A COMPARATIVE STUDY OF CHINESE AND AMERICAN CRIMINAL SENTENCING DISCOURSE

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Abstract

This paper presents a detailed comparison between Chinese and American criminal courtroom sentencing discourses, highlighting the differences. It is found that there are three major differences. Firstly, in terms of structure, American sentencing is monolithic while the Chinese structure is dualistic; secondly, in terms of content the American judge concentrates on legal reasoning throughout while the Chinese judge makes a point of following the legal sentencing with some passionate moralizing; thirdly, American sentencing is delivered as a dialogue or a conversation while Chinese sentencing is a formal monologue. Explanations based on differences between the legal systems and the larger cultures will be offered.

1. Introduction

Recent decades have witnessed a growing academic interest in the language of law from both the field of linguistics and that of law. Literature devoted to the study of the language of law is quite impressive with research topics increasingly diversified (Danet 1980; Wodak 1980; Adelsward, Arosson & Joensson 1987; Adler 1987; Walker 1987; Harris 1989, 1994; Matoesian 1993, 1995, 1999; Shuy 1993, 1998; Eades 1993, 2000; Solan 1993, 2003, 2005; Conley & O'Barr 1998; Philips 1998; Tiersma 1999; Ehrlich 2001; Cotterill 2002; Liao 2003, 2004a, 2004b, 2009; Heydon 2005; Malcolm & Johnson 2007). However, it seems that nearly all the efforts are exclusively devoted to the language of a specific legal system and very rarely do we see any work devoted to comparative study of languages of different legal systems. Specifically, we have found no such work in comparison of the languages of the Chinese and American legal systems, which represent two very important and also very different legal systems in the world. This paper attempts to fill the gap by presenting a detailed comparison – or more precisely a contrast – of Chinese and American criminal sentencing discourses. The author hopes, by so

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doing, to promote comparative forensic linguistics. This paper is an interdisciplinary study as it cuts across linguistics and law. On the one hand, it is part of comparative law study; in China there is comparative law study, part of which is devoted to comparison of Chinese law with American law or common law, but there is no corresponding comparative study of Chinese and American courtroom discourses. On the other hand, it is part of comparative linguistics; literature in studies on comparison between Chinese and English is abundant but so far no systematic effort has been made in comparing Chinese and American courtroom discourses, although discourse study is flourishing in both countries.

2. The aim and methodology

The general aim of the study is to promote mutual understanding among the people in the related areas between China and the United States of America and other countries where the common law system is practised, and to help them have a better understanding of Chinese and American legal discourse, legal culture and legal practice. In this paper I have chosen to focus on criminal courtroom sentencing discourse. Specific research questions include: 1) what are the differences in Chinese and American criminal courtroom discourses? 2) what are the causes for the differences? In the same way in which this work is both linguistic and legal, it is both descriptive and explanatory. In other words, first I will try to describe the differences in terms of structure, i.e. what the sentencing discourse is composed of, the content or what the judge is doing, and the style or the way in which the sentencing is delivered, and then try to explain and discuss the differences in terms of legal system, legal culture and culture in general.

3. The data

This study is data-based. The data used in this paper were chosen from a subcorpus of a corpus of courtroom discourse consisting of transcripts of both Chinese and American criminal courtroom trials, which took place in different parts or jurisdictions and at different court levels of the two countries. The Chinese data were tape-recorded and transcribed by the author and his MA and PhD students for the last ten years and the American data were transcribed by court reporters. For ease of reference and analysis, we attach the full version of the Chinese data and the judge's sentencing discourse in the American case with sentences numbered (in brackets) and sections marked with titles (in bold) added. For the sake of those who do not speak Chinese, the Chinese data were translated into English and the translation was literal so as to keep as many of the linguistic features of the original Chinese version as possible. In the American data, before the imposition of a sentence by the court there was a sentencing hearing, which included 1) recapitulation by the court, in which the judge made a summary of the case and the trial, 2) objections or corrections to the pre-sentence report, where possible objections or corrections to the pre-sentence report were made by the opposing parties, 3) allocution by the defen-

dant, in which the defendant was given an opportunity to say anything he/she wished by way of extenuation or mitigation, 4) allocution on behalf of the defendant, in which the defence lawyer was allowed to say anything by way of extenuation for the defendant, and 5) allocution by the government, where the government lawyer was supposed to say anything regarding the sentence. For reasons of space, we represent just the "imposition of sentence" part in the appendix with those brief interactions in the process omitted.

3.1. *The Chinese data*

In the Chinese case, the defendant, a young man called Li Zhaoqing, was charged with robbing a woman of her property by using drugs on her to make her fall into a state of lethargy. The trial took place in Shanghai in 2004. We chose this case because Shanghai is one of the most developed areas in China and the presiding judge in this case is legally well-educated and professionally highly qualified.

3.2. *The American data*

In the American case, the defendant, Lawrence Anthony Franklin, was accused of violating laws regarding secret diplomatic documents and contacts with a foreign agent out of a desire to help the US. There were three counts against him: Count 1: Conspiracy to communicate national defence information to persons not entitled to receive it; Count 2: Communication of classified information to persons not entitled to receive it; and Count 3: Unlawful retention of national defence information. The trial took place in Virginia from May to August 2005. It was a very important and also influential criminal case in America and the relevant data of the trial are available on line.

4. A brief comparison of the criminal procedures

Before we move on to the study proper, it is necessary to make a brief introduction to the criminal procedures as practised in the two countries as a background because the legal systems of the two countries are quite different and also because sentencing is made towards the end of the whole trial process and therefore a knowledge of what happens before sentencing is not only helpful but also necessary.

4.1. *American criminal procedure (Federal Rules of Criminal Procedure)*

Here are two of the most important features of American criminal procedure. First and foremost, it is part of the common law system, notable for its inclusion of extensive non-statutory law reflecting precedent derived from centuries of judgments by working jurists. Second, the system of trial by jury and the principle of presumption of innocence are practised. Stages of the trial are successively 1) a pretrial hearing without the jury, 2) pretrial motions, 3) jury selection, 4) trial with the jury, which includes opening statements, examination, closing statements, jury charge and jury verdict, 5) sentencing and 6) appeal.

4.2. *Chinese criminal procedure (The Criminal Procedure Law of China [2])*

Contrary to the American legal system, a unique legal system is practised in China which blends a variety of legal traditions which include a) Roman law, particularly the version transmitted through Germany to Japan, b) traditional law, notably the legal system developed in China over millennia, c) the communist legal tradition (including influence from the former Soviet Union), and d) common law, more recently, notably in contract law. It is a non-jury trial. The principle of assumption of innocence was not adopted until 1996. Stages of the trial are: 1) pretrial questioning by the judge**,** 2) opening statement, 3) examination, 4) identification of evidence, 5) argument or closing statement, 6) final statement by the defendant**,** 7) sentencing (either immediately after the self-defence by the defendant or at an interval) and 8) appeal.

5. Analysis of the data

5.1. *Analysis of the Chinese data*

5.1.1. *Analysis of the structure and the content*

As we can see, what is striking and special about Chinese sentencing is that there are two separate parts, which are quite different in nature. However, there is a difference in the importance of the parts. The first part is primary, compulsory and of legal effect, dealing with the legal aspect of the case. It has a rigid structure of four sections. The first section, called *首部* ('head') in the traditional Chinese study of legal documents, gives information about the name of the trial court, the source of the case, the defendant and the trial. The second section, called *事实* ('findings'), announces court findings. The third section, otherwise called *理由* ('reasoning'), provides legal reasons for the verdict and the sentence based on the findings and the relevant law. Section 4, or *主文* ('body'), declares the sentence and informs the defendant of the right to appeal. The last section, called *尾部* ('end'), lists the trial judge(s) and the court clerks. It consists altogether of 28 sentences and 728 words.

Part 2 is secondary, optional and of no legal effect, as can be seen from the title 'The judge's afterword', dealing with the moral aspect of the case, a macro moralizing speech act consisting of three sub-acts: 1) pointing to the defendant's admirable family background and the positive efforts he had made in his career thus far and at the same time criticizing him for his moral lapses; 2) appealing to or pointing out the sacrifices made by the parents and their expectations; and 3) expressing the court's encouragement and hope. It is a typical Chinese way of doing moralizing with its unique logical order and format. There are altogether 10 sentences or 209 words.

[2] *The Criminal Procedure Law of the People's Republic of China*, revised on March 17, 1996 and in force since July 1, 1979.

Table 1. Structure and content analysis

	Nature of the sentencing acts	Importance	No. of sections	No. of sentences	No. of words	Average word number per sentence
Part 1	Legalistic	Primary, compulsory and of legal effect	5	26	731	29
Part 2	Moralizing	Secondary, optional, and of no legal effect	1	11	209	20
Total			6	37	940	26

Table 2. Structure and content analysis of Part 1

Sections	Content	No. of words	No. of sentences
(1) Head	(1) Information about the trial court and the source of the case	20	1
	(2) Information about the defendant	72	4
	(3) Information about the trial	84	4
(2) Findings	Listing of findings	269	7
(3) Reasoning	Giving reasons	117	5
(4) Body	(1) Sentence and forfeiture	87	5
	(2) Information of the appeal	61	2
(5) End	Information of the trial judge, the clerk and the date	20	1

Table 3. Structure and content analysis of Part 2

Content	No. of words	No. of sentences
(1) Pointing out the defendant's family background and his positive efforts and criticizing him for his moral lapses	78	3
(2) Appealing to or pointing out sacrifices made by the parents and their expectations	72	3
(3) Expressing the court's encouragement and hope	53	4

5.1.2. *Analysis of the style*

It is obvious that there is a sharp contrast in the style of the two parts. Part 1 is actually a well-prepared written legal document, as can be seen from the use of the noun 'judgment' (*判决词*) instead of 'sentencing' (*判决*), with a rigid format and a special structure. The whole sentencing discourse is a monologue with the presiding judge reading out aloud what has been written down. It is very formal, with very formal personal addresses like full names ('Li Zhaoqing') or full names with legal

addresses ('Defendant Li Zhaoqing'), archaic words (the equivalent of 'hereafter', 'conclude', 'commence', etc.), and no personal pronouns like 'you'. Sentences tend to be long, averaging 28 words per sentence. The tone is matter-of-fact, appealing to reason and law and addressing the general public rather than the particular defendant. Part 2, though written down and prepared as well, is very informal, with a warmer tone, appealing to emotions, ethics, morality, and folk wisdom instead. Sentences tend to be shorter. It is highly personal and conversational, characterized by frequent use of the personal pronoun 'you', and direct personal addresses such as 'Li Zhaoqing'. It is more like a family letter between a father and his child.

Table 4. Stylistic analysis

	Part 1	Part 2
Sentences	Long	Short
Diction	Legalistic, formal or archaic	Informal and everyday
Tone	Matter of fact	Warm
Way of sentencing	Monologue	Monologue

5.2. *Analysis of American criminal sentencing*

5.2.1. *Analysis of the structure and content*

The American sentencing is one single part consisting of the following sections in terms of the content: Section 1, jury verdict or the court's findings and plea (8 sentences); Section 2, reasoning (46 sentences); Section 3, the adjudication, the sentence and forfeiture (26 sentences); Section 4, reasoning again, appealing to law and reason again (11 sentences).

Table 5. Structure and content analysis

	Nature of the act performed	No. of sentences	No. of words	Average word number per sentence
Monolithic	Legalistic			20
1. Findings and the plea	Legalistic	8	180	22
2. Reasoning	Legalistic	46	751	16
3. Adjudication, the sentence and forfeiture	Legalistic	26	627	24
4. Reasoning	Legalistic	11	169	15
Total		91	1727	

5.2.2. *Analysis of the style*

The style is oral and informal with personal addresses like 'Mr. Franklin' and personal pronouns like 'you'. Sentences are short with abbreviated forms such as 'doesn't',

'that's', etc. It is interactional, conversational and personal with a high degree of speaker involvement. What is conspicuous is the use of the word 'law' with its variants: 1) law, 2) the law, and 3) the rule of law.

Table 6. Stylistic analysis

Style	Features
Sentence	Short (informal)
Diction	Conversational
Tone	Warm
Way of sentencing	Dialogue

6. Findings and explanations and discussions

6.1. *Findings*

The above analysis of our data reveals the following differences in Chinese and American sentencing discourses. Firstly, in terms of structure, while the Chinese sentencing is dualistic, that is, composed of two parts, the American counterpart is monolithic. Secondly, in terms of content, the American court concentrated on legal reasoning throughout and the Chinese judge made a point of following the matter-of-fact legal sentencing with some passionate moralizing. Thirdly, there was much more legal reasoning in the American discourse than in its Chinese counterpart, as can be seen from the fact that a good 46% of the discourse space was devoted to legal reasoning in the American case as compared with a meagre 12% in the Chinese case. Fourthly, in terms of the way in which sentencing was delivered, the Chinese discourse was simply a monologue, whereas the American sentencing was more of a dialogue in spite of the fact that it was the court that did the talk most of the time. And finally, in terms of the quantity of discourse, the American sentencing outweighed its Chinese counterpart significantly. We summarize the differences in the following table.

Table 7. Differences

Discourses		Chinese Sentencing		U.S. Sentencing
1	(1) Structure	Dualistic		Monolithic
		Part 1	Part 2	
	(2) Legal reasoning	Meagre (117 words, 12% of discourse space)	None	Heavy (900 words, 46% of discourse space)
	(3) Moralizing	None	Abundant	None
2	(1) Way of sentencing	Monologue		A Near Dialogue
	(2) Style	Formal	Informal	Informal
	(3) Tone	Matter of fact	Warm	Conversational
	(4) Amount of discourse	940 words		1727 words

6.2. *Explanation and discussion*

Now let us try to explain and discuss the differences. As can be seen from Table 7 above, the differences are not equally important. The most important ones are the first three, those in Group 1 in Table 7, because they have to do with the content and the macrostructure of the discourse. The other differences, those in Group 2, have to do with the way in which the sentencing was delivered. As was said before, the Chinese sentencing discourse was actually a well-prepared document and was read out in court. That explains why it is a monologue and also very formal. So, rather than address each and every difference in detail, we will focus on the most important difference or question: why is Chinese sentencing discourse dualistic, i.e., there are two parts in the Chinese sentencing discourse with one devoted to the legal aspect and the other devoted to moralizing, while the American counterpart is monolithic, devoted exclusively to legal sentencing? We will try to explain the difference in terms of the differences in legal tradition, legal culture, legal system, ideology and culture in general.

6.2.1. *Explanation of the features on the Chinese side*

6.2.1.1. *The Chinese legal tradition*

(1) The dichotomy of *fa* and *li*

The dichotomy in the Chinese sentencing discourse actually reflects a conceptual dichotomy of *li* (礼) and *fa* (法) which is traditional in China. A good understanding of Chinese legal tradition entails a good command of *li* and *fa* and their relationship. A mixture of *li* and *fa*, with the former dominating most of the time in Chinese history, or with the former in spirit and the latter in form, characterizes traditional Chinese law.

Li is the key Confucian term or concept with a wide range of meanings. In its narrow or original sense, it means the correct performance of religious ritual: sacrificing to the ancestors and gods at the right time and place and with the proper deportment and attitude is *li*, as can be seen from an analysis of the original pictogram of *li* (), the classical left component of which portrays a sacrificial vessel with two pieces of jade above it (Luo 1913); so is the proper performance of divination. In its broad sense, *li* was a body of rules of behaviour to satisfy and to regulate human needs and consists of social and political institutions, including law and government. It also referred to propriety, ethics, or moral rules of correct conduct and good manners, and embodied the teaching of Confucius. The *Book of Rites* [3] describes *li* as 'regulator of human desires that has been devised for protection of the people', 'a form of social control over unrestrained expression of human desires' and it 'forbids trespasses before they are committed, whereas *fa* punishes criminal acts after their commission'. The Confucian view of *li* constituted the concrete institution and accepted modes of behaviour in a civilized state and *li* was grounded in the broad moral principles which gave *li* validity because they were rooted in innate human feelings, what people would in general instinctively feel to be right.

[3] *The Book of Rites* (礼记), a Confucian classic recording rules of propriety before the Qin and Han Dynasties.

Fa is the most important word in the Chinese legal vocabulary as the generic term for positive or written law as an abstraction. The original meaning of *fa* is a model, pattern, or standard (Cihai 1989). Derived from this meaning is the notion, basic in Chinese legal thinking, that *fa* is a model or standard imposed by superior authority, to which people must conform. According to Liang Zhiping (1989), what we today refer to as ancient law was, during the Three Dynasties (Xia, trad. 2205-1766 BC, Shang, trad. 1765-1123 BC, and Zhou, 1122-256 BC) referred to as *xing*, during the Sring and Autumn period (722-207 BC) and Warring States period (403-222 BC) referred to as *fa*. As *xing* means punishment, more specifically corporal punishment, and punishment was used to effectuate law (*fa*), *fa* and *xing* were interchangeable.

In terms of the relationship between *li* and *fa*, *li* acquired the force of law, characterized by moral teachings, the use of persuasion, the appeal to reason and good sense, and the exemplification of good conduct and behaviour (Lee & Lai 1978). In any conflict between *li* and *fa*, traditional Chinese society preferred *li*. Furthermore, the metamorphosis of *li* into *fa* depended on its widespread and unvaried acceptance by society, but its specific content may change with the times. Some rules of *li*, appropriate in Confucius' time, may not be relevant now, and anyone able to install a new *li* into the spirit and mind of the people would succeed in remoulding the social behaviour of millions in the same way Confucianism has done in the past. *Li* continues to be a strong influence in modern China, and these two major concepts of *li* and *fa* have become ingrained in the Chinese legal system.

(2) Confucianism vs. Legalism

The dichotomy in the Chinese sentencing discourse also represents the struggle or debate between the doctrines of the two conflicting schools, Confucianism and Legalism, the two rival schools of thought during the Spring and Autumn and Warring States periods, from which the Chinese legal tradition developed. The purpose of both the Confucian School and the Legalist School was the maintenance of the social order. The difference between them lay mainly in the problem of what constituted an ideal social order and by what means such an order could be attained (Ch'u 1961: 226) The concepts of *li* and *fa* discussed above are closely related specifically with the Confucian School and the Legalist School.

(a) Confucianism

The Confucian school, founded by Confucius himself in the sixth century BC, drew upon and developed traditional attitudes and values, especially as stated by the early Zhou rulers or exemplified in their deeds. The three foremost early Confucians – Confucius himself, Mencius, and Xun Zi – all emphasized teaching and moral guidance rather than penal law as instruments for the government of the people. Only through teaching could a proper sense of virtuous conduct be inculcated in the people. The Confucian emperors and statesmen of the Han and later dynasties all recognized the practical need for the existence of a wide-ranging penal code. They admitted that teaching and moral guidance alone would not suffice to secure good behaviour among the people. Yet penal laws, while necessary, should principally be

used to supplement and reinforce the lessons to be obtained from the teachings and guidance furnished by the ruler and his officials. The consequence was that the penal codes became, to an extent rarely found in any other society, vehicles for the reinforcement of the moral values held by the ruling elite and, to some extent, by the population at large. Confucians insisted that public enacting of law is not necessary in the ideal state, and that even in the inferior administrations of their own times, government by law should always be kept secondary to government by moral precept and example (Bodde & Morris 1967: 18). From the founding of the Han in 206 BC until the fall of the Qing in 1911, Confucianism for most of the time was the orthodox doctrine of the state; that is, it constituted a set of moral values that the state sought to inculcate in the people (Bodde & Morris 1967: 9). Here is a summary of the main Confucian argument:

> 1. Man is by nature good. It is by inculcating *li* that society shapes the individual into a socially acceptable human being. *Li* is preventive because it turns the individual away from evil before he or she has the chance of committing it. A good government based on virtue can truly win the hearts of men while one based on force can only gain their outward submission.
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> 2. *Li* derives its universal validity from the fact that it was created by the intelligent sages of antiquity in conformity with human nature and with the cosmic order. *Li* can reinforce the five major relationships of Confucianism – those of father and son, ruler and subject, husband and wife, elder and younger brother, friend and friend – which are instinctive to man and essential for a stable social order by prescribing modes of behaviour differing according to status, whereas law obliterates the relationships by imposing a forced uniformity.
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> 3. *Li* gives poetry and beauty to life and provides channels for the expression of human emotion in ways that are socially acceptable. *Fa* (law), on the contrary, is mechanistic and devoid of emotional content. A government based on *li* functions harmoniously because *li*, being unwritten, can be flexibly interpreted to meet the exigencies of any particular situation. A government based on law creates contention because its people, knowing in advance what the written law is, can find means to circumvent it, and will rest their sophisticated arguments on the letter rather than the spirit of the law (Bodde & Morris 1967: 21).

(b) Legalism

Opposed to the Confucians were men who, because of their ardent advocacy of law, eventually came to be known as the Legalists or School of Law. Their aim was to create a political and military apparatus powerful enough to suppress feudal privilege at home, expand the state's territories abroad, and eventually weld all the rival kingdoms into a single empire. Toward this goal they were ready to use every political, military, economic and diplomatic technique at their disposal. Their insistence on law was motivated by no concern for human rights, but simply by the realization that law was essential for effectively controlling the growing populations under their jurisdiction (Bodde & Morris 1967: 18). A hallmark of Legalist thinking was that there should be equality before the law. The ruler must rely on penal law and imposition of heavy punishment as the main instrument of his government of the people. A principle frequently invoked is that, were the smallest offense to be met

with severe punishment, in the end the people would cease to offend and recourse to punishment itself would become unnecessary (MacCormack 1996: 5). The main arguments of the Legalist position are as follows:

> 1. Although a few persons may be found who are naturally altruistic, the great majority of people act only out of self-interest. Therefore, stern punishments are necessary. Being essentially selfish, citizens cannot be induced merely by moral suasion to act altruistically. Hence the wise ruler establishes a system of rewards and punishments in such a way that citizens are rewarded if they act exactly in accordance with the specific responsibilities attached to their position but punished when their performance either falls short of or exceeds these specified responsibilities.
> 2. If a government is to be powerful, it is imperative for it to publicize its laws to all and to apply them impartially to high and low alike, irrespective of relationship or rank. Law is the foundation of stable government because, being fixed and known to all, it provides an exact instrument with which to measure individual conduct. A government based on *li* cannot do this, since *li* is unwritten and subject to arbitrary interpretation.
> 3. Because history changes, human institutions must change accordingly: the *li* of the ancients no longer fits modern conditions and should be replaced by a system of law. Law should not be changed arbitrarily; yet if it is to retain its vitality it should be kept ever responsive to the shifting needs of its time.
> 4. Laws that are sufficiently severe will no longer have to be applied because their mere existence will be enough to deter wrongdoing. Thus harsh laws, though painful in their immediate effects, lead in the long run to an actual reduction of government and to a society free from conflict and oppression (Bodde & Morris 1967: 23-24).

In sum, the Legalists' insistence on law was motivated by the political control of the masses while the concern of the Confucians was the moral development of the individual. While the Confucian School depended on *li* to maintain social order by moral education, the Legalist School invoked law for the same end and employed punishment as the enforcing agent (Ch'u 1961). Confucius and his followers located the prime duty of the ruler in teaching and setting a good example, whereas the Legalists had stressed the duty of the ruler to enact and maintain harsh penal laws. As is stated in the Confucian *Analects*,

> Guide them by edicts, keep them in line with punishments and the common people will stay out of trouble but have no sense of shame. Guide them by virtue, keep them in line with rites (*li*), and they will, besides having a sense of shame, reform themselves.

As it was possible to implement the same norm by different sanctions, thus *li* could be enforced by moral influence and legal means. Eventually, the incorporation of the essentials of Confucianist *li* into legal codes occurred with this Confucian conception dominating ancient Chinese law. The gradual process of Confucianization of law was the most significant development in the legal system of China prior to the 20th century modernization of Chinese law (Ch'u 1961). Many

Confucian officials wrote their court judgments or delivered their court sentencing simply by moralizing from the very beginning to the end (Wang 2008; Guo 2001).

6.2.1.2. *Chinese culture in general*

Unlike many other major civilizations where written law was held in honour and often attributed to a divine origin, law in China was viewed in purely secular terms and its initial appearance was greeted with hostility by many as indicative of a serious moral decline, a violation of human morality, and even a disturbance of the total cosmic order and ordinary Chinese people's awareness and acceptance of the ethical norms was shaped far more by the pervasive influence of custom and usage of property and by inculcating moral precepts than by any formally enacted system of law (Bodde & Morris 1978). As regards the Chinese belief in the cosmic or immanent order of the world, in Chinese thinking a disturbance of the social order meant a violation of the total cosmic order because the sphere of man and nature is inextricably interwoven to form an unbroken continuum. It was further held that correct behaviour was behaviour consonant with the immanent order which set boundaries to appropriate responses, though within these boundaries humans could respond in somewhat different ways (McKnight 1992). In this regard, the Chinese also believed that normal people usually respond within the boundaries, and deviance means going beyond them; for some types of behaviour, *fa* implies and defines boundaries, whereas *xing* (punishments) state the potential costs to the individual of exceeding them and impose penalties for these actions. The boundaries for proper behaviour were prescribed through *fa* (law). Thus, *fa* was considered as a means of providing models for behaviour and of guiding people in the right direction.

Irrespective of the different views as to how and why people observed or violated the boundaries of appropriate behaviour, in Chinese culture, people could be led to good behaviour through education. This notion from the Confucian school of thought held that it was possible to improve the heart through education that enabled a person to become good and become conscious of shame, without suffering from evil intentions. To Confucianists, this was the most thorough, the most fundamental, and the most successful way to attain their social aims. Consequently, an educative process, a process of socialization, both intellectually and, more importantly, morally, with the aim of producing good people, was considered necessary. Given the Chinese belief that human behaviour was subject to formation and reformation through the education process, it was thought that people could learn where the boundaries of appropriate behaviour were and how to act within them; law could be used to provide them with appropriate models via a mixture of rewards and penalties designed to encourage and enforce these models (Cao 2004: 62). Thus, the Chinese faith in the importance of appropriate education through provision of models of proper behaviour established the primary role of law in society.

6.2.1.3. *The present Chinese legal system*

In China, law has never been just law; nor is it purely for law's sake. For example, in Chapter I (Tasks and Fundamental Principles) of Part One (General Provi-

sions) of the Criminal Procedure Law of the People's Republic of China, we find the following article:

> Article 2: The tasks of the Criminal Procedure Law of the People's Republic of China shall be: to ensure accurate and prompt ascertainment of the facts of crimes, to correctly apply laws, to punish criminal offenders, to guarantee any innocent person from criminal prosecution, *to educate citizens to voluntarily observe the law and actively struggle against criminal acts,* so as to uphold the socialist legal system, to protect the citizens' rights of person, rights over their property, democratic rights and other rights, and to guarantee the smooth progress of the socialist modernization. (my italics)

It is specifically prescribed that criminal procedure law is enacted not just to punish those who commit crimes and protect those who are innocent but also to educate the citizens. Besides this, the Chinese Supreme Court has a tradition of emphasizing the three functions of a trial: 1) exposing crime or punishing those who commit crimes, 2) educating both the defendant and the general public, and 3) publicizing the law. The courtroom is also regarded as a classroom or shame room where the defendant is punished or denounced, or educated. If the defendant is young and has committed the crime for the first time and on impulse, he/she will be educated. A Chinese judge is supposed to have multiple roles: he/she is simultaneously a reporter or an announcer, a decision-maker, an interpreter and a teacher or an educator. Metaphorically, the judge uses both hands, his right hand pushing the defendant into jail while his left hand tries to pull him/her back, and this is typically reflected in the dichotomy in the Chinese sentencing discourse.

6.2.1.4. *The political system, dominant ideology and government*

Law in China is never independent of the dominant ideology. Leadership of the Communist Party and the Chinese government has always emphasized two rules in running the country: rule of law and rule by moral virtues. When Deng Xiaoping (Deng 1996) was in power, he proposed the use of two hands in running the country, one directed at socialist construction, which includes not just material but also spiritual construction, and the other at punishment of crimes. On October 23, 1985, in an interview with the editor-in-chief of the American weekly *Time*, when asked how China would solve the problems of corruption and abuse of power, Deng Xiaoping answered, "We will resort to two means. One of them is education and other is law" (1992: 148). Towards the end of his term, the former president Jiang Zeming (Jiang 2006) made a point of emphasizing the importance of rule by moral virtues in running the country by equating rule of law with rule by moral virtues. Hu Jingtao, the present president of China, has always advocated the rule of law, but at the same time he highlights his 'Eight Honours and Eight Shames' [4], which is essentially moralizing.

[4] He made these remarks when he went to see some of the representatives at the 4th Plenary Session of the 10th National Political and Consultative Conference on March 4, 2006 in Beijing.

6.2.2. *Explanation for the features on the American side*

6.2.2.1. *American legal culture*

In the United States, things seem to be simpler in that only the rule of law prevails in legal culture. The spirit of American legal culture seems to be best captured in the following quotation by Lincoln [5]:

> Let every American, every lover of liberty, (and) every well-wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular the laws of the country, and never to tolerate their violation by others.

In other words, within American culture, the American legal logic is: we should have law; we do have law; we have to observe the law; and any violation of the law will be punished. The spirit of the rule of law in American legal culture can be best seen in court in the reiteration of the word 'law' with its variants in the above data: 'the rule of law', nine times; 'the law', 12 times; 'a (…) law', four times; 'the statute', two times; and 'it' (for 'law'), seven times. Law, law, and law again! This reminds one of what Oliver Wendell Holmes, Jr. (1841-1935) once said: "This is a court of law, young man, not a court of justice."

6.2.2.2. *American Federal Rules of Criminal Procedure and the court's function*

The American Federal Rules of Criminal Procedure are characterized by the protection of human rights and there is no mention of the educational function of the law at all. The American court has just two functions: interpretation of the law and application of the law (and sometimes the judge is also a good conversationalist), as the judge in our case reiterated ("The judiciary simply interprets and applies the law". "The Court's business is to interpret and apply the law…"). The frequency of the word 'law' as shown in the American sample is evidence enough for this. Metaphorically, the American judge uses only one hand, a purely legal hand, which pushes the defendant into jail but only after he has made it sufficiently clear legally why he did so.

7. Concluding remarks

Yan Zi (晏子), a great ancient Chinese statesman of the State of Qi in the Warring States of the Spring and Autumn Period, said, "When what we call 'orange' grows in the south of Huai River (in China), we call it *ju* [6], while if it grows in the north of the Huai River, it becomes *zhi*" (*桔生淮南则为桔，桔生淮北则为枳*) [7]. What is essential here is the soil. The difference in soil is responsible for the difference in the type of orange. In the same way, differences in the cultures as well as in the legal systems and ideologies are responsible for the differences in the sentencing

[5] Taken from "The Perpetuation of Our Political Institutions", Lincoln's address to the Young Men's Lyceum at Springfield, January 27, 1837, published in the Springfield *Weekly Journal*.

[6] *Ju* (*桔*),tangerine.

[7] *Zhi* (*枳*) is a trifoliate kind of orange.

discourses. It should be pointed out that not every Chinese judge delivers his/her court sentencing in this way. The sample in our data is not typical in China, but it is of symbolic meaning as it represents an important trend in the present legal reforms in China. It is a compromise between the struggle to preserve the tradition and the endeavour to push reform forward, or more specifically, a compromise of rule of law and rule by moral virtues. For the past few decades, when rule of law gets the upper hand with legal reforms deepening, the Chinese legal professionals have been learning or trying to deal with law, morality and politics separately: the dichotomy of the sentencing discourse with the first part primary and second part optional and attached is a perfect reflection of this effort. This is what we intend to make known by this comparison to those who are not familiar with the Chinese legal system, legal culture and culture in general. What the Chinese people in general and the judges in particular can and should learn from the American judgments or sentencing is more legal reasoning. As for moralizing, I would like to cite the following [8]:

> Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it.

So, might judges in the United States of America also try a bit moralizing when delivering their sentencing?

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[8] The Queen v Dudley and Stephens (1884) 14 QB 273, 287 (Lord Coleridge CJ).

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APPENDIX A. Chinese data

Section 1: Head: information about the trial court, the procuratorship, the defendant and trial

Judgment by Hongkou District Court, Shanghai, 2004, No. 60

The public procuratorship: the People's Prosecutorial Office of Hongkou District, Shanghai

1) The defendant is Li Zhaoqing, male, born on Oct. 24, 1975; his nationality, Han; his birth place, Shanghai; and his education, a university graduate. 2) He was an employee of XXX Clothing Company limited, Shanghai and lives at Room 203, No. 8, Lane 565. 3) Suspected of robbery, he was held in criminal detention on Dec. 16, 2003, and was arrested on Dec. 26. 4) He is presently held in a detention house in Hongkou District. 5) In its bill of prosecution No.73 (2004) the People's Prosecutorial Office of Hongkou District, Shanghai, charged the defendant Li Zhaoqing with robbery and instituted the case to this court on Feb. 25, 2004. 6) In line with the law, the court formed a collegial panel of judges and held a public hearing. 7) The People's Prosecutorial Office of Hongkou District, Shanghai, sent a prosecutor, Fu Weiqin, to the court to support the prosecution, and the victim Wu Yanrong attended the hearing.

Section 2: Findings and legal arguments

1) The trial has been concluded. 2) During the trial, it was found that at around 9 pm, on December 12, 2003, the defendant Li Zhaoqing, after considerable premeditation, invited Wu Yanrong, a woman he acquainted himself with through the Internet, to room no. 1520 of Haihong Hotel of Shanghai, which he had reserved by using a forged identity card with the name of Shen Jun. 3) Thereafter, he made Wu Yanrong drink a glass of juice with sleeping pills. 4) As soon as she fell into a state of lethargy, Li Zhaoqing robbed Wu Yanrong of a mobile phone (Model Motorola T189) worth 541 yuan (renminbi), 50 yuan (renminbi) in cash, a leather bag, a Buddhist jade article, and absconded with the booty. 5) About eight next morning, Wu woke up aware of having been robbed and reported it to the public security station. 6) After examination, it was found that Wu's urine contained diazepam. 7) The public security people tracked down and found all the stolen money and goods, and returned them to the victim. 8) The defendant Li Zhaoqing raised no objections to the above gravamina during the trial, and we have the record of the victim's statement and identification, the testimony of the witnesses Miao Yun and Shen Jun, the registration sheet at the hotel, the forged identity card, the report of the test of the urine by the public security bureau, the record of rummage of the defendant's home by the Shanghai Public Security Bureau, Hongkou Branch, a list of the goods seized and returned to the victim, the expert's report of the value of the goods produced by the Shanghai Price Authentication Center as sufficient and true evidence. 9) The court

holds that the defendant Li Zhaoqing, in order to possess Wu Yangrong's goods illegally, robbed her of her goods by anaesthetizing her, which constitutes a crime of pillage. 10) The charge of the defendant by the People's Prosecutorial Office of Hongkou District, Shanghai, with the crime of pillage is tenable. 11) Having been held in custody, Li Zhaoqing pleaded guilty and his attitude was positive, and his family volunteered to pay the penalty for him. 12) Therefore, the punishment could be commutable. 13) In order to maintain the social order and protect legal private property from encroachment, the court issues the following sentence in accordance with Article 263 and Article 23 of the Criminal Law of P.R. China.

Section 3: Body: Sentencing and appeal

1) First, the defendant Li Zhaoqing committed the crime of pillage and is sentenced to a four-year imprisonment and a penalty of 5,000 yuan. 2) The imprisonment term starts from the day of the execution of the sentence. 3) The time of detention before the execution of the sentence will be taken as part of the imprisonment term and therefore subtracted from it. 4) Consequently, the actual imprisonment term commences on December 16, 2003 and concludes on December 15, 2007. 5) Secondly, the seized forged identity card will be confiscated and destroyed. 6) If the defendant objects to this sentence, he may, within ten days dating from the second day after reception of the notification of the sentence, appeal via this court or directly to the Shanghai Second Intermediate People's Court. 7) If the defendant chooses to appeal in a written form, one original copy and two duplicates of the appellate petition should be submitted.

Judge: Zhou Jun
Acting judge: Bian Biao
People's assessor: Xu Yaping
Secretary: Cai Yi
Secretary: Tang Chenjie
March 9, 2004

Postscript or the Judge's afterwords

1) Li Zhaoqing, you were born in an intellectual's home. 2) You worked very hard for many years and went through countless difficulties in your schooling until you successfully graduated from university. 3) You are 28 years old and this is the golden time of your life. 4) You should have been working harder and using what you have learned to serve the society and your parents, but because of a moment's greedy desire, you went the wrong way and committed a crime. 5) Think of your parents, who have endured countless sufferings and borne numerous hardships in raising and supporting you in your education. 6) Actually, parents expect no repayment from their children for what they have done. 7) They simply want their children to develop and grow happily and healthily and be a person of integrity. 8) Because of a

moment's foolish action, you failed to live up to their expectations. 9) The lesson is too expensive. 10) However, as the saying goes, it is not too late to mend the fold after the sheep is lost. 11) It is hoped that you will draw a lesson from this bitter experience, try to reform yourself, learn and abide by the law and try to come back to our society and be a useful man.

APPENDIX B. American data

United States v. Lawrence Anthony Franklin
RECAPITULATION BY THE COURT
OBJECTIONS/CORRECTIONS TO PRE-SENTENCE REPORT
ALLOCUTION BY THE DEFENDANT
ALLOCUTION ON BEHALF OF THE DEFENDANT
ALLOCUTION BY THE GOVERNMENT
IMPOSITION OF SENTENCE BY THE COURT

Section 1: Jury verdict or the court's findings and the plea

The court: Mr. Franklin, come to the podium.
The defendant: (Complies)
The court: 1) Mr. Franklin, you stand convicted of serious crimes, that is, conspiracy to communicate national defense information to persons not authorized, conspiracy to communicate classified information to a foreign government agent, and unlawful retention of that security information. 2) These are serious offenses, and Congress has appropriately prescribed severe penalties. 3) And in setting an appropriate sentence, the Court has considered your history and characteristics, the nature and seriousness of the offense, the need to avoid unwarranted disparity in terms of people being sentenced for similar offenses, and the need for personal deterrence, directed at you, and general deterrence. 4) Now, with respect to your personal history and characteristics, the Court is fully familiar with your background of service as Mr. Cacheris has aptly described it. 5) You have served in the military and you have served in government, and you have a long period of national service. 6) And I have taken that into account. 7) I have also taken into account that you have no criminal history. 8) I have also taken into account the seriousness of these offenses, which Mr. DiGregori just described very briefly.

Section 2: Reasoning

1) It should be clear that – what the significance – this is a very significant matter, a very significant case. 2) This is not significant solely or chiefly because of the nature of the statutes that you have violated. 3) This case isn't about the merits or demerits of this particular statute. 4) But what this case reflects – because people will argue lots of things about this statute, about the nature of the information, who it was disclosed to, all sorts of things. 5) It doesn't matter. 6) What this case is truly significant for is the rule of law. 7) The law says what it says. 8) The merits of the law really are committed to Congress. 9) If it's not sensible, it ought to be changed. 10) But they're – that's the body that changes it, not the judiciary. 11) The judiciary simply interprets and applies the law. 12) So, the real significance of this case is that we have a rule of law. 13) There is a law

that says that if you have authorized possession of national defense information, you can't disclose it to unauthorized people, if you have a reason to believe that it would hurt the US or help a foreign country. 14) It doesn't matter that you think that you were really helping. That's arrogating to yourself the decision of whether to adhere to a statute passed by Congress or not. 15) And we can't do that in this country. 16) You may disagree with the application of the statute to you, but you can't use that disagreement to violate the law with impunity. 17) Lots of people think that they are doing more good than harm if they disclose classified information to academia, to professors, to journalists, to other countries, to whoever – or to whomever. 18) They can't make that calculation. 19) It's not up to them to make. 20) Congress has decided how this classified information should be treated. 21) They have passed a law. 22) The rule of law applies, and we are all subject to it, and we must also obey it. 23) So that's the real significance, is that we are a country committed to the rule of law. 24) So, any discussion about whether it makes sense to apply the law in this case, or whether it's a sensible law, is irrelevant to you, because you chose to violate the law. 25) That doesn't mean we shouldn't debate whether the law is a good law or not, as a people. 26) It doesn't mean that Congress shouldn't consider it. 27) It's not for the Court to say. 28) It's none of the Court's business. 29) The Court's business is to interpret and apply the law, and we are a country under which everyone is subject to the rule of law. 30) So, there is no excuse for you thinking that you could get to the NSC circuitously by disclosing national defense information to unauthorized persons. 31) And it doesn't matter who you disclosed it to. 32) It doesn't matter whether you disclose it to a newspaper. 33) It doesn't matter whether you disclose it to people who are fierce American patriots, or anything else. 34) It doesn't matter. 35) It can't be disclosed. 36) That's the rule of law. 37) That doesn't mean that I view this case the same way as I would view this case back when I first went on the bench, in the 'Eighties, seeing people disclose things, national defense information, to the Soviet Union as it then existed, because, of course, the circumstances would be different. 38) But not different in – to the extent of excuse, not at all. 39) But I have considered the nature and seriousness of the defense. 40) And it is a serious offense. 41) As Mr. DiGregori pointed out, once the information gets into unauthorized hands, who knows where it goes? 42) Who knows where it travels? 43) That's why it is classified, to ensure that only the people with the need to know, with that classification, receive it. 442) I have also considered the need to avoid unwarranted disparities. 45) And in that regard, the Guidelines are an important benchmark. 46) And I typically use the Guidelines in order to avoid unwarranted disparities. 47) In this case I see no substantial reason – and I don't need to find something in the Guidelines to depart, that is, a Guideline departure before I would before I would depart. 48) I sometimes depart without any Guideline departure, if the circumstances warrant, because the command to the Court is not to impose a sentence that is more severe than necessary to meet these goals in the statute; that is, the deterrence, respect for the law, and the like.

Section 3: Adjudication, the sentence and forfeiture

1) Given all of that, it is the judgment of this Court that you be sentenced and committed to the custody of the Bureau of Prisons to serve a term of 120 months on Count 1 and Count 5 of the Case 05-225; that is, 120 months on the conspiracy to communicate national defense information to unauthorized persons, and Count 5, conspiracy to communicate classified information to an agent of a foreign government. 2) As to those counts, it's 120 months on each, but the sentences are to run concurrently. 3) With respect to Count 5 – I'm sorry, I misspoke there. 4) On Count 1, which is the conspiracy to – the conspiracy to communicate national defense information to unauthorized personnel is in Count 1 of the indictment, superseding – or the indictment in this case, is 120 months; Count 1 of the West Virginia matter is also 120 months, those sentences to run concurrently. 5) With respect to Count 5 of the indictment from this district, which is the conspiracy to communicate classified information to an agent of a foreign government, you are to serve a period of 31 months imprisonment. 6) And that sentence is to run consecutive to the other two sentences, for a total sentence of 151 months. 7) The Court concludes that that sentence adequately accommodates the goals of the Federal Criminal Justice System, in that it provides adequate deterrence, both general and specific, and because it promotes respect for the law. 8) That's why I emphasized the rule of law. 9) I will also impose a $100 special assessment for each count, for a total of $300. 10) And I am going to order that you serve a period of supervised release of three years on each of these counts, and that term is to run concurrently. 11) That is, all three three-year counts are to run concurrently. 12) The Court does not impose any special drug testing, because the record does not reflect the need for that. 13) The Court does not impose a financial or a punitive fine, in view of the forfeiture. 14) What is the extent of the forfeiture, Mr. DiGregori, Mr. Cacheris?

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The Court: 1) All right. The Court will order the payment of a $10,000 fine, due and payable immediately. 2) If not paid immediately – that's the figure I originally had noted – then you are to pay it at the rate of $250 a month within 60 days of your release from confinement. 3) Now the Court will allow you to surrender voluntarily and the Court will also stay the service of your sentence pending the completion of your cooperation, which extends beyond the matter that is the subject of the indictment in this district. 4) I also want to mention that I took account, Mr. Franklin, of the fact that I believe – I accept your explanation that you didn't want to hurt the United States, that you are a loyal American and a patriot, and you thought – that you perceived this problem, and you thought the only way to get this problem to the attention of the NSC was in this odd, circuitous method that you chose. 5) I have told you that is, of course, a violation of the law, no matter what your motive may have been. 6) And Mr. DiGregori has properly pointed out that one of the problems with that is that once classified information escapes, its destination or destinations can't be predicted. 7) Now, what I didn't mention is that, as I also read this record, I see some element of personal ambition, namely, you wanted to be on the NSC. 8) And you had hoped some of these people might help you. 9) That's

not as laudable a motive. 10) But I think what really drove you is what you stated in your statement. 11) I accept that. 12) Now, have I omitted any aspect of the sentence?

Section 4: Reasoning again

The Court: 1) Mr. Franklin, I tell all defendants, as you heard earlier in the courtroom today, that life is making choices and living with the consequences of the choices you make. 2) You've made some good choices in life. 3) Your record reflects that. 4) But where you ran afoul is arrogating to yourself the decision whether to comply with the law, even though you thought you could bring about a benefit. 5) That's not open to Americans. 6) We are committed to the rule of law. 7) So, all persons who have authorized possession of classified information, and persons who have unauthorized possession, who come into possession in an unauthorized way of classified information, must abide by the law. 8) They have no privilege to estimate that they can do more good with it. 9) So, that applies to academics, lawyers, journalists, professors, whatever. 10) They are not privileged to disobey the law, because we are a country that respects the rule of law, and that's the real significance. 11) Anything further, Mr. DiGregori?