); Lauren O'Neill Shermer & Brian D Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in US Federal District Courts*, 27 JUSTICE Q. 394–430 (2010).

1. Retribution

Desert theory is a modern form of retributive philosophy.[68] Its central principle is proportionality, that "the more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be."[69] This concept originates from Kant's general theory of justice, in which one must treat humanity with the utmost respect, not only in one's own person, but also in the person of others, not as a means, but as an end.[70] By imposing a proportionate sentence that respects both the rule of law as well as the limits of state power, sentences consider offenders as moral agents who are ultimately responsible for their own actions.[71] "People have a sense that punishments scaled to the gravity of offenses are fairer than punishments that are not."[72] Any deviation from proportionality calls for a defense at the very least.[73]

In order to determine the seriousness of an offense, it is necessary to consider both the harm caused by the crime as well as the culpability of the perpetrator.[74] To clarify, a retributivist may wish to have each sentence appropriate for each defendant, requiring determination case by case. Such a position refuses to classify any factor under a single category and therefore does not view the domestic factor as aggravating or mitigating in a categorical manner. The following subsection thus discusses how harm and culpability - the two primary concerns of retributivists -

---

[68] ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 88 (4 ed. 2005).
[69] R. v. Lacasse, 2015 SCC 64, at para12.
[70] *See* IMMANUEL KANT, MORAL LAW: GROUNDWORK OF THE METAPHYSICS OF MORALS (2013).
[71] ASHWORTH, *supra* note 68, at 89.
[72] Andrew Von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME JUSTICE 55, 56 (1992).
[73] *Id.*
[74] Sentencing Council, *supra* note 47.

might be considered by traditionalists and progressivists, and describes how a domestic offender can be judged to be both less or more culpable and to cause both less and more harm, depending on the position of the judge.

1.1 Traditionalists: mitigation

There have been perceptions that domestic violence is less harmful than non-domestic offenses.[75] Echoing the public vs. private divide, domestic violence has been perceived as harming and only harming those with whom one is intimate, while non-domestic offenses intrude into the general public and cause discomfort. Gilchrist and Blissett's survey of sixty-seven magistrate judges in the UK reflected the tendency of judges to minimize the severity of domestic violence.[76] "There was a general feeling that assault in public was more serious as it could contaminate undeserving others."[77] Some magistrates even question whether domestic violence that does not require medical treatment is an assault at all, whereas this question would not arise in a stranger-assault scenario.[78] Studies indicate that judges are generally of the opinion that non-domestic violence causes greater harm since it affects people outside the immediate family.[79]

---

[75] Bond and Jeffries, *supra* note 17.
[76] Elizabeth Gilchrist & Jacqueline Blissett, *Magistrates' Attitudes to Domestic Violence and Sentencing Options*, 41 HOWARD J. CRIM. JUSTICE 348 (2002).
[77] *Id.*, at 358.
[78] *Id.*, at 359.
[79] Put in other words, it is widely perceived that stranger violence is more dangerous. Such perception is closely related to "fear of strangers". *See, e.g.*, Gerald E Frug, *City Dervices*, 73 NYU L. REV. 23, 71 (1998) (argued that fear of crime is associated with crime perpetrated by strangers. In short, fear of strangers help generate the fear of crime); Joachim Kersten, *Crime and Masculinities in Australia, Germany and Japan*, 8 INT. SOCIOL. 461 (1993) (pointed out that crime debates are based on the presumption of perpetrators as strangers, yet "most reported and (with some likelihood) most unreported attacks, occur between people who know each other");

Meanwhile, the harm towards the victim may be denied and minimized. As Ptacek's interviews revealed, judicial behaviors can "parallel the tactics of men who batter…the violence was only a 'lovers' quarrel'."[80] Some participants in the criminal justice system may view domestic violence as a women's tool to ask for "weekend divorce," so "women can have a weekend off without the husband around. By Monday, they want their case dismissed."[81]

When it comes to culpability, domestic violence offenders are perceived to be less culpable since they commit crimes in a context that somehow excuses their behavior.[82] An intimate relationship may lead to disputes and conflicts that can escalate to fatal violence.[83] Compared to stranger violence, domestic violence is typically the result of strong emotions ingrained within a

---

Marc Riedel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J CRIM CRIMINOL. 223-4 (1987) ("the fear of crime is basically a fear of strangers"); Leonore MJ Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 487 (1999) ("The fear of the stranger fuels the majority of criminal legislation…"). Challenges towards the unequal treatment, *see* Carissa Byrne Hessick, *Violence Between lovers, Strangers, and Friends*, 85 WASH U. L. REV. 343 (2007) (argued that the assumptions supporting stranger violence were more serious were not necessarily true). Studies that provide evidence to the harsher attitude towards stranger violence, *see* Jennifer S McCormick et al., *Relationship to Victim Predicts Sentence Length in Sexual Assault Cases*, 13 J. INTERPERS. VIOLENCE 413 (1998) (used clinical files from 204 rapists to show that victim-offender relationship significantly decreased sentence length. Judges as outside observers may have different perception of rape according to victim-offender relationship); LAWRENCE W SHERMAN, JANELL D SCHMIDT & DENNIS P ROGAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS (1992) (described police inaction towards acquaintances disputes).

[80] JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES (1999), at 115, *cited in* Jennifer L Hartman & Joanne Belknap, *Beyond the Gatekeepers: Court Professionals' Self-Reported Attitudes about and Experiences with Misdemeanor Domestic Violence Cases*, 30 CRIM. JUSTICE BEHAV. 349, 352-3 (2003).

[81] *Id.*, at 363-4. *See also* Fradella and Fischer, *supra* note 8 (conducted thorough literature review on judicial views towards intimate partner violence, and it noted the importance of legal education as some judges tend to perceive domestic violence "as a grounds for divorce rather than a criminal offense").

[82] Hessick, *supra* note 79, at 22.

[83] Scott H Decker, *Exploring Victim-Offender Relationships in Homicide: The Role of Individual and Event Characteristics*, 10 JUSTICE Q. 585, 592 (1993).

preexisting relationship.[84] Such strong emotions reduce culpability since they obscure premeditation.[85] For example, "the man was under stress" may be used as an excuse for the violence.[86]

The judge may also consider that there is a certain degree of victim responsibility and provocation in domestic violence cases,[87] and, therefore, mitigate the criminal responsibility of domestic violence offenders. "Generally, an attack on a stranger was seen as unprovoked and unjustified, the implication was that assault on a partner was somehow justifiable or at least understandable."[88]

1.2 Progressivists: aggravation

Alternatively, progressivists normally argue that domestic violence can cause more harm than non-domestic case because even though only one incident is being presented to the judge, the victim endures an ongoing pattern of abuse of power both physically and psychologically.[89] The dynamics of power and control in battering relationships disproportionately harm the

---

[84] Kay L Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY LJ 691, 701-2 (2006).
[85] Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 LAW SOC. REV. 105, 107 (2004).
[86] Gilchrist and Blissett, *supra* note 76, at 359.
[87] *Id. See also* Donna M Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse*, 43 DEPAUL REV 1133 (1993); Ruth Busch, Neville Robertson & Hilary Lapsley, *The Gap: Battered Women's Experience of the Justice System in New Zealand*, 8 CAN J WOMEN L 190 (1995); Riedel, *supra* note 79; Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, LAW SOC. REV. 367 (1991).
[88] Gilchrist and Blissett, *supra* note 76, at 358.
[89] Deborah Tuerkheimer, *Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence*, 94 J CRIM CRIMINOL. 959, 962-3 (2003).

battered.[90] The Sentencing Council of England and Wales expressed similar concerns in its sentencing guidelines:[91]

> Domestic abuse is likely to become increasingly frequent and more serious the longer it continues, and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victims and those around them.

As the Tasmania Court of Criminal Appeal stated in *Price v. Tasmania*, "[the appellant's] actions have consigned Ms. Jacobs to a lifetime of pain and suffering, physically and emotionally."

Additionally, the notion that domestic violence offenders are less culpable has been challenged in tandem with a better understanding of the breach of trust involved in domestic violence. The breach of trust has long been recognized as an aggravating factor in stranger crimes.[92] However, it is often neglected in domestic violence cases.[93] Increasingly, it is

---

[90] *Id.,* at 968.
[91] Sentencing Council, *supra* note 47.
[92] *See e.g.*, U.S. Sentencing Guidelines Manual § 3B1.3 cmt. n.1 (2006) ("'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)."). *See also* multiple sentencing guidelines that list breach of trust as a factor to greater culpability, *e.g.*, Sentencing Council, *Fraud – Sentencing*, https://www.sentencingcouncil.org.uk/offences/crown-court/item/fraud/ (last visited Apr 21, 2022); Sentencing Council, *Bribery – Sentencing*, https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/bribery/ (last visited Apr 21, 2022); Sentencing Council, *Theft – General – Sentencing*, https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/theft-general/ (last visited Apr 21, 2022).
[93] *See* P.F. MARSHALL ET AL., BREACH OF TRUST IN SEXUAL ASSAULT: STATEMENT OF THE PROBLEM 3 (1992) ("judges often fail to recognize a breach of trust, although it is a standard aggravating factor in sentencing guidelines").

recognized that aggravation for the breach of trust should apply to marriages and other familial relationships as well.[94] Similarly, "victim obviously vulnerable due to age, personal characteristics or circumstances" signifies a higher degree of culpability.[95] Survivors of domestic violence, especially poor women,[96] are typically more vulnerable to future harm due to cohabitation.[97] The Alberta Court of Appeal decision mentioned in Section I has often been cited to illustrate the aggravated sentences of domestic violence offenders resulting from the breach of trust and the victim's vulnerability.[98]

2. Consequentialism

The idea of deterrence is representative of a consequentialist reasoning in the sense that it aims to prevent future crimes.[99] There are two forms of deterrence: special deterrence, which prevents the offender from committing another crime, and general deterrence, which aims to

---

[94] Hessick, *supra* note 79, at 395.
[95] *See e.g.*, U.S. Sentencing Guidelines Manual § 3A1.1 (2005) (providing for two-level increase for any offense where the defendant knew or should have known that a victim of the offense was "unusually vulnerable due to age, physical or mental condition, or who [was] otherwise particularly susceptible to the criminal conduct"); Sentencing Council, *Common Assault / Racially or Religiously Aggravated Common Assault/ Common Assault on Emergency Worker – Sentencing* (it is listed as a factor indicating high culpability for a victim who is evidently vulnerable due to age, personal characteristics, or circumstances), https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/ (last visited Apr 21, 2022).
[96] *See* Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 UC DAVIS L. REV. 1009, 1011 (1999).
[97] Hessick, *supra* note 79, at 343; Rodney F Kingsnorth, Randall C MacIntosh & Sandra Sutherland, *Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing*, 40 CRIMINOLOGY 553, 563 (2002).
[98] *See e.g.,* Andrew Jason Parker v. R. [1994] TASSC 94; Karklins, *supra* note 40.
[99] ASHWORTH, *supra* note 68, at 75.

deter other people from committing crimes.[100] The assumption is that rational people will choose not to commit a crime if the punishment outweighs the benefits.[101]

Consequentialists also pay close attention to the potential impact of punishments on families when analyzing the situation of domestic violence as well. As Jacques Donzelot's work illustrates, state agencies and legal regulations in nineteenth-century France often sought to solve social problems through the "family unit," rather than directly checking individual behavior.[102] The French juvenile court served more as a forum for regulating families and promoting a healthy family life. The promotion of well-functioning families has become a central method of attacking a wide range of social problems. Consequently, family considerations have played an important role in legal regulation and was nurtured together with state interests.[103] The purpose of this subsection is to demonstrate how the domestic nature can be ambivalent under a consequentialist perspective assessing the need for deterrence, as well as the consequences for the family.

2.1 Traditionalists: mitigation

---

[100] *Id.* Scholarly opinions differ as to which aspect is more important. Andrew Ashworth asserted that special deterrence is not the most important sentencing rationale, but rather general deterrence. In contrast, Zhang Mingkai stated that general deterrence should have been incorporated into the criminal code, and specific deterrence should be prioritized in the process of sentencing in individual cases. *See* Mingkai Zhang (张明楷), *Lun Yufang Xing de Cailiang (论预防刑的裁量) [On the Determination of Preventive Sentences]*, 37 XIANDAI FAXUE (现代法学) [MOD. L. SCI.] 102–117 (2015).

[101] Gary S Becker, *Crime and Punishment: An Economic Approach*, *in* THE ECONOMIC DIMENSIONS OF CRIME 13 (1968).

[102] J. DONZELOT, THE POLICING OF FAMILIES (1979).

[103] Dinovitzer and Dawson, *supra* note 9.

Courts determine whether specific deterrence is necessary based on their assessment of the offender's propensity for reoffending. Judges may give merit to a mitigating approach based on the perception that domestic violence offenders are comparatively less likely to be repeat offenders. "Stranger offenders are perceived to be more dangerous, unpredictable, and indiscriminate … compared to non-stranger offenders, who respond to the pressures of certain situations and are unlikely to recidivate."[104] Meanwhile, since domestic offenses typically take place in intimate relationships, usually involving strong emotions related to specific disputes, the need for general deterrence has diminished, because under this scenario the general public isn't concerned with deterrent effects or denunciations, but merely punishments directed at the specific offender, again reflecting the public/private divide that little public disturbance or influence is anticipated by domestic violence.[105]

Further, the justice system sometimes accords deference to family members if they choose to prioritize their obligations as family members over their obligations as citizens.[106] Moreover, family members who turn to the criminal justice system are frequently viewed as "snitches" and violators of "the taboo against turning on one's family."[107] Judges are concerned that criminal sanctions may tear apart families.[108] As long as the victim is no longer in a position of heightened vulnerability as a result of cohabitation, prosecutors seek to protect the marital

---

[104] Leonore MJ Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERS. VIOLENCE 94, 95 (1996).
[105] Che, *supra* note 52, at 37.
[106] Dan Markel, Jennifer M Collins & Ethan J Leib, *Criminal Justice and the Challenge of Family Ties*, U. ILL. L. REV. 1147 (2007).
[107] *Id.*, at 1156.
[108] Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. MARY L. REV. 1505, 1539 (1997).

relationship from potential destabilizing effects of criminal prosecution.[109] While recognizing the possibility of violence, the marital relationship is here being actively protected by the courts by reducing the severity of criminal sanctions.[110] Thus, consequentialists who hold a traditional perspective may be inclined to decrease sentences for domestic violence offenders due to their perception of low deterrent needs and to protect family interests.

2.2 Progressivists: aggravation

Alternatively, some courts increasingly utilize general deterrence and denunciation in support of an aggravated sentence. "Those who commit the crime are almost invariably sent to prison, not only to punish the offender, but to send a message to those who might be tempted to act as the defendant did that prison is the likely outcome."[111] "Factors of general deterrence and denunciation ... are very prominent in the sentencing exercise."[112] Meanwhile, the assumption that a domestic offender is otherwise a law-abiding citizen and less likely to recidivate also faces challenges.[113] A considerable number of domestic violence offenders commit another crime within the same relationship.[114]

---

[109] Kingsnorth, MacIntosh, and Sutherland, *supra* note 97, at 563.
[110] Dinovitzer and Dawson, *supra* note 9, at 659.
[111] Karklins, *supra* note 40.
[112] Price, *supra* note 39, at para 12. *See also* R. v. JD, [2018] NSWCCA 233 ("this Court has repeatedly stated that crimes of domestic violence towards female partners are to attract sentences of sufficient severity to deter others who might offend in a similar way…").
[113] *See* Hessick, *supra* note 79, at 372-7.
[114] *See, e.g.*, Christopher D Maxwell, Joel H Garner & Jeffrey A Fagan, *The Preventive Effects of Arrest on Intimate Partner Violence: Research, Policy and Theory*, 2 CRIMINOL. PUBLIC POLICY 51, 71 (2002) (noting that 40% of domestic violence offenders reoffend and that "the average suspect with at least one subsequent incident had committed about an average of seven new incidents of aggression against the same victim within just the first six months of follow-up").

In addition, from a progressive perspective, aggravating sentences may still be appropriate even when familial consequences are taken into account. According to Tara Westover, the author of *Educated*, "you can love someone and still choose to say goodbye to them, and you could miss someone every day and still be glad they're not in your life."[115] Loyalty to one's family could conflict with loyalty to oneself, and this is especially relevant in the context of domestic violence. Having a happy family life with a batterer seems like an improbable dream. The criminal justice system values family integrity and has been bound hand and foot to punish those who batter. The "policy of appeasement," however, may not necessarily lead to reconciliation between family members. The current sentencing scheme has failed to provide adequate deterrence, as will be discussed in the next section. In many cases, domestic violence is a pattern that continues over time.[116] The consequences of such troubled relationships can be profound if they are not effectively improved.

Families suffer when domestic violence leads to suicide. It has been found through systematic reviews and meta-analyses of longitudinal studies that domestic violence increases the odds of women experiencing incident depression and attempting suicide.[117] Furthermore, it is a vicious cycle that depressive symptoms increase the odds of domestic violence.[118] Suicides of this nature are not uncommon. Abigail Patterson was the victim of five years of violence. During

---

[115] Catherine Conroy, *You Could Miss Someone Every Day and Still Be Glad They're Not in Your Life*, THE IRISH TIMES, https://www.irishtimes.com/life-and-style/people/you-could-miss-someone-every-day-and-still-be-glad-they-re-not-in-your-life-1.3393409 (last visited Apr 21, 2022).
[116] Tuerkheimer, *supra* note 89, at 965-6.
[117] Karen M Devries et al., *Intimate Partner Violence and Incident Depressive Symptoms and Suicide Attempts: A Systematic Review of Longitudinal Studies*, 10 PLOS MED. (2013).
[118] *Id.*

the relationship, Patterson suffered a fractured cheekbone, bruising, and a head wound. Despite being sentenced to a suspended sentence for assaulting her, her partner Robert Holiday did not cease his acts of violence. In eight months following a brutal assault, she committed suicide.[119] Likewise, Ms. Neal was assaulted repeatedly during their four-year relationship.[120] In the incident where her partner Mr. Dion melted her cellphone, punched her, choked her, and threatened to kill her, Mr. Dion was arrested and charged. After pleading guilty, they were reunited. "The cycle, of violence and reconciliation, was ingrained in their life." Ms. Neal was drowned in the plagued relationship with "the apple of her eye," which culminated in her suicide on the bridge.[121]

The family can also be destroyed when violence escalates to murder. A string of killings in Athens sparked public concern regarding domestic violence and the general leniency shown to abusers.[122] One woman was found asphyxiated next to her infant. Another was pushed off a cliff. A victim had been stabbed 23 times.[123] As a result of gun ownership in the United States, the danger is greater. The Lautenberg Amendment was introduced decades ago in order to combat domestic violence with guns by prohibiting those convicted of assaulting a spouse or child, or

---

[119] Yvonne Roberts, *Suicide by Domestic Violence: Call to Count the Hidden Toll of Women's Lives*, THE GUARDIAN, https://www.theguardian.com/society/2022/feb/27/suicide-by-domestic-violence-call-to-count-the-hidden-toll-of-womens-lives (last visited Apr 21, 2022).
[120] Barry, *supra* note 2.
[121] *Id.*
[122] Niki Kitsantonis, *In Greece, a String of Killings Pushes Domestic Abuse into the Spotlight*, THE NEW YORK TIMES, https://www.nytimes.com/2022/01/23/world/greece-domestic-violence-abuse.html (last visited Apr 21, 2022).
[123] *Id.*

those under a protective order from possessing firearms, but a significant number of women (67%) were still killed by an intimate partner with a firearm.[124]

Regular family violence is also detrimental to the development of children. Researchers generally agree that, despite methodological complexities, growing up in an abusive and violent environment can greatly impair the development progress of children. Such a background causes many emotional and behavioral problems that cannot be erased even after remedial measures have been taken.[125] It is understandable that someone with a troubled childhood may not be law-abiding. When Mr. Sullivan was growing up, his parents fought over petty things like not being able to prepare dinner on time. After a troubled childhood, he spent much of his adult life in prison.[126] Some children can find a way to escape a violent family. When she was fourteen years old, Nelly left her mother and moved in with her father due to her mother's violent partner. Her father used abuse as a reason to revoke custody. As a result, her mother hardly ever saw her.[127] It again shows that preserving family in the short term may be detrimental in the long run.

It is also important to note that, regardless of how lenient a custodial sentence is, a family will always pay a price. A study by Wilderman and Western concluded that incarceration

---

[124] The Editorial Board, *Women's Lives, Cut Short by the Men They Knew*, THE NEW YORK TIMES, https://www.nytimes.com/interactive/2017/12/19/opinion/women-guns-domestic-violence.html (last visited Apr 21, 2022).
[125] Stephanie Holt, Helen Buckley & Sadhbh Whelan, *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE NEGL. 797 (2008); Suzanne G Martin, *Children Exposed to Domestic Violence: Psychological Considerations for Health Care Practitioners*, 16 HOLIST. NURS. PRACT. 7 (2002).
[126] Audra D. S. Burch, *A Gun to His Head as a Child. In Prison as an Adult*, THE NEW YORK TIMES, https://www.nytimes.com/2017/10/15/us/childhood-trauma-prison-addiction.html (last visited Apr 21, 2022).
[127] Christa Hillstrom, *The Hidden Epidemic of Brain Injuries from Domestic Violence*, THE NEW YORK TIMES, https://www.nytimes.com/2022/03/01/magazine/brain-trauma-domestic-violence.html (last visited Apr 21, 2022).

damages the health and earnings of adult men, many of whom are fathers. The loss of financial resources affects the well-being of their spouses, and the children left behind are more prone to behavioral difficulties and social isolation.[128] Accordingly, even short-term custody can have a significant effect on the benefits of fragile families, in particular.

In summary, progressive consequentialists will advocate an aggravating approach because they see a greater need for deterrence, believing that such a measure is in the family's long-term interests.

3. Conflict of mores

In summary, sentencing rationales support both mitigation and aggravation, which may explain why different jurisdictions have adopted different paper laws. There is no surprise in this bifurcation because it reflects a conflict between two mores. "Offences involving domestic violence [may] depart from past sentencing practices for this category of offense because of changes in societal attitudes to domestic relations."[129] Societal attitudes have changed as a result of "status competition," which JM Balkin described:

> Men who sought to defend traditional gender roles (in which women hold lower status) have often done so on the grounds of preserving the family and traditional moral values. Women who abandoned traditional female roles were either themselves immoral or were unwittingly contributing to moral lassitude and the destruction of the family.[130]

There is an underlying predicament of the criminal justice system, one that relates to the fact that there is a genuine disagreement regarding "what forms of live should be honored and receive

---

[128] Bruce Western & Leonard Lopoo, *Incarceration, Marriage, and Family Life*, PRINCET. UNIV. DEP. SOCIOL. PAP. (2004).
[129] R. v. Kilic, [2016] HCA 48.
[130] Jack M Balkin, *The Constitution of Status*, 106 YALE LJ 2313, 2331 (1996).

general moral approval."[131] People on both sides of the debate can be equally sincere in their efforts to promote their way of life and gain moral legitimacy.[132] Globally speaking, women's rights are in a position where the old social structures and norms are gradually dissolving, while the new ones are not yet in place.[133] It is difficult to predict whether the new ones will be able to fully replace the old ones in the near future. Ultimately, as long as family matters, family considerations will never cease to exist.[134] While the legislatures in some jurisdictions have endorsed progressive mores and recognized the domestic factor as an aggravating factor, we are unsure how many legal practitioners, judges especially, will adhere to traditional mores. Furthermore, despite its stated objectives, the legal system in most cases serves to preserve the existing social order.[135] In the following pages, I describe the sticky leniencies given to domestic violence offenders across jurisdictions, trace the patriarchy embedded in the criminal justice system, and analyze underdeterrence in light of these factors. This demonstrates the ineffectiveness of our current sentencing framework in addressing domestic violence.

III. Underdeterrence as a Result of Sticky Leniency

1. Sticky leniency

---

[131] *Id.*, at 2332.
[132] *Id.*
[133] *Id.*, at 2334. Recent disputes over abortion rights illustrate the back-and-forth nature of women's rights. *See* Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legitimacy*, THE NEW YORK TIMES, https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html (last visited Apr 21, 2022).
[134] Additionally, a great deal of progress has been made in domestic violence thanks to the change in social norms that marriage is no longer governed by the "rule of force" but by the "rule of love". We do not yet know what can replace the "rule of love," which can contribute to a new revolution. *See* Siegel, *supra* note 4.
[135] Balkin, *supra* note 130, at 2314.

As Richard Abel observed, "Even if a subordinate group asks only a minimum of respect, the dominant group rightly perceives this as challenging its superiority."[136] When the gender hierarchy crumbles, the status, power, and stature associated with the superior gender, namely male, will also fall.[137] Therefore, it is natural for a cultural struggle to occur and for the old world to resist and maintain its traditional values.[138] Although the traditional idea of marriage as a form of men's authority and force has disintegrated,[139] women are still expected to yield under the guise of love. In America today, "being female as opposed to being male, is a central feature of one's identity."[140] Though modern society has abolished status hierarchies and made equal rights a fundamental tenet,[141] male privileges continue to permeate multiple spheres throughout life.[142]

Specifically, Dan M. Kahan explained that criminal justice system participants such as police, prosecutors and judges would be faced with the conflict between traditional values and civic duties, and argued they would follow the law that only slightly challenged the traditional norm ("gentle nudges") but balk at laws that condemned the behavior too severely ("hard shove").[143] This suggests that "hard shove" rather than "gentle nudges" could hinder the solution to the sticky norms problem:

---

[136] *Id*., at 2334.
[137] *Id*., at 2319.
[138] *Id*., at 2319-20.
[139] Siegel, *supra* note 4, at 2151.
[140] Balkin, *supra* note 130, at 2360.
[141] *See* Reva B Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2001) (noting that Justice Brennan referred to the history of sex discrimination and race discrimination, and argued that sex-based state action should be subject to strict scrutiny as well. The position of women was "comparable to that of blacks.").
[142] Balkin, *supra* note 130, at 2361.
[143] Dan M Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, UNIV. CHIC. LAW REV. 607, 608 (2000).

> The failed campaigns to reform domestic violence law and rape law illustrate a political dynamic especially likely to generate ineffective "hard shoves." Well organized and intensely interested advocacy groups can often secure legislation that is out of line with the preferences of the median voter. That is what happened in the fields of domestic violence law and rape law, where legislative reforms reflected strong, feminist-inspired critiques of norms that had not yet been fully repudiated by society at large. Because the feminist advocacy groups did not enjoy the same influence over enforcers as they did over legislators, the reform efforts predictably generated resistance at the enforcement stage.[144]

Aggravating factors can significantly influence the outcome of a sentence. They affect both whether custody will be given and the length of custody.[145] According to Kahan, making domestic violence an aggravating factor is one hard shove that causes resistance: "When states raise the penalties…prosecutors drop cases, juries acquit, and judges refuse to sentence severely."[146]

This section discusses the backlashes from legal enforcement. In using empirical evidence globally, it reveals the deeply ingrained patriarchy (traditional mores) that is common to global criminal justice participants, and that it is insufficient to merely make the domestic nature of the crime aggravating within the current sentencing framework.

1.1 Evidence by country

As numerous authors of past research have noted, empirical studies of the sentencing of domestic violence cases are limited.[147] Below is a compilation of all the research I found that

---

[144] *Id.*, at 629
[145] Roberts, *supra* note 63, at 5.
[146] Kahan, *supra* note 143, at 628.
[147] *See e.g.*, Bond and Jeffries, *supra* note 17; Dawson, *supra* note 23 ("few studies have compared outcomes for intimate partner specifically to outcomes in cases that involve other types of relationship").

was conducted in jurisdictions that view the domestic factor as aggravating. With one exception, studies consistently indicate that aggravation is not apparent or that domestic defendants receive more lenient sentences than their non-domestic counterparts.

There was only one study that reported ideal results among the quantitative studies I found. In May 2016, Queensland began to require courts to treat domestic violence as an aggravating factor. Based on the research brief provided by the Queensland Sentencing Advisory Council, domestic violence offenses are more likely to result in custodial penalties and significantly longer custodial sentences than non-domestic violence offenses.[148] In this study, a full sample of cases sentenced in Queensland's criminal courts from May 2017 to June 2019 was examined. However, there was one major methodological flaw: bivariate analysis was used, and therefore important factors such as criminal history and age have not been measured or accounted for. Research on race and sentencing shows that excluding important relevant variables may result in an overestimation of the influence of the target variable.[149] Despite reporting the existence of racial discrimination in the United States from the 1930s through the 1980s, reviews of studies conducted in that period could not serve as proof due to the inadequate control of legally relevant variables.[150] Because of methodological flaws, the US National Research Council's Panel on Sentencing Research did not acknowledge "widespread, systematic discrimination" in 1983.[151] Hence, the Queensland report should also be used with great caution.

---

[148] Hidderley, Jeffs, and Banning, *supra* note 31.
[149] ALFRED BLUMSTEIN, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM, VOLUME II (1983), at 30.
[150] Jeffery T Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUSTICE Q. 1, 3 (2012).
[151] Cassia Spohn, *Evolution of Sentencing Research*, 14 CRIMINOL. PUB. POL. 225 (2015).

In 1996, Canada formally recognized domestic violence as an aggravating factor. The results of three quantitative studies examining a sample of Canadian cases have been unsatisfactory. According to Gannon and Mihorean, data from 1997 to 2002 in 18 urban areas indicated that spousal violence offenders received a shorter prison sentence.[152] Although the authors linked two datasets, the Adult Criminal Court Survey and the incident-based Uniform Crime Reporting Survey, and so they were able to account for more variables, they did not conduct a multivariate regression. Consequently, this study is likely to be criticized similarly to the one in Queensland. In a study conducted by Du Mont et al., 186 sexual assault cases in Canada were analyzed with a stepwise multivariate regression method that included criminal records, case characteristics, and several aggravating factors. They found that sentences in cases involving a partner or an ex-partner were significantly shorter than sentences in other cases.[153] As well, Dawson compared court outcomes between intimate partner and non-intimate homicides over a period of three decades from 1974 to 2002, and it included legal relevant variables such as prior criminal history.[154] Bivariate analysis revealed no significant differences between sentences for intimate partner homicide offenders before and after 1996. In addition, the multivariate analysis did not report the significance of intimate relationships during the sentencing process over the past three decades.[155] Based on these results, domestic violence offenders' sentences may not be aggravated as desired.

---

[152] Marie Gannon & Karen Mihorean, *Sentencing Outcomes: A Comparison of Family Violence and Non-Family Violence Cases*, DEPARTMENT OF JUSTICE (2004), https://www.justice.gc.ca/eng/rp-pr/jr/jr12/p5e.html#ftn1 (last visited Apr 21, 2022).
[153] Janice Du Mont, Deborah Parnis & Tonia Forte, *Judicial Sentencing in Canadian Intimate Partner Sexual Assault Cases*, 25 MED. L. 139, 146 (2006).
[154] Dawson, *supra* note 23.
[155] *Id.*, at 408-11.

Besides the quantitative research, Grant also conducted a qualitative legal analysis to examine the impact of s.718.2(a)(ii), which revealed the use of the domestic factor as an aggravating factor since 1996.[156] Drawing from Westlaw, Quickly and CanLII, Grant discovered 82 appellate decisions citing section 718.2(a)(ii) from 1996 to 2016, and 122 cases where one would have expected the section to be cited, but it did not.[157] Despite the deferential standard of review expected of a Canadian appellate court, 43% of all sentences imposed by trial judges were revised.[158] The trial judge gave overly lenient sentences. In addition, Grant pointed out the following issues with s.718.2(a)(ii): (1) the lack of clarity of its scope, including whether it would apply to intimate partners who were not cohabiting and to third parties who were related to them; (2) the reconciliation with other mitigating factors like s.718.2(e) which seeks to punish indigenous offenders in a restorative and rehabilitative way; (3) the lack of guidance on when non-custodial sentences are appropriate; and 4) with respect to intimate partner sexual assault, although judges often said that domestic factors should not be considered as mitigating factors, it was not uncommon to impose sentences significantly below the ranges without a detailed explanation.[159]

Other jurisdictions have also faced resistance in the legal enforcement process. Statutorily, Iceland makes the domestic factor aggravating. Nevertheless, according to the US human rights report, "there were no domestic violence cases in which judges handed down heavier sentences,

---

[156] GRANT, *supra* note 30.
[157] *Id.*, at 11.
[158] *Id.*, at 12. The deferential standard, *see* R. v. Gourgon, [1981] 58 CCC (2d) 193 ("the matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper factors ignored or overstressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge").
[159] GRANT, *supra* note 30, at 22-63.

and one respected activist expressed concern that sentences were too lenient."[160] Despite the law granting judges the authority to impose aggravated sentences, local human rights monitors complained that courts continued to follow precedents that were lenient in cases of domestic violence.[161]

Meanwhile, it is worth pointing out that backlashes are not limited to legal enforcement; the law itself is at risk of being repealed. It is noteworthy that Turkey was the first country to sign the Istanbul Convention, a landmark international treaty addressing the systematic and widespread violence against women and girls and which established corresponding obligations for states.[162] However, Turkey decided to withdraw from the Convention in 2021, indicating a reversal of women's and girls' human rights.[163]

1.2 Systematic problem

This sticky leniency may be the result of a patriarchal prejudice against domestic violence crimes within the criminal justice system. Domestic violence cases are often perceived by

---

[160] U.S. Department of State, *Iceland - 2010 Country Reports on Human Rights Practices*, U.S. DEPARTMENT OF STATE, //2009-2017.state.gov/j/drl/rls/hrrpt/2010/eur/154429.htm (last visited Apr 21, 2022).
[161] *Id.*
[162] Turkey's Withdrawal from Istanbul Convention a Setback for Women and Girls' Human Rights, INTERNATIONAL COMMISSION OF JURISTS (2021) ("The Istanbul Convention sets out comprehensive standards for prevention of violence against women, protection and support for survivors, and prosecution of perpetrators, as well as establishing obligations for State parties to provide minimum essential support services to victims, such as shelters and medical assistance. The Convention requires State parties to respect, protect and fulfill women and girls' human rights, including refugee and migrant women. Importantly, the Istanbul Convention contains provisions to hold the authorities accountable for meeting their treaty obligations."), https://www.icj.org/turkeys-withdrawal-from-istanbul-convention-a-setback-for-women-and-girls-human-rights/ (last visited Apr 21, 2022).
[163] *Id.*

participants in the criminal justice system as less serious than other types of crimes. For the police, assigning a detective to a domestic violence case was a punishment:

> The police haven't done much for our cases. DV detectives are assigned to the unit because they are the people who have screwed up and they don't know where else to put them…They are usually piss poor…There are some stand-outs…but overall, they are not good and they won't do anything for you. So, if you don't get those pictures, the DV detectives won't go out and take them or interview the defendants or anything. They don't do much. I won't even put them on the stand because they didn't do anything.[164]

Hartman and Belknap noted that among public defenders, one of the prevailing themes had been their belief that domestic violence laws were created to appease trivial feminist concerns.[165] "Ninety percent of the time give or take, the domestic violence law is an enormous waste of the taxpayer's money, time, and resources…We are using an atomic bomb to swat a fly, if you will."[166] Simply put forward, defense attorneys do not want to handle domestic violence cases.[167] Gun and drug cases were most preferred. One attorney explained:

> They are more interesting. They are more based on legal issues rather than on emotion. It's either a motion to suppress based on whether or not there is probable cause to do a search and you kind of see where the case is going. You know after reading a police report and meeting your client if this case is going to go or not. Unlike with DV cases you have no idea what is going on. Today the victim could be on board tomorrow she might not be. You have no idea day-by-day what's going on with the case.[168]

Prosecutors may have similar views to those of public defenders. In the words of one prosecutor, "the legislature (in creating and expanding the domestic violence statute) has taken 'a

---

[164] KATHLEEN ERIN CURRUL-DYKEMAN, DOMESTIC VIOLENCE CASE PROCESSING: A SERIOUS CRIME OR A WASTE OF PRECIOUS TIME? 69 (2014).
[165] Hartman and Belknap, *supra* note 80, at 361.
[166] *Id.*
[167] CURRUL-DYKEMAN, *supra* note 164, at 64.
[168] *Id.*, at 64-5.

broad axe as a solution to a problem that could have been resolved with a paring knife.'"[169] Prosecutors assigned to domestic violence cases were aware that the assignment could be detrimental to their careers.[170] As Currul-Dykeman found, non-domestic violence prosecutors tried to avoid being assigned to domestic violence cases nor promoted to superior court domestic violence units. Gang units were usually considered the most lucrative units. According to one prosecutor:

> They think… you know, it's gangs… it's sexy in terms of, well, they must try a lot of cases…but in actuality they have a lot of victim issues too because people do not want to come and rat on the fellow gang members, so they confront some of the same issues. I've watched, I don't think they go to trial all that much...but they are still perceived as sexy and cool…guns are cool. There's a lot of cop involvement and prosecutors (a lot of them are wannabes) so they are going to be able to hang out with cops…and deal with cops…whereas, dealing with battered women, that's not cool.[171]

Due to this legal culture, fewer competent police, public defenders, and prosecutors are assigned to domestic violence cases. It is possible that the disappointed ones will project their frustration onto the cases, and as a result fail to handle them appropriately. Furthermore, judges were not effective gatekeepers to mitigate any possible complications that might have arisen. Unlike specialized judges, many judges do not have an in-depth understanding of domestic violence. Here is an example from a prosecutor:

> It was a restraining order hearing and the judge asked, "Why did you go back to that man!" She actually said that…A woman judge said, "Why did you go back to this man if he did that to you?"…I was absolutely horrified because it just showed a lack of

---

[169] Hartman and Belknap, *supra* note 80, at 361.
[170] CURRUL-DYKEMAN, *supra* note 164, at 66.
[171] *Id.*, at 68.

> understanding about domestic violence. And there was another judge that came in and you know he had a lack of sensitivity.[172]

It is not uncommon for judges' reasoning to reflect the tendency to deny, minimize, justify, and blame victims.[173] In addition, Fradella and Fischer's study on mock judges found that male respondents held paternalistic views and justified a shorter prison term on the grounds that "his son needed his father at home."[174] They failed to show enough concern for the victim and the child, and showed no awareness that children who live in homes where domestic violence is present are fifteen times more likely to experience abuse.[175] To justify leniency for domestic violence offenders, judges can always cite familial factors: "The victims… need income; there are debts to be paid. If the defendant is in jail, he is not getting a paycheck and the family cannot pay the bills."[176]

Domestic violence cases have traditionally been stigmatized as "uncool," "uninteresting," and "emotional." Together with the paternalistic rationale that is embedded in the criminal

---

[172] *Id.*, at 50.
[173] Gilchrist and Blissett, *supra* note 76 (The response of magistrate judges to a sentencing exercise at an accredited magistrates' training day demonstrated that their understanding differed from an ideal shift. They commented as follows: "Are there any courses the woman can attend to learn how to avoid being hit?"; "If the woman knows what is going to happen, why does she carry on winding up the man?"; "I would say that the husband in justified in being aggrieved at things not being ready"; "the man was under stress".).
[174] Fradella and Fischer, *supra* note 8, at 44. On the other hand, Dinovitzer and Dawson found that domestic violence offenders who had intact relationships with their victims received relatively shorter sentences. Male defendants with children, however, received a longer sentence. It marked a shift in the perception of certain jurisdictions that abused fathers could constitute a danger to children and that fatherhood was associated with harsher punishments. *See* Dinovitzer and Dawson, *supra* note 9.
[175] Fradella and Fischer, *supra* note 8. *See also* Joy D Osofsky, *Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Prevention and Intervention*, 6 CLIN. CHILD FAM. PSYCHOL. REV. 161, 166 (2003).
[176] Hartman and Belknap, *supra* note 80, at 367.

justice system, these elements have caused a systemic problem for the enforcement of domestic violence laws.[177] In fact, a questionnaire assessing case dispositions' deterrence function revealed consistent findings regarding their inefficacy.[178] Legal partitioners themselves recognized that the criminal justice system had minimal effect on protecting victims and preventing future domestic violence.

Generally speaking, our criminal justice system is a traditional system, as is our sentencing system. Despite progress in the paper law, it has been unable to root out the tradition's influence in the legal enforcement stage.

2. Underdeterrence

This ineffective punishment scheme, which allows for sticky leniency, has contributed to the failure to provide adequate protection to the family members. In spite of decades of efforts to recognize family violence as a serious crime, a fundamental violation of human rights, and is unacceptable in any form, domestic violence is still prevalent and upsets victims regardless of their age, socioeconomic status, sexual orientation, gender, race, religion, or nationality.[179] The 2010 summary report of the National Intimate Partner and Sexual Violence Survey found that

---

[177] Levesque traced further back the cultural forces which contributed to the challenges in enforcing domestic violence laws and explained the origins of patriarchy. Cultural forces include ingrained discrimination against vulnerable individuals, limited economic and social resources, customary law and customs, religious traditions, and prejudice against entire groups of people within societies. *See* ROGER JR LEVESQUE, CULTURE AND FAMILY VIOLENCE: FOSTERING CHANGE THROUGH HUMAN RIGHTS LAW 67-93 (2001).
[178] Hartman and Belknap, *supra* note 80.
[179] National Coalition Against Domestic Violence, *Domestic Violence National Statistics*, https://assets.speakcdn.com/assets/2497/domestic_violence-2020080709350855.pdf?1596828650457 (last visited Apr 22, 2022).

over 10 million adults each year experience some form of domestic violence.[180] This means that if each of them experiences one incident of domestic violence, an adult will be victimized every three seconds.[181] The number of violent domestic incidents increased by 28% from 2015 to 2018.[182] The lockdown policies under COVID 19 created a more imminent danger of domestic violence in 2020. UN Women reported an increase in domestic violence cases during the pandemic in Australia, Argentina, Canada, France, Germany, Spain, the United Kingdom, and the United States.[183] The number of calls to helplines increased by more than 30% in Singapore and Cyprus in 2020.[184]

In recent years, there has been an intent to prioritize victim safety as the primary goal in order to address domestic violence.[185] In Queensland, for instance, the primary purpose of the Domestic and Family Violence Protection Act was to protect victims, with no additional purposes specified.[186] However, the definition of victim safety needs to be clarified. Some people

---

[180] MICHELE C. BLACK ET AL., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39 (2010), *available at* https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.
[181] National Coalition Against Domestic Violence, *supra* note 179.
[182] RACHEL E MORGAN & BARBARA A. OUDEKERK, CRIMINAL VICTIMIZATION 2018 3 (2018), https://bjs.ojp.gov/content/pub/pdf/cv18.pdf.
[183] Shailey Hingorani, *Commentary: Isolated with Your Abuser? Why Family Violence Seems to Be on the Rise During COVID-19 Outbreak*, CNA (2020), https://www.channelnewsasia.com/commentary/coronavirus-covid-19-family-violence-abuse-women-self-isolation-1324466 (last visited Apr 22, 2022).
[184] *Id.*; Emma Graham-Harrison et al., *Lockdowns Around the World Bring Rise in Domestic Violence*, THE GUARDIAN (2020), https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence (last visited Apr 22, 2022).
[185] AUSTRALIAN LAW REFORM COMMISSION, FAMILY VIOLENCE: A NATIONAL LEGAL RESPONSE: FINAL REPORT 158 (2010), *available at* https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC114_WholeReport.pdf.
[186] Domestic and Family Violence Protection Act 1989 (Qld) s.3A(1). Victim safety was also emphasized in the latest 2012 edition. The new objectives are: (a) to maximize the safety, protection, and wellbeing of people who fear or experience domestic violence, and to minimize

will find that short-term safety, such as separation from the abuser, is sufficient. For more people, however, the long-term welfare and safety of battered women are the most important considerations. Barbara Hart, an important activist on behalf of battered women, outlines six objectives for legal intervention, of which the criminal justice system can address four: 1) safety for the battered person; 2) stopping the violence; 3) accountability of perpetrators; 4) divestiture by perpetrators.[187] Combined, these four goals state that the criminal justice system must not only prevent batterers from perpetrating violence by incarcerating or incapacitating them, but also send the explicit message that batterers do not have the entitlement to the obedience of battered women and further deter them from future violent acts.

From a law and economics perspective, an efficient punishment requires C = f * p, where C is the social cost of the crime, p (<1) is the probability/certainty of punishment, and f is the severity of the punishment.[188] The function indicates that, if the real p is smaller than the expected p*, f must be increased to compensate for the reduction in the expected punishment, otherwise the punishment cannot ensure sufficient deterrence. The past discussions have indicated that even though f can theoretically be increased in domestic violence cases, this may

---

disruption to their lives; and (b) to prevent or reduce domestic violence and the exposure of children to domestic violence; and (c) to ensure people who commit domestic violence are held accountable for their actions.

[187] Barbara J Hart, *Arrest: What's the Big Deal*, 3 WM. MARY J. WOMEN L. 207 (1997) (asserting that safety is the first and overarching goal. In order to hold perpetrators accountable, they must be informed that they have violated the law, and that continued violence will result in severe consequences. Divestiture denounces the fact that husbands no longer have the right to control and manipulate their wives, nor can they impose their personal desires on their partners).

[188] Richard A Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEG. STUD. 71, 73 (1980). A more thorough analysis, *see* Becker, *supra* note 101.

not necessarily be true in the real world. Furthermore, the certainty of punishment in domestic violence cases is not ideal as well.

Domestic violence is a crime that is largely underreported. According to the Australian Bureau of Statistics' 2012 personal safety survey (PSS), "80% of women and 95% of men who experienced violence by a current partner did not report the incident to police."[189] The situation has not magically improved over time. In 2016, the PSS consistently found that the majority of victims who experienced current or previous partner violence never contacted the police.[190] In addition, the US National Crime Victimization Survey has also indicated that domestic violence incidents frequently go unreported.[191] Worse still, the reporting rate has been steadily decreased from 67% in 2010 to 52% in 2019.[192]

Meanwhile, reports do not usually result in convictions. In 1967, the concept of attrition was used to demonstrate the filtering-out funnel that, of the 2,780,180 index crimes received by the criminal justice system in 1965, only 6.5 percent led to a sentence.[193] The attrition rate refers to the percentage of cases that do not reach a specific stage, while the percentage that reaches the

---

[189] SENTENCING ADVISORY COUNCIL, SENTENCING OF ADULT FAMILY VIOLENCE OFFENDERS: FINAL REPORT 2 (2015), *available at* http://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0018/333324/SAC_-_family_violence_report_-_corrected_accessible_version_for_web.pdf (last visited Apr 22, 2022).

[190] Australian Bureau of Statistics, *Personal Safety, Australia, 2016*, AUSTRALIAN BUREAU OF STATISTICS (2017), https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release (last visited Apr 22, 2022).

[191] USA Facts, *Data Says Domestic Violence Incidents Are Down, but Half of All Victims Don't Report to Police*, USA FACTS, https://usafacts.org/articles/data-says-domestic-violence-incidents-are-down-but-half-of-all-victims-dont-report-to-police/ (last visited Apr 22, 2022).

[192] *Id.*

[193] JAMES VORENBERG & NICHOLAS DEBELLEVILLE KATZENBACH, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT (1967).

conviction stage denotes p, the probability of punishment. The rate of conviction for homicide in eight West European countries was 35% in 2005.[194] In comparison, although theoretically, the probability of punishment in domestic violence cases should be higher than in stranger cases since the victim knows the perpetrator and thus the police can easily identify and act, empirical research shows otherwise. According to Hester, for example, the overall attrition rate for Northumbria (England) Police in 2001 was as follows: out of 869 domestic violence incidents, 222 resulted in arrests, 60 individuals were charged, 31 were convicted, and 4 convictions were imprisoned (0.5%). Thus, the certainty of punishment was only 3.6%.[195] Similarly, a 2003 study conducted by UK officials found that only 13 domestic violence offenders were convicted among 463 incidents, and thus the certainty of punishment was only 2.8%.[196] According to the 2016 Australian personal safety survey, 31% of the women who were physically assaulted by a male contacted the police, and among those, only 43% were charged.[197] The conviction was not reported, but it was likely to be low. There are two possible interpretations of the high attrition rate. The positive explanation is that it shows limited punitiveness, and Nordic countries serve as a model in this regard.[198] However, the literature on domestic violence tends to support the opposite interpretation, that domestic violence is the result of the system's limited ability and

---

[194] Marcelo F Aebi & Antonia Linde, *Crime Trends in Western Europe According to Official Statistics from 1990 to 2007*, *in* THE INTERNATIONAL CRIME DROP 37 (Van Dijk J, Tseloni A and Farrell G eds., 2012).
[195] Marianne Hester, *Making It Through the Criminal Justice System: Attrition and Domestic Violence*, 5 SOC. POLICY SOC. 79 (2006).
[196] HMCPSI & HMIC, *Violence at Home: A Joint Inspection of the Investigation and Prosecution of Cases Involving Domestic Violence* (2004).
[197] Australian Bureau of Statistics, *supra* note 190.
[198] Tapio Lappi-Seppälä & Michael Tonry, *Crime, Criminal Justice, and Criminology in the Nordic Countries*, 40 CRIME JUSTICE 1 (2011).

effectiveness to address the crime.[199] As well, the system is ill-equipped to deal with the special needs of victims, and police expressed their understanding: "[t]hey don't want to go through with it in case they split up, etc…they don't want to go to court which could be three months down the line etc. if they are trying to rebuild the relationship."[200]

Domestic violence offenders face less certainty of punishment due to the low reporting rate and high attrition rate. The sticky leniency prevalent in our criminal justice system has meant that no compensation has been provided for the loss because although theoretically, the domestic nature may have been an aggravating factor, the severity of punishment has not been increased in reality. Thus, domestic violence is a crime that is grossly under-deterred. In order to increase the certainty and severity of punishment, steps must be taken carefully.

IV. The Second-Best Solution

The current sentencing scheme fails to adequately address domestic violence, particularly the protection of victims, as discussed in previous sections. Prior to introducing the reform proposal, I analyze the existing toolkits and explain why they are unsatisfactory, hence the need to introduce a new sentencing scheme.

1. Unsatisfactory current toolkit

1.1 Decriminalize domestic violence

---

[199] *See e.g.*, Hester, *supra* note 195; Sylvia Walby, Jo Armstrong & Sofia Strid, *Developing Measures of Multiple Forms of Sexual Violence and Their Contested Treatment in the Criminal Justice System*, *in* HANDBOOK ON SEXUAL VIOLENCE 90 (Brown JM & Walklate SL eds., 2011).
[200] Hester, *supra* note 195, at 82.

One way to deal with the backlash is to decriminalize domestic violence. There is no need to worry about backlashes from traditional legal practitioners if domestic violence is no longer dealt with by the criminal justice system. As Leigh Goodmark argued in her book *Decriminalizing Domestic Violence*, the focus could be shifted from the criminal justice system to other policy measures to combat domestic violence.[201] She argued against criminalization as a primary response since the criminal justice system had been ineffective in deterring intimate partner violence, and the costs of criminalization, in particular when incarceration is involved, significantly outweighed their benefits.[202] According to her, government funding was always a zero-sum game, and criminalization diverted resources away from more pressing issues.[203] For instance, the two largest grant programs of the Violence Against Women Act in 2013 provided $266 million to criminal justice but only $30 to housing, even though in the words of Goodmark, "housing is the single greatest need identified by people subjected to abuse."[204] In response to the trend of criminal justice reform seeking to reduce prison populations, Goodmark advocated for a multidimensional solution incorporating economic, public health, community, and human rights policies as alternatives to the current criminalization approach.[205] Therefore, instead of promoting the legal implementation of aggravated sentence schemes, Goodmark focused on the

---

[201] LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE (2018).
[202] *Id*., at 33.
[203] *Id*., at 22.
[204] *Id*., at 3.
[205] According to Goodmark, the existing research did not support the criminalization approach, and therefore no additional resources should be allocated. In addition, she proposed alternative balanced policy approaches: economic approach, such as helping victims access economic resources, public health approach, such as preventing adverse childhood experiences, community approach, such as community-based justice, and human rights approach, such as a due diligence standard for the government to help promote comprehensive approaches.

underlying causes of domestic violence and sought to provide chain reactions to decrease the number of domestic offenses.

In spite of the fact that decriminalization may sound extreme, it is not a pipe dream. Due to budgetary constraints, the Topeka City Council decriminalized misdemeanor domestic violence in 2012.[206] Their District Attorney also suggested that they focus their limited resources on prosecuting felonies alone. In 2017, Russia also reduced the crime of simple battery (*poboi*) to an administrative violation, but for a different reason.[207] *Poboi* was a primary tool for prosecuting domestic violence, and despite strong opposition from activists and victim advocates, the decriminalization of *poboi* was enacted by a large majority of legislators in less than three months.[208] According to Semukhina and her interviews, the criminal justice system had long believed that *poboi* was an inconvenient crime, and making it an administrative offense can result in effective and efficient administration of justice, since the judiciary can deal quickly and efficiently with incidents with administrative fines.[209]

---

[206] Shelley M Santry, *Penny Wise but Pound Foolish in the Heartland: A Case Study of Decriminalizing Domestic Violence in Topeka, Kansas*, 14 JL FAM. STUD. 223 (2012).
[207] Olga Semukhina, *The Decriminalization of Domestic Violence in Russia*, 28 DEMOKR. J. POST-SOV. DEMOCR. 15 (2020).
[208] *Id.*, at 18.
[209] *Id.* According to Semukhnia, the prosecution of *paboi* relied heavily upon the testimony of victims. Because of this, *poboi* was a challenging crime, as victims frequently changed their minds. Furthermore, judges were frustrated because their dockets got messed up because the victims did not show up or did not know what to do or say when they arrived. By making it an administrative violation, most police officers felt relieved: "[Decriminalization] is a good thing…we can now quickly and painlessly sign the administrative protocol for poboi…it's faster and simpler for me"; "I like it…these women can't take it back…at least not on my level…so my numbers are always good…they are actually going up"; "My boss doesn't pay as much attention to the administrative reports…and I don't sweat as much…I sign the protocol and send her to court…it's out of my hands and that's the way I like it…I have much more important business to handle than these battered women."

Despite agreeing that a multidimensional approach is necessary to eradicate domestic violence, decriminalization is inadvisable. Criminal law has an expressive function, and in a way articulates what is right or wrong. As George W. Bush noted in his Remarks on Domestic Violence Prevention:

> government has got a duty to treat domestic violence as a serious crime, as part of our duty. If you treat something as a serious crime, then there must be serious consequences, otherwise it's not very serious.[210]

Russian opponents complained that the decriminalization of domestic violence gave abusers a free pass, lest there be shame and a lack of consequences, leading to an increase in domestic violence. As a result of the decriminalization amendment, the number of domestic violence incidents reported to police in Yekaterinburg, Russia's third-largest city, has more than doubled.[211] According to the mayor, "people got the impression that before it wasn't allowed, but now it is."[212] Furthermore, decriminalizing can create a slippery slope. There are many preventative measures (such as incapacitation) that cannot be used without being a crime, so victim protection cannot be assured.[213] Additionally, decriminalizing simple battery may reinforce the stereotypes embedded within the criminal justice system and hinder the criminal response to more serious crimes, given that domestic violence is always repeated and escalated. In the Russian case, "filing a criminal complaint for repeated domestic violence became nearly

---

[210] George W Bush, *President Bush Proclaims October Domestic Violence Awareness Month*, THE WHITE HOUSE (2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031008-5.html (last visited Apr 22, 2022).
[211] YULIA GORBUNOVA, "I COULD KILL YOU AND NO ONE WOULD STOP ME": WEAK STATE RESPONSE TO DOMESTIC VIOLENCE IN RUSSIA 34 (2018).
[212] *Id.*
[213] Semukhina, *supra* note 207, at 34.

impossible after 2017," and "[d]ecriminalization…made the criminal complaints for related violence more difficult…heightened scrutiny applied to these cases and often made victims helpless since cases are sabotaged by officers, prosecutors and even medical examiners."[214] As Semukhina revealed, the only real winners from decriminalization are not the victims nor their families, but the criminal justice system, for it is able to get rid of "inconvenient cases" that they previously considered "unworthy of the attention of 'crime fighters'."[215]

The budget constraint is a weak argument in support of decriminalization. In terms of its averted costs, such as property damage, services, and lost productivity, domestic violence is a highly expensive crime.[216] Preventing and deterring it at an early stage is more cost-effective than giving misdemeanors a green light and waiting for the consequences to be severe.

An approach that is long-term oriented and multidimensional need not negate the criminalization achievements that feminist activists have achieved for decades. As Jonathan Simon notes, "the criminal justice system in most states now reflects a new consensus that domestic violence of any kind is a crime, and one best deterred by *quick* sanctions against the violator (emphasis added)."[217] Rather than treating the government as if it is governed by a single CPU, it is far better to pursue both immediate and long-term approaches concurrently. In essence, decriminalization is a gamble on the future that neglects the welfare of victims who are suffering right now. Decriminalization has been acknowledged by Goodmark herself as

---

[214] *Id.*, at 36.
[215] *Id.*, at 37.
[216] Santry, *supra* note 206, at 242-4.
[217] J. SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 183 (2007).

"certainly unlikely, and probably impossible."[218] Her goal was to reduce incarceration rates, rather than decriminalize the act itself. In this case, a new sentencing mechanism is necessary in order to save resources caused by incarceration but still provide sufficient deterrence.

1.2 Specialized courts

Another option to address the backlash is to select a group of legal practitioners with specialized training and a deep understanding of domestic violence to handle the cases. As a response to the traditional approach that does not devote any particular attention or resources to domestic violence cases, some state courts have established specialized courts to hear such cases.[219] Specialized courts align with therapeutic jurisprudence and incorporate judges, prosecutors, court personnel, and other domestic violence resources into one system to facilitate a comprehensive and effective response.[220] The establishment of specialized courts shares the same concern as Goodmark, and it is an integrated approach to addressing the criminal justice system's adverse effects on family, children, finances, and psychological functioning.

As an example, New York implemented specialized domestic violence problem-solving courts in 1996. There was a presiding judge who was specially trained in domestic violence

---

[218] Leigh Goodmark, *Should Domestic Violence Be Decriminalized*, 40 HARV. WOMENS LJ 53, 112 (2017).
[219] *See* Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM REV 1285 (1999).
[220] *Id.* Therapeutic jurisprudence is an approach that is grounded in "sociological jurisprudence and legal realism". It examines the pros and cons of the criminal justice system on the social and psychological functioning of the individuals involved in the system and aims to provide comprehensive services to those individuals. *See* Bruce J Winick, *The Jurisprudence of Therapeutic Jurisprudence.*, 3 PSYCHOL. PUB. POL. L. 184, 206 (1997).

issues so that judges could discredit "excuses" such as substance abuse or anger management.[221] Meanwhile, probation officers were actively involved in monitoring defendants on probation, and judges regularly checked on those on bail.[222] To facilitate well-informed decisions by the judges, the court staff would also seek information from agencies such as victim services and treatment programs.[223] A more advanced version, dubbed integrated domestic violence courts, allows a judge to hear multiple criminal, family, and matrimonial cases arising from the same family, ensuring that judicial orders are more consistent and address the peculiarities of a family's situation.[224] This group of specialized courts was generally believed to significantly improve the quality of support for victims, and provide better legal intervention for abusers.[225] The integrated specialized courts encouraged a greater level of coordination and exchange of information regarding domestic violence-related matters and were believed to be a more efficient process with better outcomes for families.[226]

---

[221] LAWYER'S MANUAL ON DOMESTIC VIOLENCE REPRESENTING THE VICTIM 5 (Mary Rothwell Davis, Dorchen A. Leidholdt, & Charlotte A. Watson eds., 6 ed. 2015), *available at* http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/DV-Lawyers-Manual-Book.pdf.

[222] Jonathan Lippman, *Ensuring Victim Safety and Abuser Accountability: Reforms and Revisions in New York Courts' Response to Domestic Violence*, 76 ALB. L. REV. 1417, 1429 (2012).

[223] *Id.*

[224] *Id.*, at 1430.

[225] Rachel Birnbaum, Nicholas Bala & Peter Jaffe, *Establishing Canada's First Integrated Domestic Violence Court: Exploring Process, Outcomes, and Lessons Learned*, 29 CAN. J. FAM. L. 117, 122 (2014).

[226] *Id.*, at 123. *See also* Peter Jaffe, CV Crooks & Nick Bala, *Domestic Violence and Child Custody Disputes: The Need for a New Framework for the Family Court*, *in* WHAT'S LAW GOT TO DO WITH IT? THE LAW, SPECIALIZED COURTS AND DOMESTIC VIOLENCE IN CANADA (Jane Ursel, Leslie M. Tutty, & Janice leMaistre eds., 2008); Peter G Jaffe, Claire V Crooks & Samantha E Poisson, *Common Misconceptions in Addressing Domestic Violence in Child Custody Disputes*, 54 JUV. FAM. COURT J. 57–67 (2003); Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts*, 18 BU PUB. INT. LJ 197 (2008).

However, the advantages of specialized courts do not negate the importance of a properly designed sentencing scheme. It is not advisable to select and train a small group of legal practitioners while ignoring the larger group. In his participant observation, Currul-Dykeman noted that, "from time to time, a judge from a different court would be assigned to the specialized session for the day or some very short period. This was done most often to cover the session when the two primary judges were unavailable."[227] These visiting judges did not share the same deep understanding of domestic violence nor handled the cases "with the same gravity" as the primary judges, which led to a chain reaction that could harm the victims and may result in a deteriorating outcome.[228] In many cases, domestic cases will not be handled by specialized judges due to the heavy caseload, limited personnel of specialized courts, and the fact that many places simply lack the resources to set up specialized courts.

Further, without a change to the current sentencing scheme, the certainty of punishment is unlikely to be magically increased. From an evidentiary viewpoint, the specialized court was similar to the traditional court in defining domestic violence cases as weak.[229] Despite the fact that the specialized court placed more emphasis on problem-solving and victim protection, and that the traditional court focused more on processing cases efficiently, both courts used similar criteria to evaluate case strength,[230] and a majority of cases in the specialized court were dismissed.[231] Consequently, establishing specialized courts alone is not adequate to handle domestic violence cases, and a reformation of the sentencing scheme is still required.

---

[227] CURRUL-DYKEMAN, *supra* note 164, at 49-50.
[228] *Id.*, at 50.
[229] *Id.*, at 180.
[230] *Id.*, at 148-50, 180.
[231] *Id.*, at 130.

2. Progressively aggravated sentence scheme

2.1 The proposal: prior records as a proxy

Previous discussions examined how the current sentencing system fails to properly protect victims due to family considerations. Family considerations and victim protection are zero-sum games during the sentencing process, and judges may be concerned that a more severe sentence may lead to the breakdown of a family, which would in turn be adverse for the victims.[232] At its core, our laws are intended to support marriage rather than dissolve it, and our courts should take into consideration "the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children."[233] Law enforcement has thus, unfortunately, been lenient towards abusers despite legislative progress in this area. Therefore, the only way to resolve the dilemma is to admit that it is impossible to accomplish both at the same time. This leads to the second-best solution, the progressively aggravated sentence scheme.

As opposed to pursuing the two conflicting goals simultaneously and paralyzing each other, the progressively aggravated sentencing scheme incorporates them sequentially. The scheme consists of two stages. As a result of acknowledging the strong traditional forces present in the criminal justice system, the "credit" stage prioritizes family considerations. The punishment of

---

[232] When deciding domestic violence cases, some jurisdictions prioritize victim protection over family considerations. However, this does not necessarily mean that family considerations are less important. According to the Minister of Family Services in Queensland, "No one should doubt that the family is the natural and fundamental unit in our society ... The widest possible protection and assistance needs to be given to the family unit and the institution of marriage ... The Queensland Government is committed to doing all in its power to promote the family unit and strengthen and support its role." *See* AUSTRALIAN LAW REFORM COMMISSION, *supra* note 185.

[233] A. DICKEY, FAMILY LAW 43 (2007).

abusers is "credited," with domestic violence incidents only addressed by gradually increasing fines beginning at a relatively low level.[234] The low severity of the punishment addresses the concerns of many judges, prosecutors, and police, and this "gentle nudge" will help to increase the certainty of deterrence.[235] Prior economics research has shown that compared to increased severity, increased certainty of punishment exhibits a much greater deterrent effect.[236] Moreover, relying exclusively on fines as a means of punishment rather than incarceration reduces the criminogenic effect of imprisonment.[237] Since there will only be a fine imposed at this stage, the evidentiary standard can be relaxed.[238] A victim's statement or appearance can be unnecessary.[239] A progressively aggravated sentencing scheme would, as opposed to the current

---

[234] Fines collected here will be deposited into a fund that will assist women who are adversely affected in the second "debit" phase.

[235] High penalties can have an inverse sentencing effect, which results in a lower conviction rate. As a result of the traditional norm, police and prosecutors may hesitate to prosecute, jurors hesitate to convict, and judges may be reticent to aggravate sentences. *See* Tracey L Meares, Neal Katyal & Dan M Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1185-6 (2003).

[236] Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQ. 297, 304-5 (1991).

[237] *Id.*

[238] The way in which criminal justice system participants handle criminal procedures and evidentiary standards is highly influenced by the severity of the crime. In contrast to serious felonies, which generally follow the ideals of due process, misdemeanor proceedings typically involve weak prosecutorial screening, an inadequate defense bar, and a less rigorous scrutiny of evidence. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2011).

[239] To overcome the victim's reluctance to appear in court, evidence-based prosecution has been introduced. It does not require the victim's presence in court. Pictures taken at domestic violence scenes, police officer reports, and witness testimony are examples of evidence. While evidence-based prosecution has been endorsed, it is not routinely used. It is generally considered necessary for the victim to give testimony, and failure to do so may result in dismissal. *See* Lois A Ventura & Gabrielle Davis, *Domestic Violence: Court Case Conviction and Recidivism*, 11 VIOLENCE WOMEN 255 (2005); George Wattendorf, *Prosecuting Cases Without Victim Cooperation*, 65 FBI ENFORC. BULL. 18 (1996).

procedure where most cases are dismissed,[240] be able to establish and monitor abusers' domestic violence records more easily. A fast, efficient, and responsive criminal justice system would optimize the victim's experiences and impressions of the system as well.

The reason for this proposal is that, despite the sticky leniency, I have found that criminal histories, and in particular those of domestic violence, can offset such a tendency.[241] Different aggravating factors and mitigating factors bear different weights during the sentencing process.[242] Among them, the criminal history should play a larger role because of its statutory nature and relevance across cases.[243] Prior convictions of batterers have been used as an effective argument by many judges to refuse leniency.

In some jurisdictions, it is not necessary that the prior conviction is, or is similar to, domestic violence. As an example, in *Gregson v Tasmania*, the court dismissed the appeal of excessive sentencing and stated,

> The appellant has a very long record of prior offending commencing with an assault committed in October 1989. Many of the previous offenses involve dishonesty, including

---

[240] Refusal of participation by victims is always an important reason for dismissal. *See* Ventura and Davis, *supra* note 241. In response, Hanna suggested mandating participation rather than dismissing cases when women refuse to participate. It is likely that a somewhat aggressive proposal of this nature will result in resistance from the prosecution, and the victim's attitude towards the criminal justice system will be adversely affected. *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, HARV. L. REV. 1849–1910 (1996).

[241] Prior studies have demonstrated that prior convictions are strongly associated with convictions and severe punishments. *See e.g.*, Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes*, 32 CRIM. JUSTICE BEHAV. 612 (2005).

[242] Roberts, *supra* note 63, at 13.

[243] *Id.*

> numerous burglaries… his record of violent offending demonstrated that the assaults under consideration were "not aberrations committed out of character".[244]

Nevertheless, many more judges will focus on prior convictions that are related to domestic violence. In *McFarland v. R.*, the court stated "the applicant's prior conviction for domestic violence offending against his previous female domestic partner disentitled him to leniency."[245] In the State of Ohio, domestic violence offenders will be sentenced to an aggravated sentence only if they have previously pleaded guilty to or been convicted of two or more charges of domestic violence or two or more violations or offences "substantially similar" to domestic violence.[246] As the Australian Sentencing Advisory Council put forward,

> The history of prior offending that is presented to a sentencing Magistrate does not indicate whether any specific instances of prior offending were family violence offences… The offence then appears as common assault on the record of prior convictions, with no indication of the circumstances in which it occurred… he or she cannot obtain a true picture of the seriousness of the instant offence or the seriousness of the family violence offending as a course of conduct. In light of research which indicates that family violence offending escalates over time, evidence of a pattern of relationship violence should be an important consideration in sentencing so it is imperative that the history of family violence offending is available to the sentencing officer.[247]

Undoubtedly, the full picture of the history of domestic violence can assist sentencing judges to make a more appropriate decision. However, how can this information be readily available? The dynamic between the severity and certainty of punishment determines that few incidents are convicted and recorded under the current sentencing scheme. Further, previous protection orders cannot be considered criminal histories for the purposes of sentencing, so sentencing rationales

---

[244] Gregson v Tasmania, [2018] TASCCA 14.
[245] McFarland v. R., [2021] NSWCCA 79.
[246] State v. Pauley, 2019-Ohio-2368.
[247] SENTENCING ADVISORY COUNCIL, *supra* note 189, at 35.

would object to taking them into account.[248] The "credit" stage of the progressively aggravated sentence scheme primarily serves to raise the conviction rate and to establish a history of each perpetrator.

If the batterers fail to learn a lesson at the "credit" stage and continue to reoffend, they may pass the threshold based on their escalated acts of violence and/or the frequency of domestic violence incidents, in this case the "credits" earned by them will be recouped. This is the "debit" stage, which prioritizes victim protection, and the batterer will receive a mandatory minimum sentence, such as five years. At this stage, judges should be more confident of imposing such a severe sentence due to the prior record, plus the psychological perception they did not deserve the "leniency credit" and the "credit" should be repaid. For the sake of the well-being of the family, it is considered unsuitable to preserve the family at this stage.[249] In addition, the funds deposited by fines in the "credit stage" will assist the victims and children in overcoming short-term economic hardship resulting from the loss of a family member.

A scheme such as this uses domestic violence history as a means to gradually diminish judges' empathy towards the batterers as family members and can effectively aggravate

---

[248] *Id.*, at 28.

[249] Similar to previous sections discussed, criminal legal intervention on domestic violence has been criticized for its undue respect for "families" that place women and children at risk. *See* Jane W Ellis, *Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue*, 75 J. CRIM. CRIMINOL. 56 (1984); Dinovitzer and Dawson, *supra* note 9. The preservation of a family is not necessarily a good thing. It can have adverse effects on children, *see* Jennifer E McIntosh, *Thought in the Face of Violence: A Child's Need*, 26 CHILD ABUSE NEGL. 229 (2002); LUNDY BANCROFT, JAY G SILVERMAN & DANIEL RITCHIE, THE BATTERER AS PARENT: ADDRESSING THE IMPACT OF DOMESTIC VIOLENCE ON FAMILY DYNAMICS 6-8 (2011).

sentences when necessary. The following discussion illustrates why such a scheme is likely to work and addresses certain concerns.

2.2 Concerns

2.2.1 Burden of fine

Fines at the credit phase may pose a problem. The offender may threaten or coerce the victim into paying the fine. As a result, the deterrence effect of the batterer is relatively limited.[250] In addition, a portion of family funds that might be used for food, clothing, rent, or child support have to go into paying the fine.

In regards to the first concern, it is vital to recognize that many victims are subjected to economic abuse.[251] If the offenders are able to shift the burden of their fines onto the victims, it proves that the victims are under the offenders' economic control. Consequently, the victim's money will likely be spent elsewhere as requested by the offender, such as on alcohol and drugs, if not spent on fines. In fact, it would be far worse than paying a fine. The imposition of a fine is an important expression of the judge's disapproval of the batterer's behavior, while the dismissal of the case is often interpreted as an endorsement.[252] The deterrent effect of fines may not be the best, however they are more efficient and much more effective than the current system.

Similarly, I do not anticipate that fines will have a significant impact on the living standards of the families. As a first step, fines will be set at a low level, such as one hundred dollars. This

---

[250] SENTENCING ADVISORY COUNCIL, *supra* note 189, at 31.
[251] It is a form of economic abuse to control how resources are distributed and monitor their use. 79% to 92% of participants in a financial literacy program for women exposed to abuse reported being in control of their finances. *See* GOODMARK, *supra* note 201, at 38-41.
[252] The use of laws to express judgments about appropriate values, *see* Cass R Sunstein, *On the Expressive Function of Law*, 144 UNIV. PA. L. REV. 2021 (1996).

amount is unlikely to exceed most people's ability to pay. In addition, all fines collected at the credit stage will be deposited in a fund that will provide funds to the impacted families at the "debit" stage. In essence, the families are forced to deposit money that will enable them to leave the batterers in the future.[253]

In spite of this, there is still the possibility that offenders may refuse to pay even a small amount of fine. However, the noncompliance issue does not constitute a strong objection to the fine proposal. In this scenario, offenders are most likely to be incarcerated, meaning they are punished more severely for domestic violence, which is actually a desired outcome. Additionally, incidental noncompliance does not alter the fact that fines are penologically effective.[254] A fine decreases the criminogenic effect, increases the certainty of punishment, and is associated with lower reconviction rates for fined offenders than for those sentenced to probation and short-term imprisonment.[255]

2.2.2 Victim's wishes

Another concern is that the harsh punishment at the "debit" stage will be in opposition to the victim's wishes.[256] It is, after all, not uncommon for victims to wish to maintain a relationship with the perpetrator.[257] During my interview with the prosecutor in charge of the domestic

---

[253] Some victims are trapped in abusive relationships due to economic dependence. Leaving a relationship is difficult for some victims due to limited access to money, being unbanked, suffering from damaged credit, having large debts, etc. *See* GOODMARK, *supra* note 201, at 41.
[254] Sally T Hillsman, *Fines and Day Fines*, 12 CRIME JUSTICE 49, 53 (1990).
[255] *Id.*
[256] It is believed that the victim's wishes should play a role in determining the outcome of the case. *See* Hartman and Belknap, *supra* note 80, at 357.
[257] Victims' attitudes towards the offender can change as their relationship status changes. *See* Vanessa Bettinson, *Sentencing Domestic Violence Offences and the Victim's Wishes: Wilson v United Kingdom (App. No. 10601/09, 23 October 2012)*, 77 J. CRIM. L. 28 (2013) (described a

violence division of a county, the prosecutor indicated a reluctance to pursue the case against the victim's wishes.[258] A judge may also feel that they should heed the wishes of the victim.[259] Many well-intentioned representatives of the criminal justice system hesitate to prioritize public demand over the private wishes of the battered individual.[260]

It is evident from their hesitation that they still view domestic violence as a largely "private" matter. While they defer to non-stranger victims, they pursue stranger crimes regardless of the victim's wishes.[261] In doing so, they "fail to recognize that domestic violence is a crime against society as well as the victim."[262] It is essential that a prosecutor prosecute based on the

---

case in which the victim retracted her statement after the couple reunited and continued their relationship, but reinstated complaint after ending her relationship with her husband). Domestic violence can also lead to the development of Stockholm's syndrome in some victims. *See* Pat Wallace, *How Can She Still Love Him? Domestic Violence and the Stockholm Syndrome*, 80 COMMUNITY PRACT. 32 (2007).

[258] Hanna, *supra* note 242 (noted that the prosecutor feared that they could be the person 'ruining the victim's life'," and that the victim will accuse the prosecutor of making things worse by pressing forward with the case. Therefore, it was deemed appropriate to act in accordance with the victim's wishes).

[259] *Id.*, at 1875.

[260] *Id.*

[261] *See* Hessick, *supra* note 79, at 385-6:

> [C]riminal justice actors view crime between acquaintances as essentially private matters between the two parties, rather than as public matters. In crimes between acquaintances, officials view the defendant as having harmed, and representing a continuing threat to, an isolated individual. Therefore, the decision to prosecute depends heavily on the victim's interest; only if there is reasonable assurance that the victim wants to press charges, may the prosecutor and the court see a compelling reason to proceed with the case. In stranger-to-stranger cases, on the other hand, the defendant is perceived by officials as having harmed the community at large, and is seen as representing a continuing threat to all members of the community. The interests of the individual victim are subordinate to the interest of the community (as those interests are interpreted by court officials). Therefore, victims are less likely to be consulted about their interests, and defendants are more likely to be prosecuted regardless of whether or not victims have indicated that that is what they wish.

[262] Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but Is It Enough*, U. ILL. L. REV. 533, 567 (1996).

"seriousness of the offense and sufficiency of the evidence" and "look beyond the theoretical dilemmas…and to stop worrying about whether the choice to pursue a case conflicts with their feminist (or nonfeminist) ideals."[263]

The court must, in many instances, determine that the victim is unable to decide what is in her best interests.[264] As an example, in *R. v MacDonald*, the victim made an oral plea for leniency, blaming herself for the violence and expressing a strong desire to continue the relationship with the offender. As the court noted, "the extent of her vulnerability and dependence upon Mr. MacDonald. One wonders if she is able to fairly evaluate the relationship and the dangers that it creates for her."[265] As stated in *R. v. Wise*:

> It is, of course, an unfortunate fact that victims of violent, drunken partners, to their own cost, often seek to forgive their partner and to resume a dangerous relationship. The courts must offer protection even when the potential victims deny its need.[266]

2.2.3 Underreporting

The new scheme may deter victims from reporting. It is possible that they fear that the punishments are too lenient at the "credit" stage and that a fine will not help them escape retaliation. At the "debit" stage, victims may still choose not to report following more repeated offenses in order to avoid harsh punishments and preserve their families.

---

[263] Hanna, *supra* note 242, at 1908.
[264] SENTENCING ADVISORY COUNCIL, *supra* note 189, at 22.
[265] R. v. MacDonald, [2003] NSCA 36.
[266] R. v. Wise [2004] VSCA 88 at 36.

Indeed, most victims oppose prosecution due to their fear of the abuser.[267] Some offenders may have specifically threatened the victims against prosecution, and victims may be concerned that this may provoke the offender to act more violently.[268] A domestic homicide case shared by Wills provides some insight.[269] Donna Houston was murdered by her estranged husband. When he was first arrested for felony spousal assault, Ms. Houston was determined to give their marriage a second chance and insisted on dropping the charges. When the prosecutor refused, Donna did not testify. The case was eventually dismissed. The abuser then attempted to run her off the road, but she did not report it. She did report the abuse when the abuser grabbed their infant daughter. His wealthy family posted bail and the police released him quickly. Later that day, he killed her. The classic interpretation of this case was that the victim should not drop the charges. Wills noted, "many battered women fail to see that criminal intervention can assist in the shared goal of getting their abuser to stop the violence."[270] However, Houston's story illustrates that victims' fear may be connected to a distrust of the justice system: She was not safer cooperating with the system, and she was even murdered when she did report.

By increasing the certainty of the punishment and simplifying related procedures,[271] the "credit stage" helps rebuild the victims' confidence in the system by improving their perception of the system. According to the research, victims' fear was reduced through "fast-track

---

[267] ANDREW R KLEIN, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 39 (2009).
[268] *Id.*
[269] *See* Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMENS LJ 173, 177 (1996).
[270] *Id.*, at 178.
[271] There is an interaction between how procedural standards are handled and the severity of punishments. *See* footnote 238.

scheduling, reducing victim vulnerability pending trial, increased victim contact pending trial, and victim-friendly proceedings that remove, as much as possible, victim involvement to proceed with prosecution."[272]

In addition, based on the lessons learned from the three strikes law, the "debit" stage grants judges the discretion to decide when the offenders cross the threshold based on their criminal history and the actual crime. The mechanical cut-off re-offense number set by legislators may lead to judicial resistance and circumvention. It was revealed by Starr and Rehavi that the dynamics between the pre-trial process and the sentencing process create a balance.[273] Because there is no visible "cut-off" number of times, victims should not be deterred to report after a certain frequency number, and they are reassured by the fund that can support them even if they are economically dependent.

It must be acknowledged that underreporting is a real problem, and could harm the effectiveness of the new scheme. Although the progressively aggravating scheme provides certain tools to address this problem, it is unlikely that the issue will be completely resolved. Even so, it is expected that the new scheme will still be much better than the current scheme, since the underreporting problem associated with the current scheme is likely to be magnified by the fact that most cases result in dismissals. Despite the fact that underreporting may exist, the certainty of punishment is likely to be greatly increased under the new scheme.

---

[272] KLEIN, *supra* note 269, at 40.
[273] Sonja B Starr & M Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE LJ 2 (2013) (showed that loosening mandatory sentencing guidelines did not increase racial disparity, due to the dynamics between pre-sentencing decision-making and final sentencing).

Conclusion

When it comes to the sentencing of domestic violence, two sets of values conflict with each other. Traditional mores emphasize family considerations, while progressive mores emphasize individual rights and victim protection. While traditionalists have criticized domestic violence laws as "atomic bombs to swat flies," progressivists have characterized the laws as "band-aids on bullet wounds." Such juxtaposition illustrates the domestic punishment paradox. My first step is to present a global sample that adopts vastly different sentencing strategies towards domestic violence, and then demonstrate that the dispute cannot be resolved philosophically through an examination of the punishment theories. Next, I turn to the legal practice side of the issue and reveal the discrepancy between a progressive legislature and a traditionally conservative legal community, which result in domestic violence underdeterrence. In recognition of the fact that victim protection and family concerns cannot be reconciled, I proposed an aggravated sentencing scheme which, rather than pursuing the two goals at the same time, prioritized them sequentially. This will enable victims to be better protected with less judicial resistance.

In conclusion, it is worth noting that the effects of the progressively aggravated sentencing scheme rely primarily on the assumption that lowering the severity of punishment can alter the behavior of the legal practitioners and increase the certainty of punishments. If the assumption is not met, the scheme cannot achieve its objective.

CHAPTER TWO: THE EFFECT OF MASS PUBLICATION ON JUDGMENTS

Abstract

The literature on Chinese mass publication's external effects, such as its influence on public confidence, is substantial, but its internal effects, such as its influence on judges' judgments, are rarely investigated. This article utilizes a new and complete dataset of intentional injury cases originating from a Chinese basic court before and after the introduction of the mandatory disclosure requirement of judgments, and examines how judges react to this reform formally and substantively. It finds that mass publication has significantly increased the length of judgments and the consistency of sentences, and that prison sentences have generally been lighter since the reform.

1. Introduction

"It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[1] The idea of open justice is not only a fundamental principle of administration of justice in democracies, but is also increasingly embraced by autocracies. It is not uncommon for authoritarian leaders to reveal information to their public to deter criticism from grassroots sources and from within the ruling coalition (Hollyer, Rosendorff, and Vreeland 2019).

To achieve open justice, it is essential to make judgments open and accessible (Ministry of Justice and HM Courts & Tribunals Service 2021). In terms of making court decisions accessible online, China is a trendsetter among authoritarian countries and is uncommon even among civil law democracies (Liebman et al. 2017). The Chinese judiciary had been experiencing a crisis of public confidence, caused by the policy that prioritized mediation over formal law and judicial proceedings (He 2007; Minzner 2011). Thus, the restoration of public confidence and authority in the Chinese legal and governance system becomes one of the government's main goals (Biddulph, Nesossi, and Trevaskes 2017). In 2013, Zhou Qiang, the

[1] R v Sussex Justices: Ex parte Macarthy, [1924] I KB 256, 259.

then newly appointed president of the Supreme People's Court (hereinafter referred to as "the SPC"), introduced judicial reforms in a number of different areas, including the transparency initiative for the mass publication of judicial decisions (Chen, Liu, and Tang 2021). From 1 January 2014, all courts in China are required to upload their judicial decisions to a centralized website, 'China Judgments Online' (http://wenshu.court.gov.cn/). Over one hundred million cases have been posted online since then.[2] Before 2014, most decided cases were not accessible to the public (Liu 1991; Chen and Li 2020). They "were of the 'for-your-eyes-only' sort, never intended for readers even outside of the authoring institution (Diamant 2000: 527)."

Research performed earlier on the judgments online reform emphasized the evaluation of the practice (Yang, Qin, and He 2019; Ma, Yu, and He 2016), the missingness issue (Liebman et al. 2017), and the principal-agent problem identified herein (Liu et al. 2022; Wang 2021). Furthermore, researchers observed that the reform improved public confidence (Chen and Li 2020) and the centrality of local courts (Chen, Liu, and Tang 2021), but adversely affected the private firms whose judgments were disclosed (Liu et al. 2022). To the author's knowledge, however, no research has been conducted to examine how judicial behavior changes in response to the reform. It is understandable given the limited access to data prior to an open data initiative.

This paper examines the data I gathered from my field study in a basic court covering intentional injury judgments before and after the reform in 2014 in order to determine whether judges' behavior altered as a result of public scrutiny to increase formal and substantive legitimacy. Do judges write longer judgments to facilitate the understanding and acceptance of their decisions in terms of formal legitimacy? What is the impact of the reform on substantive legitimacy in terms of sentencing consistency and severity? Based on linear regression models, my analysis suggests that judges who are subject to public scrutiny write more thoroughly and have more consistency in their sentences, and, sentences for defendants are generally lighter.

My contributions are twofold. Methodologically, I have a full sample obtained from the court's internal system, and therefore the sample is free from selection bias due to intentional missingness. In light of the severe missingness issue identified in previous studies and the

[2] The China Judgments Online website reported that the total number of judgments it archived was 131,319,868 as of April 8, 2022.

difficulty of solving the problem on a technical basis (Liebman et al. 2017; Liu et al. 2022), the sample itself has tremendous value.

Furthermore, it advances the literature on authoritarian transparency by studying the effect on the internal process and evaluating if transparency reforms are mere window dressing from the judges' perspective. This is a novel approach, and is informative to other jurisdictions that have similar initiatives. For example, Vietnam, a state governed by the Communist Party and where political and legal reforms are frequently influenced by Chinese practices, has already done the same. On July 1, 2017, all Vietnamese courts were required to make their judgments available online, through a website managed by the Vietnamese Supreme People's Court (Nguyen 2019). Also, it has been observed that Chinese judges behave similarly to their counterparts in other jurisdictions, such as the United States and France (Liu, Klöhn, and Spamann 2021). In this respect, the results are also indicative of judicial operations in democratic societies.

The remainder of the paper is organized in the following manner. Section 2 introduces the background of judicial transparency reform. Section 3 explains the hypotheses of the paper. The data, methodology and descriptive results are presented in Section 4. Section 5 presents the regression results, and the paper then concludes with a discussion of those results.

2. Background

2.1 The Chinese courts under authoritarianism

In modern authoritarian states, many quasi-democratic institutions are incorporated, including the legislatures (Gandhi 2004; Malesky and Schuler 2010) and courts (Ginsburg and Moustafa 2008; Wang 2015). In parallel with this, an increasing number of authoritarian countries have embraced the concept of open government, which has led to the emergence of scholarship on "authoritarian transparency." Several reasons have been advanced to explain this trend. One is that public scrutiny helps autocrats monitor their officials (Stromseth et al. 2017), and another is that transparency also helps them mitigate threats coming from rivals within the ruling coalition (Hollyer, Rosendorff, and Vreeland 2019).

Besides these two arguments, China also needs more transparency in order to increase public trust. "Consultative authoritarianism," in which public opinion is deemed influential for the leadership, is an important characteristic of the Chinese regime. It has been suggested that the

Chinese regime's survival despite rapid social and economic change is due primarily to this practice. China had a period when litigation was largely compromised for social harmony, which made it easier for powerful enterprises and government departments to intervene in cases via threats or bribes (Biddulph, Nesossi, and Trevaskes 2017). People no longer trusted the local courts to resolve disputes involving land, labor, or the environment, and they traveled to provincial capitals and Beijing to lodge protests (Chen 2012). It was also widely complained that local courts routinely refused to register administrative suits (He 2007). In addition, due to widespread judicial corruption at the local level, judges' credibility has been destroyed (Fu 2016). When public opinion towards the judiciary was turning negative, it was not surprising that when the newly elected central leadership team came to power in 2012, they felt the urgent need to limit opportunities for corruption and restore the public's confidence in the judiciary. An important part of this broad judicial reform is the enhancement of judicial transparency by making judgments open and easily accessible.

Fan and Lee (2019) interpret the efforts to increase judicial transparency as "responsive authoritarianism." In essence, the objective of this approach is to increase the perceived responsiveness of the political system to public opinion without necessarily sacrificing institutional control over decision-making. Under responsive authoritarianism, increasing judicial transparency is not an end in itself. This is primarily a method of preserving the legitimacy of the authoritarian regime, and enhancing the visibility of judicial operation can also be a tool for the central leadership to keep watch.

Besides the needs of the central leadership, courts also have a self-interest in strengthening their long-term authority and status through building legitimacy. Sociological, moral, and legal legitimacy are equally important for authoritarian courts, as they are for democratic courts (Nguyen 2019). However, contrary to democratic courts, judges in authoritarian regimes lack institutional protection, such as life tenure, and are dependent on the government for job security, their livelihood, and the necessary resources to run the court on a day-to-day basis (Nguyen 2019).

Making public the court's judgments is an important strategy for increasing external support, and thereby raising the cost of the regime trying to undermine it (Epstein and Knight 2018). According to Staton, "communication strategies are broadly designed to advance the

transparency of the conflicts constitutional courts resolve and to promote a deep societal belief in the judicial legitimacy, conditions that promote judicial power (Staton 2010: 7)." In this regard, China Judgments Online was seen as a big victory by reformers on the inside, as it has the potential to enhance public trust, combat corruption, and assist courts in resisting external pressure (Liebman et al. 2017).

2.2 The judgments online reform

Before 2012, the Chinese public had no official right to access court judgments. Traditionally, court decisions were made available only to those directly involved in the litigation. It was therefore necessary to establish personal contacts in order to gather even a limited number of court opinions in most cases (Liebman et al. 2017). The 2012 amendment to the Civil Procedure Law introduced Article 156, which outlines the judgments and rulings that have taken legal effect are accessible to the public, unless they involve state secrets, commercial secrets, or personal privacy. This establishes the official right to access court judgments. In practice, however, judges' judgments were not easily accessible to laypeople before the unprecedented disclosure of decisions online in 2014 (Liebman et al. 2017; Chen and Li 2020).

Yet the Chinese courts have worked long and hard to make some judgments public. The SPC began publishing an official gazette in 1985, which contained a few cases (Liu 1991). Although published cases do not constitute a precedent, they serve as guides for lower courts on how to resolve specific legal issues and improve the uniformity and quality of court decisions throughout China. During 2000, the SPC issued Administrative Measures for the Publication of Judgment Documents by the SPC (hereinafter referred to as "the Administrative Measures"), which addressed only the publication requirements for its own judgment documents, but this opinion is not binding on other lower courts. It specified that its daily judgment documents *could* be published at any time on the People's Court Newspaper website and the government website that the court opened. Additionally, it stated that "in the event of violation of these measures by *unauthorized publication (shanzi gongbu)* to the outside and causing extremely negative effects, the liable person(s) shall be investigated in accordance with relevant provisions (emphasis added)." Such a tone reflects the SPC's reluctance to formally publish its judgments at the time.

There continues to be a level of reluctance prior to the implementation of the judgment online reform in late 2013. The SPC, in its 2009 Opinions on Facilitating Access to Judicial

Services, recommended that the people's courts gradually implement a public inquiry system for adjudication documents and litigation files. However, rather than as a requirement, the people's courts *may* make case judgments and information about enforcement available to the public via the Internet. Similarly, the 2010 Provisions on the Publication of Judicial Documents on the Internet by People's Courts stipulated that judicial documents *may* be published via the Internet, except in specified circumstances. Online publication is required only for those judgments rendered by the SPC and higher people's courts that provide guidance to the application of law.

Such reluctance largely disappeared in 2013. With its Provisions for the Publication of Judgments by People's Courts on the Internet, the SPC has made great strides forward in the field of judicial transparency. All effective judicial documents now must be published on the Internet unless they 1) involve state secrets and/or personal privacy, 2) involve minors who have committed crimes, 3) are settled by mediation, or 4) are otherwise unsuitable for publication online. The Provisions took effect on January 1, 2014. This date marked the beginning of China's mass digitalization and publication of judgments. As the SPC president Zhou Qiang stressed:

> people's courts at all levels shall constantly update their concepts on judicial transparency and take it as granted to make disclosure, with exceptions only in a very few cases; and shall make efforts in changing the passive disclosure into active disclosure, internal disclosure to external disclosure, optional disclosure to full disclosure and disclosure in disguised form to substantial disclosure.

During the decade when the SPC explored to increase judicial transparency, some pilot local courts voluntarily disclosed some cases before mandatory disclosure requirements were established (Yang and Chen 2014). Yet, the number of pilot courts was limited, and there was only partial coverage of the disclosed cases.

3. Hypotheses

3.1 Formal legitimacy

As stated in the Administrative Measures, judgments whose reasoning could not be adequately substantiated to support the adjudication doctrine were not suitable for publication. Although the Administrative Measures are no longer in effect, the existence of such a requirement implies that open judgments require a higher degree of formal legitimacy. That is,

the examination of case facts, as well as the arguments provided in the reasoning section, should be able to be accepted by a wider audience.

For the parties involved in the cases, the fundamental function of court judgments is to make decisions. In this process, judges attempt to convince the parties that their arguments are sound. Accordingly, a judgment serves both as a declaratory and a justifying instrument (Cheng, Sin, and Zheng 2008). However, the reasoning portion of Chinese court judgments has been usually brief. Legal reasoning contributed 68% of word counts to American judgments, while the percentage was only 23% in Chinese judgments (Cheng, Sin, and Zheng 2008). In spite of the fact that the study was conducted in 2008, the results were based on open court judgments, since several courts had already published some judgments prior to 2014.

As noted by Wang (2019), the brevity is due to a number of factors. The primary concern is that it may be better to write fewer words rather than more, since more words are more likely to cause errors. Additionally, when the only audience of judgments is the parties involved in the case, judgment is more important than reasoning. To ensure that the judgments are acceptable to the parties, it is best to define them narrowly and shallowly. Furthermore, communication in China is seen as more important than reasoning. According to Judge Hu Yunteng of the SPC: "In comparison with the reasoning in the judgment document, reasoning in the adjudication process has richer and more profound value implications, and has a greater importance in realizing the judgment outcome. It is ineffective and inefficient if a judge does not articulate what he should say and what he can say in terms of reasoning in court, and only expresses his reasoning in writing. The high-quality and efficient work of Judge Li Hongxing is achieved by maximizing pre-trial and trial reasoning, resolving all conflicts between the parties at that stage, which allowed him to write the judgment or mediation easily, and spare the time and expense associated with writing judgment documents (Wang 2019: 84)."

It must be noted that mass publications and digitalization significantly alter the composition of potential audiences of judgments. Not only will parties closely review the judgments, but also the public as well. It is possible for the public who has not been involved in the communication process, in addition to knowing case outcomes, to ask: Why and how did the courts reach their conclusions? Was that the right decision? This change introduced new standards for judgments in regards to specificity. As one judge said, "The uptake of law

transparency movement does require me to reveal more details of courtroom trials. My colleagues and I start to provide more factual narratives in opinions, and some of the narratives may read much like entertaining stories (Han, Bhatia, and Ge 2018: 476).” With an expanding audience, there will be a greater need for detail (Ginsburg 2010).

The work of judges also faces evaluation. The judgment is the culmination of the judicial work performed by a judge. The judicial opinion communicates the judges’ authoritative views on what the law is and how it should be interpreted based on the circumstances (Han, Bhatia, and Ge 2018). Non-publication implies that the judgment document will not be widely judged. Despite the stylized nature of the judgment document, it will not cause fundamental doubt, and the judge does not have to make a profound reasoning for her decision. The publication of criminal judgments, however, alters the playing field. It is likely to lead judicial personnel to write judgments with increased caution. Without proper precautions, the judge’s “legal qualification,” “value orientation,” and even his “literacy level” may become a source of public ridicule (Sun 2014).

With that in mind, it is possible that judges may still omit certain facts or reasoning that would make a judgment less evidently correct. Such a tendency, however, existed before publication requirements, as Wang (2019) demonstrated. Judges are more likely to include more details and argue more thoroughly in the reasoning section of judgments than before 2014 in order to make the judgments more formally acceptable, resulting in a substantial increase in the length of judgments. My first hypothesis, therefore, is that *the word count of judgments would have been significantly higher following the mass publication of case judgements*.

3.2 Substantive legitimacy

I am primarily concerned with two factors that determines the substantive legitimacy of the criminal judgments: the consistency of the sentences and their severity. Indeed, during China’s first public release of court judgments, dating back to the 1980s, its main objective was to achieve uniformity (*tongyi*) in sentencing standards for significant and complex criminal cases, and to provide models for determining criminality and sentencing standards in newly emerging criminal cases (Liu 1991).

A commitment to consistency in sentencing has long been a goal of the judiciary. To a large extent, this is in line with the political desire to centralize oversight and control over the

courts (Stern et al. 2020). Critics contend that enforcing consistent adjudication in a mechanical manner could limit judicial discretion, "the essence of justice" (Feng and Hu, 2018). However, in the heart of the matter, standardized adjudications and consistency in sentences are foundational for building a fair and impartial judicial system. They are also essential for improving predictability (Feng and Hu 2018; Qian 2018). As long as it is within a certain range, increasing consistency is desirable.

By mass publishing similar cases, consistency in sentences may be achieved through the use of similar case searches. Although past Chinese cases cannot be considered precedents, "when available, prior cases will inevitably be used as authoritative precedents, official denials notwithstanding (Liu, Klöhn, and Spamann 2021: 95)." According to researchers, prior cases had a significant impact on Chinese judges. Even though judges seldom cited previous cases in their judgments, they actually spent more time reading prior cases than statutes, and they read cases before referencing statutes (Liu, Klöhn, and Spamann 2021: 95). By digitizing and publishing cases in large numbers, it is possible for judges to aggregate and analyze similar cases. Such an analysis can influence judges during the sentencing process of pending cases and for the preparation of judgments. Indeed, the Supreme People's Court issued its Guiding Opinions on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation) in 2020, which obliged judges to search for cases similar to theirs in case of major, difficult cases (Cao 2021).

While a formal search for similar cases has not been conducted, a random review of one or two similar cases may also affect a judge's decision because of the "anchoring effect" (Stern et al. 2020). Judges may read a sentence in a similar case as a numerical anchor. Considering that judges in China are typically under time constraints and unwilling to take responsibility for decisions that deviate from the norm, such an effect would be even more pronounced (Stern et al. 2020). Accordingly, my second hypothesis is that *the judgments online reform increased the consistency of sentences.*

Nevertheless, it is not yet clear how judges will respond to the increased judicial transparency in terms of sentence severity. Being watched may lead to harsher punishments from one perspective. It is likely that judges will refrain from following the world's trend of reducing punishments in order to avoid being seen as special (Zhao and Jin 2012). After all, the nail that

sticks up the most gets hammered down. Furthermore, they have an incentive to please penal populism in order to gain public support.

In spite of this, judges may impose lighter punishments as lawyers and defendants tend to be better prepared because of the public judgments. It helps to build a knowledge base that benefits the entire legal community when judgments are shared (Ramos Maqueda and Chen 2021). It is possible for attorneys to learn how to defend more effectively, while judges are encouraged to treat defense opinions more seriously as a result of public scrutiny. In the meantime, defendants may learn law from public judgements, become less afraid of the court, and know how to better protect themselves. As the interviewee of Chen and Li (2020: 52) said:

> This [development] is very good. The first point is that it increases public confidence. Courts serve ordinary citizens and, being open, can be inspected by them. The second aspect is that everyone must learn. Openness is a very good mode of passing down knowledge. We must know the law, obey the law, and learn the law. Only then can the law protect us.

The improvement of consistency may also result in a change in the severity of punishment. The sentences of many crimes are likely to be right-skewed. When sentences are more consistent, skewness may be reduced (a shorter tail), and the severity of the sentences is likely to decrease. Therefore, my third hypothesis is that *the greater judicial transparency helps mitigate punishments.*

4. Data, Methodology, and Descriptive Results

4.1 Data and methodology

As part of my field study in China, I was able to access a sample of full intentional injury judgments that had been rendered between 2012 and 2017. The court is located in a well-developed city in Southern China, and it generally has a large caseload. This sample consists of 826 cases. Since this court is not one of the pilot courts that voluntarily disclosed their judgments before 2014, my sample covers the time before 2014 when judges were free from public scrutiny and the period after 2014 when they begin to be closely scrutinized. A dataset of this nature is of great value, since it also contains all non-disclosed judgments and thus free from the selection bias due to intentional missingness. There are certain categories of cases that remain confidential before and after 2014. The majority of them in the intentional injury context relate to juvenile

cases. There are 27 of them (3.3%). Also included in the sample are three non-disclosed adult judgments (0.4%) that dealt with personal privacy, decided by a closed trial, and thus fell into the category of "inappropriate" to be disclosed. These cases are under the "exempt circumstances" in which judgments should not be made public, therefore, in theory they can serve as a control group, which may enable me to conduct a Difference-in-Difference analysis. Unfortunately, the common trend assumption was violated, so I will focus on the remaining cases in my main-text analysis and provide the Difference-in-Difference results in the appendix. There were also 15 adult cases (1.8%) that were not disclosed for reasons that I am not certain of. I consider these cases a compliance issue since their case characteristics are similar to the disclosed cases. Therefore, they are still included in the main-text analysis.

To gauge the consistency of sentencing, I compute the rolling difference between the sentence of one case and the average sentence of the 90 cases (including itself) that followed it. All observations without a 90-case window (*i.e.,* the last 90 cases in 2013 and 2017) are excluded from the regression. To determine the severity of punishments, I have also converted acquittals into a zero-month punishment and multiplied the months of limited incarceration (*juyi*) by 0.75 to put them on an equal footing with fixed-term imprisonment.[3]

I utilized multivariate linear regressions with the following specifications:

1) the length of judgments

$$Log(Wordcount_i) = \alpha + \beta Public_i + \gamma Control_i + \varepsilon_i$$

2) the consistency of punishments

$$Log(Difference_i) = \alpha + \beta Public_i + \gamma Control_i + \varepsilon_i$$

3) the severity of punishments

$$Log(Month_i) = \alpha + \beta Public_i + \gamma Control_i + \varepsilon_i$$

4.2 Descriptive data

[3] Limited incarceration (*juyi*) is less severe than fixed-term imprisonment. In contrast with those sentenced to a fixed-term prison sentence, those sentenced to limited incarceration will not be sent to prison but to a detention center, and they will be permitted to return home on a monthly basis. If they reoffend, they will not be considered recidivists (*leifan*). Due to all of this, it is appropriate to multiply *juyi* by 0.75 to put it on the same scale as a fixed-term prison sentence.

Since one case may have multiple defendants, I code one defendant as a separate observation. The data includes 792 observations that contain essential information. A half of them (52.1%) do not have an attorney and have to defend themselves. Most of defendants are male (96.5%), non-local (91.9%), and have an educational background between elementary school and high school (94.8%). Most defendants (89.1%) are first-time offenders. Following are the figures showing the change in trend before and after the date of the mandatory publication requirement. In both figures, the Y axes have been rescaled logarithmically.

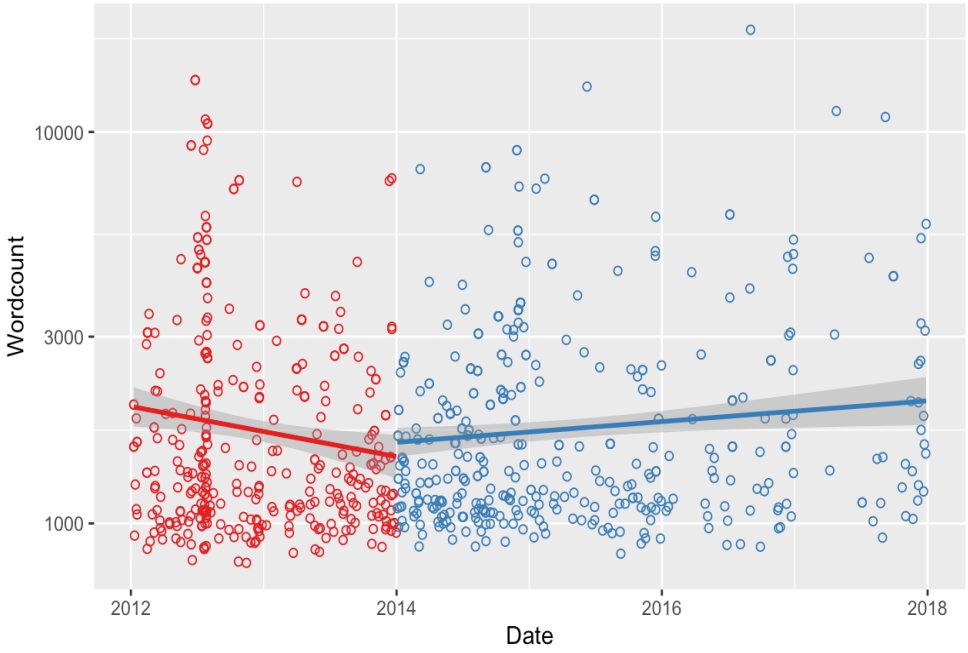

Figure 2 The trend of word counts before and after Jan 01, 2014

Figure 2 illustrates the change in trend following the implementation of the mass publication requirement. Prior to January 1, 2014, the length of judgments was decreasing, whereas after this date the length of judgments tend to increase. The majority of Chinese judgments are under 3000 words long, confirming the impression that Chinese judgments are typically short and brief.

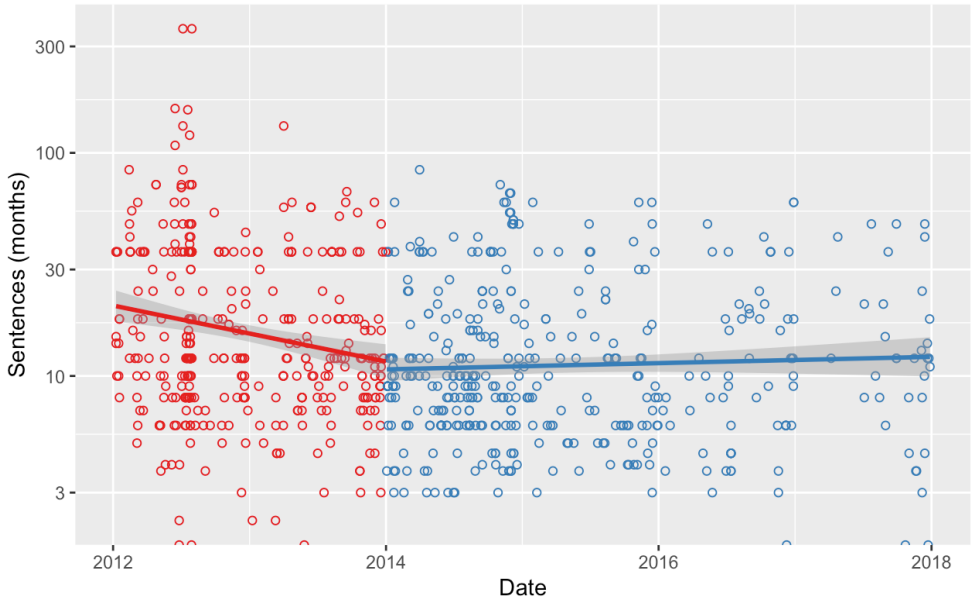

Figure 3 The trend of sentences before and after Jan 01, 2014

A comparison of the trend of sentences between and after 2014 can be seen in Figure 3. In the past, it has been observed that punishments have become more lenient over time. This trend ceased following the mass publication reform. Punishments tend to be more consistent over time after 2014. Based on this figure, it appears that judges might be more lenient in the short term following the publication requirement, but that dedication to consistency in the long run could make judges more harsh when consistency itself becomes the obstacle to imposing a relatively lenient punishment.

Additionally, the mean of sentences before and after 2014 is 23.8 months and 15.5 months, respectively. On average, sentences after the mass publication are shorter.

5. Regression Results

5.1 The word count

Table 1 Regression results on the word counts

#	Covariates	Log (wordcount)	Adjusted R^2
M1.	public	0.01	0.00
		(0.04)	
M2.	M1. + lawyer + gender + local + education	0.01	0.08
		(0.04)	
M3.	M2. + minor injuries + severe injuries + deaths	0.10**	0.22
		(0.04)	
M4.	M3. + criminal history	0.10*	0.22
		(0.04)	
M5.	M4. + confess	0.15***	0.25
		(0.04)	
M6.	M5. + compensation	0.18***	0.32
		(0.04)	
M7.	M6. + tool of crimes + malicious aforethought	0.18***	0.32
		(0.04)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the length of judgments. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

The dummy variable public is computed to indicate whether the judgments were made prior to or after January 1, 2014. This variable indicates whether judges were subject to public scrutiny when they wrote the judgment. After controlling for the legal variables, this dummy consistently shows a very significant positive relationship with the length of judgments. The results are consistent with the first hypothesis, that judges tend to increase the specificity of their judgments and write longer in order to improve the formal legitimacy, thus making them more acceptable to the wider public.

5.2 The consistency of sentences

Table 2 Regression results on the rolling differences/consistency of sentences

#	Covariates	Log (difference)	Adjusted R^2
M1.	public	-0.42***	0.07
		(0.06)	
M2.	M1. + lawyer + gender + local + education	-0.41***	0.08
		(0.06)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.29***	0.22
		(0.06)	
M4.	M3. + criminal history	-0.29***	0.22
		(0.06)	
M5.	M4. + confess	-0.30***	0.22
		(0.06)	
M6.	M5. + compensation	-0.32***	0.23
		(0.06)	

Table 2 Regression results on the rolling differences/consistency of sentences (continued)

M7.	M6. + tool of crimes + malicious aforethought	-0.31***	0.23
		(0.06)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the consistency of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

To measure the consistency of sentences, I have used the absolute rolling difference between the sentence one defendant received and the average sentence over a 90-case window. Based on Table 2, mass publication is significantly negatively associated with the differences, indicating that the consistency of sentences is significantly improved when the judges are widely watched. This supports my second hypothesis.

5.3 The severity of sentences

There is a legitimate concern that sentences have a general tendency to become lighter over time. Accordingly, a more lenient punishment may be due to the time trend rather than the requirement for mass publication. For this reason, I examine the effect of the time trend first.

Table 3 Regression results on the severity of sentences, the time trend included

#	Covariates	Trend	Trend×Public	Adjusted R^2
M1.	Time trend + public + time trend×public	-0.31***	0.33**	0.06
		(0.08)	(0.11)	
M2.	M1. + lawyer + gender + local + education	-0.27***	0.29**	0.08

Table 3 Regression results on the severity of sentences, the time trend included (continued)

		(0.08)	(0.11)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.08	0.09	0.53
		(0.05)	(0.08)	
M4.	M3. + criminal history	-0.08	0.09	0.53
		(0.05)	(0.08)	
M5.	M4. + confess	-0.07	0.07	0.54
		(0.04)	(0.08)	
M6.	M5. + compensation	-0.02	-0.09	0.60
		(0.05)	(0.08)	
M7.	M6. + tool of crimes + malicious aforethought	-0.02	-0.10	0.61
		(0.05)	(0.08)	

Note: The table displays coefficient estimates from regressions testing the impact of the time trend on sentencing across seven different covariate sets on the severity of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Even if a time trend is detected in Table 3, after the entire set of controls has been accounted for in the regressions, the effects of the time trend and the trend that interacts with the treatment period (that is, after the mandatory publication date) are small in magnitude and do not appear statistically significant.

Table 4 Regression results on the severity of sentences

#	Covariates	Log (sentence)	Adjusted R^2
M1.	public	-0.32***	0.04
		(0.06)	
M2.	M1. + lawyer + gender + local + education	-0.33***	0.07
		(0.06)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.15***	0.53
		(0.04)	
M4.	M3. + criminal history	-0.15***	0.53
		(0.04)	
M5.	M4. + confess	-0.12**	0.54
		(0.04)	
M6.	M5. + compensation	-0.08*	0.60
		(0.04)	
M7.	M6. + tool of crimes + malicious aforethought	-0.10*	0.61
		(0.04)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the severity of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

As can be seen from Table 4, all models indicate a significant negative relationship between mass publication and sentence severity. My third hypothesis is supported by the fact

that defendants typically receive a more lenient treatment when judgments are made publicly accessible.

Generally, the results are stable when comparing data from the same period before and after 2014 (2012-2014 versus 2014-2016). Details of the results are presented in the appendix.

6. Discussion and Conclusion

This research is among the pioneering studies that examine how authoritarian judges behave under greater judicial transparency. It appears that a transparent judiciary can achieve greater benefits in general. Researchers have always wondered whether authoritarian regimes are genuinely embracing transparency initiatives to improve public confidence and improve governance, or if they are simply using transparency initiatives as window dressing (Wang 2021; Liu et al. 2022). This paper presents evidence that increased judicial transparency through mass digitalization and publication, whether or not the intention is genuine, led to changes in judges' behavior. With the potential audience of judgments extending no longer just to the parties to the litigation, but also to the general public, judgments have become a valuable instrument for analyzing and evaluating a judge's performance. As their names are attached to the judgments, it is not surprising that judges feel a personal obligation to make and write judgments that are likely to be approved by the public. Therefore, judges may be more motivated to write longer and more detailed judgments, to impose more consistent punishments, and to treat defense opinions with greater reverence. My analysis indicates that this occurs regardless of whether the mass publication reform was implemented with the intention of doing so.

It is possible that there are alternative explanations for the results. There is a concern that these results should not be attributed solely to the mass publication reform but to other initiatives that occurred in late 2013 and early 2014. Nevertheless, these concerns are less relevant to the results regarding the length of judgment documents and the consistency of sentences. It was revealed in the white paper on judicial reform in China that major judicial reforms occurred during 2015 and after (Supreme People's Court 2019). The Guiding Opinions on Strengthening and Standardizing the Analysis and Reasoning in Adjudicative Instruments was issued on June 01, 2018, while the Guiding Opinions on Unifying the Application of Laws to Strengthen the Retrieval of Similar Cases (for Trial Implementation) was issued on July 15, 2020. The data I have pertains only to cases that were decided between 2012 and 2017. Thus, intentional reforms

from the institution to improve the quality of judgments and the consistency of sentences are bound to take place much later than the time period of my analysis cares about. Moreover, the clear change in trend on January 1, 2014 further supports that something external is altering the behavior of judges.

The concern of alternative explanation, however, is more relevant in terms of the severity of punishments. This is due to the fact that there is already a tendency within the judiciary to impose less severe punishments over time, in accordance with the trend of more humane punishments in general (Zhao and Jin 2012). To address this concern, I conducted a linear trend regression to examine the effect of the time trend, but did not find a significant effect when legal attributes were included as controls. Therefore, the results of the lighter punishments associated with the mass publication are fairly robust.

In the meanwhile, my data provides an accurate depiction of the disclosure rate of the basic court. In 494 cases involving intentional injury decided after 2014, 24 cases (4.9%) were not disclosed. This means that the disclosure rate is 95%, which is quite high. On the other hand, 15 of these cases are not disclosed for reasons that I could not determine based solely on the judgments, which may suggest a non-compliance issue. It is possible that severe non-compliance issues of other courts will adversely affect the effect of mass publication on judicial behavior to enhance both formal legitimacy and substantive legitimacy.

Additionally, I would like to acknowledge that this study has some limitations. It should be noted that this sample is from a basic court located in a developed city in China, and therefore, the results are more representative of similar courts. Future research should expand the sample court coverage in order to make the results more generalizable. Meanwhile, even though the results are fairly stable across models, I have not been able to employ more demanding methods for causal inference due to the limitations of the data itself. I have included the results of the Difference-in-Difference analysis in the appendix for reference, but those results should be treated with caution because the common trends assumption is violated.

Technology has been embraced by China's judiciary as a significant tool for delivering justice, a trend that has been pioneered by this country (Stern et al. 2020; Papagianneas 2021). It is worth noting that improvements made in the present may become obstacles in the future. For example, consistency is beneficial when sentences are arbitrary, but it becomes a hindrance when

the uniformity becomes excessive and sentences need to be drafted to reflect the defendant's special circumstances. "Too much water drowned the miller." Therefore, it is imperative that the Chinese judicial reform be closely monitored to ensure it is done at an appropriate level.

Appendix

Below are the figures showing the change in trend using the same length before and after the mandatory publication requirement in 2014 (2012-2016). Results are similar to those reported in the main text.

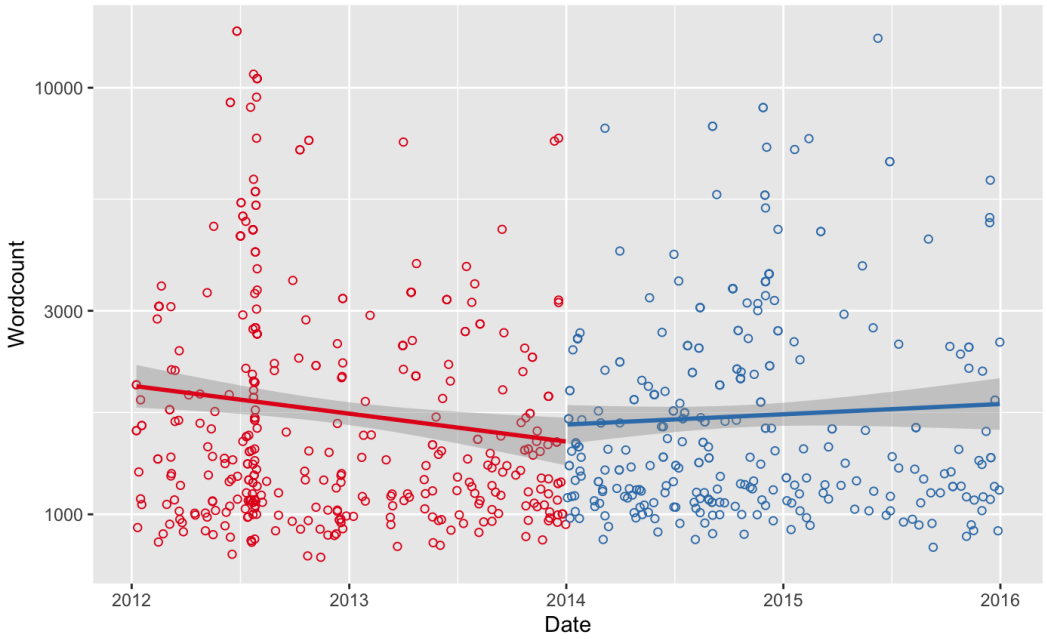

Figure 4 The trend of word counts before and after Jan 01, 2014, 2012-2016

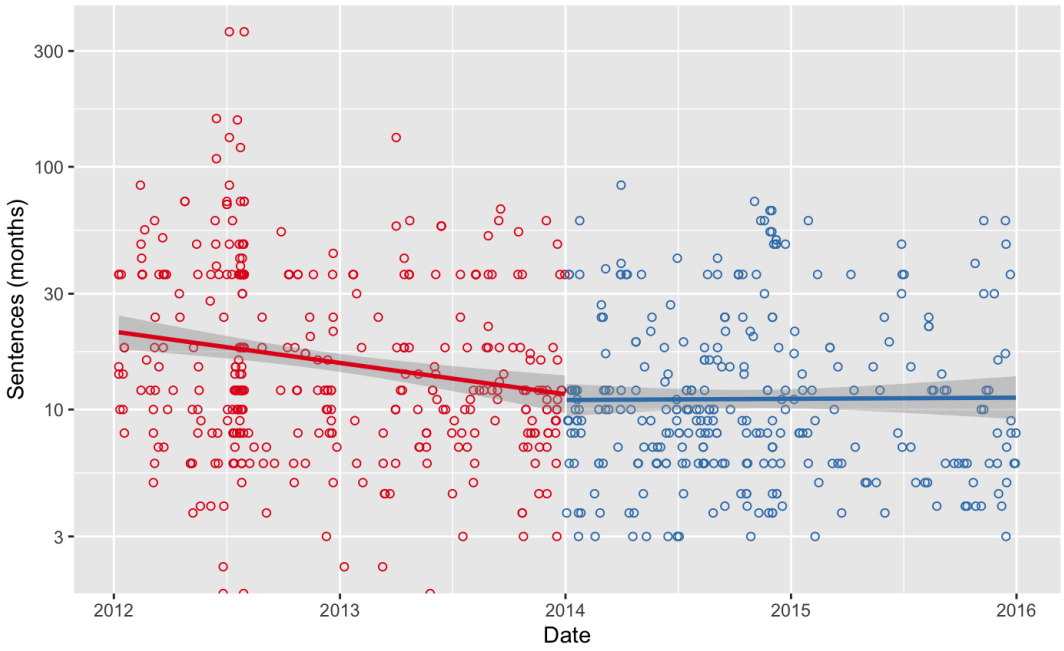

Figure 5 The trend of sentences before and after Jan 01, 2014, 2012-2016

Table 5 Regression results on the word counts, 2012-2016

#	Covariates	Log (wordcount)	Adjusted R^2
M1.	public	-0.02	0.00
		(0.04)	
M2.	M1. + lawyer + gender + local + education	-0.01	0.09
		(0.04)	
M3.	M2. + minor injuries + severe injuries + deaths	0.07	0.22
		(0.04)	
M4.	M3. + criminal history	0.07	0.23
		(0.04)	

Table 5 Regression results on the word counts, 2012-2016 (continued)

M5.	M4. + confess	0.12**	0.25
		(0.04)	
M6.	M5. + compensation	0.16***	0.31
		(0.04)	
M7.	M6. + tool of crimes + malicious aforethought	0.16***	0.31
		(0.04)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the length of judgments. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

With the exception of going public not being statistically significant in M3 and M4, results reported in Table 5 are generally similar to those reported in the main text.

Table 6 Regression results on the consistency of sentences, 2012-2016

#	Covariates	Log (difference)	Adjusted R^2
M1.	public	-0.42***	0.07
		(0.06)	
M2.	M1. + lawyer + gender + local + education	-0.42***	0.08
		(0.06)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.29***	0.22

Table 6 Regression results on the consistency of sentences, 2012-2016 (continued)

		(0.06)	
M4.	M3. + criminal history	-0.29***	0.22
		(0.06)	
M5.	M4. + confess	-0.30***	0.22
		(0.06)	
M6.	M5. + compensation	-0.33***	0.23
		(0.06)	
M7.	M6. + tool of crimes + malicious aforethought	-0.31***	0.23
		(0.06)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the consistency of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Results reported in Table 6 are generally similar to those reported in the main text.

Table 7 Regression results on the severity of sentences, the time trend included, 2012-2016

#	Covariates	Trend	Trend×Public	Adjusted R^2
M1.	Time trend + public + time trend×public	-0.27***	0.33**	0.06
		(0.07)	(0.11)	

Table 7 Regression results on the severity of sentences, the time trend included, 2012-2016 (continued)

M2.	M1. + lawyer + gender + local + education	-0.22***	0.27**	0.09
		(0.07)	(0.11)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.05	0.13	0.55
		(0.05)	(0.08)	
M4.	M3. + criminal history	-0.05	0.14	0.56
		(0.05)	(0.08)	
M5.	M4. + confess	-0.05	0.13	0.56
		(0.05)	(0.08)	
M6.	M5. + compensation	0.02	0.02	0.61
		(0.05)	(0.08)	
M7.	M6. + tool of crimes + malicious aforethought	0.02	-0.00	0.61
		(0.05)	(0.08)	

Note: The table displays coefficient estimates from regressions testing the impact of the time trend on sentencing across seven different covariate sets on the severity of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Results reported in Table 7 are generally similar to those reported in the main text.

Table 8 Regression results on the severity of sentences, 2012-2016

#	Covariates	Log (sentence)	Adjusted R^2
M1.	public	-0.31***	0.04
		(0.06)	
M2.	M1. + lawyer + gender + local + education	-0.32***	0.07
		(0.06)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.13***	0.53
		(0.04)	
M4.	M3. + criminal history	-0.14***	0.53
		(0.04)	
M5.	M4. + confess	-0.11**	0.54
		(0.04)	
M6.	M5. + compensation	-0.05	0.60
		(0.04)	
M7.	M6. + tool of crimes + malicious aforethought	-0.07	0.61
		(0.04)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the severity of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

With the exception of going public not being statistically significant in M6 and M7, results reported in Table 8 are generally similar to those reported in the main text.

The following figures demonstrate the trend change for "the control group" before and after the mandatory publication requirement in 2014. The control group includes 27 juvenile cases as well as three adult cases involving privacy that are exempt from mandatory publication. It should be noted that there are 15 non-disclosed cases which I view as a result of non-compliance since their characteristics resemble those of published judgments, and thus, they are not included in the control group, but included in the main-text analysis. The Y axes in both figures are rescaled logarithmically.

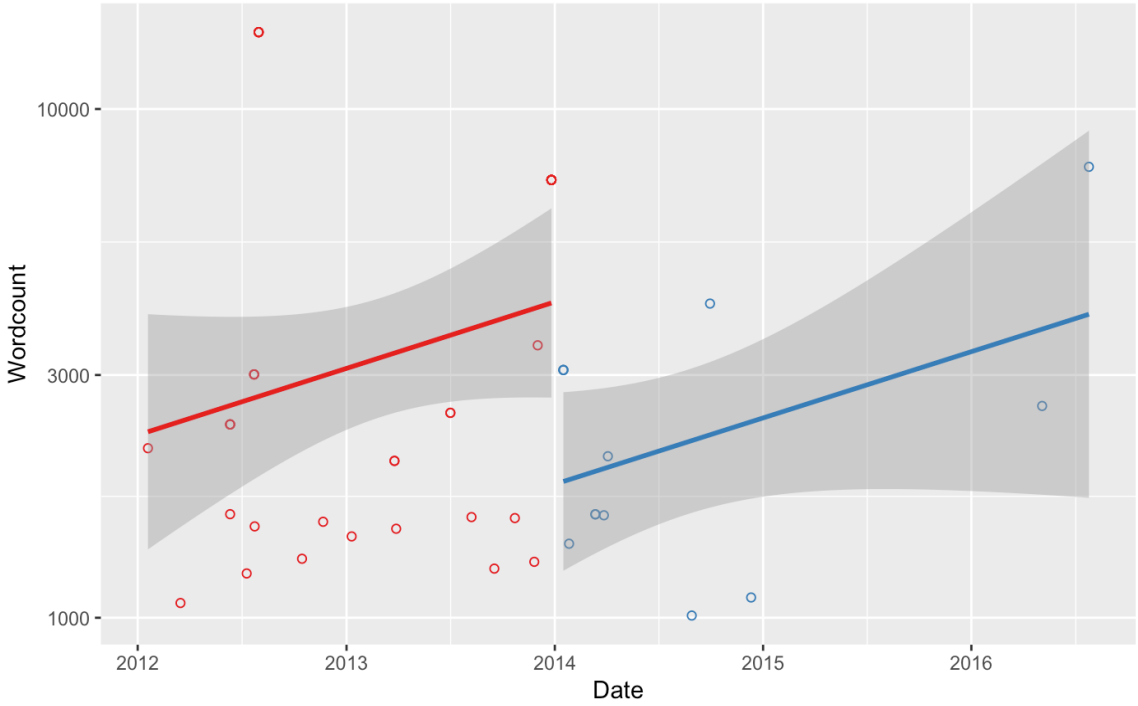

Figure 6 The trend of word counts before and after Jan 01, 2014, "the control group"

Figure 7 The trend of sentences before and after Jan 01, 2014, "the control group"

Below are the results of the "Difference-in-Difference" analysis. It shows that mass publication significantly increased the length of the judgments, but it significantly decreased the consistency of punishments, and no significant relationship was detected for the severity of punishments. Nevertheless, the results cannot be considered reliable due to the violation of the common trend assumption and the limited number of observations in "the control group".

Table 9 Regression results on the word counts, DiD

#	Covariates	Log (wordcount)	Adjusted R^2
M1.	DiD indicator	0.39	0.00
		(0.21)	
M2.	M1. + lawyer + gender + local + education	0.33	0.08
		(0.20)	

Table 9 Regression results on the word counts, DiD (continued)

M3.	M2. + minor injuries + severe injuries + deaths	0.42*	0.22
		(0.21)	
M4.	M3. + criminal history	0.41*	0.22
		(0.21)	
M5.	M4. + confess	0.46*	0.25
		(0.21)	
M6.	M5. + compensation	0.51*	0.32
		(0.21)	
M7.	M6. + tool of crimes + malicious aforethought	0.51*	0.32
		(0.21)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the length of judgments. Robust standard errors shown in parentheses. Standard errors are heteroskedasticity robust. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Table 10 Regression results on the consistency of sentences, DiD

#	Covariates	Log (difference)	Adjusted R^2
M1.	DiD indicator	0.76***	0.10
		(0.22)	

Table 10 Regression results on the consistency of sentences (continued)

M2.	M1. + lawyer +gender + local + education	0.81***	0.11
		(0.22)	
M3.	M2. + minor injuries + severe injuries + deaths	0.93***	0.21
		(0.22)	
M4.	M3. + criminal history	0.93***	0.21
		(0.22)	
M5.	M4. + confess	0.91***	0.22
		(0.22)	
M6.	M5. + compensation	0.87***	0.23
		(0.23)	
M7.	M6. + tool of crimes + malicious aforethought	0.87***	0.23
		(0.22)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the consistency of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Table 11 Regression results on the severity of sentences, DiD

#	Covariates	Log (length)	Adjusted R^2
M1.	DiD indicator	-0.46**	0.04

Table 11 Regression results on the severity of sentences, DiD (continued)

		(0.18)	
M2.	M1. + lawyer + gender + local + education	-0.52***	0.07
		(0.18)	
M3.	M2. + minor injuries + severe injuries + deaths	-0.27	0.53
		(0.15)	
M4.	M3. + criminal history	-0.27	0.53
		(0.15)	
M5.	M4. + confess	-0.24	0.53
		(0.15)	
M6.	M5. + compensation	-0.18	0.59
		(0.15)	
M7.	M6. + tool of crimes + malicious aforethought	-0.19	0.60
		(0.15)	

Note: The table displays coefficient estimates from regressions testing the impact of mass publication across seven different covariate sets on the severity of sentences. Robust standard errors shown in parentheses. *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Works Cited

Biddulph, Sarah, Elisa Nesossi, and Susan Trevaskes. 2017. "Criminal Justice Reform in the Xi Jinping Era." *China Law and Society Review* 2 (1): 63–128.

Cao, Lei 曹磊. 2021. "Leian Jiansuo dui Caipan Wenshu Xiezuo de Qidai 类案检索对裁判文书写作的期待 [The expectations of similar case search on the writing of adjudication documents]." *Yangzhou Daxue Xuebao (Renwen Shehui Kexue Ban)* 扬州大学学报(人文社会科学版) *[Journal of Yangzhou University (Humanities and Social Sciences Edition)]* 25 (6): 28–36. https://doi.org/10.19411/j.cnki.1007-7030.2021.06.003.

Chen, Benjamin Minhao, and Zhiyu Li. 2020. "How Will Technology Change the Face of Chinese Justice?" *Columbia Journal of Asian Law* 34: 1-58.

Chen, Lei, Zhuang Liu, and Yingmao Tang. 2021. "Judicial Transparency as Judicial Centralization: Mass Publicity of Court Decisions in China." *Journal of Contemporary China*, https://doi.org/10.1080/10670564.2021.2010871

Chen, Xi. 2012. *Social Protest and Contentious Authoritarianism in China*. Cambridge University Press.

Cheng, Le, King-kui Sin, and Ying-Long Zheng. 2008. "Contrastive Analysis of Chinese and American Court Judgments." *Critical Approaches to Discourse Analysis across Disciplines* 2 (1): 49–58.

Diamant, Neil J. 2000. "Conflict and Conflict Resolution in China: Beyond Mediation-Centered Approaches." *Journal of Conflict Resolution* 44 (4): 523–46.

Epstein, Lee, and Jack Knight. 2018. "Efficacious Judging on Apex Courts." In *Comparative Judicial Review*. Edward Elgar Publishing.

Fan, Hua, and Francis Lap Fung Lee. 2019. "Judicial Visibility under Responsive Authoritarianism: A Study of the Live Broadcasting of Court Trials in China." *Media, Culture & Society* 41 (8): 1088–1106.

Feng, Jiao 冯姣, and Ming Hu 胡铭. 2018. "Zhihui Sifa: Shixian Sifa Gongzheng de Xinlujing Jiqi Juxian 智慧司法: 实现司法公正的新路径及其局限 [Smart Justice: A New Approach to Realising Judicial Justice and Its Limitations]." *Zhejiang Shehui Kexue* 浙江社会科学 *[Zhejiang Social Sciences]* 6: 67-75.

Fu, Hualing. 2016. “Building Judicial Integrity in China.” *Hastings International and Comparative Law Review* 39: 167.

Gandhi, Jennifer. 2004. *Political Institutions under Dictatorship*. New York University.

Ginsburg, Tom, and Tamir Moustafa. 2008. *Rule by Law: The Politics of Courts in Authoritarian Regimes*. Cambridge University Press.

Ginsburg, Tom. 2010. “Constitutional Specificity, Unwritten Understandings and Constitutional Agreement.” In *Constitutional Topography: Values And Constitutions, A. Sajo and R. Uitz, Eds.* Eleven International Publishing.

Han, Zhengrui, Vijay K Bhatia, and Yunfeng Ge. 2018. “The Structural Format and Rhetorical Variation of Writing Chinese Judicial Opinions: A Genre Analytical Approach.” *Pragmatics* 28 (4): 463–88.

He, Xin. 2007. “Why Did They Not Take on the Disputes? Law, Power and Politics in the Decision-Making of Chinese Courts.” *International Journal of Law in Context* 3 (3): 203–25.

Hollyer, James R, B Peter Rosendorff, and James Raymond Vreeland. 2019. “Why Do Autocrats Disclose? Economic Transparency and Inter-Elite Politics in the Shadow of Mass Unrest.” *Journal of Conflict Resolution* 63 (6): 1488–1516.

Liebman, Benjamin L., Margaret Roberts, Rachel E. Stern, and Alice Z. Wang. 2017. “Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law.” *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2985861.

Liu, John Zhuang, Lars Klöhn, and Holger Spamann. 2021. “Precedents and Chinese Judges: An Experiment.” *The American Journal of Comparative Law* 69 (1): 93–135.

Liu, Nanping. 1991. “Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court.” *Journal of Chinese Law* 5: 107-140.

Liu, Zhuang, TJ Wong, Yang Yi, and Tianyu Zhang. 2022. “Authoritarian Transparency: China’s Missing Cases in Court Disclosure.” *Journal of Comparative Economics* 50 (1): 221–39.

Ma, Chao 马超, Xiaohong Yu 于晓虹, and Haibo He 何海波. 2016. “Da Shuju Fenxi: Zhongguo Sifa Caipan Wenshu Shangwang Gongkai Baogao 大数据分析:中国司法裁判文书上网公开报告 [Big Data Analysis: China’s Judicial Judgment Documents Online Public Report].” *Zhongguo Falv Pinglun* 中国法律评论 *[China Law Review]* 4: 195–246.

Malesky, Edmund, and Paul Schuler. 2010. "Nodding or Needling: Analyzing Delegate Responsiveness in an Authoritarian Parliament." *American Political Science Review* 104 (3): 482–502.

Ministry of Justice and HM Courts & Tribunals Service. 2021. "Boost for Open Justice as Court Judgments Get New Home." GOV.UK. June 16, 2021. https://www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home.

Minzner, Carl F. 2011. "China's Turn against Law." *The American Journal of Comparative Law* 59 (4): 935–84.

Nguyen, Trang Mae. 2019. "In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts." *Harvard Human Rights Journal* 32(1): 147-88.

Papagianneas, Straton. 2021. "Towards Smarter and Fairer Justice? A Review of the Chinese Scholarship on Building Smart Courts and Automating Justice." *Journal of Current Chinese Affairs*, https://doi.org/10.1177/18681026211021412.

Qian, Dajun 钱大军. 2018. "Sifa Rengong Zhineng de Zhongguo Jincheng: Gongneng Tidai Yu Jiegou Qianghua 司法人工智能的中国进程: 功能替代与结构强化 [China's Process of Judi- Cial AI: Function Replacement and Structural Enhancement]." *Faxue Pinglun* 法学评论 *[Legal Review]* 36 (5): 138–52.

Ramos Maqueda, Manuel, and Daniel L. Chen. 2021. "The Role of Justice in Development: The Data Revolution." Working Paper. Washington, DC: World Bank. https://doi.org/10.1596/1813-9450-9720.

Staton, Jeffrey K. 2010. *Judicial Power and Strategic Communication in Mexico*. Cambridge University Press.

Stern, Rachel E, Benjamin L Liebman, Margaret E Roberts, and Alice Z Wang. 2020. "Automating Fairness? Artificial Intelligence in the Chinese Courts." *Columbia Journal of Transnational Law* 59: 515–53.

Stromseth, Jonathan R, Edmund J Malesky, Dimitar D Gueorguiev, Lai Hairong, and Carl Brinton. 2017. *China's Governance Puzzle: Enabling Transparency and Participation in a Single-Party State*. Cambridge University Press.

Sun, Wanhuai 孙万怀. 2014. "Gongkai Guran Zhongyao, Shuoli Gengxian Gongzheng: Gongkai Sanda Pingtai Zhong Xingshi Caipan Wenshu Gongkai Zhi Juxian 公开固然重要, 说理更显公正——'公开三大平台' 中刑事裁判文书公开之局限 [The Limits of Public

Disclosure of Criminal Adjudication Documents in the 'Three Public Platforms']." *Xiandai Faxue* 现代法学 *[Modern Law Science]* 36 (2): 42–53.

Supreme People's Court. 2015. "Judicial Transparency of Chinese Courts." 2015. https://english.court.gov.cn/2015-07/20/content_21332354.htm.

Supreme People's Court. 2019. "Zhongguo Fayuan de Sifa Gaige (2013-2018) Baipishu《中国法院的司法改革（2013—2018）》白皮书 White Paper on Judicial Reform of Chinese Courts (2013-2018)." February 27, 2019. https://www.court.gov.cn/zixun-xiangqing-144192.html.

Wang, Yaming 王亚明. 2019. "Caipan Wenshu Zhiliang Guanli de Tansuo yu Biange 裁判文书质量管理的探索与变革 [Exploring and changing the quality management of judgment documents]." *Shidai Faxue* 时代法学 *[Presentday Law Science]* 17 (1): 80–86.

Wang, Yuhua. 2015. *Tying the Autocrat's Hands*. Cambridge University Press.

Wang, Zeyuan. 2021. "Judicial Transparency in China: Principal-Agent Problem and Firm Characteristics." Duke University.

Yang, Jianwen 杨建文 and Dongsheng Chen 陈东升. 2014. "Renmin Fayuan Wangshang Gongbu Caipan Wenshu Guocheng Jiemi (人民法院网上公布裁判文书过程揭秘) [The Unmasking of the Road to Publishing Court Opinions Online by the People's Courts]." January 9, 2014. http://www.chinadaily.com.cn/dfpd/2014zyzfgzhy/2014-01/09/content_17226669.htm.

Yang, Jin Jing 杨金晶, Hui Qin 覃慧, and Haibo He 何海波. 2019. "Caipan Wenshu Shangwang Gongkai de Zhongguo Shijian: Jinzhan, Wenti yu Wanshan 裁判文书上网公开的中国实践——进展、问题与完善 [China's Practice of Online Disclosure of Judgment Documents - Progress, Problems and Improvements]." *Zhongguo Falv Pinglun* 中国法律评论 *[China Law Review]* 6: 125–47.

Zhao, Bingzhi 赵秉志, and Yixiang Jin 金翼翔. 2012. "Lun Xingfa Qinghuanhua de Shijie Beijing Yu Zhongguo Shijian 论刑罚轻缓化的世界背景与中国实践 [On the World Context and Chinese Practice of Penal Mitigation]." *Falv Shiyong* 法律适用 *[Journal of Law Application]*, no. 6: 7–14.

CHAPTER THREE: THE IMPACT OF TYPES OF COUNSEL UNDER AUTHORITARIAN REGIMES: A CASE STUDY OF CHINA

Abstract

Lawyers practicing in non-democratic countries encounter a wide variety of challenges, particularly in criminal cases, where they may face violations of their clients' rights and even criminal prosecution themselves. It has been suggested, however, that lawyers with political connections face fewer of these obstacles. Yet, it is unclear whether legal aid lawyers are able to operate significantly more effectively than other lawyers due to their institutional ties to the "iron triangle" (police, public procurators, and judges). I examine the impact of the type of counsel on sentencing in China, using a hand-coded dataset derived from nearly 450 murder cases. I find no evidence that the performance of the two types of attorneys differs. Furthermore, my analysis suggests that types of counsel have not had a major effect upon sentencing.

1. Introduction

The right to counsel, particularly in criminal cases, has been widely recognized throughout the world as a basic human right. According to the Universal Declaration of Human Rights, all persons are entitled to "equal protection of the law." The International Covenant on Civil and Political Rights requires the State to ensure that every individual facing a criminal charge receives legal assistance, and that he or she should be provided with such assistance without payment if they lack the means to pay for it. UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems acknowledge and reinforce that legal aid is essential to a fair, humane and efficient criminal justice system; a foundation for the enjoyment of other rights,

such as the right to a fair trial; and an essential safeguard that assures fundamental fairness and public confidence in the criminal justice process and enables access to justice.

The Chinese government also acknowledges the importance of legal aid in facilitating justice. The state provides free legal aid to those who meet a financial threshold, as well as a number of other groups, such as those who may face life imprisonment or the death penalty and minors if they have not hired a lawyer.[1] Government-funded legal aid centers screen applications for legal assistance and send lawyers, grassroots legal workers (professionals without a lawyer's license), and pro bono attorneys to provide services.[2] It should be noted that, pursuant to the current Chinese Criminal Procedure Law, the court shall appoint an expert lawyer *ex officio* for people who may face a sentence which exceeds life imprisonment, and the professional lawyer must not be a grass-roots worker.[3] Beginning in 2017, China has attempted to provide legal representation to all criminal cases.[4] However, it is unclear how their role will be felt in comparison to private lawyers under authoritarian regimes like China.

According to Solomon, in authoritarian countries, formal institutions are established which proclaim judicial autonomy but allow informal practices to undermine it; this practice

---

[1] Falü Yuanzhu Tiaoli (法律援助条例) [Regulations on Legal Aid] (promulgated by the State Council, July 21, 2013, effective Sept. 1, 2003).
[2] Harvey Kong & Jack Lau, *What Difference Will China's New Legal Aid Law Make For Its Citizens?* SOUTH CHINA MORNING POST (2021), https://www.scmp.com/news/china/article/3146796/what-difference-will-chinas-new-legal-aid-law-make-its-citizens (last visited Mar 24, 2022).
[3] Xingshi Susong Fa (刑事诉讼法) [Criminal Procedure Law] (promulgated by the Nat'l People's Cong., July 1, 1979, amended Mar. 17, 1996 and Mar. 14, 2012), Art. 34, http://www.gov.cn/flfg/2012-03/17/content_2094354.htm.
[4] Guanyu Kaizhan Xingshi Anjian Lüshi Bianhu Quan Fugai Shidian Gongzuo de Banfa (关于开展刑事案件律师辩护全覆盖试点工作的办法) [Issuing the Measures for Launching the Pilot Program of Full Coverage of Defense Lawyers in Criminal Cases] (issued by the Supreme People's Court and the Ministry of Justice, effective Sept.10, 2017).

allows authoritarian leaders to cultivate good reputations and public relations while retaining control over justice when necessary.[5] An important part of this informal practice is that defense counsel who insist on protecting their clients in an independent and conscientious manner, in addition to their conventional support role, may be subject to abuse by the police, including beatings, illegal detentions, and criminal prosecution.[6]

It is possible that legal aid lawyers will be subject to fewer restrictions. They are typically regarded as the conduit between the government and the governed.[7] The state narrative about "the good lawyer" is closely aligned with pro bono activities in China. More than one-fifth (15.8%) of the National Outstanding Lawyers have dedicated their careers to providing legal aid. They have handled hundreds of legal aid cases each year or thousands throughout their careers, including some working for government legal aid agencies.[8] As Liebman noted, local legal aid attorneys have learned to take advantage of the "cooperation" of the system in order to obtain more access to case files and to represent their clients' interests.[9] They often persuade their clients to admit guilt in order to persuade the public procurator to recommend leniency. The fact remains that, given the inquisitorial system in China, defendants who disobey the system may not only have their claims rejected by the judges but also suffer harsher punishments, whereas defendants who show a "cooperative" attitude (e.g., confess) often experience more favorable

---

[5] Peter H Solomon, *Law and Courts in Authoritarian States*, 2 INT. ENCYCL. SOC. BEHAV. SCI. 427 (2015).
[6] *Id.* Peter H Solomon, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 COMMUNIST POST-COMMUNIST STUD. 351 (2010).
[7] Rachel E Stern & Lawrence J Liu, *The Good Lawyer: State-Led Professional Socialization in Contemporary China*, 45 LAW SOC. INQ. 226 (2020).
[8] *Id.*
[9] Benjamin L Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX INTL LJ 211, 259 (1999).

outcomes.[10] Thus, legal aid lawyers' more submissive and cooperative behavior tends to produce more lenient sentences.

Multiple empirical studies have examined the effects of counsel on sentencing in the United States.[11] Nevertheless, their results do not generalize to the authoritarian context and relevant studies about China are particularly scarce.[12] My primary contribution is to be one of the pioneers in China to examine this issue by conducting an econometric analysis regarding the influence of counsel types on the sentencing of murder cases. In parallel, this study, which utilizes a recent dataset, serves as side evidence to evaluate the impact of the 2012 amendment to the Criminal Law, which theoretically expands lawyers' rights.

---

[10] Bin Liang & Ni (Phil) He, *Criminal Defense in Chinese Courtrooms*, 58 INT. J. OFFENDER THER. COMP. CRIMINOL. 1230 (2014).

[11] Many studies have been conducted based on US data, but the results have been mixed. In general, defendants represented by public defenders are not at a disadvantage, however, some research indicates that private lawyers may have better sentencing outcomes. *See* Robert V. Stover; Dennis R. Eckart, *A Systematic Comparison of Public Defenders and Private Attorneys*, 3 AM. J. CRIM. L. 265, 300 (1975) (no significant relationship between the type of attorney and the conviction rate); Richard D. Hartley, Holly Ventura Miller & Cassia Spohn, *Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. CRIM. JUSTICE 1063 (2010) (no significant relationship between the type of attorney and imprisonment length); James M. Anderson; Paul Heaton, *How Much Difference Does the Lawyer Make: the Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L. J. 154, 217 (2012) (defendants with public defenders had lower conviction rates and less imprisonment length); Morton Gitelman, *The Relative Performance of Appointed and Retained Counsel in Arkansas Felony Cases - an Empirical Study*, 24 ARK. L. REV. 442, 452 (1971) (defendants with private lawyers were less likely to be incarcerated); Morris B. Hoffman; Paul H. Rubin; Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the Marginally Indigent*, 3 OHIO ST. J. CRIM. L. 223, 256 (2005) (defendants with private lawyers received lighter sentence).

[12] The only empirical paper I have encountered targeting this issue relied primarily on self-descriptive results and was merely descriptive in nature. As a result, the paper cannot objectively quantify the impact of legal aid due to the limitations in its methodology. *See* Jing Lin, *How Effective is Legal Aid Service in China*, 5 PEKING UNIV. LAW J. 187 (2017).

There has been some difficulty with previous studies in the US due to the issue of selection bias. The types of counsel have endogenous effects on which cases end up in court, the type of charges being filed, and the characteristics of cases that can influence sentences. Due to the strength of the Chinese data, my study does not suffer from the limitations encountered by US-based studies. Since China does not have plea bargaining, almost all public prosecution cases will end in a court judgment. Also, the Chinese public procurator will only file one charge of crime per criminal conduct based on relevant doctrines. Though theoretically lawyers can intervene as early as the first interrogation and thus may influence the charges being prosecuted, empirically such chances could be quite small. Based on the findings of Liang and He, the defense strategy arguing that the charge was misclassified only had a success rate of 6.6% at court.[13] As demonstrated by Zuo and He, lawyers usually submit defense opinions on sentencing, defending the defendant through leniency, mitigation, or exempting the defendant of punishment. Defenses on the question of guilt, such as submitting an innocence defense or a defense to a lesser charge, are used sparingly.[14] Meanwhile, the case characteristics can be effectively controlled due to the existence of a sentencing guideline that articulates the weight each sentencing factor has in the final sentence. As an example, the sentencing guideline stated that the penalty of a surrendered person may be reduced by less than 40% of the benchmark penalty.[15] By including the most common sentencing factors as independent variables, I am able

---

[13] Liang and He, *supra* note 10.

[14] Zuo Weimin & Ma Jinghua, *The Role of Criminal Defence Lawyers in China: An Empirical Study of D County, S Province*, *in* COMPARATIVE PERSPECTIVES ON CRIMINAL JUSTICE IN CHINA (2013).

[15] Guanyu Changjian Fanzui De Liangxing Zhidao Yijian De Tongzhi (关于常见犯罪的量刑指导意见) [Guiding Opinions on Sentencing for Common Crimes] (promulgated by Supreme People's Court, Dec. 23, 2013, effective Jan. 1, 2014, revised Mar. 9, 2017).

to reduce the bias associated with omitted variables. I do not claim that my study eliminates selection bias completely, but the Chinese data helps alleviate some of the concerns by its particular nature.

The remainder of this paper can be found below. Section 2 presents the background and hypothesis. Section 3 provides information about the data, methodology, and descriptive statistics. Section 4 summarizes the results. Section 5 concludes with a discussion and suggestions for further research.

2. Background and Hypothesis

2.1 Background

Lawyers were a marginal group in China. Almost destroyed by the Cultural Revolution, the legal profession was revived by the economic reforms in the late 1970s.[16] Lawyers in the 1980s were all state bureaucrats working for state-run institutions (the "state official's era"). During the 1990s, they underwent a rapid privatization process.[17]

China offers one of the lowest entry barriers to becoming a lawyer. A junior college degree was all that was required from 1986 to 2001 to sit for the national bar examination. It was replaced by the national judicial examination in 2001, which raises the education requirement to a college degree, although a legal degree still was not required until 2018.[18] Thus, the educational background of lawyers varies considerably.

---

[16] Sida Liu, *The Changing Roles of Lawyers in China: State Bureaucrats, Market Brokers, and Political Activists*, *in* THE NEW LEGAL REALISM 180 (Heinz Klug & Sally Engle Merry eds.)., at 180.
[17] *Id.* at 184.
[18] Liu, *supra* note 17. The National Uniform Legal Profession Qualification Examination effective in 2018 increased the eligibility requirement. Guojia Tongyi Falü Zhiye Zige Kaoshi Shishi Banfa (国家统一法律职业资格考试实施办法) [Implementation Measures for the

Lawyers do not have a friendly legal environment. They are usually not welcomed by the "iron triangle" (police, public procurators, and judges). Lawyers had no equivalent in ancient China and they had never constituted as a professional class in the Chinese society.[19] The concept of a lawyer confronting a public procurator is foreign to Confucius.[20] Individual rights are something that is inherent and inalienable to the western world. The Chinese concept of rights as interests that should be balanced, however, reduces rights to the privileges that are awarded by authorities, given that it is the ruler who has the final say over the balancing process.[21] The rise of lawyers in China is not a result of rights-oriented philosophical thinking that is popular in democratic movements; rather, it is a result of the "opening and reform" process and the direct importation of western legal concepts.[22] The balance of interests generally results in the priority of collective interests. In the criminal justice system, the authorities are inclined to prioritize crime control over any other goal, thereby intentionally weakening the lawyers.[23] The crime-control oriented system is utilitarian and consequentialist, showing a lack

---

National Uniform Legal Profession Qualification Examination] (promulgated by the Ministry of Justice, Apr. 28, 2018), Art. 9.

[19] The closest equivalent was the term "litigation trickster," or "litigation stirrer." Lawyers in traditional, feudal China were referred to as "devious gods." "Devious" in the sense that they manipulated words to exonerate criminals and enhance the interests of rich litigants; and "gods" in the sense that they collaborated with corrupt judicial officials to accomplish their goals and were powerful in their influence over the courts. *See* Frankie Fook-Lun Leung, *The Re-Emergence of the Legal Profession in the People's Republic of China*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 275, 288 (1985).

[20] Ping Yu, *Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People's Republic of China after the 1996 Revision of the Criminal Procedure Law*, 35 VAND. J. TRANSNAT'L L. 827 (2002)

[21]Randall P Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN J INTL L 359 (1995).

[22] Li Enshen, *The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China*, 24 COLUM. J. ASIAN L. 129, 170 (2010).

[23] *Id.*

of concern for the rights of individuals which are usually sacrificed to the interests of society as a whole.[24] The protection of individual rights in China is typically subject to the interests of society.

"Socialist legality," in which law is primarily a political tool designed to further the interests of the state, makes lawyers an outside annoyance and a thorn in the side of the "iron triangle."[25] During the "state officials' era," lawyers were in the "golden age" in terms of their relationship with the "iron triangle." Lawyers were given civil service positions (*chi huangliang*) in the state personnel system. Taking advantage of such status made lawyers insiders in the institutions, offset their socialist marginalization, and provided them with protection from official harassment.[26] However, as a result of the privatization of the legal market, ordinary lawyers no longer qualified as state officials and thereby lacked such protection.[27] The work of lawyers has been widely prejudiced and suppressed. Lawyers sometimes joke that the police are to "cook the food (*zuofan de*)," the procurators are to "deliver the food (*songfan de*)," the courts are to "eat the food (*chifan de*)," and lawyers are to "beg for the food (*yaofan de*)."[28]

---

[24] For example, while westerners tend to accept acquittals because of procedural improprieties such as the failure to read the suspect the Miranda rights, most Chinese see such acquittals as particularly absurd. Also, a significant number of Chinese, including lawyers, regard it quite acceptable to detain a criminal suspect beyond the statutorily prescribed period, even indefinitely, pending completion of a proper investigation. *See* Peerenboom, *supra* note 22.
[25] Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673 (1999).
[26] Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOCIOL. 352–414 (2007), at 365.
[27] Liu, *supra* note 292.
[28] Ma Mingliang (马明亮), *Falü Yuanzhu: Zhongguo Xingshi Susong Zhidu Fazhan De Pingjing (法律援助:中国刑事诉讼制度发展的瓶颈) [Legal Aid: The Choke Point of the Development of Chinese Criminal Procedural System]*, 4 XINAN ZHENGFA DAXUE XUEBAO (西南政法大学学报) [JOURNAL OF SOUTHWEST UNIVERSITY OF POLITICAL SCIENCE AND LAW] (2004).

The criminal defense field is considered to be one of the most hazardous for a lawyer.[29] It was not uncommon for the government to abuse its power, intimidate or even prosecute criminal defense lawyers under the "big stick 306." It is a criminal offense under Article 306 of the Criminal Law of 1997 for a defense lawyer to support a crime suspect or defendant by concealing, destroying, or fabricating evidence, cooperating with each other, threatening or inducing witnesses to alter their testimony, providing false evidence, or engaging in other activities to obstruct the process of litigation.[30] In addition, criminal defense attorneys encountered several difficulties on the job, particularly when they sought to meet with detained clients without police supervision, to obtain a copy of the procurator's case files, or to gather evidence and cross-examine witnesses.[31] It is believed that the amendment of Criminal Procedure Law in 2012 giving the right for lawyers to handle such difficulties can be a big step forward.[32] According to a study, defendants are increasingly refusing to admit their guilt and lawyers are more willing to challenge the authorities.[33] However, the extent to which a lawyer may play a role in the criminal process is still uncertain in practice today. They continue to face

---

[29] Bin Liang, Hong Lu & Ni He, *Political Embeddedness and its Impact on Chinese Lawyers' Practices in Criminal Defense Cases*, 22 EUR. J. CRIM. POLICY RES. 341 (2016).
[30] *Id.* at 342, 344. Chen's experience can serve as a representative example. Chen represented a client in a criminal case involving corruption. Chen told the two procurators in the case when they attempted to obtain information about his client that he was his client's lawyer and therefore could not release any information about him to them. Outraged by Chen's arrogant attitude, one of the public procurators told Chen, "Let's see if you can have your privilege." Five days later, Chen was summoned to the public procurator's office and detained for one year. *See* Yanfei Ran, *When Chinese Criminal Defense Lawyers Become the Criminals*, 32 FORDHAM INT'L L.J. 988, 1042 (2009).
[31] Michelson, *supra* note 27.
[32] *See e.g.*, Zheng Yijuan (郑艺娟), *Xin Xinsu Fa Shiye Xiade Lüshi Quanli (新刑诉法视野下的律师权利) [Lawyer's Right Under the New Criminal Procedural Law*]. 11 FAZHI YU SHEHUI (法制与社会) [L. AND SOC.] (2013), at 257.
[33] Liang and He, *supra* note 11, at 1246.

challenges, such as judges who tend to disregard the arguments of lawyers, as well as police who interfere with the evidence, intimidate witnesses, and engage in police harassment, including beatings, kidnappings, and illegal detentions. Police officers dislike lawyers because they deem them useless, unnecessary, and even annoying.[34] If defendants hire a lawyer, judges may be less inclined to show leniency.[35]

2.2 Hypothesis

The issue of criminal justice is one that is deeply political in nature.[36] In an authoritarian system like China, concerns about law and justice are likely to be compromised by political considerations. According to Michaelson's theory of political embeddedness, a lawyer's political

---

[34] An interview with the chief of a local public security bureau in Hebei Province vividly represents a policeman's attitude toward lawyers:

> In our criminal cases there are very few with lawyers, relatively few lawyer interventions. But the relevant parties often consult lawyers, at least letting the victims know the procedure and know generally what the judicial decision would look like. Lawyers usually are not willing to do criminal cases, and they are the weak party in relation to the public security agency. They must communicate with us in advance. It is useless to intervene. In the investigation phase they often do not dare to intervene, [because it is] relatively easy to be accused of bringing messages [for the suspects]. The people we arrest are all detained in the detention center. The government is in charge of detention, not the police, but the lawyer's meeting needs our approval. The function of lawyers is mainly on the heaviness or lightness of the sentence, not guilty is impossible. Actually, we police think lawyers do not play a positive role, always put obstacles on our work, because they do not provide good advice for the suspects, and sometimes put the blame on the police, so the clients feel unhappy. They always use favorable words when talking to the clients. Nowadays people trust lawyers but do not trust our police, actually they talk like nonsense, sometimes like fortune-telling, not professional at all.

See Sida Liu & Terence C. Halliday, *Dancing Handcuffed in the Minefield: Survival Strategies of Defense Lawyers in China's Criminal Justice System*, SSRN ELECTRON. J. 9 (2008).

[35] Benjamin L Liebman, *Leniency in Chinese Criminal Law: Everyday Justice in Henan*, 33 BERKELEY J INTL L 153, 202 (2015).

[36] SIDA LIU & TERENCE C HALLIDAY, CRIMINAL DEFENSE IN CHINA: THE POLITICS OF LAWYERS AT WORK (2016).

embeddedness, such as prior experience working in the "iron triangle" and personal connections with state officials, can significantly reduce their professional difficulties.[37]

On one hand, it means certain private lawyers can bargain for greater leniency based on private connections. There is a large subgroup in the private lawyers with connections to the iron triangle, and some of them were even high-ranking officials there. For example, a lawyer in Anhui province who used to work for municipal procuratorates said, "With my experience I do not worry about this [the big stick 306]. Because I have work experience in the procuracy, at least in this city, I don't worry about my ability in self-protection and in making personal connections...I don't think Article 306 should necessarily be abolished."[38] Meanwhile, private lawyers have incentives and more assets to make a connection with the judges and navigate the sentencing outcome through these connections. Nevertheless, it is unclear how many private lawyers are well-connected.

On the other hand, however, legal aid lawyers have institutional connections with the "iron triangle" and thus they generally face less plight. A considerable amount of lawyers report that they received different attention by courts when they represented legal aid cases compared to "normal" cases.[39] Moreover, since the Legal Aid Agency uses a rotating system in the appointment of lawyers in death penalty cases, such appointed lawyers can be repeat players in

---

[37] *Id.* Interviews conducted by Liu and Halliday supported Michelson's assertion. It shows that lawyers seeking assistance from the "iron triangle" have less difficulty in all problem areas. Well-connected lawyers are half as likely to report difficulty persuading judges than lawyers without connections. In criminal defense cases, lawyers who are more politically engaged appear to have an advantage over their counterparts. Further, they found that the most significant factor in reducing the effects of Article 306 was previous experience in the "iron triangle". This type of experience provides defense lawyers with substantial protection from retaliation and prosecution.
[38] *Id.*, at 60-4.
[39] Lin, *supra* note 13.

the court, allowing them to build a close relationship with the "iron triangle," and also to enhance their expertise in death penalty matters.[40] Additionally, full-time legal aid workers are considered public officials, and those assigned to represent legal aid cases will also be viewed as having special political embeddedness, and therefore will not be regarded as opponents.[41] They may have more access to information than private lawyers and face fewer barriers, providing them with better opportunities to defend the accused.[42] Appointed lawyers tend to be less aggressive, perhaps due to the dual role they play for both the client and the government.[43] As such, they relied more on written defenses, cooperating more with the government.[44] It is particularly important in an environment where trials are more focused on sentencing rather than acquittals.[45] The defense that "cooperates" with the "iron triangle," such as trade defendant's confession to leniency, are more likely to be accepted.[46] Defenses that adopt an aggressive approach are likely to fail.[47] Despite this, the institutional bond shared by legal aid lawyers may not assist them as much as private lawyers who maintain private contacts.

---

[40] For example, the Guangzhou Legal Aid Center's lawyers can establish a good working relationship and won the respect from the corresponding Guangzhou intermediate court. Liebman, *supra* note 10, at 260.
[41] *Id.*
[42] *Id.*
[43] Liang and He, *supra* note 11. Liebman, *supra* note 10, at 259.
[44] Liang and He, *supra* note 11.
[45] Acquittal is particularly rare in Chinese trials. The conviction rates in China from 2000 to 2007 has been all around 99%. *See* Li Li, *High Rates of Prosecution and Conviction in China: the Use of Passive Coping Strategies*, 42 INT. J. LAW CRIME JUSTICE 271 (2014).
[46] Liang and He, *supra* note 11, at 1246. *See also* Dong Hongmin (董红民) & Ma Weijing (麻伟静), *Wanshan Xingshi Falü Yuanzhu Zhidu Shizheng Yanjiu (完善刑事法律援助制度实证研究) [An Empirical Study to Improve the Legal Aid System]*, 1 ZHONGGUO SIFA (中国司法) [JUSTICE OF CHINA] (2016) (most defense opinions of appointed attorneys have been accepted by the court. The unaccepted rate is 8.4%, 13.4%, 9.5%, 8%, 5.7%, 4.8% respectively from 2009 to 2014.).
[47] Liang and He, *supra* note 11, at 1246.

Therefore, under the political embeddedness theory, private lawyers are likely to receive leniency at the extreme end of the spectrum by virtue of their private connections, whereas legal aid lawyers will receive leniency at the average end of the spectrum by virtue of their institutional connections. In view of the mixed results indicated by the theory, a further examination of the quality of lawyers is necessary.

Private lawyers vary in quality. In the past, those without a law degree may have taken and passed the Chinese bar examination with intensive training over a short period of time.[48]

In contrast to some civil law countries such as Germany, where law students must pass a second bar exam for practice knowledge after passing the bar exam, lawyers in China need only work at a law firm for one year to receive their lawyer's certificate and become a defense attorney.[49] Consequently, a number of lawyers lacked sophisticated legal training and practical skills to provide quality defense.[50] The average quality of the lawyers is poor.[51] Judges in a survey expressed dissatisfaction with the ability of the lawyers to appeal to them.[52] Some lawyers failed to spot the issue, some lacked the defense skills to persuade the judges, and the

---

[48] Chen Ruihua (陈瑞华), *Xingshi Susongzhong De Youxiao Bianhu Wenti (刑事诉讼中的有效辩护问题) [The Problem of Effective Defense in Criminal Litigations]*, 5 SUZHOU DAXUE XUEBAO (苏州大学学报) [JOURNAL OF SOOCHOW UNIVERSITY] (2013), *available at* http://www.spp.gov.cn/llyj/201510/t20151030_106679.shtml.

[49] *Id.*

[50] *Id.*

[51] Ou Mingyan (欧明艳) & Huang Chen (黄晨), *Cong Xingshi Dao Shizhi: Xingshi Bianhu Dui Caipan Jieguo Yingxiangli Yanjiu – Yi C shi Y Zhongyuan Jin 3 Nian 198 Ming Beigaoren De Lüshi Bianhu Wei Yangben (从形式到实质：刑事辩护对裁判结果影响力研究——以 C 市 Y 中院近 3 年 198 名被告人的律师辩护为样本) [From the Form to the Essense: the Influence of Criminal Defense on Case Outcome – A Sample of 198 Defendants' Lawyer Defense in Y Intermediate Court in C City These 3 Years]*, 1 FALÜ SHIYONG (法律适用) [JOURNAL OF LAW APPLICATION] 13 (2016).

[52] *Id.*, at 12.

defense opinions were generally not specific.[53] Meanwhile, considering the problems and challenges lawyers may encounter as noted above, lawyers are less inclined to investigate and verify evidence diligently.[54] Moreover, even if some local associations have been working on setting up defense criteria, and the Ministry of Justice has updated its Guidelines for Punishing Illegal Acts of Lawyers and Law Firms, there is no national penalty system for lawyer's malpractice that affects the quality of defense.[55]

Thus, finding an affordable and competent criminal lawyer is particularly difficult in such a market. Murder defendants are generally not wealthy individuals. They hope to find the best lawyer at the lowest cost. According to my interview with a lawyer, cheap local firms offer defense packages that cost 15,000 yuan - 30,000 yuan (2000-5000USD) to represent a single case, but their defense arguments are usually standardized, so the effectiveness of such defense is debatable. Yet, people are susceptible to the egocentric bias, in which they may overestimate their chances of finding a competent criminal lawyer.[56] They may end up hiring a cheap and "average" lawyer, who could be worse than the legal aid lawyers. The situation is particularly relevant if the defendant hires an attorney primarily because the lawyer claims to have special relationships (*guanxi*) that can influence the outcome of the case. In this situation, the defendant

---

[53] *Id.*
[54] Chen Ruihua, *supra* note 48.
[55] The updated Guidelines specified the behaviors that need to be punished, such as dual representation of defendants and maintaining frivolous litigation. However, it did not include certain malpractice such as failure to meet the client even for once, or failure to read the case files before trial and so on. *See* Elizabeth M. Lynch, *China's Rule of Law Mirage: The Regression of the Legal Profession Since the Adoption of the 2007 Lawyer's Law*, 42 GEO. WASH. INT'L L. REV. 535, 586 (2010).
[56] Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 18 (1999).

may make unrealistic predictions and even appear to be self-deprecating in support thereof.[57] However, the claim may not be true, and the *guanxi* may not always work. "*Guanxi* helps, but it must be rock strong (*ying*)."[58] Shallow or indirect guanxi has little impact on a case and money may be used as a risky substitute to strengthen a *guanxi*. Even so, money has a limited effect as judges are in higher positions and rarely feel compelled to exert themselves.

The appointed attorneys in death-potential cases must have a minimum of trial experience in criminal defense, thus assuring their ability to handle the case. Legal aid agencies, as compared to defendants, are generally in a better position to screen market participants based on their expertise. It is unlikely that they will be able to assign the best lawyers, yet they can ensure that the appointed lawyer is not incompetent or fraudulent.

As such, although political embeddedness theory predicts a mixed result, I expect legal aid lawyers to perform better than private practitioners owing to quality concerns.

3. Data, Method and Descriptive Results

3.1 Data

There does not appear to be a preexisting dataset on this subject for China. I compiled a data set of 440 first-instance murder cases in Guangdong province, including a complete sample from 2016 to 2017 and a random sample from 2014 to 2016 obtained from the China Judgments Online website.[59] I chose murder cases since it is one of the few crimes that carries a death

---

[57] *Id.*
[58] Xin He & Kwai Hang Ng, *"It Must Be Rock Strong!" Guanxi's Impact on Judicial Decision Making in China*, 65 Am. J. Comp. L. 841, 863 (2017).
[59] Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu De Guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定) [Provisions of the Supreme People's Court on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by Supreme People's Court, Nov. 21, 2013, effective Jan. 1, 2014, revised Aug.

sentence. Therefore, the defendants will be appointed a lawyer if they fail to hire one on their own, regardless of whether they request one. Since the data set is based on the judgments published on the official website, a selection bias may be introduced by the posting procedure. The possibility that the Chinese courts might intentionally conceal certain death penalty judgments is a legitimate concern due to the fact that the number of executions is considered a national secret.[60] This, however, may not be a significant problem in the current dataset. As a matter of principle, murder cases are not exempt from the mandatory online publication requirement that took effect on January 1, 2014. Although, it may fall under the "inappropriate" category and not be posted.[61] The Intermediate People's Court of Guangzhou in Guangdong, the capital city of the province, reports regularly on cases which are not published online, including their case number, their cause of action and the reasons for their non-publication. Of the 2,686 not-online judgments in the third quarter of 2016, 199 were criminal cases. The two main reasons for cases not being published online are juvenile offences and crimes considered "not appropriate for online publication," which mostly refer to rape and drug-related allegations.[62] In the period from January 2016 to February 2017, no murder cases were excluded from online publication. In addition, I have been told by several judges in Guangdong that they will post all judgments, unless they clearly fall into an exempted category. My dataset also uncovers a

---

29, 2016), Art. 2. The Supreme People's Court will set up a website of China Judgments Online on the Internet, and uniformly post the effective judgments of the people's courts at all levels.

[60] Chen Xingliang (陈兴良), *Kuanyan Xiangji Xingshi Zhengce Yanjiu (宽严相济刑事政策研究) [On Criminal Policy Combining Punishment and Leniency]*, 1 FAXUE ZAZHI (法学杂志) [L. J.] 23 (2016).

[61] Provisions, *supra* note 59.

[62] Weishangwang Wenshu Anhao Ji Bushangwang Yuanyin (未上网文书案号及不上网原因) [Case Number and Reasons for Not-online Cases], GUANGZHOU SHENPANWANG (广州审判网) [GUANGZHOU TRIAL WEBSITE], http://www.gzcourt.gov.cn/cpws/bswws/.

significant number of death penalty cases. In the circumstances, even while the possibility of incompleteness of the dataset here cannot be eliminated entirely, the information available suggests the sample remains largely reliable.

There are two sets of independent variables: extralegal factors that may influence sentencing and sentencing factors drawn from judgments. Extralegal independent variables include gender, *Hukou*, and type of attorney. *Hukou* is an official record of a person's residence within an area included in the household registration system. Traditionally, *Hukou* has played an important role in resource distribution and allocation. For example, non-locals are generally not allowed to buy properties or attend public schools in Beijing. "In a sense, *hukou* discrimination can be viewed as racial discrimination in Chinese society."[63] In addition to case nature, case circumstances, and case results, sentencing guidelines list factors such as whether the defendant is disabled, whether the defendant has limited criminal responsibility, whether the defendant pleads guilty, whether the defendant surrenders, whether the defendant confesses, whether the defendant has a criminal history, whether the victim is vulnerable, whether the victim has fault, and whether the victim's relatives forgive. The first dependent variable is the length of

---

[63] *See* Jiaqi Lao, *The Complexities of Prior Record, Current Crime Type, and Hukou Status in China: Interactive Effects in Sentencing*, 4 PEKING UNIV. LAW J. 125 (2016). Nonlocal defendants are reported to be punished harsher compared to local defendants. *See e.g.,* Ruan Qilin et al (阮齐林等), *Beijingshi Chaoyangqu Jianchayuaan 1999 Niandu Gongsu Anjian Liangxing De Fenxi Yanjiu (北京市朝阳区检察院 1999 年度公诉案件量刑的分析研究) [Analysis and Research on Sentencing Discretion of Public Prosecution in Beijing Chaoyang District People's Procurators'Office in 1999]*, 1 ZHENGFA LUNTAN (政法论坛) [FORUM OF POL. SCI. AND L.] 94 (2001). Hu Changming (胡昌明), *Beigaoren Shenfen Chayi Dui Liangxing De Yingxiang: Jiyu 1070 Fen Panjueshu De Shizheng Fenxi (被告人身份差异对量刑的影响：基于 1060 份刑事判决的实证分析) [An Empirical Analysis on the Influence of Defendant's Identities on Sentencing Based on 1060 Judgments]*, 4 QINGHUA FAXUE (清华法学) [TSINGHUA L. SCI.] 100-1 (2018).

imprisonment in months. In order to convert all other punishments to months, I used an existing standard: a life sentence equals 264 months, a suspended death sentence equals 288 months, and a death sentence equals 360 months.[64] In addition, I convert a suspended death sentence with restrictions to a 300-month sentence. The second dependent variable is the judgment of life or death.

3.2 Method

Regarding the length of imprisonment, I utilized OLS with the following specifications:

$$Log(Length_i) = \alpha + \beta Attorney_i + \gamma Other\_Extralegal_i + \delta Legal_i + \varepsilon_i$$

The life/death decision was analyzed by a binary logistic model with the same specifications:

$$Logit(death_i) = \alpha + \beta Attorney_i + \gamma Other\_Extralegal_i + \delta Legal_i + \varepsilon_i$$

3.3 Descriptive statistics

Table 12 presents the independent variables, their codes, and frequencies. The majority of defendants were male (89.9%), non-local (55.1%), and represented by appointed counsel (61.2%). The majority of incidents follow a common pattern in terms of nature (88.4%), circumstances (68%) and result (94.5%), indicating they are not caused by planned killings and a foreknowledge of severe harm, the methods of killing were not particularly brutal (e.g., no sulphoacid or dismemberment), and there was only one victim per incident. Very few of them

[64] Hou, Yue and Truex, Rory, *Ethnic Discrimination and Authoritarian Rule: An Analysis of Criminal Sentencing in China* (June 1, 2020). Available at SSRN: https://ssrn.com/abstract=3481448.

had criminal records, and the majority of defendants surrendered, or confessed, or pleaded guilty at court.[65]

Table 12 Frequency distribution of independent variables

Variables & Coding	Descriptive Statistics
Gender	N=426
Male (0)	383(89.9%)
Female (1)	43 (10.1%)
Hukou	N=379
Non-Local (0)	209 (55.1%)
Local (1)	170 (44.9%)
Attorney	N=438
Private Lawyers (0)	170 (38.8%)
Appointed Lawyers (1)	268 (61.2%)
Case Nature	N=438
Common (0)	387 (88.4%)
Severe (1)	51 (11.6%)
Case Circumstances	N=438

[65] The act of pleading guilty in court, confessing, and surrendering can be considered as progressive sentencing factors. For instance, if the offender has already confessed or surrendered, he or she will not be given additional leniency for pleading guilty in court.

Table 12 Frequency distribution of independent variables (continued)

Common (0)	298 (68.0%)
Severe (1)	140 (32.0%)
Case Results	N=436
Common (0)	412 (94.5%)
Severe (1)	24 (5.5%)
Disabled Defendant	N=438
False (0)	434 (99.1%)
True (1)	4 (0.9%)
Limited Criminal Responsibility	N=438
False (0)	382 (87.2%)
True (1)	56 (12.8%)
Plead Guilty at Court	N=438
False (0)	389 (88.8%)
True (1)	49 (11.2%)
Confess	N=438
False (0)	169 (38.6%)
True (1)	269 (61.4%)
Surrender	N=438

Table 12 Frequency distribution of independent variables (continued)

False (0)	242 (55.3%)
True (1)	196 (44.7%)
Criminal History	N=438
False (0)	413 (94.3%)
True (1)	25 (5.7%)
Vulnerable Victim	N=438
False (0)	396 (90.4%)
True (1)	42 (9.6%)
Victim Fault	N=438
False (0)	361 (82.4%)
True (1)	77 (17.6%)
Forgiveness Obtained	N=437
False (0)	357 (81.7%)
True (1)	80 (18.3%)

In addition, the mean of numeric-converted sentences for private lawyers is 246.7 months, while the mean for legal aid lawyers is 244.9 months. This difference is relatively small. It will take further regression analyses to determine whether lawyer types have an impact on sentencing.

4. Regression Results

Table 13 The effect of types of counsel on sentencing

#	Covariates	Outcome	
		severity	life or death
M1.	nature + circumstance + result	-0.02	-0.02
		(0.04)	(0.22)
M2.	M1. + hukou + gender	-0.03	-0.09
		(0.04)	(0.24)
M3.	M2. + disabled defendant + limited responsibility + plead guilty + confess + surrender	-0.00	0.03
		(0.04)	(0.25)
M4.	M3. + criminal history	-0.00	0.03
		(0.04)	(0.25)
M5.	M4. + victim fault	-0.00	0.04
		(0.04)	(0.25)
M6.	M5. + forgiveness obtained	-0.03	-0.10
		(0.04)	(0.26)
M7.	M6. + court (fixed effects)	-0.02	-0.09
		(0.04)	(0.28)
M8.	M7. + year (fixed effects)	-0.02	-0.04
		(0.04)	(0.28)

Note: The table displays coefficient estimates from regressions testing the impact of type of counsel across eight different covariate sets on a defendant's sentence length (in months, logged)

and whether they received a life-or-death sentence. Robust standard errors shown in parentheses. $*** p < 0.001$, $** p < 0.01$, $* p < 0.05$.

Despite being mostly negative, the coefficient remains non-significant across all covariates. Based on my analysis, I did not find that the type of counsel had an impact on sentencing. Moreover, the variance explained by the type of counsel is very close to zero. In that regard, another question arises: does the type of counsel make a *meaningful* difference regarding sentencing?

Along with "statistical significance," economists also use "economic significance" to establish whether a factor exhibits "real-world significance," i.e., if it is likely to have a "major effect."[66] What counts as a "major effect" can vary across researchers' opinions. Here, I will define a "major effect" as one greater than five percent. Now, I reexamine the covariates reported in Table 13, and report "No" if the hypothesis of a major effect is rejected,[67] and "Null" if neither the hypothesis of zero effect nor the hypothesis of a major effect can be rejected.

Table 14 The existence of a major effect of types of counsel on sentencing

#	Covariates	Outcome	
		severity	life or death
M1.	nature + circumstance + result	NO	NULL
M2.	M1. + hukou + gender	NO	NULL

[66] William HJ Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIR. LEG. STUD. 474, 487 (2017).

[67] This means a one-sided t test for the null hypothesis that the change of outcome is five percent or more rejects the null with $p<0.05$.

Table 14 The existence of a major effect of types of counsel on sentencing (continued)

M3.	M2. + disabled defendant + limited responsibility + plead guilty + confess + surrender	NO	NULL
M4.	M3. + criminal history	NO	NULL
M5.	M4. + victim fault	NO	NULL
M6.	M5. + forgiveness obtained	NO	NULL
M7.	M6. + court (fixed effects)	NO	NULL
M8.	M7. + year (fixed effects)	NO	NULL

Note: The table displays whether the type of counsel has had a major impact on sentencing across eight covariate sets.

According to Table 14, all models demonstrated that counsel types have not had a significant impact on severity. In terms of life/death decisions, neither the zero-effect hypothesis nor the major effect hypothesis can be rejected. However, the results on severity indicate that types of counsel have relatively small effects, because severity incorporates portions of the life/death decision as I have also converted death penalties into numbers.

With that being said, I only assert that the type of counsel has a relatively small *direct* impact. As Lu and Miethe pointed out, less aggressive defense strategies are more likely to be accepted and result in shorter sentences.[68] Legal aid lawyers may know how to utilize a "cooperative" strategy to gain extra leniency.[69] I therefore examine in more detail the effects of

[68] Hong Lu & Terance D Miethe, *Legal Representation and Criminal Processing in China*, 42 BR. J. CRIMINOL. 267–280 (2002).
[69] Liang and He, *supra* note 11.

the types of counsel on the defense strategies depicting a cooperative attitude, namely confession (including pleading guilty in court, confessing, and surrendering), and forgiveness. Considering that these factors are non-confrontational and merely appeal for mercy, they represent the ideal examples for testing whether "cooperation" has any benefit. Model 8 above serves as my baseline model, and I added the interaction terms separately. In order to simplify the regression equation, I combined the three types of confessions into one factor, "general confession."

Table 15 The interactive effect on sentencing

Covariates	Target Variable	Outcome	
		severity	life or death
nature + circumstance + result + hukou + gender + disabled defendant + limited responsibility + plead guilty + confess + surrender + criminal history + victim fault + forgiveness obtained + court (fixed effects) + year (fixed effects) + type of attorney×forgiveness obtained	type of attorney	0.01	0.01
		(0.02)	(0.05)
	interactive term (type of attorney×forgiveness obtained)	0.11*	-0.07
		(0.04)	(0.12)

Table 15 The interactive effect on sentencing (continued)

nature + circumstance + result + hukou + gender + disabled defendant + limited responsibility + general confession + criminal history + victim fault + forgiveness obtained + court (fixed effects) + year (fixed effects) +type of attorney×general confession	type of attorney	-0.00	0.03
		(0.02)	(0.12)
	interactive term (type of attorney×general confession)	-0.01	-0.03
		(0.03)	(0.13)

Note: The table displays coefficient estimates from regressions testing the interactive effect on a defendant's sentence length (in months, logged) and whether they received a life-or-death sentence. Robust standard errors shown in parentheses. $*** p < 0.001$, $** p < 0.01$, $* p < 0.05$.

While the results for life-or-death decisions are still insignificant, Table 15 does suggest that legal aid lawyers are better able to obtain leniency in cases where forgiveness from the victims' families was obtained, but not in confession cases. It should be noted that Lu and Miethe found that legal representation significantly reduced the likelihood of confession.[70] Thus, the insignificant result is not due to the fact that lawyers generally have no control over confessions. There is a distinction between confession and forgiveness in the sense that confession is considered a "mandatory circumstance (*fading qingjie*, specified in the Criminal Law)" and forgiveness is considered a "discretionary circumstance (*zhuoding qingjie*, not specified in the Criminal Law),"[71] and thus theoretically, judges have more discretion over the evaluation of the forgiveness-related factor.

[70] Hong Lu & Terance D. Miethe, *Confessions and Criminal Case Disposition in China*, 37 LAW SOC. REV. 549, 563 (2003).
[71] Liang and He, *supra* note 11, at 1238.

5. Discussion and Conclusion

Prior studies have shown that the presence of legal representation has no impact on the final sentence received by the defendant.[72] The type of legal representation and the defense strategies employed, however, may have an effect.[73] In this research, I examine three related questions regarding the effect of types of attorneys on sentencing: (1) Does it have an effect? (2) Does it have a *major* impact? (3) Does it have an *indirect* effect through its use of cooperative strategies?

Based on a new dataset that examines the impact of legal aid in China, I observe that there is no significant association between types of counsel and sentencing outcomes. In addition, my analysis suggest that it has not had a major impact on sentencing. The results are not in accordance with my hypothesis, but they do echo the mixed results predicted by the political embeddedness theory. This may also indicate that the 2012 amendment did allow private lawyers to defend more effectively, thus ensuring that lawyers without personal ties to the court could also make a positive impact on the sentencing process. In regards to the overall quality concern, the results may suggest over the years of marketization, there has been a general improvement in the quality and standard of private lawyers. Consequently, the advantages of appointed advocacy are no longer evident.

Additionally, the results suggest that legal aid attorneys have been more successful in obtaining extra leniency for cases in which the victim's family was forgiven, but not in cases in

---

[72] Hong Lu & Kriss A. Drass, *Transience and the Disposition of Theft Cases in China*, 19 JUSTICE Q. 69–96 (2002); Lu and Miethe, *supra* note 68; Hong Lu & Elaine Gunnison, *Power, Corruption, and the Legal Process in China*, 13 INT. CRIM. JUSTICE REV. 28–49 (2003).
[73] Liebman, *supra* note 10; Lu and Miethe, *supra* note 68.

which the victim confessed. The results are quite interesting, as legal aid attorneys are generally considered "deferential" and "submissive" in court, while private attorneys tend to be more aggressive, and authoritarian courts tend to favor the former systematically. Private lawyers who are more likely to challenge the prosecutions have not been punished at least in "mandatory circumstances (*fading qingjie*)," which may reflect an improvement in the Chinese courts. If so, the result can serve as an incentive for lawyers to challenge the state's case further.

To conclude, I would like to acknowledge a few limitations of this study. Firstly, the data is from Guangdong province, a developed province on the eastern coast of China. It is more representative of provinces with similar economic development levels, but may not be representative of western provinces. Therefore, a future study could obtain a national sample, which would also expand the sample size. In addition, although the Chinese data by their nature reduces the degree of selection bias, it does not eliminate the concern completely. A natural experiment is always more effective at controlling bias.

Many of the prior discussions about Chinese lawyers may be outdated due to the rapid changes in the Chinese legal system. Using empirical data, I have been able to provide a rare and new insight into how different types of lawyers operate. However, the recent changes in the Chinese context must be closely monitored in order to develop accurate theoretical explanations.

Appendix

1. Guiding Opinions on Sentencing for Common Crimes in China (2014 version)

When considering juvenile delinquency ("limited criminal responsibility"), the juvenile's ability to understand the crime, the motive and purpose of the crime, his or her age, whether the crime is a first or an occasional offense, repentance, personal growth experiences, and consistent performance, etc., shall be taken into account, and the punishment should be lenient.

(1) Minors who have reached the age of fourteen and under the age of sixteen shall have their sentences reduced by 30% to 60% of the benchmark sentence.

(2) Minors who have reached the age of sixteen and less than eighteen years old shall have their sentences reduced by 10% to 50% of the benchmark sentence.

In the circumstances of the surrender, considering the motive, time, manner, seriousness of the crime, the degree of truthful confession and repentance, etc., can be reduced by less than 40% of the base sentence; lesser crimes can be reduced by more than 40% of the base sentence or exempt from punishment according to law. A surrender in bad faith to escape legal sanctions and any other means is insufficient to mitigate the punishment.

For the confession, it is necessary to consider the degree of confession, the seriousness of the crime, and the degree of repentance, in order to determine the degree of leniency.

(1) truthful confession of the crime, can be reduced by less than 20% of the base sentence.

(2) the truthful confession of the same type of heavier crime not yet grasped by the judicial authorities can be reduced by 10% to 30% of the base sentence.

(3) In the event of a truthful confession of their crimes that avoided particularly serious consequences, the benchmark sentence may be reduced from 30% to 50%.

When an offender pleads guilty at court, the benchmark sentence can be reduced by 10% or less according to the law, depending on the nature of the crime, the severity of the crime, and the degree of confession and repentance, except if the offender already experienced leniency from surrender or confession.

The punishment can be reduced by less than 40% of the base sentence if the offender compensates for the victim's economic loss and obtains forgiveness; if the offender compensates

but does not obtain forgiveness, the penalty can be reduced by less than 30%; if the offender obtains forgiveness without compensation, the penalty can be reduced by less than 20% of the base sentence; leniency of this category on robbery, rape and other serious crime against public security should be strictly controlled.

For recidivists, the penalty may be increased by 10% to 40% of the benchmark penalty by fully considering the nature of the former and latter crimes committed, the time from the completion of execution or exemption of the criminal penalty to the time of re-commitment of crime, and the seriousness of the former and latter crimes committed.

Where the offender has any criminal history, the penalty may be increased by less than 10% of the benchmark penalty by fully considering the nature of the criminal history, duration, times, and seriousness of penalty, except where the criminal history is a criminal negligence or juvenile delinquency.

Where the target of offense is a minor, aged, disabled, pregnant woman, or any other vulnerable person, the penalty may be increased by less than 20% of the benchmark penalty by fully considering the nature and seriousness of the offense.

2. Judicial Opinions on the Effective Implementation of the Criminal Policy of Leniency and Compassion in the Trial of Cases of Intentional Homicide, Injury and Gangland Crimes

All the circumstances surrounding the criminal offense shall be considered. Criminal circumstances include the motive for the crime, the means, the target, the location, and the results. Each criminal circumstance represents a different level of harm to society. Criminal circumstances are often discretionary circumstances of sentencing and exist in law only in general terms. However, criminal circumstances are the basis for the imposition of punishments in specific cases. It is necessary to carefully sort out criminal circumstances in the trial of a case,

so as to accurately judge the social harmfulness of the crime. In some cases, the motive of crime is particularly despicable, for instance, murdering a person by hiring killers for the purpose of exterminating a political opponent. Some commit a crime out of indignation, or even murder a person with the motive of "placing righteousness above family loyalty" or "getting rid of an evil for the people." In some cases, the criminal means is extremely cruel, for instance, an intentional homicide in which a person is burned alive by means of setting fire or throwing vitriol. The criminal consequences may be divided into several grades, including general criminal consequences, serious criminal consequences, and especially serious criminal consequences. In practice, as generally recognized, the consequence is serious where one death is involved in the intentional homicide or intentional injury; and the consequence is especially serious where two or more deaths are involved in the intentional homicide or intentional injury. Specific targets of crime and places also reflect different social harmfulness. For instance, a crime targeting women, children, and other vulnerable groups or murder or injury committed in a public place cause great social harm. In the aforesaid crimes with such execrable circumstances that the motive of the crime is despicable, the criminal means is cruel, the criminal consequence is serious, or a crime is committed against women, children, or other vulnerable groups, where there are no other statutory or discretionary circumstances, the criminal offender shall be given a severe punishment according to the law. If under general criminal circumstances, the defendant shows sincere repentance or falls under such statutory circumstances for a lighter punishment as meritorious service and voluntary surrender, the people's court shall generally consider giving the defendant a lenient punishment.