

# The Limits of Legal Commensuration: Blood Money and Negotiated Justice in China

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## Abstract

Commensuration has been identified as the key mechanism of valuation. Legal commensuration is arguably the most prevalent and consequential form of institutional commensuration. This article studies the limits of legal commensuration through the criminal reconciliation process in China. Drawing mainly on data collected from fieldwork investigation of two grass-root courts, this article examines two factors that affect the process and outcome of legal commensuration: institutional interests favoring reconciliation and cultural meaning of money. Institutionally, political considerations play a decisive role in judges' motivation to facilitating the settlement. Culturally, the different meanings of money (what money means to defendants and how it is raised) serve as another dimension shaping the practice. Contrary to the conventional wisdom that criminal justice in China is generally repressive, this study paints a more complicated yet dynamic picture of *negotiated* justice, in which the social meanings of money, the political concerns of the courts, economic benefits, and sense of justice are all in play. Through this study of blood money in China's legal system, we challenge that institutional-led commensuration is a totalizing process.

Recent studies have pinpointed commensuration as the key mechanism of valuation (e.g., Espeland and Stevens 1998, Levin and Espeland 2002, Cohen 1984, Kaprik 2010, Fourcade 2011), a mechanism that many consider as integral to the governance of modern states (Porter 1995). Simply put, commensuration is the process of turning qualities into quantities, or the process of transforming “different qualities into a common metric” (Espeland and Stevens 1998: 314). It is the mechanism for expanding the frontiers of the empire of money. Money, famously described by Georg Simmel (2004: 272) as “the most terrible destroyer of form,” plays a central role in the process of commensuration. It flattens, abstracts, and homogenizes qualitatively different things (Fourcade 2011: 1725). Law, in turn, is one of the crucial modern institutions that have helped turned commensuration into an art form, or rather, a body of technical knowledge. Legal commensuration as a technique achieves uniformity through the process of simplification. It justifies comparison by limiting the amount of information the law considers to facilitate comparisons. A broad array of quantitative techniques are deployed by law to equalize sentencing, to conduct cost-benefit analysis in regulation, and to rank the value and prestige of different law school degrees (Espeland and Vannebo 2008). Law’s unparalleled power to facilitate commensuration turns on its ability to price the priceless (Ackerman and Heinzerling 2004), putting a price tag on things as varied as healthy environment (Ackerman and Heinzerling 2002; Anderson and Leal 1991), carbon emissions (Levin and Espeland 2002), oil spills (Fourcade 2011), the value of children’s health (Lutter 2000).

In this article, we examine legal commensuration from a sociological perspective that emphasizes the significance of institutional and cultural practices. The recent literature on commensuration seems to have put much more emphasis on how institutions eliminate uniqueness in the process of commensuration (see, for example, Karpik 2010). Even in works that emphasize the socially embedded quality of the commensuration process, the focus is mainly on how values are created, defined, and constructed in the process (cf. Fourcade 2011). Of course, the questions of what to measure and how to measure are at root tied deeply to social morality. But the literature is quite silent on practices of legal commensuration that are institutionally isomorphic and have attained field-level dominance (DiMaggio and Powell 1983).

Nowhere is the dominance of legal commensuration more manifest than in law's ability to put a dollar value on the vicissitudes of life. Along with the insurance industry, law has systematically monetized what would otherwise have known as "singular" life experiences of different kinds (Zelizer 1983; Chan 2011). Indeed, much of the development of modern torts has been a process of giving values to intangible injuries and pain, a process that validates the Durkheimian view (1997) that law is the quintessential form of social morality. In the common law context, for example, compensation is calculated on the basis of how an injury happened rather than what happened. It focused on cause rather than need. It also pays no attention to a defendant's ability to pay. It simplifies moral judgment by reducing every act into either fault or no-fault while making virtually no distinction between major and minor faults. It is more concerned with whether victims entitled to be compensated rather than whether they need to be compensated. Above all, it allows for an economistic coordination of qualitatively

different feelings and emotions – individual pain and grief is now treated as comparable experience that can be converted into dollar prices (Abel 1990). Money is adopted as the unified medium for the calculation of lives lost and damaged, and the pain and suffering caused by injury, and the grief and remorse experienced by the loss of loved ones.<sup>1</sup>

In what follows, we would like to offer an alternative approach to the study of legal commensuration, an approach that goes above and beyond the focus of how values are defined. It is easy to imagine legal commensuration as a process wholly governed by institutional rules. But a theoretical perspective that makes little mention of political consideration, cultural values, as well as power differentials and agency fails to capture the actual working of the law. Commensuration does not take place in social vacuum, despite its tendency to equalize social differences. Studying how commensuration is carried out therefore provides an important vantage point for one to develop a much more sociological understanding of the process. Our thesis is that institutional incentives and cultural meanings *matter* in the negotiation of values. We use the case of criminal reconciliation in China to challenge the prevailing views on legal commensuration. The emergence of reconciliation in the criminal justice system of China, known as 刑事和解 in Chinese, defies the popular perception of the system as a draconian and repressive one that still relies on stiff punishment to achieve deterrence. Chinese-style criminal reconciliation is a highly “transactional” process that epitomizes the role of money as a form of cure-all compensation. Defendants pay a fixed sum of money in order to earn the

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<sup>1</sup> This tendency to commensurate is certainly not without its critics. Richard Abel, writing from the perspective of Critical Legal Studies, remarks: “Damages commodify a unique experience, injury, by substituting the universal equivalent, money, as when a plaintiff’s attorney asks the jury to assign a monetary value to each second of the victim’s pain and then aggregate it over a lifetime of suffering” (Abel 1990: 804). He adds: “Damages for pain and suffering extrapolate Bentham’s hedonic calculus to its logically absurd conclusion, insisting that every pain suffered can be offset by an equivalent pleasure, which can be bought for money” (Abel 1990: 803).

forgiveness of the victims they injured or killed (in that case, the forgiveness of their families). It is this apparent instrumental calculativeness of the process that makes it an interesting case for studying legal commensuration in action. For subject matters such as life (Posner and Sunstein 2005), child (Zelizer 1985), or intimacy (Zelizer 1994), it is hard and sometimes offensive to discuss and compare its price and then bargain for it. It may be considered as illegitimate or immoral to compare, bargain for, and manipulate the assigned monetary values, as if they were market prices (Carruthers 2010: 59). But often in China, criminal reconciliation is precisely about lives lost and families damaged - singular experience that is too uniquely individualistic to be easily valued (Karpik 2010). China has adopted, largely by borrowing from the United States and Europe, a body of technical rules to commensurate losses and damages of different qualities into a common metric. A young person's life lost in the urban, more developed part of the country is valued at around the price of 400,000 yuan today. The price would be reduced by half if the same life were lost in less developed, inland part of the country. The effect of criminal reconciliation is that it uses money to offset what is supposedly "just" punishment of a defendant. As a critic points out bluntly: "If you have money, you will get a lenient sentence; if you are poor, you will go to prison." (Li 2006: 96).

The use of reconciliation has permeated deeply into China's criminal justice system since its emergence in the early 1990s. Through private negotiations among parties, offenders can have their sentences reduced or even suspended, by offering economic compensation to their victims in exchange for their forgiveness. In some regions, almost half of the minor injury cases filed at the Police Office were reconciled and thus dropped (Ge 2008: 340; cf Huang 2013), and about a third of the criminal cases in court were

reconciled (Cheng 2012). By most scholarly accounts, minor physical assaults and traffic-related crimes are the two main types of crimes in which criminal reconciliation is practiced. But it is also used in cases such as fraud, theft, and crimes related to so-called disruption of public order. Criminal reconciliation is also used more restrictively in cases concerning serious crimes, e.g., the bargaining for life imprisonment rather than death penalty in murder cases. The practice was so informally widespread that the Chinese party state decided to officially “recognize” it in its latest exercise of revising its Criminal Procedure Law. The 2012 version of the law stipulates that “criminal reconciliation” can be carried out in public prosecution cases.

Chinese scholars have commented extensively on this practice, with focuses primarily on the legal and policy repercussions of the practice.<sup>2</sup> Their discussions consider the legal theories justifying this form of reconciliatory procedure in criminal justice system and the extent to which criminal reconciliation is practiced at different levels of China’s court system (Song ed. 2008, Song ed. 2011, Ge 2008, Sun 2009, Chen 2011, Sha 2012). Skeptics of criminal reconciliation are concerned about the possible abuse of the process would lead to greater inequalities for economically vulnerable litigants (Li 2006, Ge 2010, Rosenzweig et al. 2013). In line with these points, existing scholar works on the subject, most of them arguing from a jurisprudential standpoint, simply assume that the exchange involved in reconciliation is determined exclusively by the nominal value of money and the bargaining between the victim and the defendant

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<sup>2</sup> Searching the China Journal Full Text Net with the key work “criminal reconciliation” generates 1518 papers. A search in the Hong Kong Universities Library catalog retrieves 15 Chinese books with “criminal reconciliation” in the title. In the English-speaking world, however, criminal reconciliation is rarely discussed. In their remarkable and comprehensive empirical examination of the criminal process in China, for example, McConville et al (2011) barely address this practice. There are only two exceptions. Rosenzweig et al. (2013) briefly discuss criminal reconciliation from a legalistic perspective and sporadic interviews with lawyers, and Zheng (2012) describes the legislative developments with regard to this practice.

operates on a pure market logic. Equally important, many studies unduly presume that litigants who pay are *capable* of paying.

Few studies, however, have examined empirically the actual process of criminal reconciliation. What does reconciliation entail? How does it come about? How does it arrive at artificial prices for life-changing suffering and loss agreed upon by defendants and plaintiffs? Is the process of attaching prices to life-changing experience a simple outcome of legal rules and regulations? Or is it something more? After all, negotiation between defendants of criminal charges and the victims they hurt is anything but easy. In many traffic-related crimes, victims' families lost their loved ones as a result of reckless acts of defendants. Understanding the process of reconciliation also allows us to formulate a more sociological account of legal commensuration. As will be shown, the lack of attention to the actual practice and how social and moral ideas are factored into the calculation of economic compensation often leads to oversimplified conclusions. Because of individual's different valuation systems, for example, rich defendants may not be forgiven just because they can afford to compensate, while poor defendants may be forgiven because they and their families have exhausted all the possible means in order to raise only a part of the demanded money. In short, the reality is much more complex and layered than the slogan "the rich get away, the poor get prison" suggests.

### Blood Money as a Challenge to Legal Commensuration

We call financial compensations offered by offenders to victims or courts in exchange for less punishment a form of "blood money" (Baker 2001). The term is used to distinguish money of this kind from insurance money. According to Baker (2001: 276), "blood

money' is money paid directly to plaintiffs by defendants out of their own pockets. ...[It] hurts defendants in a way that money paid on behalf of a defendant by a liability insurance company cannot." The concept highlights that the value of money is not simply determined by its denomination. Depending on the context of its circulation, blood money can be worth more than money from other sources, or as will be shown, less. This suggests that the source of money makes a difference in even formal legal processes. Beyond the practical valence of blood money, there is a clear moral valence. Money is more "valuable" because of the hardship experienced by defendants and their families in raising it. It is also more "valuable" because it is a more certain form of money than judgment money, which in China is often not enforceable.

The perspective of blood money derives from the literature of the sociology of money. There are different categories of money, and its value varies across social contexts and social transactions. Most notably, money is valued differently depending on who gives it and who receives it. For example, immoral practices such as crime, theft, and corruption produce "dirty" or "bitter" money (Shipton 1989). For a long time in human history, money generated from interest on loan is sinful because it violates the prohibition on usury. Zelizer (1994: 36-70) documents a variety of domestic earmarking practices that commonly occurred in American households, and shows how these were articulated in conjunction with evolving gender roles and policy imperatives. Heath and Soll (1996) show how consumers undertake mental budgeting that labels the different types and sources of money that come into and then flow out of their households (cf. Thaler 1999). Gerriets (1985) finds that money in Christian Ireland was more valued because it helped fulfill social obligations and boosted one's social status. And different

interpretations on money are by no means limited to personal and household practices. Both private and public organizations earmark their internal and external budgets to meet their need and obligations (Stinchcombe 2001). All these examples suggest that the differences in different types of money come from the fact that social meanings are attached to these sources and recipients. The individuals and institutions that provide or receive the money often have different interpretations and evaluations of the money. In other words, in different social contexts, there are alternative evaluation modes that often conflict and compete with the market one. People, both in and outside organizations, categorize and distinguish money. These monetary practices reflect a variety of social, psychological, political, and organizational imperatives. As a result, the commensurability of money is managed and constrained by these social and organizational considerations (Carruthers 2010).

Based on extensive interviews conducted with judges working in two different grass root courts in China, one coastal, urban, and economically developed, one inland, rural, and economically backward, this article examines the typical features of criminal reconciliation in China and the effects it has on the criminal justice system of the world's most populous country. To preview our argument, we identify two key factors in disrupting, counteracting, and subverting legal commensuration. The first is the negotiated nature of criminal reconciliation in practice. Criminal reconciliation is common because it is an outcome preferred by judges in China. Judges in fact push for criminal reconciliation as it is riskier for them to adjudicate. Courts have very limited institutional capital to burn on unpopular and controversial decisions. Reconciliation, coupled with compensation, is a safe option for avoiding petitions and appeals. Criminal

reconciliation can thus be understood as a risk averting option for the judges. They are strongly incentivized to facilitate reconciliation, so much so that criminal reconciliation can be accurately characterized as a form of official-led defendant-victim negotiation. The same tendency of risk aversion that motivates judge to promote reconciliation also prompts victims to accept offers from defendants - While the payoff in the reconciliation process is usually lower, blood money, or money directly out of the pocket of defendants and their families, is a much more certain source of money than seeking potential higher payoff in civil litigation. So understood, it is a mischaracterization to describe the process as strictly a private affair between defendants and victims (cf. Chen 2008). It is instead a process highly controlled, promoted, and orchestrated by judges and other law-related officials. In short, reconciliation is an outcome negotiated by three parties: the victim, the defendant (and their families), and the court. The negotiated nature of the reconciliation process means that the calculation of compensation does not simply follow a uniform set of established rules. To determine pecuniary damages in law, China has basically borrowed and adopted from the West a formal system of commensuration. But the political calculation of judicial personnel renders the process of valuing physical injury, pain and suffering, and even criminality a much less standardized or rule-based process. The courts we studied, as will be seen, make use of different tactics and strategies to persuade victims and defendants to agree to reconcile.

If commensuration is complicated by the bureaucratic instinct of self-preservation, it is further disrupted by the partial devolution of power to litigating parties. This is the second factor we identify. Litigants imbue the negotiation process with a moralizing logic of valuation that goes against the quantitative logic of commensuration. In order to

determine pecuniary damages in law, money is treated as the unified metric to quantify different types of social experiences. The process of reconciliation however makes salient stories about how defendants raised the money and what the money meant to them. The bringing in of cultural values disrupts the singular economic rules that facilitate uniform conversion. Cold, hard cash is turned into hot, blood money. Seen in this light, criminal reconciliation is in fact a complex process blending institutional and political calculations of bureaucrats with moralistic valuation of money that makes criminal compensation anything but uniform, homogeneous, and impersonal. It is the interaction of the two analytically distinct logics, one institutional and one cultural that makes criminal reconciliation the perfect locale for understanding how law and society interacts in today's China.

#### Studying Criminal Reconciliation in Two Chinese Courts

The study is primarily based on an ethnographic study of the process of criminal reconciliation happened at two base-level courts in China, Court X in northwestern hinterland and Court Y in southern coastal China.

The county in which Court X is located has been left behind in economic terms since the economic reform that began in the 1980s. The economy of the region grew during the initial stage of the reform period, but has become stagnant since the 1990s: by 2012, the GDP per capita had reached only around 5,200 yuan (China Statistical Yearbook 2013). Agriculture has been the pillar industry because of the availability of fertile valleys formed by the Yellow River and a climate congenial to crops such as wheat. The policy separating income and expenses (收支两条线), one of the most

important policies affecting the financial relationship between the courts and local government, has never been implemented in this court.<sup>3</sup> This is because the fees that the court collects are not adequate to cover its own costs, so the financial bureau of the local government has never bothered to implement the requirement. As a result, the operating expenses of the court come largely and directly from the litigation fees and fines that it imposes on criminal defendants.

In contrast, the county in which Court Y is located has a population of about half a million people. It was, for a long time, the agricultural hinterland of nearby more urbanized and economically developed cities. Rice cultivation and aquaculture (breeding of freshwater fish, shellfish, mussels and clams) remain the main activities of its strong agricultural industry. But the county itself has also undergone the process of urbanization and industrialization. Its investment-friendly economic policy has attracted foreign and domestic companies to set up factories there. This has led to an influx of young migrant workers employed in the county's booming industrial complexes and in the local construction companies that are responsible for building many of these new manufacturing and assembling facilities. The meeting of the locals and the migrants, their rural versus urban background, and their differences in life experiences, mean that there has been a steady increase in social conflicts of various sorts.

As part of our larger study of the Chinese legal system, one of us visited Court X twice in 2011 and 2012. Each visit lasted for about a month. We managed to conduct extensive interviews with a small group (five) of judges in the criminal courts there. We focused in particular on the process of criminal reconciliation and discussed individual cases with the judges (see below).

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<sup>3</sup> For an evolution of this policy, which has had huge impacts on judicial behaviors, see Zhu (2011).

As for Court Y, we first visited it in 2012 for a month to develop trust with the judges working there. One year later, we visited more or less the same group of judges whom we had already established contacts. Our visits lasted again for about a month. We asked and gained permission to sit in on the criminal courts. We surveyed the docket of the criminal court and picked out cases that we believed were more likely to involve criminal reconciliation. We heard about 30 trials, of which about a third of them mentioned reconciliation as an option that both sides agreed to pursue further. It was clear to us that, however, reconciliation was often a process that began before the trial and continued after the formal trial has ended.

To get an in-depth look into the social character of criminal reconciliation, we conducted extended interviews with small group of judges (four to five in each of the two courts) that have experiences with criminal reconciliation in Courts X and Y. We also interviewed the president of Court Y to get his perspective from the standpoint of an administrator. The interviews were extensive. They lasted for an average of an hour to ninety minutes. Some lasted more than two hours. We made an effort to go back to talk to some of the same judges multiple times. We started an interview with by asking judges to describe the process to us. We then moved to more in-depth questions such as some of the successful and failed cases they personally encountered as well as the stories behind the compensation offered in the cases they handled. We paid special attention to the different understandings of different defendants/victims with regard to economic compensation and the incentives of the judges in coordinating this.

The interviews provide us a rich source of qualitative data to understand criminal reconciliation as a cultural and political practice. Towards the end of our fieldwork, we

also obtained from Court Y a full list of written judgments from cases that involved the use of criminal reconciliation in 2012. The written opinions are an important source. They offer an important source of data for studying the effects of monetary compensation on sentencing in China. We derived from the judgments an overview of the main categories of cases that were reconciled and the social and demographic characteristics of the defendants who offered monetary compensation to plaintiffs. The analysis of written judgments allows us to see how courts react to defendants' efforts to offer compensation to plaintiffs.<sup>4</sup>

There are certainly common practices shared by Court X and Court Y in carrying out criminal reconciliation. We draw from the data and materials we gathered from both courts to present our analysis below. There is, however, an important distinction with regards to their attitude towards criminal fines. Comparing Courts X and Y allows us to see how relative well-off courts and poor courts react to the offering of criminal fines differently.

### Why is it Common to Collect Blood Money?

As the name “criminal reconciliation” suggests, the victim and the defendant (‘the parties’) come together in order to reconcile, often with the court or the procuratorate playing the role of go-between. From the defendant’s perspective, the motive of reconciling is to obtain forgiveness from the victim or his family, which is now an officially recognized factor of sentence mitigation under the new Criminal Procedure Law. From the victim’s perspective, reconciliation provides an opportunity for him to

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<sup>4</sup> We also make further efforts to triangulate our findings with judges working in the criminal courts of provinces and cities including Jiangsu, Guangdong, Guangxi, Guizhou, Yunnan, Beijing, and Tianjin. Our discussions incorporate what we learned from judges outside of Court X and Court Y as well.

obtain financial compensation from the defendant. The transactional nature of reconciliation can be seen by how closely the negotiation resembles an offer and an acceptance in formal contract. It is clear that the most distinctive feature of this Chinese-style reconciliation is the necessary involvement of payment straightly out of the defendant's pocket to the victim's pocket. As mentioned, this is a form of blood money. The process of reconciliation of course must receive the blessing of the court, as the power of sentencing is formally vested in a judge's hand. If the defendant agrees to pay and the victim agrees to forgive, then the judge will perform "the contract" by sentencing the defendant lightly or in many cases, suspending sentence.

#### TABLE 1 ABOUT HERE

Table 1 shows a breakdown of the total number of defendants who struck a criminal reconciliation agreement with their victims in Court Y in 2012. In total, 116 defendants reconciled with their victims, which constituted about 20 per cent of the total number of criminal cases ruled by Court Y.<sup>5</sup> Broadly, we categorize the reconciled cases into four major categories – minor violent crimes, traffic-related crimes, property crimes, and public order crimes.

Minor violent crimes make up the biggest category among cases that were reconciled that year. Of the 46 defendants who fell within this category, 42 of them were

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<sup>5</sup> We do not have systematic statistics from Court X. But judging from what we learned from individual judges, the two most common types of reconciled cases in Court X were also minor violent crime and traffic-related crime.

accused of “intentionally inflicting bodily harm upon another,” the Chinese equivalent of battery in its criminal law.

The second most common type in Court Y is traffic-related crime. As with the case in the United States, death and serious injury claims are more likely to prompt a demand for money in China, even in the absence of obvious intentional wrongdoing (Baker 2001: 299). Yet, the biggest difference between the way blood money operates in China and the US is that while in the US, there is a general reluctance to collecting blood money and the act is considered an exception rather than the norm, the exact opposite is the case in China. Collecting blood money is a common practice in China. Why is it not a stigma against collecting blood money in China?

The key to answering these questions lies in the unique legal circumstances in which blood money is collected in China. Unlike the US situation in which insurance money is commonly available in tort litigations, insurance money is often unavailable or offered at a rate much lesser than the amount the court would award in China.

Take traffic-related crime cases as an example. The laws require licensed motor vehicles to buy compulsory “transportation insurance.” A policy that meets the legal minimum requirement pays up to around 130,000 yuan (about \$21,300) to a victim injured or killed. In China today, this amount of money is not enough to cover the full “value” of a lost life (which is estimated to range from 200,000 to 500,000 yuan, depending on the level of the local economy) and the expenses of prolonged medical care and lost income due to injury. The gap is even larger if multiple victims are involved.

Worse still, any discussion of insurance money is often rendered moot in reality. There are two reasons. First, many of the vehicles in China, particularly those in some of

the fast developed areas, are unregistered and thereby uninsured. Often the drivers of these vehicles are unlicensed as well. A substantial majority of traffic-related crime cases involve motorcycles or electrical bicycles. In the county where Court Y is allocated, the local government has officially banned the use of motorcycles within the city area. Yet, as any visitors to the county and in fact many other urban cities could attest, darting motorcycles zigzagging between cars and sometimes pedestrians remain a common sight. Economic growth at a breakneck pace means that most cities lag behind in developing adequate infrastructure and high-capacity public transport system to cope with fast-growing traffic demand. In the absence of an adequate public transportation system, these motorcycles provide a cheap, convenient, but risky means of transportation for low-income laborers. Many local governments turn a blind eye to unregistered motorcycles on the streets.

Second, enforcement of judgments is a perennial problem in China. Victims often get judgments that direct defendants to pay them in accordance with the compensation rules on the book. But the still-fragile civil litigation system of China means that a lot of these decisions cannot be enforced (Clarke 1996, He 2009). A judge said: “Even those litigants without much legal knowledge know that enforcing a civil judgment is difficult. Pursuing judgment money requires a lot of efforts and at the end of the day, a victim often ends up not being able to collect the full sum. But we will tell the victim – If you reach an agreement with the defendant, you can get the money immediately. You don’t have to forgive if you don’t get the money.”

In sum, in the US, the pursuit of blood money is avoided in general because there are other easier targets (Baker 2001: 293). But in China, blood money is preferred

because without a well-developed insurance system, blood money *is* the easier target. Blood money in this context means secure money for victims and their families. For cases that have reached the trial stage, this is the last opportunity for victims to obtain economic compensation with certainty. When a victim's family agrees to forgive, the defendant or his family immediately pays. In fact, a victim's family would not have forgiven if they had not received the money. The certainty of blood money is most appealing to victims and defendants. Once parties agree to a reconciliation agreement, the presiding judge will then act to sentence lightly or in some cases allow for suspended sentence to reflect the degree of forgiveness offered by the victim or his family. Court judgments are very specific and precise on the question of whether the defendant had already paid and how much they had already paid. Official judgments therefore doubled up a "contractual agreement" for the settled parties. A survey of judgments we obtained from Court Y show that judgments are very specific on how much has been paid, how much is still owed to the victim and when the defendant plans to pay it. For example, in the following judgment on a case in which a tow truck driver killed another truck driver who stopped his truck on the freeway to examine a flat tire, the judge specifies the outstanding sum to be paid by the defendant to the victim's family:

"In the course of this trial, Defendant X voluntarily agreed to compensate Y(victim)'s family a total of 20,000 yuan. He has already paid 15,000 yuan to the family. He received the forgiveness from the family of the victim."

Paradoxically, the popularity of blood money further contributes to the difficulty of collecting judgment money. For cases that are not reconciled, the defendants are mostly not sentenced lightly. They thus have even less incentive to pay the victims. In short, once a person is already put in jail, there are no future stakes to speak of, it is thereby very difficult to enforce judgment against that person.

### Why Judges Favor Criminal Reconciliation?

The court system of China is a highly bureaucratic institution. As bureaucrats, judges' interests are embedded within the prevailing institutional logic of self-preservation. Chinese judges are most keen to dissociate themselves from situations where they have to commit to decisions that may backfire. It is noteworthy to point out that as an institution, the Chinese court system is one that is low in legitimacy. In other words, courts in China does not have, to quote the famous phrase of political scientist Davis Easton, "a reservoir of favorable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants" (Easton 1965:273). Contrary to common perception, the judicial system in China has increasingly become populist (He 2009; Liebman 2012). As a state bureaucracy, it frequently mixes legal judgment with economic and political considerations (Cohen 1968; Clarke 1996; He 2011; Minzner 2009; Stern 2011; Su and He 2009). This section examines how the court's extra-legal considerations promote the negotiation of blood money.

Why do judges prefer reconciliation? Our interviews identify two reasons. First, reconciliation provides a safe alternative to adjudication. In cases where the evidence

provided by the police and the public prosecutor is flimsy, judges feel uncomfortable to convict. The use of criminal reconciliation helps judges to avoid blatantly defying the recommendation of the Procuratorate by suspending sentence for defendants who reconcile with victims. For example, a judge we interviewed recalled the difficulty of adjudicating one privately initiated criminal case (as opposed to those initiated by the Procuratorate) of personal injury and property loss arising from the fighting between two middle-aged women. The judge said the police provided a very brief five-page report. The plaintiff requested 800 yuan for medical expenses and 14,000 yuan for an earring lost during a fight occurred in the defendant's furniture shop. The plaintiff also insisted that the defendant should be sentenced to jail. The defendant told a different story. She claimed that the plaintiff harassed her and took her computer and two chairs from her shop. From the perspective of the judge, many questions remained unanswered: Did the plaintiff actually wear the earring on the day of the fight? Was the earring really lost during the fight? How did the fight occur? Who started the fight? How was the injury inflicted? While the laws stipulate that the court may return cases to the Procuratorate or the police for further investigation, gathering fresh evidence late at the trial stage was considered impractical by most Chinese judges. This would also lead to prolonged detention of defendants in overcrowded jails. Reconciliation was in practice the best option for the presiding judge.

Uncertainty about the quality of evidence in some cases aside, judges dread the prospects of having their judgments appealed or petitioned. Social stability has become the paramount concern of the Chinese communist regime. The number of petitions and appeals against judgments handed down by individual courts has become a crucial

indicator of measuring courts' job performance (Minzner 2009). Many judges privately admit to us that they fear that their career may get done in by some persistent litigants. Reconciliation is considered appeal-proof because by definition it already secures the agreement of the litigating parties. "Honestly, we prefer to have an reconciliation agreement in many cases because this gives us the best protection," a judge acknowledged. From the perspective of judges, a done deal is as good as a closed case. "If a victim makes a petition, I'm the one who's responsible. If they accept to take money from the defendant, it is the best outcome for me," the judge said. Judges also do not have to worry about whether their judgments are enforceable or not. Unenforceable paper judgments further undermine the already weak legitimacy of the courts. Many disgruntled and disillusioned litigants eventually express their frustrations by petitioning to the central government (Chen 2006).

As is obvious, it is not any attempt to economize criminal justice that prompts judges to promote reconciliation. Instead, it is judges' tendency to self-preserve as bureaucrats, coupled with their political acuteness not to contradict the central policy of maintaining social stability, that prompts them to engage proactively to facilitate blood money deal. As summarized by Chen (2008:7):

"The judicial officials actively and even aggressively facilitate the reconciliation between the victim and the wrongdoers by doing the following tasks. First, they facilitate the communication between the two parties, especially the apologetic attitude and willingness to offer financial compensation of the wrongdoer. Second, they criticize and educate both sides, including the victims and their

relatives, making them realize their own legal responsibilities. Third, they provide guidance and persuasion on the issue of the amount of economic compensations, leading them to making compromises and narrowing their positions. They urge the wrongdoer to fulfill their promise on economic compensation on the spot and persuade the victim to give up the request for criminal punishment...”

### The Role of the Judges

This section examines the important role of judicial officials in the actual process of criminal reconciliation. Judges are central figures not only because they are the ones who sentence, but they play the role of go-between and buffer for defendants and victims in the process leading up to reconciliation. We illustrate not only with cases that were quickly reconciled, but also with hard cases that ended without reconciliation agreement, and cases that were only reconciled after protracted and difficult negotiations. Hard cases are particularly instructive because value disagreement is most manifest in these cases. As will be shown, the process of bargaining differs drastically from the U.S. situation. Baker (2001: 276) suggests that in the U.S. “bargaining for blood money turns more on morality and practicality in the shadow of law.” In China, judges play a pivotal role, sometimes in the shadow of law but at other times in the absence of clear legal rules.

#### *No Deal*

When a defendant has no money, or little money to offer to his victim, efforts to reconcile is unlikely to bear fruit. The bottom line is that it takes money to facilitate forgiveness. This instrumental nature of criminal reconciliation cannot be ignored. In the

absence of the victim's forgiveness, a judge may sometimes return the maximum or near-maximum sentence to a convicted defendant. In Court X, one judge retold a case she came across in which eight persons in a tractor were killed after it was hit by a tourist bus in a rainy day. The bus driver who was partially responsible for this was sentenced to seven years. Even though the tractor's driver (who was also killed) was contributorily responsible for the accident, the fact that the bus driver could not offer any money to the dead victims' families made a difference in the judge's sentencing decision. The judge who handled the case said to one of us, "I rarely gave someone the maximum sentence. But in that case, the driver was extremely poor; he had a dilapidated house in remote mountainous area. So was the bus owner: the poor guy bought the bus just a few days before the accident with borrowed money. The seven-year sentence was indeed not enough. The widows and the mothers of the boys killed were crying in my office."

The threat of being put behind bars as a defendant faces trial gives great leverage to judges to put pressure on the defendant to participate in criminal reconciliation. Without compensation, victims and their families will not offer forgiveness. If they think the sentence is too light, they may even appeal or make petitions to the court and other government units. This is the very scenario that judges and their courts most fear.

In one case in which the defendant was charged with fleeing after causing traffic accident, the defendant, an unlicensed motorcyclist, hit an old woman on the main road of the county. The accident occurred early in a winter morning when it was still dark. Right after the accident, the motorcyclist did not move the woman off the road. He himself lost consciousness momentarily because of the collision. He was seen running away from the scene once he regained consciousness. The man later explained that he

was scare and disoriented and he wanted to receive medical treatment for the injury he suffered. What happened was that the injured woman was run over by a public bus. The bus driver could not see the woman's injured body lying on the road because of it was dark.

One contentious point of fact was whether the woman's death was caused by the bus or by the motorcycle. The question turned on the fact whether the woman was already dead after the first accident and before the happening of the second accident, during the time when she was lying on the road. Chinese criminal law punished fleeing after injuring someone in a traffic accident. But it distinguishes between fleeing and fleeing *causing* death. If the victim was dead after the first accident, the charge would be, under Chinese law, "fleeing after causing an accident," which mandated an imprisonment of three to seven years. But if she was still alive after the first accident, then since the death was directly related to the man's fleeing, he could be charged with fleeing causing another person's death, which would result in a lengthier fixed-term imprisonment of not less than seven years (the harshest among traffic-related crimes). The prosecutor from the People's Procuratorate asked the judge to sentence the defendant for the crime of "fleeing after causing an accident," because the Procuratorate considered the status of the victim after the first hit inconclusive. According to the legal principles, "decisions shall favor the defendant," and "doubtful crimes shall be dismissed," the defendant shall not be responsible for that.

The otherwise routine trial was turned emotionally intense when the son of the deceased asked to speak before the court. The criminal trial of China is dominated by the judge and the prosecutor. Lay litigants rarely speak out. But the deceased victim's son, a

man in his mid-forties, delivered the most emotional speech that we had witnessed during our fieldwork investigation. Sitting beside the public prosecutor, he spoke loudly while staring alternatively between the judges and the defendant sitting in front of him:

“Can’t you understand middle school level Chinese? It is so clear that the coroner’s report suggests it is this man who caused the death. I do not understand why the law is so lenient. My mom was still alive. It was his fleeing that caused her death!”

The man was furious. He told everyone in the courtroom that just charging the defendant the lesser included crime of “fleeing after causing an accident” was too lenient. He said the prosecutor’s recommendation ignored the evidence presented in the coroner’s report, which, according to him, indicated fatal spinal damage was caused by the second accident but not the first one.

Right after the trial had concluded, we talked to the son. He was still visibly angry. We asked the son if the defendant had offered his family some blood money as a way to make up for his mistake, would he still choose to pressure the judge to convict the defendant for the most serious crime of fleeing causing death? The man said he would definitely do the same. This, for him, is not about money. “It has nothing to do with the money. It is about justice. I can’t understand why they decided not to go for the more serious charge. The coroner’s report clearly indicated that my mother was still alive after the first accident.”

We do not have access to the coroner’s report. But the presiding judge arrived at a different conclusion. She said the investigation report contained an important piece of

information that was not noticed by the prosecutor. A pedestrian, the key witness in the case, said that the bus ran over the old lady almost at the same time when the man regained consciousness (implying that his fleeing was inconsequential to her death, even if she was still alive at that point). The judge told us that while she would not convict the defendant for causing death by fleeing, she would not give the defendant a light sentence. Within the mandated spectrum of sentence allowed by the law, she had the leeway to sentence the defendant to as low as three years or as high as seven years. The judge frankly admitted that she had to take the son's angry reaction into consideration. The defendant was a migrant worker and he did not offer much blood money to the son. In fact, the victim's son was also a migrant worker; his mother came to visit him and on the day of the accident she was carrying a big basket of vegetables and meat on her way back from the morning market to prepare meals for his son's family.

“Until the day of the trial, all the defendant offered was covering the funeral costs of 16,000 yuan. And this was only done after three rounds of mediation. The victim's son was very unhappy.” The judge explained. “There is an expectation that defendants in this kind of traffic-related crimes would cover funeral costs. That's the least they are supposed to do. Often that's still not enough but defendants are expected to do so. A life lost in our county, assuming that fault is proven, can easily translate into a judgment awarding a compensation of 400,000 yuan.”

The judge also disagreed that the son did not care about money. Otherwise he would not have participated in negotiating with the defendant in the first place, she said.

Nonetheless, the judge acknowledged in this type of traffic-related cases, the attitude of the victim's family holds sway. "If victim's family doesn't change their attitude, it is likely that we'll have to levy a heavier punishment within the range," she said.

### *Deal*

Judges play an important role in cases that are successfully reconciled. It is rare for a victim and a defendant to strike a deal by themselves. The nature of a criminal case implies that one party hurts the other. Residual hatred and emotions lingered. As judges in Courts X and Y told us, in personal assault cases where one party physically injured the other, or in traffic-related cases where serious injury or even death was involved, most people's natural tendency was to avoid the situation.

"Some feel guilty to see the victim. Some fear that they'll be yelled at or even beaten up by the victim's family members and friends. Some people just want to avoid the whole thing. To offer a personal apology to the one you hurt is easier said than done," the same judge explained.

In the United States, lawyers serve the role of the middleman. In China, judges are in the best position to play the same role. Judges we interviewed said they met with parties separately, sometimes multiple times, before a formal meeting on criminal reconciliation was called for. In other words, what criminal judges do is not much different from their civil counterparts do in mediation. They broker an agreement by caucusing and meeting with the two sides separately.

The presence of the judge also helps to overcome the lack of trust between the defendant and the victim. The judge is entrusted to offer impartial analysis not favoring either party. She helps parties to know the bottom line of each other in the course of negotiation. Of course, judges are not disinterested third party. They are the ones who have to adjudicate should negotiation fall through at the end. They sometimes use their adjudication to put pressure on parties to come up with an agreement. It is this mix of hard and soft power that gives judges a unique role in pushing through negotiations.

It is widely reported that judges exert pressure on parties to settle or reconcile, not just in criminal trials, but also in civil disputes (Huang 2010). Judicial officials are known to criticize and lecture parties about their “legal responsibilities.” A case documented by Zhu (2000) illustrates how judges impose pressure on both the defendant and the victim in order to facilitate criminal reconciliation. The case was about an extra-marital affair. The husband [H] whose wife had an affair with another man insisted on a compensation of 10,000 yuan from the latter. But the man, his neighbor [N] was only willing to pay 7,000 yuan. The judge said to the husband, who threatened the personal safety of the other party’s young children:

“I understand your feelings and the reasons for your excessive behavior . . . . You have been emotionally assaulted and your reputation damaged. . . . [N] should give you some compensation, but the whole discussion has gone awry. Think it over. You can’t ask for too much or act unreasonably. In this situation, RMB10,000 is high. Think about it carefully and remember that your wife was also in the wrong.

Now that [*N*] has brought the matter to this court, you should not bother him anymore. If you act excessively again, the law will punish you.”

Meanwhile, another judge from the same court said to *N*,

“You shouldn’t blame the other side . . . , you started the whole thing. It is on your shoulders because you broke the law. You have severely affected another person’s family and the couple’s emotional relationship, and you’ve hurt society. You should look at your behavior from the point of view of breaking the law, look at the results—the responsibility is yours and that makes your illegal behavior even more serious (translated by Upham 2005: 1691).

The pressure was obviously felt. As a result, both parties settled on 8000 yuan. As Zhu (2000) suggests, there was no legal basis for the payment at all. In other cases where the law clearly confers power to the court, the judge will explicitly cite the law to the litigants. In the Earring Case in which the plaintiff insisted on both criminal and civil charges for her injury suffered in the defendant’s furniture shop, the judge first said to the defendant, “this might involve up to three years of imprisonment.” A few minutes later, when the defendant was asked to leave the courtroom, the judge said to the plaintiff and her legal representative:

“Fighting is usually mutual. How can you claim that the responsibilities are all borne by the other party in a fight occurring in her shop? How can you prove you

really wore the earrings that day? Why did you wear such expensive earrings when you knew your disputes might be escalated into fighting? And you have taken away a computer and two chairs.”

The plaintiff, after talking to her legal representative privately, immediately proposed to drop out the criminal charges and asked for only 3000 yuan, which the defendant quickly agreed to pay.

Once a deal is reached, the court will ask the victim’s family to write a letter of forgiveness. In some cases, a victim only agrees to forgive to an extent, i.e., the party would not insist on maximum sentence or even agree to light sentence, but he opposes a suspension of the entire sentence. It is common practice for a judge in China to inform the victim that “lighter sentencing” include the possibility of suspending sentence and see if the party would object to it. The judge needs to make sure both sides are on board with the content of the reconciliation agreement. It also protects judges against any future appeals or petitions: the goal of the paying party is to get less punishment; the victim’s side cannot get the money and then complain about the lesser punishment given out by the court.

### *From No Deal to Deal*

There are cases in which reconciliation was at first impossible to achieve but a deal was eventually struck because of the efforts made by courts and judges. In cases with important political repercussion, the entire judicial machinery will get itself involved to push through an agreement. This kind of tough cases can be found at different levels of

the court system, from the very top to the very bottom. The following case was retold by a Supreme People's Court judge who worked in the Death Penalty Confirmation Division during an interview we conducted in another project:

“At the beginning, the judge was asked to persuade the victim's family to reconcile (in order to get the side to agree to a suspended death sentence). When it didn't work, the chief judge was asked to do work. When it didn't work, the vice division head was asked to do work. Finally, the division head was sent to talk to the family too. These people were all senior judicial officials. But they were instructed to visit the victim's family again and again. They were sometimes humiliated by the victim's family. The victim's side made claims that these judges had taken bribes because they worked so hard to facilitate a deal. It was crazy!”

The Supreme People's Court is the apex of the court hierarchy in China. But similar stories were told by the frontline judges we interviewed in Court X. One judge there shared with us the following story. A 13-year-old girl died as a result of medical malpractice in an unlicensed community clinic. The owner of the clinic, a so-called “barefoot” doctor, failed to conduct a required skin test before administering an injection. The girl died because of her allergy to the drug. No reconciliation could be reached during the course of the trial. The defendant had neither personal saving nor property. The court sentenced the doctor to 14 years of imprisonment and instructed him to pay 220,000 yuan to the dead victim's family as economic compensation. Since the doctor had no money and he was already in jail, the young girl's family received not even a

penny of the compensation. But the death of the victim has turned her father into a fierce and persistent petitioner. Like most petitioners in China, his efforts at first apparently were fruitless. Most petitioners would be wore out and gave up. But on the eve of the first anniversary of her daughter's death, the man plunged himself into the Gold Water River, right before the Tiananmen Square in Beijing. His dramatic act drew the attention of the higher officials in the central government. As a result, the court was instructed to "do some work."

The problem for Court X was that the judgment had already been made. The defendant was in jail and had no incentive to pay. The case needed to be reopened. And there was still the question of money, or the lack thereof, which led to the failure to reconcile in the original trial. The entire court had an annual budget of about 300,000 yuan for special remedies. The judge recalled that there were many other desperate cases that were fighting for special remedies from Court X as well. The court eventually learned that the doctor's mother, who was in her late sixties, had some savings. The judge then tried everything he could to persuade the doctor's mother to provide some compensation. He first informed the relevant authorities, including the intermediate level court, the prison authority, the procuratorate, of the situation. He then promised that if the doctor's mother could provide 80,000 yuan, which was all her savings, and the court would provide 20,000 as matching fund. There would be a retrial of the case; and the doctor's imprisonment could be reduced to 10 years to take the forgiveness of the victim's family (if given) into account.

As soon as the doctor's mother agreed to pay, the judge persuaded the girl's family to accept the offer. "Although 100,000 was less than a half of what was awarded in the

original judgment, this was all the court could do.” It took almost another year before the victim’s father agreed to the reconciliation agreement. The girl’s father was finally convinced that the court had exhausted all possible means to resolve his case. Each time the judge who was responsible for enforcing the judgment visited the jailed doctor to ask him to persuade his mother to offer her savings to the victim’s family, he took the victim’s father with him, to facilitate conversation between the two. During that period, the court showered the disgruntled father with goodwill. For example, the court provided the man with lunch each time he visited the court. And the enforcement judge always dropped off the man at his home on their way returning from visits to the jailed doctor. The girl’s father was touched by these gestures, and also moved by the fact that a large part of the money came from the convicted doctor’s old mother (see below). He finally agreed to end his one-man petition campaign and signed off on the reconciliation agreement that the court brokered.

Though much less than what was awarded, the 100,000 yuan was valued higher than its face value. The court’s willingness to accommodate and the judges’ kind gestures were “added” components of the compensation. It is a scenario where political constraints forced the court to “personalize” compensation. The effort in turn complicated the supposedly universal value of money presupposed in the mechanism of commensuration.

### Blood Money and Commensuration

So far, we have focused on the institutional interests that lead courts to deviate from a uniform process of commensuration. We have also shown that judges and other legal

officials play a pivotal role in facilitating reconciliation. The negotiated nature of reconciliation is reflected by the deep involvement of judicial officials in pushing, urging, and even pleading parties to settle. Despite the strategic involvement of institutional agents, the practice does create a civic space within the heavily state-sanctioned criminal justice system. There is a clear moral valence that cannot be ignored in the practice of blood money. Litigants, and even judges, elicit non-economic value for a process that is supposedly operated on a uniform matrix of money. Blood money is valued more because of the hardship experienced by defendants and their families in raising it. In many cases, even though the money offered often still falls short of the nominal sum of money in a paper verdict, a victim would accept “blood money” as the ultimate gesture of a sincere apology in the Chinese context. “The offering of blood money must be performed as part of an act of sincere apology,” a judge in Court Y said. “Just offering money is not enough. If a defendant doesn’t show a sincere attitude, some victim’s families will reject the offer.” The same judge went on to describe one of the cases she presided:

“The defendant already paid 60,000 yuan to the victim’s family (the victim was killed). But the victims were still very angry. As it turned out, defendant’s family was not very apologetic. They were not most willing to pay (but they paid anyway) and they showed it to the victim’s family. They didn’t visit the victim’s family.”

“So I explained to both sides and asked them to get together. I urged two sides to put their emotions aside. I told the victim’s family that if this defendant (a twenty-something young man) was sent to jail, you wouldn’t get any money from his

family. And I asked the defendant's family if they were willing to pay more and to apologize. They agreed. Sometimes, once that initial hurdle is overcome, people then show a lot of emotions. I've seen defendants and their families kowtow to victim's family to express remorse in meetings," the judge said.

The defendant's family in this case eventually agreed to offer 100,000 yuan, on top of the 60,000 yuan already paid. In return, the victim's family agreed to forgive. Reviewing the judgments of Court Y showed that judges often commented on the attitude displayed by defendants. This was especially important in assault and battery cases, in which victims were often angered by the violence inflicted on them by defendants. In one case where a victim was punched and beaten up by two defendants and their friends in a bar fight, the defendants, according to the judge, subsequently "actively sought to compensate the economic loss suffered by the victim" (they offered a total of 35,000 yuan to the victim). The judge suspended a one-year sentence for two defendants in return.

Cynics may say that the delivery of an apology is a form of posturing and that it is money that really matters. This view, though tempting to hold in view of the calculative nature of the process, is oversimplified. Money matters of course. Yet people tend to *value* blood money differently in view of the hardship a defendant or his family went through in order to raise the money. In the judgments of Court Y, some defendants were commended by the court for overcoming economic hardship to raise money to compensate the victims they hurt. In one case, a man aged 22 was accused of committing a traffic crime that led to the death of his friend (whom he carried as a passenger in his

unregistered motorcycle), the young man was a construction worker with very little income. The judge praised specifically that his family actively sought to pay the victim a total of 71,500 yuan despite their own economic hardship.

In general, we can typify different kinds of blood money in accordance with the source from which blood money is drawn as well as the nature of the recipient.

### *Source*

The blood money that hurts the least is spare money from defendants with a decent income. Spare money sometimes comes from personal insurance policy or from worker's compensation given to the person. Though very rare in traffic-related crimes (since most motorcyclists are poor migrant workers), money that comes from the personal savings of a defendant or his family is the type of blood money that hurts the least. There is an emergent wealthy middle class in China. Some people have the "disposable" wealth to pay up. The fact that some people have the spare money to pay up is also the main reason why critics of criminal reconciliation describe the mechanism as one that promotes inequalities between the rich and the poor. The reality however is that financial well-off people is still a small minority of the population of the country. More important, rich people are much less likely to get involved in minor criminal cases that constitute the bulk of reconciled cases.

The second type of "blood money" is money borrowed from family members, relatives, and friends. Compared to the first type, it is a type of blood money that hurts more. As mentioned, defendants who can dip into their personal savings to find the money are of a small minority. More often than not, a defendant does not have enough

saving to offer as compensation. In those cases, the defendant's entire family digs deep into their personal relationship networks (*guanxi*) in order to borrow money to help the defendant to escape prison. This puts the defendant and his family in debt, both financial and social. Judges in Court Y said it was common for defendants who escaped jail time to take on a second job to repay their debts. But for most people in China, this is still considered a better option than being put behind bars. As a judge explains to us:

“With a growing economy today, most people can find a job to make a living. And if they work harder or get a second job, it is possible for a blue-collar worker to make 40,000 to 50,000 yuan a year. So, a worker can make 100,000 yuan in two years (and live with his family to minimize expenses). Of course, they have to give most of the money made to the other party. But for most Chinese families, this is considered a much better option, because the person still has his freedom if he's out. The person can still stay with his family members.”

The third type of “blood money” hurts even more. It is money from home equity. Like many families in the U.S., owning a property is considered a milestone achievement for many Chinese families. For defendants who own a house, using home equity as blood money is considered a last resort, often times only when the person could not raise enough money by borrowing from relatives and friends. Precisely because it hurts so much, this form of blood money usually “buys” more sympathy from the party compensated. A judge in Court Y explained:

“The other party knows that the defendant has no money left, otherwise he (defendant) wouldn’t choose to sell his flat. In some cases, the victims’ family were willing to wait because they knew it took time to sell a property. People usually understand.”

The type that draws the most sympathy from judges and opposing parties, the type of money that draws the most blood, so to speak, is home equity of aging parents who are forced to sell their flats to raise money for their children. The taking of this kind of money hurts so much that even a victim’s family who lost their child or parent have sympathy for the other party, at least in cases where there was no elements of malice or intentional harm. Another judge in Court Y recalled a case where an old mother traveled from a remote province to save her child:

“The victim was killed in the accident but the defendant had no money to compensate the victim’s family. His elderly mother alone took the train all the way from Hubei (a province far from County Y). She presented to us about 60,000 yuan and she told the victim’s family that was all she got from selling her own flat. She lamented about her poor life and what it meant to her to have her son with him. And even though the victim’s family was asking for more initially, they accepted the money and said they understood and forgave. They saw the old woman and knew it was very hard to be in the old woman’s position. They sympathized.”

Here we see the social value of the blood money offered by the aging mother of the defendant as something larger than its face value. It showed how earnest and in fact desperate the woman was in her attempt to save her son from jail.

### *Recipients*

If the source constitutes one dimension determining the social value of blood money, the other dimension that also affects value is the nature of the recipient. The impact of blood money changes depending on whether the target recipient is rich or poor. Rich recipients care less about money. It is difficult to strike a deal in cases involving rich victims. Most just want to send defendants to jail. They also seem to discount the value of the hardship associated with raising blood money. To use an economic metaphor, the marginal utility of more (blood) money declines with rich victims. On the other hand, poor victims seem to value the hardship factor more, besides the fact that they need the money. Blood money has more impact on poor recipients in deciding whether they are willing to forgive.

When the recipients are courts rather than individuals, the impact of the money depends largely on whether or not the courts need the money to cover their expenses. The law empowers the courts of China to impose criminal fines for certain types of crimes, in particular, economics crimes such as smuggling, commercial fraud, speculation, counterfeits, and misappropriation of state funds (Article 116-130 of Criminal Procedure Law). The money raised by defendants to pay as fines to the courts can also be regarded as a type of blood money.<sup>6</sup> It is important to note that money paid to a court has different

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<sup>6</sup> By definition, criminal reconciliation refers only to the transaction between the two private parties, thus excluding the situation in which the courts reduce penalty for criminal fines. We nonetheless regard

social meanings than that from a defendant to a victim. Courts in urban developed regions of China are comparatively well financed these days. Criminal fines are imposed not because these courts need the money but more as an additional means for achieving deterrence. As a result, they tend not to sentence more leniently just because a defendant agrees to pay the fine. A judge from Court Y said he told defendants who paid fines not to have their hopes up:

“For us, paying fines helps only in the sense the defendant shows good attitude in admitting his crime. It is another way to show your remorse. But we are not the victim, we can’t say: ‘We forgive’.”

Another judge added:

“In fact, they (fines) don’t mean much to us. We don’t put too much emphasis on defendants who volunteer to pay fines. The court is bound by the law. For some crimes, we impose fines. For others, we don’t.”

But for courts that are short on money, mostly those in inland provinces where local economy is less developed, the exchange between paying criminal fines and receiving less punishment is a common sight. How courts sentence is governed by the sentencing spectrum specified in the law. But judges in Court X acknowledge that they would sentence a defendant who pays fine to the lower end of the spectrum. One middle-aged judge said in an interview:

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criminal fines as a form of blood money because this inclusion helps understand the relationship between money and justice in China’s criminal justice.

“It was back to the early 90s when we found out that the criminal division could generate income. A tribunal in our county, for half a year, collected less than 100,000 yuan in litigation fees. But in one criminal case, the defendant was willing to pay this amount. When we came across a case like that, judges in the criminal division almost felt like celebrating.”

As documented by He (2009), cash-strapped courts in China asked their criminal division to meet a quota in generating income. The situation is different for courts such as Court Y, whose operational budget is not tied to their income. We asked the same judge in Court X, “What is the situation of your court now?”

“The district government never allocates more funds to us and we never hand in what we collected,” the judge said. “The only difference is that back in the 1990’s, the required annual quota for the criminal division was 20,000 yuan, but now it is one million yuan.”

Other judges working in inland provinces also reported similar use of criminal fines as subsidies of their operational budgets. A judge who was the vice president of an intermediate court in Yunan, a southwestern hinterland province bordering Burma, told us: “We differentiate defendants in terms of the fines we charge. For a poor farmer who is caught for drug trafficking, we might only ask for less than 100,000 yuan, for this might be all he could pay. For an official who is involved in economic crimes, we will

ask for one million yuan or more, especially if his lawyer takes the initiative in approaching us.” It seems that in order to maximize their income, this type of courts has employed a sophisticated strategy akin to what economists describe as price discrimination. In other words, they expect the defendants to pay according to the best of their abilities.

“Do you always impose lighter sentence when a defendant agrees to pay criminal fines?” we asked. “Yes we do,” answered the same judge from Court X, “the sentencing spectrums for both drug related crimes and economic crimes are large and flexible. We can reduce a twenty-year sentence to fifteen or shorter. We do keep our promises.”

### *Money Deflated or Inflated*

If we define the social value of blood money as what it can get for a defendant, then this value is sometimes more than the monetary face value. Obviously, a victim would not have agreed to forgive if not for the compensation offered. Yet, in some cases, the social value of blood money goes above and beyond its monetary value. We might say that in these cases, the moral value of blood acts to amplify its face value. But there are also cases in which exactly the opposite happens. The value of blood money at times is denied or discounted because the choices defendants made, or the circumstances they face, or the beliefs they hold.

Blood money is said to be *deflated* when the social purpose it serves is treated as less important, hence the devaluation of the moral worth of blood money. There are defendants who feel much less important than most about the need to stay out of jail, hence the value of blood money to earn forgiveness is suddenly deemed unimportant, or

deflated. These defendants would rather go to jail than giving up their own money and get their families to help raise money. They are in this sense indifferent to the threat of imprisonment and are unwilling to work with the court. Many migrant workers, for example, afraid of losing face and not wanting to “waste” family money on them, requested courts not to contact their families to even contemplate the possibility of raising money to free them. A judge said, “It’s our usual practice to ask defendants if they want to contact their families. But some refused to tell us their family contacts. They were usually migrant workers who had no local family ties. They didn’t want their family to know. They didn’t want their family to worry about them.” Lying at the very bottom of Chinese society (Solinger 1999), migrant workers have specific understanding toward blood money. Moreover, they are often the breadwinners of their families and they often have a sense of responsibility toward their family members. As documented, they would rather choose not to visit their families during the Spring Festival, the biggest holiday of the year for the Chinese, if they could not bring home some money (He *et al* 2013). These defendants do not want to add more economic burdens to their family members. They seemed to think that if they had asked family members to pay, they would have lost not just the money, but also their face before other family members. “They just tell us: ‘Why don’t you sentence me to jail?’” one judge in Court Y, which deals with a significant number of migrant workers each year, said. Judges said in those situations, it was futile to mediate. They would just go ahead and sentence the defendants according to the law. It is interesting to note that the very value that prompts some victim families to take less money (because it is from the family) also in some cases discourages defendants

to raise blood money for their freedom. For this small group of defendants, it is a conscious choice of familial welfare over individual freedom.

On the other hand, there are scenarios where the price of earning one's freedom has risen to an unrealistic level. In such case, blood money is forced to operate in a morally inflated moral economy, and its face value of money is deeply discounted. Some rich victims and their families value vindication and retribution more than the prospect of monetary compensation and thus are known among judges as difficult parties to reconcile. A different judge in Court Y said:

“Sometimes reconciliation is impossible even if the defendant is willing because the victim asks for the moon. In one case, the family of a dead victim demanded one million yuan for compensation. Basically, the victim's family demanded far more than what they would have been awarded in civil litigation.”

The judge added:

“With wealthy victims, they don't really need more money. An exorbitant demand for blood money is not a serious demand. Making an unreasonable demand is their way of turning down reconciliation and telling a defendant to go to jail.”

There are even cases that the victim's family make clear that they do not want any compensation. They want vindication. The Supreme People's Court judge from the death penalty confirmation department that we mentioned earlier shared with us her story:

“You cannot imagine the pressure we experienced. I was asked to talk to a victim’s family who lost their only son in murder. The defendant’s family hoped their son could be spared from death penalty. The victim’s family flatly said no. But our division head would not approve the execution decision. So I was asked to negotiate with the family many times. Eventually the family got annoyed. The mother said, ‘If you judge believes one can simply reconcile in such cases, what if I kill your son and pay you some money in return?’”

Blood money is *inflated* in these scenarios – it buys even less than what its face value would have bought in normal circumstances because the other side has raised the asking price. It is also inflated because victims and their families do not take the hardship of collecting blood money into consideration to offer the defendant, as it were, a “moral discount.” In cases where victims and their families are not willing to negotiate, they reject by demanding a prohibitive price. Asking for the moon is a politically acceptable way to turn down reconciliation efforts by the court (meaning “I still do what you’ve asked me to do and negotiate with the other party but it’s just that the other party could not fulfill my demand.”).

### Conclusion

Through this study of blood money in China’s legal system, we challenge the dominant view that institutional-led commensuration is a totalizing process. We argue that scholars have been focusing too much on what experiences are commensurated but overlooking

the question of how commensuration takes place. Legal commensuration in practice is not a wholly theoretical and cerebral process. Our study of the criminal justice system of China aims to incorporate the ecology within which interests and values are derived and negotiated into our analysis, such that the cultural meanings of blood money, the political concerns of the courts, the economic benefits of private compensation, and a developing sense of legal entitlement are all in play.

We have showed how courts' institutional priority for avoiding petitions and maintaining stability, as well as litigants' cultural evaluation of blood money, complicate the process of legal commensuration. The political and bureaucratic considerations of judges motivate them to facilitate criminal reconciliation. It is seen as a surefire way to prevent their judgments from being appealed or petitioned. As such, criminal reconciliation is a common strategy for judges to deal with the problem of "overload," not so much an overload of cases in terms of volume, but an "overload" of commitments in the judicial system to resolve social problems. What Marc Galanter said about the problem of bureaucratic overload fits the current situation in China that this paper analyzed - There are "more rights and rules 'on the books' than can be vindicated or enforced" (1974). Judges discourage full-dress adjudication in favor of bargaining and stereotyping. At the urging of judges, many litigants involved in minor criminal offenses (both as victims and defendants) agree to reconcile. Victims and their family need money to make up for the lost income and medical fees and to compensate for their emotional pain. Defendants want to do whatever possible to stay out of jail. But as a defensive strategy, judges' efforts to promote reconciliation depend much on the pressure they feel from litigants. In fact, the intensive all-out efforts described in this article are impossible

to carry out as an ordinary mode of operation. As such, it is not a form of justice system based on rules. It is instead a form of negotiated justice that is motivated by the institutional incentives and disincentives that judges are subject to.

Moreover, the layered cultural meaning of blood money further complicates the supposedly uniform process of commensuration. Some victims are willing to take less if the money offered is raised with great hardship. We identify several levels of “blood” in blood money. Home equity offered by an aging parent is a form of money that far exceeds its denominational value; but spare money from a well-off family carries much less moral weight. Different from the model of commensuration that assumes money to be the universal matrix, the social meaning of money and the institutional considerations of the courts must be factored into the bargaining matrix in practice. The incorporation of cultural meaning also sensitizes us to take note of the limits of the penetration of state power. Much scholarship has focused on the repressive and powerful character of Chinese criminal system (Cohen 1968; 2011, Trevaskes 2007, McConville 2011, McConville and Pils 2013), our study reveals its weak and malleable side: its capability to adjudicate is rather limited because it is often forced to negotiate with private litigants in order to get cases resolved.

The significance of political consideration in our analysis also suggests that criminal reconciliation is a phenomenon that only has become so prevalent in this period of China. China’s negotiated justice stems from the limited ability of the court to adjudicate and to enforce. The weak capabilities in enforcing civil judgments and a lack of social security net suggest that the state’s power and resources are still limited. To prevent petitions and protests that may threaten social stability, tremendous political

pressures are imposed on the courts to pacify disgruntled parties. As demonstrated, judges exhausted all possible means in order to get a reconciliation agreement done - Besides putting in extra efforts, time, and tokens of sincerity, they even put in their own “blood” money. The means through which legal commensuration is disrupted is likely to be different in institutionally stronger legal systems such the ones in the United States, perhaps in the form of a more coordinated style of strategic settlement (cf. Albiston 1999) – powerful litigants are willing to lose by paying big to settle in order to win in the long run. Our approach means that legal commensuration is analyzed as a process that takes place within an environment with distinct institutional and cultural correlates of preference. Implicit in our approach is a critique of theories of commensuration that sees the equalizing force of the process as solely an extension of institutional isomorphism. It suggests that political power and civil society also feature prominently in the negotiation of values. The approach is particularly useful for studying comparatively how values are constructed, defined, and negotiated across legal systems in different societies.

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Table 1: Criminal Cases Reconciled at Court Y in 2012

<b>Types of Crimes</b>	<b>Specific Offences</b>	<b>%(n)</b>	<b>Sub-Total%(N)</b>
<b>violent crimes</b>	intentionally inflicting bodily harm upon another	36.2 (42)	39.7 (46)
	intentionally inflicting bodily harm upon another (severe bodily injury caused)	2.6(3)	
	rape	.9 (1)	
<b>traffic-related crimes</b>	dangerous driving	11.2 (13)	29.3(34)
	traffic crimes (death involved)	15.5 (18)	
	traffic crimes (serious injuries)	2.6 (3)	
<b>property crimes</b>	theft	7.8 (9)	16.3(19)
	Robbery	2.6 (3)	
	forcible seizure	.9(1)	
	take advantage of office to illegally take possession of property	4.3(5)	
	fraud	.9(1)	
<b>public order crimes</b>	causing a disturbance	12(14)	14.7(17)
	obstructing the administration of public order	2.6(3)	
<b>Total</b>		100.0(116)	