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## ABSTRACTS

### *How Criminal Misjudged Cases Be Produced? —Based on the Cognitive*

#### *Psychological Analysis of Sixty-one Criminal Misjudged Cases*

TANG Fenghe · 1 ·

The production mechanism of criminal misjudged cases can be divided into two steps. The first step is to construct a crime story. Based on the cognitive psychology, because of the spontaneous action of cognitive system I of our brains, cognitive biases, main representativeness biases, availability biases and anchor biases should be responsible for criminal misjudged cases and will directly dominate our thinking. The second step is to confirm or falsify crime story. On the basis of the cognitive psychology, because of “theory of overconfidence”, “prospect theory” and “sunk cost effects”, the investigating authorities will prefer torture and give up the principle of presumption of innocence and provision of no torture.

**Key Words** Criminal Misjudged Cases; Cognitive Psychology; Cognitive Biases; Torture; Psychological Story

Tang Fenghe, Ph.D. in Law, Associate Professor of Law School of Zhejiang University of Finance and Economics.

### *On the Concretization of Proportionality in the Narrower Sense*

LIU Quan · 17 ·

Proportionality in the Narrower Sense can cause the abuse of discretion, inadequate measure of benefits and results-oriented analysis, so we should make proportionality in the narrower sense more specific to limit balancing. The concretization of proportionality in the narrower sense can be mainly divided into two modes. One is the mathematical model from the perspective of the balancers, the other one is the discourse mode from the perspective of the parties. The essence of the principle of proportionality in the narrow sense is the judgment of the necessity of purpose. Its functions are to protect the human rights and to make sure that the whole social welfare is promoted. In order to eliminate the irrationality of proportionality in the narrower sense as much as possible, we should construct a new concretization mode from the common perspective of the balancers and the parties. We should use cost-benefit analysis and the formula of the equilibrium to calculate the proportional value of the less restrictive mean which can cause damage and promote interest, and then balance whether the less restrictive mean is comply with proportionality in the narrow sense according to the formula of the equilibrium.

**Key Words** Proportionality in the Narrower Sense, Balancing, Concretization, Cost-benefit Analysis, Discourse

Liu Quan, Ph.D. in Law, Letcher of Law School of Central University of Finance and Economics.

***Interpretation of Constitutionality on the Compulsory Commercial***

***Insurance System***

WANG Liwan · 31 ·

Compulsory commercial insurance system is covered in the scope of property rights and the freedom of contract. Owing to its compulsory purchase and incidental punishment, compulsory commercial insurance system restricts the fundamental rights of the Constitution. However, this system frequently aims at risk-sharing and features comprehensive functions of balancing interests between the public, policy holders and the potential casualty, in ways that suit perfectly fundamental policy clause in the Chinese Constitution. As far as its present form, compulsory commercial insurance system is guided by the principle of legal reservation, which ensures it beyond the local interests and sector interests. By its nature, this system overcomes the market failures by law enforcement, and complies with the principle of proportionality in the means and ends. Given all this, compulsory commercial insurance system has a fragile constitutionality, so it's still subject to periodically constitutional review.

**Key Words** Compulsory Commercial Insurance System; Constitutional Review; Property Rights; Freedom of Contract; the Principle of Proportionality

Wang Liwan, Ph.D. in Law, Assistant Professor of Human Rights Institute at China University of Political Science and Law.

***Errors of Rights Issues of Real Estate Register and Acquisition of***

***Real Estate in Good Faith***

CHENG Xiao · 44 ·

Errors of the register of real estate should be divided into the errors of rights issues and the errors of non-rights issues. According to the presumptive correctness of the real estate register, the parties who trust the errors of rights issues can acquire corresponding real property in good faith. It should always revolve around whether the errors of the real estate register are the errors of rights issues which will determine whether the third person of the real estate transactions is in good faith, rather than beyond register of real estate and considering whether the third person has gross negligence.

**Key Words** Real Estate Register; Rights Issues; Reliance; Acquisition of Real Estate in Good Faith

Cheng Xiao, Ph.D. in Law, Professor of Tsinghua University Law School.

***The Autonomy and Regulation of Labor Contract: Focus on the Labor Contracts***

***Violating the Compulsory Provisions***

XU Ke · 56 ·

The complicate relationship between the Private Autonomy and State Regulation is reflected by the labor

contracts violating the compulsory provisions. The empirical study on China judicial practice indicates that the compulsory provisions are applied case by case, rather with regular pattern. However, the principles lurked in the phenomenon have not revealed and the existing divergence has not resolved. Therefore, through the Formal Control and Structural Control, the compulsory provisions rendering the contract void are restricted to the laws, rules and administrative regulations with the nature of public law, which mainly regulate the objects and acts; through Substantial Control, the compulsory provisions are further excluded, which fail to meet the examination of normative aims and interest analysis. Based on the triple control, the effective judicial experience is refined, the futile operations are abandoned, and the controversial conflicts are dissolved. Finally, the autonomy and regulation of labor contracts are balanced.

**Key Words** Labor Contract; Compulsory Provisions; Substantial Control

Xu Ke, Ph.D. in Law, Research Fellow of Law School of Renmin University of China.

*Consider the Difficulties of Joint Crime in Bribery from the Perspective of  
Unitary Principal Offender*

LIU Mingxiang · 69 ·

The crimes of “taking bribe by influence” and “introducing bribe” in Chinese Criminal Law indicate that what China has adopted is the unitary principal offender system. As a result, perspective of unitary principal offender should be taken to view the issues of joint crime in bribery. According to interpretative theory of unitary principal offender, several predicaments caused by differentiation between principal and accomplice can be avoided. Such as improper punishment to joint participants in crime of taking bribe, incapable of convicting and punishing the attempted instigation in taking bribe, and difficulties in exactly confirming the nature of action in which people with the identity of state functionary instigate those who are not to take bribe. In addition, problems like the nature of jointly taking bribe by state officials and special related person, as well as discrimination between introducing bribe and accomplice in crimes of offering or taking bribes can also be better resolved.

**Key Words** Unitary Principal Offender, Joint Crime, Crime of Bribery, Crime of bribe, Crime of Introducing Bribe

Liu Mingxiang, Professor of Center for Criminal Jurisprudence of Renmin University of China.

*Basic Structure and Concrete Expansion of Instigation Intention*

GAO Wei · 83 ·

Centering on whether instigation intention including cognition of constitutive result of practicing offender, there are two types of controversies in this issue: single intention and double intention. Based on principle of legal interest and restriction of punishment scope, considering that all punitive offenders should have legal interest infringement and taking *compromise* provoking theory as the foundation of instigator punish-

ment, the double intention theory is more reasonable. For consequential offense and concrete potential damage offense and uncompleted abstract potential damage offence, there is not penalization for the attempted solicitation. About the purpose related to legal interest, instigators should have purpose and cognition of perpetrator purpose. About the purpose unrelated to legal interest, instigators only need to have cognition of perpetrator purpose without need to have purpose. In the situation of intentional and no purpose tool, cognition of perpetrator purpose should not be taken as content of instigation intention.

**Key Words** Instigation Intention; Single Intention; Double Intention; Potential Damage Offence; Purpose Offence

Gao Wei, Professor of Yunan University Law School.

***On Patent Applicant's Duty to Disclose Prior Arts***

CUI Guobin · 96 ·

Under Chinese Patent Law, a patent applicant has the duty to disclose prior arts material to the patentability of his invention. Theoretically, this duty could diminish information asymmetry between applicants and examiners, and thus is reasonable to certain degree. However, when operating in the United States, the duty causes excessive disclosure of prior arts by bona fide applicants, but barely has deterrence effect on bad faith applicants. Moreover, it wastes judicial resources. Various existing measures and suggestions fail to eliminate the negative consequences of this duty effectively. In this digital era, more effective measures of patent examination become available; the effect of prior arts disclosure in improving patent quality is very limited; and other relevant patent rules help to reduce the negative impacts caused by applicants' concealing prior arts. Weighing the social costs and its actual effect, Chinese legislature should repeal applicants' duty to disclose prior art.

**Key Words** Patent Applicants; Duty to Disclose Prior Arts; Patent Quality; The "Inequitable Conduct" Defense

Cui Guobin, Associate Professor of Tsinghua University Law School.

***On the Automatic Renewal of Residential Construction Land Tenure***

JU Tao · 113 ·

Tax rules should be adjusted in administrative laws, and should not be the content of Property Law, which is a part of civil law. As the legal effect of the expiration of construction land tenure, "re-apply" and "renewal" are based on existing laws. From the perspective of interpretation of existing laws, the State Council has the power to stipulate the standards and measures of charge for state-owned construction land tenure. The so-called "land finance" constituted by real estate taxes on the basis of land was or is the fact all the time and all over the world. According to the "real estate consistent principle", real estate tax shall be levied uniformly on the land and the above buildings. However, for the homeowner and the holder of construction land tenure, tax rules should be different in different situations. Meanwhile, based on the value

orientation of fairness and justifiableness, real estate related taxes and fees collection should introduce a progressive tax.

**Key Words** Residential Construction Land Tenure; Automatic Renewal; Land Finance; Tax and Fee

Ju Tao, Research Fellow of Law Institute of Chinese Academy of Social Sciences, Distinguished Professor of Civil and Commercial Law School of Zhuhai College of Beijing Institute of Technology.

***The Remaining Problems of Denying to Retry “Jurisdictional Mistakes”***

LI Hao · 128 ·

Since the enforcement of the “Interpretation of PRC Civil Procedure Law”, the PRC Supreme Court ceased to retry the verdicts over the motions challenging the “jurisdictional mistakes”. However, although “jurisdictional mistakes” were excluded from the scope of retrial matters, as an exception, it is still necessary for the court to retry the verdicts challenging “jurisdictional mistakes” relating to arbitration agreements and foreign courts’ jurisdiction. When a disputing party disagreed with the verdicts made by a court authorized by a provincial supreme court, he may appeal to the PRC Supreme Court. When a disputing party applies for a retrial against several matters including “jurisdictional mistakes”, the judge shall not review the “jurisdictional mistakes” if the judgement itself is correct; only if the judgement itself is wrong, shall the judge review the “jurisdictional mistakes”.

**Key Words** Civil Litigation; Jurisdictional Mistakes; Civil Retrial

Li Hao, Professor of Nanjing Normal University Law School, Researcher Fellow of China Academy of Law Modernization.

***The Evaluation of Criminal Illegality for the Behavior of the Production and***

***Sale of Counterfeit Drugs***

SUN Wanhui · 138 ·

Canceling the “enough to harm human health” in the article of the Production and Sale of Counterfeit Drugs Crime just means the negative of the risk of the results rather than the negative of the risk of behavior. The origin of misunderstanding lies in the retreat of the concept of judicial interpretation, from “consequential anti-value” to “behavioral anti-value” to “form crime”. From the view of relative illegality theory, the substantial damage in criminal law must be taken into account in the conviction, because the pre-law based on the scope of the control and the particularity of the punishment always more focus on the formal illegality. The relative independence of the judgment of criminal illegality decides that it can not avoid the evaluation of substantial damage, substantial damage is an important basis for the independent judgment of the criminal law from other law. In the identification of this crime, the following and interpretation of the law should be based on the premise of meeting the needs of survival.

**Key Words** the Production and Sale of Counterfeit Drugs Crime; Relative Illegality; Substantial

Damage; Retribution

Sun Wanhui, Ph.D. in Law, Professor of East China University of Political Science and Law.

***The Reasons Why Courts Do Not Enforce Notarial Debt Instruments and  
the Remedies for Them***

ZHANG Haiyan · 150 ·

The system of enforcement of notarial debt instruments can effectively save judicial resources and reduce debt-achieving cost. Nevertheless, the proportion of notarial debt instruments not enforced by courts is fairly high, which renders creditors short of expectation about quickly realizing claims by notary procedure. In consideration of this, it is necessary to analyze practical cases to summarize the concrete reasons why courts do not enforce notarial debt instruments as well as the path of remedies chosen by different main parts, and then construct a more scientific system of the reasons why courts do not enforce notarial debt instruments and a more scientific system of the right remedies by relative main parts, which not only helps truly realize the legislative purport and the operative value of the system of enforcement of notarial debt instruments, but also provides a useful path selection for easing the pressure of the present situation in China where too many cases are for few judges to handle.

**Key Words** Notarial Debt Instruments; Enforcing Documents; Do not Enforce; Reasons; Remedies  
Zhang Haiyan, Ph.D. in Law, Professor of Shandong University Law School.

***Commentary to Article 66 of Contract Law***

WANG Hongliang · 163 ·

The right of concurrent performing counterplea, in other words, the right of defense to reject the demand, aims to give pressure to the counterparty and make sure the realization of one's own obligations. In a bilateral contract, when a party has the obligations to fulfill his duties first, there is no space for the application of the right of concurrent performing counterplea. However, when the following conditions are satisfied, including two associated payment duties, the claims being existing, becoming due and not being submitted yet, a right of concurrent performing counterplea has its role. In the substantive law, the legal effectiveness of the right of concurrent performing counterplea is the same as the right to reject the demand. Besides, the right of concurrent performing counterplea could exclude the delay of the debtor. In the procedural law, it should be submitted before the judge, otherwise the judge has no duties to review whether the right exists or not; What is more, the result of the judgement is to order both parties to fulfill their obligations simultaneously. When the debtor falls in a delay of acceptance, the creditor shall fulfil his obligations by compulsory execution according to the judgement.

**Key Words** Right of Concurrent Performing Counterplea; Right of Defense to Reject The Demand; Bilateral Contract; Doctrine of Existing Effects; Judgement Ordering a Performance of Obligations Simultaneously

Wang Hongliang, Ph.D. in Law, Professor of Law School of Tsinghua University. Feitian Scholar of Gansu Institute of Political Science and Law.



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