Study of Sentencing Factors in Intentional Crimes from the Perspective of Victimology

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Abstract. In traditional criminal justice system, the victim was often viewed as insignificant and marginal. However, victimology has emerged as a field of study that aims to examine the impact of victims on criminal behavior, reposition the victim's role in penal theory, and consider the victim's "Schutzwürdigkeit" and "Schutzbedürftigkeit", which means the worthiness and need for protection, as important factors in determining the culpability of the accused. While victimology has gained more recognition in the field of negligence in penal theory, it may not be suitable as a universal principle for legislation, interpretation, and incrimination in intentional crimes. Moreover, the role of victimology in the field of sentencing remains to be explored. This study proposes to use the victim criterion as the theoretical basis, and use the time of victim involvement as the criterion to differentiate the victim's action into the victim's fault, as well as victim self-involvement in risk. Further abstract the behavior patterns of the victim's fault and the boundaries between self-perilous participation and consensual other-peril. These factors could be integrated into the current sentencing system to develop a theory model with the function of guiding practice and explore the richer possibilities of penal victimology in China.

Keywords: Penal victimology; Victim's self-involvement in risk; Victim's fault; Sentencing guidelines.

1. Introduction

The campaign to eliminate mafia-style organizations in China has brought many related cases to public attention, particularly focus on those situations where resistance against evil forces has resulted in casualties, such as the "Xie Mou homicide" [a] case. When the righteous party causes significant harm to the unjust side, it raises questions about how such cases should be handled. If evaluated solely based on the traditional penal theory of homicide, Xie's behavior would be deemed entirely unjust. This would suggest that people have no right to resist or fight back against black and evil forces, but must instead wait for state protection. Such an approach would deviate from basic just demands of the people.

However, the victim in this case, while we define him as the evil side according to the common sense, did not "attack" the defendant based on the criminal law, therefore the defendant's action did not meet the requirements of legitimate self-defense. Additionally, the defendant intentionally killed three people, resulting in serious consequences that do not meet the related provisions for exemption from criminal punishment. The dogmatic application of existing law may lead to unfair outcomes, but expand the interpretation of existing laws because of one especial case doesn't line up to principles of criminal law and may shows provisions' uncertainty.

The root of this issue lies in the long-dominant binary path of attribution that lacks victim status, and the dilution of the victim factor in sentencing regulations. To resolve such controversies, it is essential to systematically introduce the theory of victimology into judicial practice, typify the victim factor in crime based on the victim criterion, and reposition the victim's role in the criminal law attribution and sentencing system.

2. The current plight of penal victimology

Victimology is a perspective that examines the constituent elements of criminal law from the viewpoint of the victim. Unlike traditional penal theory, which judge accused's responsibility in terms of " the worthiness and need for publish" of the act, victimology advocates that the victim's prior and secondary acts also influence the accused's behavior to varying degrees. The concepts of "worthiness

of protection" and "need for protection" [b] of the victim are used to build a two-dimensional perspective of "state-offender-victim". The theories of victim's consent, victim's fault, and victim self-involvement in risk, as products of the analysis of the imputation problem under the perspective of the penal victimology, extend the theoretical resources of victimology.

The birth of victimology in the sense of criminal law is generally believed to have occurred in Germany in the 1980s, and in China, the research on victimology began with Professor Feng Jun's "Self-responsibility in Criminal Law" published in 2006. Compared with the systematic development of victimology in German and Japanese penal theory, China's research in this field is still in the initial stage of exploration. At present, the theoretical research on this issue in China is diverse, with the victim's consent as one of the elements of illegality deterrence being generally accepted by the legislation. However, the victim self-involvement in risk (also called the victim's dangerous acceptance), the victim's fault, and other existing theories from the perspective of the victim are diverse and controversial. Most victimology theories in China are based on the same basic principle of self-responsibility, and they all take the victim's right to self-determination, including the victim's personal freedom of will, as the basis for liability.

2.1 The principle of self-responsibility

The issue of exoneration based on the victim's duty of self-protection is a contentious topic in the field of victimology. While it is generally accepted that the victim has a duty to protect himself or herself in cases of negligence, this is not in the case of intentional crimes. The victim's obligation of self-protection doesn’t mean that the citizens' self-protection can exempt the state from it’s responsibility of intentional crimes, which would ignore the criminal law purpose of liberating citizens from self-defense.

Critics have argued that even if the victim participates self-responsibly in the damage to his or her own legal interests, there is no justification for attributing full responsibility in criminal law to the victim for the harm caused [c]. Moreover, it is not easy to delineate the field in which the victim has the duty to defend himself against his own legal interests and to justify the priority of liability for the victim in this field. Additionally, the use of criminal law to protect citizens from intentional perpetrators is a mission of the state, and even if the victim is responsible for participating in the harm, this does not exempt the state from this mission.

It is essential to carefully consider the victim's role in cases of intentional crimes and to ensure that their rights and interests are protected. While the victim's duty of self-protection may be relevant in some cases, it should not be used as a principle for exoneration in cases of intentional crimes. Rather, a more nuanced approach is needed to balance the victim's obligation with the state's obligation to protect citizens from intentional harm [d].

2.2 The controversy between victim's right to self-determination and the intervention of the criminal law in father’s position

The concept of the victim's right to self-determination is closely tied to the doctrine of the victim's self-responsibility. This is because there exists a reciprocal relationship between rights and responsibilities, and the right to self-determination and self-accountability are two sides of the same coin. To enjoy freedom, one must bear the corresponding responsibility and consequences of free choice. Professor Feng Jun defines self-determination as the subject's freedom to decide and realize their own freedom through their behavior based on the general recognition and respect of freedom. It is the objective expression of freedom of will. If there are no insurmountable external obstacles, such as violent coercion, threat, or deception by others, the victim who arbitrarily violates self-determination as a general principle of practice and denies the universality of freedom must bear the resulting damage consequences [e].

In cases where the victim exerts a substantial and decisive influence on the damage to legal interests, the dispositive decision of the victim based on free will should be respected.Attributing responsibility to the victim himself or herself is thus in line with the victim's right to self-

determination, and it is no longer appropriate for criminal law to assign responsibility to others. This is not only the ideological basis of criminal law issues such as the victim's consent but also the embodiment of the constitutional right to development of citizens' human dignity and personal freedom.

However, unlike other sectoral laws, the penal governance model in which the state monopolizes the exercise of penal power gives criminal law a natural paternalistic character. The involvement of the state's public power inevitably limits the space for the realization of the victim's right to self-determination. This trade-off between individual freedom and paternalism also affects the determination of whether to attribute blame to others when the victim is at risk [f].

It is commonly held that the negligence of the victim in protecting themselves due to the implementation of the victim's right to self-determination does not automatically exclude the state's obligation to protect the victim. The purpose of criminal law is to delineate the field of freedom for individuals so that they can fully realize themselves in the field of freedom. If the obligation of self-protection is imposed on the individual through the victim's right to self-determination, it will only lead them into endless anxiety of self-protection. This anxiety is not conducive to the realization of individual freedom and has it completely backward [g].

2.3 The current plight of penal victimology and it’s solution pathway

As discussed above, the rationale of the use of victimology in the allocation of responsibility hasn’t form a consensus among scholars. While victimology can provide valuable insights into the interaction between the perpetrator and the victim in a crime, its role in responsibility allocation seems hard to define, what is the issue?

It is important to recognize that the original goal of victimology is not to interfere with responsibility allocation but to examine the respective roles of the perpetrator and victim in the crime, which is more suit to sentencing guidelines instead of distribution of responsibility [h]. As sentencing becomes increasingly standardized, there is an opportunity to use the victim factor as an explicit sentencing norm in the criminal justice system. However, current research in victimology lacks a systematic typology of victim behavior that can provide an operable standard for sentencing. This is an area that requires further development in the future. Victimology should be seen as a valuable tool for understanding the interaction between the perpetrator and the victim in a crime, while itcan function in the sentencing process, its role in responsibility allocation should be limited. The development of a systematic typology of victim behavior can provide an operable standard for the use of the victim factor in sentencing and is a necessary step for the future development of victimology.

3. The contemporary status of applying victimology in the context of judicial practice: exemplified by violent crimes

According to Hassemer, the primary focus of penal victimology lies in relationship offenses [i]. However, as the publication of the Anti-Domestic Violence Law and the ongoing efforts to combat mafia-style organizations, there has been increasing interest in how to assess sentencing in cases involving the victim factor, particularly those that infringe upon citizens' life and democratic rights. It is essential to determine whether victimology can be employed to assign culpability in such cases and how to ensure that sentencing is equitable and legally sound. This article aims to investigate the application of the victim factor in contemporary judicial practice, provide a typology of victim’s actions in intentional crimes, and propose a sentencing theory model that aligns with present-day society. By utilizing victimology doctrine, examine the role of the victim in penal law, specifically in the violent crimes.

3.1 The contemporary status of application

The author conducted a search of 1728,884 criminal cases, limited to the last three years, and found that 227,269 of them were crimes against the personal and democratic rights of citizens. Further searches for the keywords "self-inflicted risk" and "victim's fault" yielded 22 and 838 cases respectively, with only a small proportion of these cases utilizing the theory of victim's victim self-involvement in risk in defense or judicial decision-making. However, the use of "victim's fault" was more common, particularly in cases of intentional crimes such as intentional injury and homicide.

The study revealed that the lack of a clear definition of the victim's role in criminal behavior has led to inconsistencies in sentencing and the misuse of terms such as "victim's fault", this has resulted in the phenomenon of "different sentences for the same case", as well as absurd defense opinions such as the "why hurt you but not someone else? "

Overall, the study highlights the need for a standardized and systematic victimology approach in the sentencing of crimes. It is imperative to clearly define the role of the victim in criminal behavior, and to renew the criminal law in the light of penal victimology to ensure legal and fair judgments.

3.2 Exemplifying the dilemma with concrete cases

Amongst various factors leading to personal injury, the behavior of the victim is a quite critical element, and it is a prevalent occurrence. Nonetheless, due to the uncertain process of behavior and the complexity of the subjective mindset of the parties involved, similar "victim behavior" can result in varying degrees of impact of the crime, which often causes controversy in practice. Furthermore, the recognition and theoretical application of whether the behavior of the victim can deter or mitigate the perpetrator's illegality is a problem with a vague standard of recognition and arbitrary theoretical application. The issue of opposite conclusions in the same case frequently occurs.

For instance, take the following two typical cases: Case 1: Zhang abducted Su and commit false imprisonment to collect a debt; during the period, Su committed suicide one morning after calling friends to borrow money unsuccessfully [j]. Case 2: The accused, Yang, illegally imprisoned the victim, Yu, in order to collect a debt, and intimidated the victim during this period, causing the victim Yu to fall to his death when escaping from the window [k].

From the facts of the two cases, they have a lot in common: in the false imprisonment behavior, although the perpetrator did not further cause physical harm, the victim's own behavior directly led to the victim's death, and the perpetrator 's behavior and the victim's death do not appear to have direct causalities according to traditional penal theory. However, verdicts for the two cases is diametrically opposed. The verdict in case one stated that Zhang actively participated in the illegal deprivation of personal freedom with the method of confinement. Although Zhang did not use violence against Su, during this period, Zhang should have foreseen that their actions may cause other harmful consequences. Due to their negligence, they did not foresee the consequences, which should be de deemed negligence causing death of false imprisonment. The defense's argument that "the victim's suicide by drinking pesticide belonged to the victim self-involvement in risk " was not accepted.

In contrast, the verdict in case two adopted the defense of mitigating circumstances. The death of the victim and false imprisonment did not have a causality. Although the perpetrators took some measures to prevent Yu from escaping, the victim still had the freedom to communicate with the outside world, and did not face real and imminent danger to their life and rights. The victim disregarded basic common sense that plastic drainage pipes and network cables cannot withstand the weight of an adult, which is a risk to the victim's self. This incident is different from tying the victim to restrict physical movement and isolate all communication, which eventually led to death.

As can be seen from the above, these two cases reached opposite conclusions on whether the victim self-involvement in risk has reduced the degree of malice of the perpetrator, thus affecting the severity of the sentence. Both cases focus on the legal interpretation of "false imprisonment causing death" and the determination of causality. In the judgment, the defense of the victim's self-inflicted risk was ignored, and only the duty of foresight was answered in less space. The contrast between these two cases reflects the lack of a relatively unified judgment standard and relatively clear argumentation

process in China's practice, as well as the preference for judging the victim factor from the perspective of traditional criminal theory and the low recognition of victimology in practice.

4. The Concept of Typifying Victim Behavior as a Sentencing Guideline

This paper aims to utilize domestic judicial precedent as a starting point and apply the theoretical model of victim's worthiness and need for protection. This will be combined with the "four limit values" introduced by German scholar Thomas Hillenkamp [l]. The time of the victim's participation will serve as the criterion to categorize the victim's actions into two groups: the victim's fault of prior influence and the victim's self-involvement in risk of insidious participation, based on the victim's criterion.

4.1 Pre-impact influence factors: the victim's fault

Based on the above sample statistics, it is evident that the application of "victim's fault" in judicial practice is much more prevalent than "victim's self-inflicted risk ". However, victimology scholars rarely focus on the study and discussion of victim's fault. This is because the mainstream penal victimology mainly expects victimology to be the theory of exemption from liability. Thus the victim's fault often appears in judicial practice as the standard of social harm evaluation for the perpetrator. The author contends that the disregard of victim's fault in theory is one of the problems that make it challenging for theory and practice to converge in the development of victimology in China.

From the legislative development perspective, the "Sentencing Guidance for People's Courts (for Trial Implementation)" promulgated in 2008 explicitly included "victim's fault" as a common sentencing circumstance. This circumstance not only provided that sometimes the victim's fault should take responsibility for the intensification of the conflict, but also divided the victim's fault into three different degrees, corresponding to different sentence reduction ranges. However, in 2014, the Supreme Court removed the relevant provisions of "victim's fault", and it was excluded from the common sentencing circumstances. As above, victim's fault as a sentencing circumstance in China's judicial practice once occupied a more critical position, but due to the lack of objective and feasible criteria for the "victim's fault" circumstance, the judiciary was given excessive discretion, making it difficult to be universally applied.

For the most part, determining the victim's fault is a subjective judgment and evaluation of the case by the judge following his or her own value judgment. The varying legal literacy of the judge can lead to confusion of the victim's fault concept in criminology and penal law, resulting in the absurd conclusion ---for instance, if a woman dresses in a revealing manner on the street, and be raped, the criminological theory holds that the woman dressing in a revealing manner is the victim's fault in a rape case. However, from a criminal law perspective, there is no causality between the two, and hence, there is no victim's fault.

Therefore, the author proposes using the six types of victim actions proposed by the victim scholar Sheley [m] as a reference to classify the specific victim's fault behavior type and delineate the scale of victim fault from the perspective of the objective behavior of the victim worthy of protection and the need for protection.

4.1.1 Victim's invitation and facilitation

"Invitation " typically occurs when a victim voluntarily enters a high-risk environment or situation that could have been avoided, resulting in victimization. Examples include a victim wandering in a robbery-prone area late at night and being robbed, or a victim dressed in a revealing manner and entering a pornographic establishment and being raped. "Facilitation" involves situations in which the victim's extreme negligence, absent-mindedness, or ignorance inadvertently enables the perpetrator's crime. For instance, leaving a door or window unlocked or keeping a wallet in a back pocket could facilitate theft.

In both scenarios, the victim lacks subjective malice or the intent to dispose of their legal interests in a prohibited manner. Victims are therefore deserving for protection, and their need for such protection cannot be dismissed as they do not play a decisive role in their own victimization. Consequently, such behavior should not be used as a criterion to evaluate the social harm caused by the perpetrator, nor should it reduce their liability. The victim's actions in these cases do not necessarily lead to the perpetrator's intention to commit the crime. Restrictive interpretations of criminal law that place additional burdens on the victim are counterproductive and cause the law to deviate from its legislative purpose, resulting in a "struggle against the perpetrator by punishing the victim" [n].

Some scholars argue that incorporating these kind of “victim’s fault” into sentencing standards is consistent with the principle of subsidiarity of criminal law. However, this view is based on a misunderstanding the boundaries between criminal law’s theory and criminology. From a criminal policy perspective, this view is misguided, as it places an excessive burden of self-protection on citizens, promotes suspicion and caution of society's common life, which contradicts the purpose of the law to protect the interests of people.

4.1.2 Victim’s provocation or precipitation and victim’s perpetration

The legal term "provocation or precipitation" typically refers to a victim's provocative behavior in criminal law. This behavior is characterized by intentional physical actions with malicious intent, such as minor blows or the malicious appropriation of the perpetrator's property. However, such behavior does not reach the severity of "infringe" in the criminal law context. Thomas assigns this type of behavior to the limit of self-defense in order to address the practical difficulties in applying self-defense [o]. This is because such behavior does not rise to the level of criminality as described later in the case of perpetration. Nevertheless, in some cases, the victim's behavior may convey to the defender a genuine possibility of victimization, thereby creating a sense of urgency for self-defense.

For instance, in a "familial tyrant" case, a person who causes serious injury to a tormentor in order to resist cannot use the states of self-defense as a defense because there is no ongoing violence. However, if the victimology interpretation is adopted, the violence can still be considered in progress. From a victimology perspective, the initiation of provocation towards a law-abiding person actually puts them at risk of a counterattack by the perpetrator [p]. This behavior weakens the malice of the perpetrator and reduces the protectiveness of the victim's legal interests, thereby justifying an act of self-defense.

The notion of "perpetration" is a common provision in the criminal law of all countries. It allows people to counter-attack offenders in order to protect themselves, others, society, or the interests of the state. For example, if A sneaks into B's house to steal valuable cultural relics, and B injures A in order to apprehend him, this situation generally falls under the victim’s self-involvement in risk. The implementation of the original offender's infringement turns into a risk of being stopped by others, leading to a counterattack and consequent harm.

In both cases, the victim's behavior is characterized by a subjective malice intention and the performance of an evil action. Such behavior should be included in the sentencing standards as mitigating circumstances for the perpetrator's responsibility. This is because the victim's fault behavior is the direct cause of the perpetrator's criminal intent. In other words, the victim participated in their own victimization, and this weakens the perpetrator's need for punishment.

From the perspective of criminology and criminal policy, the law should restrict the prior wrongdoing of the victim to reduce the crime rate. Rather than simply punishing the perpetrator for their criminal behavior, the victim's behavior should be take into consideration as well. From the perspective of law, social order and morality, since the victim bears a large degree of responsibility for the crime, the subjective malice of the perpetrator is often lower compared to similar crimes. Therefore, the victim's fault should be recognized as the circumstances to reduce perpetrator's responsibility in the intentional crime. However, in some cases, legitimate defense or defensive emergency jurisprudence may apply., this involves the cause of defense and the limits of identification, which will not be further discussed here.

4.2 In-process influence factors: the victim's self-involvement in risk

The victimology theory commonly used in China categorizes cases where victims expose themselves to risks into two types: self-perilous participation and consensual other-peril. However, there is still considerable controversy about the criteria for differentiating between them. Two prevailing viewpoints are currently debated in China, one of which emphasizes the degree of control over risk as the main criterion [q], while the other advocates for actual harm results as the decisive factor [r].

Nonetheless, in practice, the above criteria are insufficient to address the complexity of situations where the victim is at risk. Firstly, it is nearly impossible to establish a clear threshold for "control" in practice. Secondly, in many cases, identifying the perpetrator and the victim before actual harm occurs is challenging, and the risks involved are circumstantial. For example, in a game of "Russian roulette," the legal assessment of the alternating act of shooting each other and the act of shooting oneself differs considerably. The traditional risk distinction theory would classify the former as "consensual other-peril," which would generally not mitigate the responsibility of the perpetrator, while the latter would be categorized as "self-perilization" and therefore not subject to punishment. Such a conclusion is unequivocally absurd [s].

Consequently, we can classify situations where the victim self-involve in risk into two types, by combining the aforementioned propositions with the theory of victim consent.

4.2.1 Victim's self-perilous participation

The victim's consent is directed towards the outcome of the risk, in which the victim possesses the knowledge of the potential outcome of the realization of the risk and actively pursues or tolerates it (corresponding to the direct and indirect intention of the subjective aspect of the perpetrator). In such a case, the victim is deemed to have waived their legal interest, which consequently loses its protective value. As per the principle of respecting the victim's right to self-determination, criminal law should refrain from intervening in the disposal of their legal interest and should not restrict their abandonment of the protection of specific norms of conduct. Such actions exclude malice and criminality and are, in principle, non-punishable.

For instance, in the two aforementioned "Russian roulette" scenarios, regardless of whether A and B shoot themselves or each other, they exhibit indulgence towards the potential fatal outcome. Thus, both situations are deemed as instances of self-perilization, and the survivors, in principle, are not subject to punishment.

4.2.2 Victim's consensual other-peril

The victim's consent can be oriented towards the act itself, indicating that the victim lacks full knowledge of the risks involved or has an attitude of avoidance towards the realization of the risks (comparable to the subjective negligence of the perpetrator). In such situations, the victim often harbors a sense of luck and believes that a favorable outcome will arise, while the damage will not occur. Therefore, the victim consents only to the risk of entering the situation, not to the possibility of an unfortunate outcome. Although the victim is responsible for the consequences of their choices based on their own will, the criminal law still needs to play a certain restraining role based on the general preventive function and the protective function of the victim under the view of criminal law paternalism. Particularly, when dealing with situations that involve extremely important personal interests such as life, body or public interest, the crime is punishable in principle, regardless of the subjective attitude of the perpetrator towards the pursuit of harmful results. Nevertheless, the perpetrator should be given appropriate mitigation of responsibility.

Both of the above classifications are predicated on the victim's freedom of will. If the victim is not self-determined to enter into risk but makes decisions under unfree circumstances, such as when the perpetrator forces the victim to surrender property, then the situation can be resolved directly through the traditional theory from the perspective of the perpetrator, without consideration of the victim's position.

5. Conclusion

Currently, in China, the study of penal victimology is mainly focused on its application in legislation and interpretation, with a particular emphasis on negligence crimes and crimes such as fraud and illegal fund-raising. However, research results in the field of intentional violent crimes and their sentencing are relatively scarce and disconnected from judicial practice, in contrast to the prevailing social sentiment and contemporary status---victim's behavior is a critical factor in many types of crimes, especially in domestic violence and mafia-style organizations' crime. While some scholars ignore the victim's position in the penal law, others tend to condemn and blame the victim in an excessive way, even attributing the perpetrator's responsibility to the victim. These issues highlight the urgent need for reasonable factors in victimology to form a systematic evaluation guidelines of victim factors that can be used to guide imputed sentencing.

This study aims to refine the specific types of victim behavior in the two categories of victim's fault and victim's self-involvement in risk, based on the sample of adjudication documents of crimes against citizens' personal safety and democratic rights, and using the victim's criterion as the standard. The purpose is to establish a definite and accessible position for victimology in the sentencing process and pave the way for future innovation of criminal law theory in China.

To achieve this goal, it is recommended that legislators introduce additional legal provisions to force judicial practice of sentencing to pay attention to victimology guidelines. This will enable China to establish a more comprehensive and effective victimology framework that reflects the actual situation of victims in intentional crimes, and align with the expectations of society and the public.

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Appendix

[a]Xie's intentional homicide case is that, on June 20, 2006, in long-term control of the loach purchase and sale market, Xie and other loach buyers and sellers were forced to buy or sell, forced charges of Gao, Li, and other people to Xie's shop to make trouble, Xie because of the unreasonable obstruction of its legitimate business, so organized the brothers and relatives to resist. Xie and the other eight people holding a pre-prepared steel pipe beat Li, Zhang, and Yuan to death, and Reng and customer Guo were injured.

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[m]See Wang Huanting: Research on the Attribution of Criminal Law in the Risk of Victims' Self-Involvement, PhD thesis, East China University of Political Science and Law,2017.

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[o]See [German] Thomas Hillenkamp and Chen Xuan, where is Victimology Today? - A Short Summary of the Victimology Guidelines as Principles of Legislation, Interpretation, Attribution and Sentencing, in Journal of Comparative Law, 2018, No. 5.

[p][German] Thomas Hillenkamp and Chen Xuan, where is Victimology Today? - A Short Summary of the Victimology Guidelines as Principles of Legislation, Interpretation, Attribution and Sentencing, in Journal of Comparative Law, 2018, No. 5.

[q]See Che Hao: Victim Consent and Victim Self-Inflicted Risk in Negligent Offenders, in Political Science and Law, 2014, No. 5.

[r]See Zhang Mingkai: The Jurisprudence of Dangerous Acceptance in Criminal Law, Chinese Journal of Law, 2012, No. 5.

[s]Wang Fangkai: On the Differentiation of Types of Victims' Risk of Self-Entrapment, in Journal of Henan Police Academy, 2021, No. 2.