

A Study of Aggravated Consequential Offense

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Abstract

Critics charge that aggravated consequential offense violates principle of culpability for two reasons. First, the defendant would be liable to the extended result without culpable mental state. Second, the punishment of aggravated consequential offense is so severe that it could not be justified.

However, in light of Chinese Constitution and Criminal Law, a defendant should be culpable of causing the damage only if he has a mental state of intention or negligence. Therefore, aggravated consequential offense could not immune from principle of culpability in positive law. As a result, the aggravated consequential offense belongs to combination of intentional basic crime and another negligent or intentional crime causing extended result.

Furthermore, the problem of punishment may be solved through special illegality. As to the statutory sentence of aggravated consequential offense, which often exceeds the total punishment of basic crime and negligent crime of causing extended result, it is disproportionate. Thus, the aggravated consequential offense should be divided into formal and substantial combination. Punishment for formal combination is relatively reasonable, so it is unnecessary to establish extra justifications for combination. Punishment for substantial combination is based on special dangerousness of essential conduct and immediate relation between basic crime and extended result.

Because the substantial combination is punished much more severely, it is necessary to limit its application with strict requirements. First, the causative action should match requirement of basic crime and cause the extended result in high probability. Second, the extended result should be limited in actual damage that is more harmful than the essential result. Third, the extended result should be caused immediately by essential act. Forth, the defendant should aware basic factors creating dangerousness to the extended result.

Dual combination theory is helpful to explain criminal participation in aggravated consequential offense. In light of this theory, the extended result is illegal

element of aggravated consequential offense. The Chinese Criminal Law states that participation is not punishable unless a defendant intends to commit the crime, thus participation of aggravated consequential offense should be limited in intention to cause extended result. However, if a defendant's act immediately caused extended result, he should be guilty of aggravated consequential offense. Furthermore, it is unnecessary to require double or multiple intentions and communications.

Besides, the dual combination theory can be applied to judge the standard of attempt in aggravated consequential offense. On the one hand, because basic crime is an important aspect of aggravated consequential offense, if basic crime is unaccomplished, even if the extended result is caused, aggravated consequential offense should be attempt. On the other hand, extended result is an indispensable element of increasing punishment, so it is impossible to commit aggravated consequential offense as attempt without the extended result.

It is necessary to identify which provisions belong to the aggravated consequential offense besides analyzing the application of these provisions. The aggravated consequential offense refers to crime that substantially increases statutory sentence because the extended result occurs. According to the definition, the aggravated consequential offense should include indirect model of aggravation such as the transferred consequential offense in Chinese Criminal Law, and the felony murder in American Criminal Law. In other words, indirect model of aggravation is the important resource of analyzing aggravated consequential offense.

Key Words: Principle of Culpability; Dual Combination; Basic Crime; Extended Result; Special illegality; Mental State; Indirect Model of Aggravation

Abbreviations

§, §§	Section, sections
ALR	Landrecht, Allgemeines Landrecht=General State Laws or the Prussian States
Anm	Anmerkung(en)=Annotation
Bes.	Besitz(er)
BGH	Bundesgerichtshof=Federal Court of Justice
Cal.	California
cdd	culpa dolo determinata theory
Ch. :	Chapter
Chinese Criminal Law	Criminal Law of the People's Republic of China (1997)
Eliz. :	Elizabeth
German Penal Code	German Penal Code (As Amended As of December 19, 2001)
Haw.	Hawaii
Japanese Penal Code	Japanese Penal Code (Act No. 45 of 1907)
Ky.	Kentucky
Model Penal Code	American Law Institute Model Penal Code
Mich.	Michigan
NJW	Neue Juristische Wochenschrift, cited by year and page
NW.	Northwestern
Ohio St.	Ohio State Reports
OLG	Oberlandesgericht = provincial high court and court of appeal (Germany)
Pa.	Pennsylvania
Rev.Stat.	Revised Statutes
Russian Criminal Code	The Criminal Code Of The Russian Federation
S. Ct.	Supreme Court Reporter of United States
Swiss Criminal Code	Swiss Criminal Code of 21 December 1937 (Status as of 1 July 2013)
U.S.	United States

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Introduction

The aggravated consequential offense is a legal concept in continental criminal law. It usually refers to a kind of crime that increases punishment in the circumstance that a defendant commits any basic crime and thereby causes extended result.

Chinese Criminal Law provides many aggravated consequential offenses. Furthermore, these provisions for increasing punishment are applied in judicial practice at high frequency. However, there is no clear-cut provision about the constitutive requirement of aggravated consequential offense except for the extended result. Thus the judges and jurists are always confused about how to apply the aggravated consequential offense. Here, there are two cases to explain the divergence of applying aggravated consequential offense.

(1) X (defendant) had quarrels with Y in the course of playing mahjong. X punched Y and pushed on Y's right shoulder so that Y could not stand steadily and his head bumped into the door. After minutes, Y fell down and died. In light of forensic analysis, the cause of Y's death was the collision of his head and the door. The court held that X committed intentional infliction of bodily injury causing death, since X caused death through his act of intentional bodily injury. ^①

(2) A (defendant) fought with B (A's wife) because B wanted to stop A from playing mahjong. A punched B on corner of her mouth and caused B to bang her head on the floor when she fell down. As a result, B died because of injury in her head. In light of forensic analysis, cause of B's death was the collision of her head and the floor. The court held that B committed crime of causing death through negligence. ^②

We can find that there is no substantial difference between "punch" of case one and "punch" of case two. And, "collision of head and door" is same as "collision of head and floor". However, X is guilty of injury causing death as the aggravated

^①First, Second, Third, etc., Criminal Tribunals of Supreme People's Court, Chinese Criminal Instructing Cases: Crimes of Infringing upon Intellectual Property Rights, 2009, Law Press·China:287.

^②Research Institute of the Supreme People's Court for Applied Jurisprudence, Chose Cases of People's Court, 2002, China Legal Publishing House:447.

consequential offense of injury whereas B is guilty of causing death through negligence. Thus, it is not very clear about rule of applying aggravated consequential offense in judicial practice. Furthermore, some argue that immediate causation or recklessness to cause death is the requirement of aggravated consequential offense.^① X cannot be guilty of injury causing death according to this idea.

The case one is the ruling case of the Supreme Court of China and reflects common attitude of Chinese court about the aggravated consequential offense. In other words, there is no strict requirement for limiting aggravated consequence offense in Chinese judicial practice. However, some aggravated consequential offenses are punished very severely. For instance, in Chinese Criminal Law, robbery causing death shall be punished by sentencing to fixed-term imprisonment of not less than 10 years, life imprisonment or death and be imposed fine or forfeiture cumulatively. If such severe punishment is imposed unreasonably, the defendant's basic right will be entrenched. Thus it is doubtful that defendant is easily convicted of aggravated consequential offense in judicial practice. It is necessary to research the applying rule of aggravated consequential offense so as to apply this kind of crime reasonably. Of course, limitation itself is not the object of limitation, otherwise legislation of aggravated consequential offense will become a hollow provision and the order of law will be broken down. Therefore, limiting rule of applying aggravated consequential offense should be based on the rationale of increasing sentence.

In the past, the extended result was considered as the only rationale of the aggravated consequential offense. In terms of this opinion, if only the basic crime caused the extended result, whatever the defendant was culpable to the result in mental state, he should be guilty of the aggravated consequential offense.^② This view recognized the aggravated consequential offense as the product of strict liability or consequential responsibility. However, principle of culpability has been accepted as one of the most important guidelines in modern criminal law. Everyone is only responsible for the result which is caused by blameworthy misconduct in mental state.

① Zhao Binggui, Original, Reality and Ideal of Aggravated Consequential Offense, 2009, Contemporary Law Review, (1), p121.

② Kagawa Tatsuo, Nature of Aggravated Consequential Offense, 1963, The Horitsu Jiho, 35(9), p64.

The consequential responsibility conflicts with principle of culpability fundamentally so many scholars denounce the aggravated consequential offense and ask for abolishing it.

However, this theory makes no sense for limiting the aggravated consequential offense in judicial practice. Furthermore, there is doubtful whether the aggravated consequential offense is purely consequential responsibility or not. Thus most scholars now attempt to make the aggravated consequential offense better by finding a good approach to interpret this kind of crime.

This main approach includes combination theory, recklessness theory, proximate causation theory and dangerousness theory. The combination theory holds that the aggravated consequential offense is the combination of intentional crime and negligent crime. The recklessness theory holds that aggravated consequential offense is punished because the defendant causes the extended result through gross negligence or reckless. The proximate causation theory holds that proximate relationship between basic crime and the extended result is the foundation to punish the aggravated consequential offense. The dangerousness theory holds that the special danger included in the basic crime is the main reason for punishing the aggravated consequential offense.

Among these theories, the combination theory and the dangerousness theory are the most important approach.^①In Germany, there is no doubt that the dangerousness theory has dominated the field for many years. In Japan, the combination theory is the main approach to limit the aggravated consequential offense but the dangerousness theory is a very powerful approach and accepted by more and more jurists.^②In China, most scholars tend to support the combination theory but recently many scholars begin to approve the dangerousness theory.^③

Above-mentioned theories may be effective rules on limiting the aggravated consequential offense. The combination theory holds that the extended result is the

① Hans-Heinrich Jescheck, Thomas Weigend, Textbook of German Penal Code: General Part, Xu Jiusheng(trans), 2001, China Legal Publishing House, p218.

② Maruyama Masao, Structure of Aggravated Consequential Offense, 2003, Gendai Keijiho, 5(4), p46.

③ Li Bangyou, Research on Basic Theory of Aggravated Consequential Offense, 2001, Wuhan University Press, p 770.

constitutive requirement of the aggravated consequential offense so that a causal relationship should exist between basic crime and the extended result. Furthermore, it requires that the defendant cause the extended result through negligence. The mainstream of the dangerousness theory usually limits the aggravated consequential offense through “directness requirement”. According to this requirement, special danger of the basic crime should be realized to the extended result.^① Recklessness theory limits the aggravated consequential offense by requiring the defendant to cause the extended result through gross negligence. The proximate causation theory considers that basic crime is the efficient cause of the extended result.

Besides general requirement, how to comprehend participation and attempt to commit the aggravated consequential offense is discussed in different ways. In aspect of attempt, there are deep divisions about the relationship between attempt to commit basic crime or failure to cause extended result and the attempt to commit the aggravated consequential offense. German jurists generally hold that if basic crime is not accomplished or the defendant intends to cause extended result but the result does not occur, it would constitute the attempt on aggravated consequential offense. Japanese jurists generally hold that criminal attempt only exists in intentional aggravated consequential offense and extended result occurs or not is the mark of the attempt on aggravated consequential offense. Chinese jurists generally hold that only if basic crime is not accomplished, the attempt on aggravated consequential offense would be affirmed. In aspect of participation, because of Section 18 in German Penal Code,^② German jurists generally hold that co-principal and complicity both are possible to be constituted in aggravated consequential offense.^③ By contrast, there is no similar provision in Japanese Penal Code to Chinese Criminal Law, but the jurists of the countries generally hold the same view as German jurists according to theory of

① Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, *Gendai Keijiho*, 4(12), p107.

② Section 18 in German Penal Code states that aggravated sentence based on special consequences of the offense. If the law imposes a more serious sentence based on an extended result of an offense, any principal or secondary participant is liable to the increased sentence only if they acted at least negligently with respect to that result.

③ Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p686-687.

participation and rationale of the aggravated consequential offense.^①

In addition, there are different forms of the aggravated consequential offense in different countries. For instance, the aggravated consequential offense is only based on basic crime with respect to intention in the Japanese Penal Code. However, many basic crimes are negligent crimes in the Chinese Criminal Law, such as crime of serious safety accident in project of engineering.^② Definition of the aggravated consequential offense not only influences application of rationale but also resource of rationale. For instance, scholars differentiate transferred consequential offense in Chinese Criminal from the aggravated consequential offense, so that this kind of crime cannot be limited by rationale of aggravated consequential offense. Besides, the aggravated consequential offense is always considered as the legal patent of continental criminal law, so as to ignore related theories in Anglo-American law. Especially, there are many similar discussions between the felony murder in United States and the aggravated consequential offense. If felony murder belongs to aggravated consequential offense, its rationale can offer references for justifying aggravated consequential offense. Therefore, it is important to define aggravated consequential offense before analysis of specific contents on it.

In view of above-mentioned questions, this dissertation will concentrate on determining whether aggravated consequential offense is justifiable or not and finding applicable rules. The dissertation is divided into four chapters. Chapter 1 defines aggravated consequential offense in substantial way so as to make it contain transferred consequential offense and felony murder. Chapter 2 explains the relationship between aggravated consequential offense and principle of culpability. It affirms that aggravated consequential offense should not be considered as strict liability and restricted by principle of culpability; demonstrates that aggravated consequential offense belongs to combination of crimes such as combination of

① OyaMinoru, MaedaMasahide, *Exciting Criminal Law*, 1999, Yuhikaku Publishing Co.,Ltd, p44-45.

② Article 137 in Chinese Criminal Law states that where any building, designing, construction or engineering supervision unit, in violation of State regulations, lowers the quality standard of a project and thereby causes a serious accident, the person who is directly responsible for the accident shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined.

intentional basic crime and negligent crime which causes extended result. Chapter 3 concludes some requirements for limiting aggravated consequential offense on the basis of rationale advocated in Chapter 2. The requirements include basic conduct, extended result, causation and mental state. Chapter 4 analyses two special questions containing the participation and the attempt on aggravated consequential offense.

Chapter 1 Rationale of Aggravated Consequential offense

It is well known that the punishment of aggravated consequential offense is very severe, so much so that it even exceeds the total punishment of basic crime and crime of negligent causing extended result. Nonetheless, why is the punishment so serious remains controversial? Thus we need to find whether there is any convincing argument in favor of aggravated consequential offense or not. These arguments are concluded to be the rationale of aggravated consequential offense. Commentators of Romano-Germanic family often replace “rationale” by terms such as “nature”, “construction” or “ground”. However, there is no substantial difference among those terms that are related to unitary pattern approach, compound pattern approach and danger approach. Therefore, they may be alternated by each other in this paper.

Many people consider that aggravated consequential offense conflicts with the principle of culpability because it seems that the mental state on the extended result is not provided in law and the statutory punishment is too severe. But some hold that it is unnecessary to impute the extended result to the defendant on condition of mental state and other substantive reasons. These opinions both treat aggravated consequential offense as strict liability offense. However, this conclusion might be wrong. We cannot convict a defendant of a serious crime according to literal requirements, because there are elements hiding behind the text of law. Furthermore, principle of culpability becomes so important that it is intolerable to let so many criminals violate this principle.

Therefore, the purpose of this chapter is to analyze the construction and to find the rationale of aggravated consequential offense. In this Chapter, there are four parts to finish this mission. The first part affirms that aggravated consequential offense should be restricted by the principle of culpability. The second part analyses the approaches to coordinate aggravated consequential offense and principle of mental culpability. The

third part reviews ways to justify aggravated consequential offense in proportionality. The last part advocates the author's opinion on making aggravated consequential offense better.

1.1 Relationship between Aggravated Consequential Offense and Principle of Culpability

1.1.1 Defining Principle of Culpability

In ancient society, the general opinion totally upheld strict liability that gave criminal sanctions to the defendant in revenge for the victim regardless of mental state of the defendant. Moreover, many people were punished for being simply related to or friendly with someone who has been convicted of an offense.^① Strict liability is restricted with the development of human society and mental state of defendant takes an important position in conviction. Culpability has gradually been a part of liability.

Culpability refers to possibility of accusation formed by volition.^② In process of evaluating whether the defendant is guilty for a crime in substantial criminal law, culpability is evaluated after illegality as a requirement of imposing penalty.^③ Thus principle of culpability is usually confined to negative culpability rather than positive culpability.^④ In transverse aspect, culpability contains mental culpability and personal culpability. In light of mental culpability, a defendant cannot be punished if he lacks intention, negligence or knowledge on illegality and probability of anticipating the defendant to abide by the law. In light of personal culpability, a defendant only takes liability for his own conduct and should not be accused for other's although he is related to the offender in social status.^⑤ In vertical aspect, culpability can be divided into

① Oya Minoru, *Criminal Law: General Part*, 2nd ed, 2008, Li Hong(trans), China Renmin University Press, p281.

② Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p490.

③ Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p256.

④ Hirano Ryuichi, *Criminal Law: General Part I*, 1972, Yuhikaku Publishing Co., Ltd 52.

⑤ Sone Takehiro, *Important Questions of Criminal Law*, 2005, Seibundoh Publishing Co., Ltd, p27.

convicting culpability and sentencing culpability. In light of convicting culpability, legislation of punishment is built on basis of possibility to accuse the defendant. In light of sentencing culpability, the judge should consider all elements about measurement of punishment.^① As a result, principle of culpability consists of specific contents including subjective responsibility, individual responsibility and proportionality of sentence.^②

1.1.2 Origins of Aggravated Consequential Offense and Principle of Culpability

According to the general idea of German scholars, aggravated consequential offense has had gone through a continuous process: Versari Theory → Dolus Indirectus Theory → Culpa Dolo Determinata Theory.^③ Many people hold that these theories belong to thoroughly strict liability, and believe that aggravated consequential offense is derived from strict liability offense. However, this paper will show that even if above-mentioned theories overlooked defendant's mental state in causing result, it is wrong to call them as thoroughly strict liability, and there is a positive connection between aggravated consequential offense and strict liability.

1.2.2.1 Versari in re Illicita Theory

Origin of aggravated consequential offense is well known to be versari in re illicita theory which is responsibility for the unintended harms resulting from an unlawful act,^④ with roots in Christian ethics and Cannon law.^⑤ Roman law strictly limits crime in intentionally unlawful and immoral act. However, Germanic law did not pay attention to defendant's motivation and the result happened by accident, while both of which can be imputed to the defendant. In medieval Italy, interpretation of intention in Roman law

① Hans-Heinrich Jescheck, Thomas Weigend, Textbook of German Penal Code: General Part, Xu Jiusheng(trans), 2001, China Legal Publishing House, p490.

② Johannes Wessels, German Penal Code: General Part, 2008, Law Press·China, p214.

③ Uchida Hiroshi, Structure of Aggravated Consequential Offense, 2005, Shinzansha Publisher Co.,Ltd, p50.

④ Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p182.

⑤ Guyora Binder, The Origins of American Felony Murder Rules. 2004, Stanford Law Review, 57(1),73. Also see Francis Bowes Sayre. Mens Rea, Harv. L. Rev Harvard Law Review, 1932,(45):974, 984-85.

had been followed, but the defendant should be responsible to a result caused unintentionally but negligently on basis of Germanic idea and necessity of social life. As a result, *versari* theory, initially belonged to canon law, was used to expand the meaning of intention.

In Canon law, *versari* theory was applied to decide whether the clergy was suitable to carry out the priesthood. Although the defendant caused a forbidden result by accident, he would be responsible to the result.^① For instance, several clergies and believers went back to home together after they finished their job in vine yard. They played planting tools on the way during which one of them wounded another and caused him died after 8 days. This case was taken as an instance for *versari* theory. Because clergy was forbidden to play with believer at that time, their playing was treated as unjustified conduct. Therefore, they should undertake the liability to the result.^②

Versari theory influenced legislation of Romano-Germanic family. For instance, aggravated consequential offense in Italian Criminal Law was considered as exemplification of *versari* theory and strict liability.^③ *Constitutio Criminalis Carolina* provided that barbers and archers were not guilty of causing death in the course of hairdressing or shooting in proper place. Nonetheless, if their acts caused death in improper place, it is possible to impose liability to them.^④

1.2.2.2 Dolus Indirectus Theory

Because unlawful acts may not be dangerous to cause result, *Dolus Indirectus* theory expanded meaning of intention based on dangerousness of previous act, which was different from *versari* theory paying attention to the improper act.^⑤ Thomas Aquinas

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p53.

② Llompart Jose, *Objection to versari in re illicita in the Ancient Criminal Law and Function of Accident in the Modern Criminal Law*, 1981, *Sophia Law Review*, 24(3), p248.

③ Tullio Padovani, *Outlines of Italian Criminal Law*, Chen Zhonglin(trans), 1998, Law Press·China, p228-231.

④ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p56-57.

⑤ It is necessary to distinguish *dolus indirectus* from *dolus eventualis*. Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p362.

held that accidental incidence were neither intended nor voluntary, and that if somebody did not remove the incidental result of homicide as he could and should, he would be guilty of voluntary homicide.^① Didacus Covarruvias cited Aquinas' opinion and held that if someone intended to commit a crime causing a result, he also indirectly intended to cause the result.^② Bartous immediately held that if the essential criminal act showed a dangerous tendency to cause extended result in line with general experience, the defendant is liable to the extended result as intention.^③

Benedict Carpozov brought *dolus indirectus* theory to Germany.^④ In light of Carpozov's opinion, because intention of homicide was very hard to be proved, intention should be divided into direct intention and indirect intention. If it was doubtful whether the defendant intended to inflict harm against or to kill the victim, he should be responsible to intentional homicide. However, besides the mental state, only if the causal act was fatal to victim's life, the defendant can be found guilty for murder.^⑤ This opinion was known as fatal theory.

Fatal theory is divided into absolute approach focusing on nature of basic crime and comparative approach depending on all factors in a case. For instance, childbirth is not fatal to the baby in nature, so if a baby died by accident in the course of giving birth, the mother is not liable to the baby's death according to absolute approach. However, the same case may end up with murder conviction in light of comparative approach considering the mother's physical and mental condition.^⑥ These approaches tend to ignore mental state of causing result so that *Dolus Indirectus* theory was also criticized as strict liability.

1.2.2.3 Culpa Dolo Determinata Theory

① Guyora Binder, *The Origins of American Felony Murder Rules*. 2004, *Stanford Law Review*, 57(1), p73.

② Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p184.

③ Xu Yuxiu, *Contemporary Theories on Criminal Law*, 2005, China Democracy and Legal Institute Press, p697.

④ Xu Yuxiu, *Contemporary Theories on Criminal Law*, 2005, China Democracy and Legal Institute Press, p697.

⑤ Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p185-186.

⑥ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p67-69..

Dolus indirectus theory was in dominant position during the period of common law in Prussia for a long time. This situation did not change until Feuerbach advocated culpa dolo determinata theory (in short, cdd theory). Because dolus indirectus theory presumed the defendant's intention of avoiding difficulty for adducing evidence, it was criticized as presumption of guilt.^① Feuerbach presented cdd theory in order to correct the mistake of dolus indirectus theory by breaking through types of culpability.

Feuerbach expressly differentiated intention from negligence. In Feuerbach's opinion, intention equals to purpose and can be divided into certain intention and uncertain intention. Certain intention refers to purpose to make crime happen. By contrast, uncertain intention points to special type of several illegal acts. In uncertain intention, defendant not only pursues one special result but also foresees that his illegal act would cause several results that do not go counter to his will.^② Between pure intention and pure negligence, there is one type of mental state containing intention and negligence at the same time. The intention is defendant's actual willingness. Furthermore, the negligence is contained in the act for other unlawful purposes. Thus the decision on basis of unlawful act may be called negligence decided by intention.^③

Based on the above-mentioned opinions, Feuerbach suggested that if someone intends to commit a crime and causes several illegal results, he should not merely constitute imaginative concurrence of crimes, and ought to be punished as following proposals:

Section X: If the intentional crime is accomplished and causes results belonging to other crimes, the defendant should be liable to intentional crime about related results in condition that he intends to cause these results or foresees that these results maybe happen.

① Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p188.

② Paul Johann Anselm v. Feuerbach, 5th ed., Xu Jiu-sheng(trans), 2010, Text Book of German Penal Code: General Part, p64

③ Paul Johann Anselm v. Feuerbach, 5th ed., Xu Jiu-sheng(trans), 2010, Text Book of German Penal Code: General Part, p65-66.

Section Y: Even if the defendant has no intention or knowledge about causing the result, which then is attributed to negligence, because he should have foreseen the result if he pays full attention, his punishment should be severer according to degree of negligence in the course of causing the result.

Aggravated consequential offense in modern sense has had been accepted by Bavarian Penal Code in 1813 with the effect of Feuerbach's theory. This code provided abortion against the will of the pregnant woman causing death (Section 173 IV), abandonment causing death (Section 177), rape causing death (Section 189) excluding application of general provision on intention in the law.^① This law showed conflict of aggravated consequential offense and mental state. Prussian Penal Code in 1851 accepted objective punishment condition theory so as to make aggravated consequential offense prone to strict liability. By 1871, objective causation theory still dominated legislation of aggravated consequential offense in the Reich Penal Code.

1.2.2.4 Evaluation On the Above Mentioned Theories

Because all the above mentioned theories were to close the loophole of "intention" in narrow sense and impose serious sentence to the defendant without strict intention about causing result, German jurist Liszt held that aggravated consequential offense was is the remnant of strict liability which come from ancient times and that it not only violates current trend of legal thought but also deviates from principle of criminal policy.^② However, it is unreasonable to confirm the relationship between aggravated consequential offense and strict liability according to original theories.

First, even if versari theory paid not enough attention to mental state, it is not only based on consequence but also dangerousness of unlawful act. Japanese jurist Kagawa Tatsuo held that versari theory was not based on strict liability at all, rather, it focuses

^①Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p87.

^②Dr. Franz v. Liszt, *Text book of German Penal Code*, Xu Jiusheng(trans), 2000, Law Press·China, p269-270.

on holding responsibility of dangerous caused by unlawful act.^① Morii Akira also argued that accident result is attributable on basis of clergy's unlawful act, thus versari theory not only advocates consequential responsibility doctrine but also attaches importance to dangerousness. Thus versari theory is not equal to basing responsibility on consequence.

Second, *dolus indirectus* theory began to rectify objective imputation deviation. Böhmer held that when the defendant foresees that his act would cause result, even if he were not deliberate, he has uncertain intention.^② This opinion was already inclined to comprehend intention in tolerant attitude of the defendant, which approached to contemporary understanding of indirect intention. By the late 18th century, ALR, influenced by *dolus indirectus* theory, provided that if defendant abused victim intentionally and it was inevitable to cause death, the defendant should be punished as murder.^③ Although some people held that this provision belonged to example of presumed intention,^④ in situation of “inevitable to cause the result”, the defendant has direct intention rather than indirect intention to commit the crime, therefore, *dolus indirectus* theory is probable to match principle of culpability.

Third, *cdd* theory can be in accordance with principle of mental culpability. Feuerbach's theory was criticized for following reasons. First, Section X provided that knowledge of causing result is presumed as intention, so there is no substantive difference between *cdd* theory and *dolus indirectus* theory.^⑤ Second, it could say that Section Y is embryo of aggravated consequential offense, but Feuerbach did not offer substantive contents about increasing punishment in contrast to imaginative concurrence of crimes.^⑥ Third, it remained the opinion of constructive intent because the defendant should shoulder the burden of proving that he negligently causes extended

① Akira, *Aggravated Consequential Offense*, 1961, *Kyoto Law Review*, 69(2), p72.

② Akira, *Aggravated Consequential Offense*, 1961, *Kyoto Law Review*, 69(2), p73.

③ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p70.

④ Ke Yaocheng, *Development of Criminal Law Thoughts*, 2003, China University of Political Science and Law Press, p114.

⑤ Ke Yaocheng, *Development of Criminal Law Thoughts*, 2003, China University of Political Science and Law Press, p115.

⑥ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p78.

result.^① Although apparently persuasive, these arguments are subject to following rejoinders. First, it is controversial about essence of intention. In light of tolerance theory, if a defendant recognizes his conduct will cause the result while he does not go against it, he should be guilty of intentional crime. Furthermore, general view holds that it is unnecessary to foresee the extended result in aggravated consequential. The defendant is intent to cause the result if he foresees the result and does not oppose it.^③ Second, Section Y is similar to imaginative concurrence of crimes. Even if imaginative concurrence of crimes is punished as one crime, it is doubtful that whether concurrent crimes are fully evaluated by one punishment. Moreover, if a defendant is negligent in causing extended result, the strained relationship between aggravated consequential offense and mental culpability will be relaxed. Third, burden of proof is determined by criminal procedure. Aggravated consequential offense itself cannot determine how to allocate the burden of proof. Because the defendant is unnecessary to intend to cause the extended result, the prosecutor is not obligated to prove the intention of causing extended result. However, the prosecutor still has to give evidence about whether the defendant causes the extended result through negligence according to cdd theory.

In sum, original theories of aggravated consequential offense contain aspects of dangerousness liability and mental culpability, thus it is hard to say that aggravated consequential offense is purely based on consequence responsibility or not. Furthermore, there is no positive connection between origins and justification. Even if above mentioned theories are not accomplished to match culpability, we still cannot deny their reasonability. On the contrary, these theories reflect different aspects of aggravated consequential offense. And, development of these theories is a process of justification about attribution of a crime. Nowadays, aggravated consequential offense may be acceptable to principle of culpability on basis of these theories. If confliction of origins

① Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p189.

③ Yamaguchi Atsushi, *Criminal Law: General Part*, 2nd ed, Fu Liqing(trans), China Renmin University Press, p189.

of aggravated consequential offense and principle of culpability is partially exaggerated so as to ignore its reasonableness, it is possible to “throw the baby and dirty water out together”.

1.1.3 Provisions of Aggravated Consequential Offense and Principle of Culpability

There is no statutory requirement about mental state and other element except from consequence in aggravated consequential offense, which is considered as the legal ground of consequence liability by some Chinese jurists. However, if anyone claims that there is no provision about culpability in Chinese Criminal Law, it is not true.

Before 1953, German Penal Code provided aggravated consequential offense without limitation of mental state, thus precedents treated aggravated consequential offense as strict liability. On September 28, 1881, Supreme Court of the German Reich ruled that the result is generally attributed to the defendant in condition of culpability. However, statute did not care about the defendant’s mental state of causing the extended result because the defendant usually and empirically intended or foresaw the serious result regarding injury’s nature, thus but-for relation between basic crime and extended result was sufficient requirement to constitute aggravated consequential offense.^① This is an obvious standpoint of strict liability.

Japanese Penal Code transplants German Penal Code and expressly stipulated aggravated consequential offense in writing. There is no provision on mental state about extended result at all in Japanese Penal Code up to now. Even if needless negligence theory is criticized by jurists, this theory always dominates the opinions of determining commission of aggravated consequential offense in judicial practice. In a case that the defendant caused his wife of special physique to death in the course of beating her on February 26, 1954, Japanese Supreme Court held that because there was indirect

^① RGSt., Bd.5, S.29, bes.33f. Cited in Sakuma Osamu, Co-Principal in Aggravated Consequential Offense, 1983, The Nagoya journal of Law and Politics, (96), p117-118.

connection between the beatings and the death of the wife, it was unnecessary to require foreseeability about causing extended result for constituting aggravated consequential offense.^①

Chinese courts also, usually, omits mental state of causing extended result. In the 2011 case of *People v. Li*, Li quarreled with Cheng and gave Cheng one punch on head. Cheng fell down and died of injury based on heart disease, myocardial infarction, double-sides poly-cystic kidney and renal calculus causing multiple organ failure. The court held that Li was guilty of injury causing death regardless of the victim's special constitution.^② This case actually denied necessity of negligence about causing death in the course of battering; therefore, if there is no provision on mental state of causing extended result, aggravated consequential offense is probable to become strict liability in practice.

Some scholars also agree to exclude the negligence of causing extended result from the requirement of aggravated consequential offense. Chinese jurist Zhou Mingchuan holds that guilty mind refers to assess whether the defendant should take responsibility to criminal liability and its specific degree of punishment depending on the common perception. If the defendant should be liable to some kind of result according to general social opinion, it is unreasonable to stick too much in defendant's mental state. Thus the defendant can be convicted of aggravated consequential offense regardless of intention and negligence to cause extended result.^③ For example, Japanese jurist Nagashima Kazuhiro holds that direct causality between basic crime and extended result is the ground of aggravated consequential offense. For instance, the crime of injury causing death is punished severely in objective aspect of dangerous act for protecting the victim. As long as the defendant intends to commit the injury, the punishment of injury causing

① Maruyama Masao, Atsushi Yamaguchi// Shibahara Kuniji, etc, *One Hundred Cases of Criminal Law: General Part I*, 2003, Yuhikaku Publishing Co., Ltd, p96-97.

② People's Court of Ningxiang County, Hunan Province, Judgment Paper of Penal Sentence Attaching Civil Judgment, 2011, First Trial, No.126.

③ Zhou Mingchuan, *Research on Disputed Questions of Aggravated Consequential Offense*, 2007, Chinese Criminal Science, (5), p44.

death can correspond to the principle of culpability.^①

In fact, the opinion mentioned above treats extended result as objective punishment condition.^② Because most German and Japanese jurists consider that objective punishment condition is not contained in constitutive requirements and it is unnecessary to require the defendant to culpably cause this condition.^③ Thus principle of culpability cannot restrict aggravated consequential offense.

Nonetheless, the opinion lacks concern for importance of culpability. First, mental state may be an unwritten requirement. Even if there is no express provision for some elements, these elements may hide in spirit of law. It is well known that constitutive elements can be divided into statutory elements and unwritten elements.^④ For instance, purpose for illegal possession is not provided expressly as subjective element of larceny in Chinese Criminal Law, but majority opinion of judges and jurists uphold conviction of larceny limited in this element. Therefore, lack of legal provision is not an effective reason to relieve aggravated consequential offense from principle of culpability.

It is important to affirm principle of culpability in constitutional level.^⑤ Section 2 in Basic Law for Germany provides: (1) every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law. In light of this provision, personal freedoms are protected strongly. If a defendant is punished because of accident result without any guilty mind, his freedoms are violated. Thus principle of culpability should be a part of constitutional principle. Section 46 in Germany Criminal Law specifically

① Nagashima Kazuhiro, *Several Questions on Aggravated Consequential Offense*, 2006, *The Teikyo Law Review*, 24(2), p158-163.

② Rittler, a. a. O., S. 186, Anm. 3. Cited in Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p20.

③ Dr. Franz v. Liszt, *Text book of German Penal Code*, Xu Jiusheng(trans), 2000, Law Press·China, p324—325; Otsuka Hitoshi, *Criminal Law: General Part*, 4th ed, 2008, Yuhikaku Publishing Co.,Ltd, p515—516.

④ Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p125.

⑤ Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p35.

confirms culpability as a principle of sentence.^① Johannes Wessels holds that German Penal Code is based on principle of culpability and principle of responding to prosecution in accordance with “human’s picture” in sense of Basic Law.^②

Second, there is sufficient legal ground for principle of culpability in Chinese Criminal Law. Many people hold that culpability takes no position in basic principles because this principle is not provided in Chinese Criminal Law.^③ Thus some people doubt that principle of culpability can restrict conviction as a universal rule and hold that aggravated consequential offense is an exception of principle of culpability.^④ However, principle of culpability should restrict on conviction and sentence according to integral construction of legal order in China. Article 33(2) in Chinese Constitution provides that all citizens of the People's Republic of China are equal before the law. If criminal law set up responsibility regardless of defendant’s foreseeability of causing the result, it is possible to punish pure thought and forbid common conduct. It is incompatible with principle of protecting human rights.

Besides Chinese Constitution, Chinese Criminal Law can offer sufficient grounds for principle of culpability. On one hand, Article 16 in Chinese Criminal Law provides that an act is not a crime if it objectively results in harmful consequences due to irresistible or unforeseeable causes rather than intent or negligence. Most people view this provision as exclusion of conviction in irresistibility and fortuitous event. However, this provision is not limited in this meaning. If someone is not convicted of a crime, he should not be liable to the result as element of the crime. Thus the provision rules that there is no responsibility to result lacking of culpability. Furthermore, intentional crime and negligent crime has already been provided in Article 14 and Article 15. In light of principle of a legally prescribed punishment for a specified crime, there is no crime with

① Section 46(1) in German Penal Code provides that the guilt of the offender is the basis for sentencing.

② Johannes Wessels, *German Penal Code: General Part*, 2008, Law Press·China, p212-213

③ In Chinese Criminal Law, there are three basic principle including "conviction and penalty according to law", "equality of everyone before the law", and "punishment commensurate with the crime".

④ Liang Genlin, *Principle of Culpability and its Exception*, 2009, *Tsinghua Law Review*, (2), p42.

the exception of intentional crime and negligent crime. It is unnecessary to repeat guilty mind in conviction of general crime in Article 16. Therefore, this provision should be related to culpability for measuring punishment. In other words, result is not responsible without culpability. This is a classic manifestation of principle of culpability.

On the other hand, Article 5 in Chinese Criminal Law is legal ground of principle of proportionality. This provision states that degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender, which founds principle of proportionality. Judge should measure sentence in light of every elements included in the crime and the criminal.^① In past time, scholars limited measuring sentence to allocate punishment in statutory sentence designated after conviction. However, recent study shows that statutory sentence is related to interpretation of constitutive requirement. For instance, Chinese jurists Lao Dongyan argues: “If some conclusion cause disproportional sentence, its validity should be denied: some interpretation is doubtful for violating principle of proportionality as same as it is invalid for violating principle of a legally prescribed punishment for a specified crime. This is logical inevitability in systematic interpretation. Proportionality is the instruction for interpretation in order to keep harmonious relation among different provisions.”^② In fact, constitutive requirement of a crime or application of sentence is impossible to break away from statutory sentence because proportionality is the basic principle of criminal law. The legislator has to set up heavy sentence to punish the serious crime. There is no reason to have a serious punishment applied in an easy way, or such punishment would violate principle of forbidding improper sentence. Thus proportionality should restrict the interpretation of aggravated consequential offense.

Third, the objective punishment theory cannot deny relationship between extended result and culpability. Some jurists hold that objective punishment condition belongs to

① Zhou Guangquan, *Criminal Law: General Part*, 2nd ed, China Renmin University Press, p41.

② Lao Dongyan, *Criminal Policy and Value-Judgment in the Criminal Law*, 2012, *Trubune of Political Science and Law*, (4), p40.

element of restricting initiation of imposing sentence beyond illegality and culpability. However, objective elements often exert influences on illegality, especially on illegal result, which means that the legal order is undermined. Thus more and more scholars classify all or some parts of objective punishment condition to content of constitutive requirement or criminal concept again. For instance, German jurist Claus Roxin holds that “drunken state”^① in Section 323a(1) of German Penal Code traditionally is classified to objective punishment condition but in fact it can belong to constitutive requirement;^② similarly, “truthful reports about the public sessions of the bodies indicated in section 36 or their committees”^③ in Section 37 can belong to the content of illegality.^④ Another example, Japanese jurist Matsubara Yoshihiro holds that “a person to be appointed a public officer accepts, solicits or promises” in Japanese Penal Code Section 197(2) belongs to objective punishment condition according to general opinion, but it actually should be element of constitutive requirement.^⑤ If objective punishment condition is not the independent element of conviction, it is impossible to attribute the extended result to the defendant beyond guilty mind.

Although some elements belong to objective punishment condition, the extended result should be limited in culpability. For instance, German jurists Jescheck and Weigend hold that aggravated consequential offense is different from objective punishment condition. The former requires negligence or recklessness with respect to the extended result, but the latter is unrelated to illegality or culpability.^⑥ The two

① German Penal Code Section 323a (1) states that whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment not exceeding five years or a fine if he commits an unlawful act while in this state and may not be punished because of it because he was insane due to the intoxication or if this cannot be excluded.

② In light of Roxin’s opinion, constitutive requirement and illegality, however, there is no element of conviction beyond criminal construction according to Chinese theory.

③ Section 37 in German Penal Code states that truthful reports about the public sessions of the bodies indicated in Section 36 or their committees shall not give rise to any liability.

④ Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, 692-695.

⑤ Matsubara Yoshihiro, *Concept of Crime and Punishability: On Objective Conditions of Punishment and Solitary Defense*, 1997, Seibundoh Publishing Co., Ltd, p225.

⑥ Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p668.

scholars differentiate objective punishment condition from objective condition. Furthermore, some scholars require the extended result with respect to culpability even if they admit objective punishment condition exists in criminal requirement. For instance, Japanese Hirano Ryuichi held that objective punishment condition could be divided into real punishment condition and unreal punishment condition. There is no relationship between the former and illegality but the latter is related to the mental state. In light of Hirano's opinion, whether the extended result is objective punishment condition cannot impede the restriction of principle of culpability to aggravated consequential offense. Chinese jurists have similar opinions. Professor Zhou Guangquan holds that objective punishment consists of inner punishment condition and external punishment condition.^①In this classification, the inner punishment condition belongs to content of illegality, thus it should be connected with defendant's mental state. In contrast, the external punishment condition only is the condition for restricting punishment, thus they are unnecessary to be limited in principle of culpability.

Fourth, objective elements cannot replace mental state. Professor Zhou's opinion confuses act of perpetrating with mental state because he misunderstands mental state to be evaluated according to probability of casualty.^②Probability of casualty affirmed by the rule of thumb cannot determine defendant's mental state. If a defendant is guilty of some crime in name of intention or negligence because his conduct is likely to cause result, it is obviously objective culpability, which not only eliminates intervention of subjective elements to aggravated consequential offense but also betrays principle of culpability.

There is a similar problem in Nagashima's view. Although legislators see aggravated consequential offense as a preventive measure for causing extended result in high probability, negligence with respect to the extended result still is indispensable. It

① Zhou Guanguan, Objective Punishment Conditions, Chinese Journal of Law, 2010 (6), p114-134.

② Zhou Mingchuan, Research on Disputed Questions of Aggravated Consequential Offense, 2007, Chinese Criminal Science, (5), p44.

is unjustified to incriminate a defendant on basis of dangerousness separating from mental state. Furthermore, intention of basic crime cannot prove mental state of causing the extended result. Therefore, even if a defendant is guilty of basic crime, he is unnecessary to be liable for the extended result.

In sum, there is no reason to make an exception of principle of culpability to aggravated consequential offense. Nowadays, more and more scholars recognize that both strict liability theory and exception theory are acceptable so that they try to make aggravated consequential offense comply with principle of culpability. Both principle of mental culpability and principle of proportionality are restrictions to aggravated consequential offense, while they have different approaches for justifying it. These approaches would be discussed in later stage. On the other hand, American jurists have felony murder deeply discussed. These discussions are valuable for improving aggravated consequential offense. Thus rationale of felony murder will be discussed in this article too.

1.2 Approach to Coordinate Aggravated Consequential Offense and Principle of Mental Culpability

It is unreasonable to convict someone of aggravated consequential offense without mental state about causing the extended result. Therefore, many jurists limit aggravated consequential offense in subjective requirement, which can be called mental approach. This approach includes combination theory and gross negligence theory (recklessness) theory.

1.2.1 Combination Theory

1.2.1.1 Basic Ideas of Combination Theory

Combination theory holds that aggravated consequential offense is combination of basic crime by intention and negligent crime of extended result. For instance, Japanese

jurist Hirano Ryoichi held that crimes were often classified as intentional crime or negligent crime. However, both intention and negligence are included in aggravated consequential offense.^① Of course, aggravated consequential offense is not only combination of intentional crime and negligent crime but also double intentional crimes. For instance, robbery causing death includes robbery causing death intentionally. Aggravated consequential offense including intention to cause the extended result is called unreal aggravated consequential offense.^②

Why aggravated consequential offense is provided in criminal law as a kind of combination of intention and negligence? Most combination theorists hold that it is to meet the demand of justice. For instance, Japanese jurist Shimomura Yasumasa held that attempted rape causing death could only be convicted of attempted rape or causing death through negligence if there was no provision about rape causing death, which is unfair.^③

There is similar opinion in China. Chinese jurist Huang Hanyi holds the similar opinion that the harmfulness of aggravated consequential offense cannot be fully evaluated in imaginative concurrence of crime.^④ Chinese jurist Lin Shantian even immediately held that it is necessary to punish an offender severer if the offender caused extended result negligently in committing the basic crime on intention because it is more punishable. As a result, lawmakers legislated about the constitutive requirement for increasing the sentence.^⑤

1.2.1.2 Debate on Combination Theory

Obviously, combination theory was to solve the problem of punishing unfairly on aggravated consequential offense by creating a kind of mental state between intention and negligence. However, this theory was criticized because of injustice on punishment.

① Hirano Ryoichi, *Aggravated Consequential Offense*, 1981, Law Library, (10), p57.

② Hirano Ryoichi, *Aggravated Consequential Offense*, 1981, Law Library, (10), p58.

③ Shimomura Yasumasa, *Attempt in Aggravated Consequential Offense*, 1958, *The Chuo Law Review*, 65(4), p31.

④ Huang Hanyi, *New Opinions on Criminal Law: General Part*, 2010, Yuan Zhao Press, p263.

⑤ Lin Shantian, *Criminal Law: General Part (Volume II)*, 2012, Peking University Press, p128.

For instance, Japanese jurist Maruyama Masao immediately held that in light of combination theory, causing death or injury through negligence is superposed to illegality of basic crime so there is ground for aggravated punishment going beyond basic crime. Aggravated punishment cannot exceed total punishment of basic crime with intention and causing death or injury through negligence. However, most of aggravated consequential offense is punished more severely than this combinative bound, which is too harsh.^① Chinese jurist also holds that combination theory is coordinated with principle of mental culpability, but it cannot explain why aggravated punishment surpasses the total punishment of intentional basic crime and crime of causing extended result through negligence.^②

Combination theory responds to the query above mentioned with three points. First, combinative crime theory argues that aggravated is analogical with combinative crime. For instance, Chinese jurist Guo Li holds that aggravated consequential offense is similar to imaginative concurrence of crimes on structure, but combinative crime aggravated consequential offense actually belongs to combinative crime.^③ Another example, Japanese Court of Cassation in 1922 held that intentional homicide in robbery was a combinative crime consists of intentional homicide and robbery.^④ Second, normative analysis theory argues that punishment of aggravated consequential offense should not be analyzed in hollow digit. For instance, Japanese jurist Ishidou Koutaku holds that the outward appearance on basis of digit is empty of meaning for human…… if we recognize this empty, aggravated consequential offense should not be criticized so severely when its punishment exceeding concurrent crimes.^⑤ Third, certain culpability theory argues that negligence of aggravated consequential offense can be shaped with

① Maruyama Masao, Reviewing Structure of Aggravated Consequential Offense, 1987, *Journal of Criminal Law*, 27(4), p45.

② Zhang Mingkai, Seriously Restricting Conviction and Punishment of Aggravated Consequential Offense, 2005, *Chinese Journal of Law*, (1), p86.

③ Guo Li, The Analysis on the Nature of Consequence-aggravated Crime, 2010, *Hebei Law Science*, (5), p103-104.

④ Nishimura Katsuhiko, Rethinking Aggravated Consequential Offense(2), 1979, *The Hanreijiho*, (930), p11.

⑤ Ishido Kotaku, Preface to Aggravated Consequential Offense, 1978, *Chukyo Hogaku*, 12(3), p25-26.

certainty so as to be punished more severely than generally negligent crime with uncertainly constitutive requirement. For instance, Saitou Nobutada holds that objective duty of care in general negligence is judged by experience, so it is hard to show standard of conduct. However, it is crystal clear how to judge whether the defendant violates the duty of care when he causes the extended result in the course of committing intentional crime. Therefore, aggravated consequential offense can be sentenced severer than general negligent crime.^①

Critics step forward to deny the response mentioned above. First, critics differentiate aggravated consequential offense and combinative crime. For instance, Japanese jurist Tatsuo Kagawa held that it was arbitrary to interpret rationale of aggravated consequential offense through combination theory because combination theory states no punishability but only actuality of aggravated consequential offense.^③ Furthermore, Kagawa excluded the relation of aggravated consequential offense and combinative crime. In light of Kagawa's opinion, "combination" was translated from German term "kombination". However, no crime in "kombination" should lose independence. By contrary, each crime in combinative crime should be unified to a new crime. Intentional crime and negligent crime of aggravated consequential offense are still independent from each other so combination theory cannot explain the rationale of aggravated consequential offense.^④ For another example, Hirano Ryoichi held that combinative crime is a crime of combination of the above two criminal acts which are independent from each other. However, robbery causing death is not combination of two independent acts, so it is not suitable to be called combinative crime even if the defendant intended to kill the victim.^⑤ Second, critics disagree with normative analysis in terms of increasing punishment. For instance, Japanese jurist Maruyama Masao holds that it is difficult to solve problem of disproportional

① Saito Nobutada, *Criminal Law: General Part*, 2001, Seibundoh Publishing Co., Ltd, p206.

③ Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p69.

④ Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p69—71.

⑤ Hirano Ryoichi, *Aggravated Consequential Offense*, 1981, Law Library, (10), p58.

punishment on aggravated consequential offense through legal policy.^① Third, critics hold that negligence of aggravated consequential offense is not different from normal negligence. For instance, Chinese jurist Cai Shengwei argues that if circumstances of constituting aggravated consequential offense are considered to be intentional basic crime and causing death through negligence, it will be hard to avoid violating principle of equality.^②

1.2.1.3 Commentary on Combination Theory

In the author's opinion, there are two dimensions, namely possibility of increasing punishment and levels of increasing punishment, in rationale of aggravated consequential offense. Thus combination theory is related to questions followed: (1) is it possible to increase punishment when intentional crime and negligent crime combine in an act? (2) Is it reasonable to impose such a heavy punishment that surpasses the total punishment of combined crimes?

The question (1) refers to punishment of imaginative concurrence of crimes. In light of combination theory, aggravated consequential offense can be classified as imaginative concurrence of crimes.^③ It is well known that imaginative concurrence of crimes is about one criminal act causing double even multiple criminal results but related crimes are superimposed each other in some parts of constitutive requirements so as to be punished as one single crime.^④ Therefore, aggravated consequential offense should not be punished more severely according to combination theory. However, some people considered imaginative concurrence of crimes as plural crimes in two approaches.

Approach one is to consider that there are plural criminal acts in imaginative concurrence of crimes. For instance, Chinese jurist Zhuang Jin holds that imaginative

① Maruyama Masao, *Structure of Aggravated Consequential Offense*, 2003, *Gendai Keijiho*, 5(4), p45.

② Cai Shengwei, *Research on Several Questions of Criminal Law (1)*, 2008, Yuan Zhao Press, p442.

③ Zheng Yizhe, *Theories and Application of Constitutive Requirements*, 2004, Ruixing Books Co Ltd, p145.

④ Gao Mingxuan, *Basic Theory of Criminal Jurisprudence: Volume II*, 1993, China Renmin University Press, p524-525.

concurrency of crimes causing several harmful consequences should be treated as multiple crimes with multiple criminal acts rather than one crime with one act. Thus it should be punished by several punishments.^① For another example, Chinese jurist Cai Jun holds that criminal duty is the standard of counting number of acts. There are several acts in imaginative concurrence of crimes because multiple criminal duties are generated. Thus this kind of crimes should be classified as plural crimes.^②

Approach two is to affirm reasonability of reiterative evaluation on one criminal act. For instance, Chinese jurist Huang Rongjian holds that there are two standards for judging reiterative evaluation, one is number of criminal act against legal interest and number of legal interest infringed by legal act...if several legal interests are infringed, it is not reasonable to differentiate between one act causing the results and several acts causing the results.^③ Thus combined punishment for several offenses should be applied in the situation that one act infringing several interests and corresponding with several constitutive requirements.^④

Approach one is not acceptable. Cai Jun makes a judgment on number of criminal acts by subjective requirement and criminal duty, which is not acceptable because of confusing result and act so as to argue in a circle. Zhuang Jin's opinion is also unreasonable because he makes a mistake about relationship between act and result. Infringement upon legal interest is a result can be caused by act or other natural phenomena unrelated to human's act. If the number of legal interests that are infringed by the criminal conduct determines the number of acts, act will be replaced by result.

Approach two is reasonable in treating imaginative concurrence of crimes as plural crimes. Natural act is the basic element of the constitutive element. Natural conduct does not belong to constitutive element because it cannot reflect illegality and

① Zhuang Jin, Imaginatively Multiple Crimes or Substantially Multiple Crimes: Imaginative Concurrence of Crimes Should Be Punished by Multiple Punishments, 2006, Modern Law Science, (2), p109-114.

② Cai Jun, The Behavior Analysis of Imagine Competition-collaboration Committed, , 2011, Journal of Henan University (Social Science), (4), p51-52.

③ Huang Rongjian, Basic Criminal Law: Volume II, 2009, Yuan Zhao Press, p984.

④ Huang Rongjian, Basic Criminal Law: Volume II, 2009, Yuan Zhao Press, p986.

culpability.^① In other words, there is no evaluation on natural conduct at all. Thus natural conduct cannot be judged repeatedly. Even if there is only one conduct, it is possible to constitute plural crimes.

More and More Chinese jurists begin to acknowledge that imaginative concurrence of crimes belong to substantially plural crimes. For instance, Chinese jurist Ding Huiming holds that iterative evaluation is only limited in the case of basing on the same purpose of law. She holds that if one natural conduct was evaluated in different purposes of law, plural crimes should be affirmed for completely evaluating illegality of this conduct. There are different purposes of legal protection for the plural crimes including in imaginative concurrence of crimes, so if one crime was affirmed and others were excluded, legality of conduct cannot be evaluated completely.^{②-176} For another example, Chinese jurist Zhao Binggui holds that the actual-committed crimes should be evaluated even if there is only one conduct, otherwise it is meaningless to talk about one conduct committing plural crimes, let alone legal interest protected by criminal law would be ignored.^③

In Japanese Penal Code, imaginative concurrence of crimes is often considered as one crime in sentence.^④ This opinion is supported by statutory enactment.^⑤ Japanese jurist Makoto Tadaki holds that this principle of punishment is to avoid reiterative evaluation of illegality and culpability.^⑥ However, even if someone is convicted of one crime in sentence, he actually commits plural crimes. Similarly, German jurists once debated about whether imaginative concurrence of crimes is one crime or plural crimes. Because German Penal Code prescribed that imaginative concurrence of crimes is

① 2012 Li Hong, *Criminal Law*, 2012, Law Press•China, p77.

② Ding Huiming, *The Function of Conceptual Concurrence and Its Foundation*, 2013, Modern Law Science, (3), p133-134.

③ Zhao Binggui, *Research on Imaginative Concurrence of Crimes*, 2007, China Procuratorate Press, p187.

④ Imai Takeyoshi, etc., *Criminal Law: General Part*, 2009, Yuhikaku Publishing Co., Ltd, p410.

⑤ Section 54 of Japanese Penal Code states that when a single act constitutes two or more separate crimes, or when an act as the means or results of a crime constitutes another crime, the greatest among the punishments prescribed for such crimes shall be imposed.

⑥ Tadaki Makoto, *Research on Amount of Crimes*, 2004, Seibundoh Publishing Co., Ltd, p41-42.

applied only one punishment,^① general opinion held that the controversy was of little practical significance.^② However, imaginative concurrence of crimes is punished more severely by penalties in other countries. For instance, Article 49 of Swiss Criminal Code states that if an offender, by committing one or more offenses, who has fulfilled the requirements for two or more penalties of the same form, the court shall impose the sentence for the most serious offense at an appropriately increased level. It may not, however, increase the maximum level of the sentence by more than half, and it is bound by the statutory maximum for that form of penalty.^③ Another example, Article 17 of Russian Criminal Code states that one act (inaction), containing the elements of crimes envisaged by two or more Sections of this Code, shall also be deemed to be cumulating crimes.

In fact, because constitution of a crime is the standard of evaluating quantity of crime, imaginative concurrence of crimes infringing plural legal interests which should be evaluated as plural crimes because of confirming multiple constitution of a crime. However, there is no express provision about imaginative concurrence of crimes in Chinese Criminal Law so it is doubtful about its punishment. Combined punishments theory holds that several punishments should be imposed on the defendant.^④ Single punishment theory holds that imaginative concurrence of crimes should be sentenced on the basis of the most serious crime.^⑤

If imaginative concurrence of crimes is punished by multiple punishments, it is possible to violate principle of prohibiting repeatable evaluation because some illegal elements, culpable elements or the defendant's personal factors may be repeatedly evaluated. Thus single punishment is more acceptable than combined punishment

① Section 52 of German Penal Code states that if the same act violates more than one law or the same law more than once, only one sentence shall be imposed.

② Claus Roxin, German Penal Code: General Part (Volume I), Wang Shizhou(trans), 2005, Law Press·China, p874.

③ This provision was stated in Article of Swiss Criminal Law in the old edition.

④ Repudiation and Re-ascertainment About Imaginative Joinder of Offenders, 2007, Journal of Southwest University(Social Sciences Edition),(4), p45-52.

⑤ Ding Huimin, The Function of Conceptual Concurrence and Its Foundation, 2013, Modern Law Science, (3), p137-138.

theory. In Chinese Criminal Law, some provisions immediately accept single punishment theory. For instance, Article 133A (1) states that whoever races a motor vehicle on a road with execrable circumstances or drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and a fine; Paragraph (2) states that whoever commits any other crime while committing a crime as mentioned in the preceding paragraph shall be convicted and punished according to the provisions on the crime with the heavier penalty. However, there is still some exceptional provision support combined punishment theory. For instance, Article 204 (2) in Chinese Criminal Law states that any taxpayer who, after having paid the taxes, adopts the deceptive means to obtain a tax refund shall be convicted and punished according to the provisions in crime of tax evasion, and for the defrauded part that exceeds what he has paid, he shall be punished according to the provisions in crime of defrauding a tax refund for exports.

Combined punishment theory is not alone, single punishment theory also holds that criminal of imaginative concurrence of crimes should be punished more severely than specific crime in concurrence. There are two approaches to punish aggravated consequential offense in single punishment theory. Blockade approach holds that lesser serious crime can seal off supplementary punishment and lightest punishment.^① There are some countries' criminal laws provide this approach expressly, such as German Penal Code.^② Article 233 in Chinese Criminal Law states that crime of causing death through negligence is punished by fixed-term imprisonment of not less than three years but not more than seven years;^③ Article 277 states that crime of disrupting public service

① Ke Yaocheng, *Research on Concurrent Crime*, 2000, Yuan Zhao Press, p230.

② Section 52 in German Penal Code states: "(1) If the same act violates more than one law or the same law more than once, only one sentence shall be imposed. (2) If more than one law has been violated the sentence shall be determined according to the law that provides for the most severe sentence. The sentence may not be more lenient than the other applicable laws permit. (3) The court may impose an additional fine to any term of imprisonment under the provisions of section 41. (4) If one of the applicable laws allows for the imposition of a confiscatory expropriation order the court may impose it in addition to imprisonment for life or a fixed term of more than two years. In addition, ancillary penalties and measures (section 11(1) No 8) must or may be imposed if one of the applicable laws so requires or allows.

③ Article 233 in Chinese Criminal Law states: "Whoever negligently causes death to another person shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years; if the

is punished by fixed-term imprisonment of not more than three years, criminal detention, or public surveillance or fine. The punishment of the former obviously is more serious than the latter.^① If defendant A should cause death in the course of disrupting public service, he shall be convicted of crime of causing death through negligence. However, offense of disturbing public order will not merely be fined; thus, when the concurrence mentioned above occurs, it is necessary to sentence A to a fine according to blockade approach.

In contrast to blockade approach, severity approach holds that the criminal who commits imaginative concurrence of crimes should be given a heavier punishment or aggravated punishment on basis of the most serious crime in concurrence.^② In light of severity approach, if there is no express provision about how to measure punishment against imaginative concurrence of crimes, the heavier punishment shall not surpass the statutory range limiting the most serious crime. For instance, in Chinese Criminal Law, crime of forcible indecency to woman is punished by imprisonment for no more than 5 years,^③ crime of causing injury through negligence no more than 3 years.^④ If A injured other in the course of forcibly committing an indecent act to a woman, he should be convicted of forcible indecency to woman. Then his punishment will be heavier than that for common situation of forced indecency to woman according to severity approach. However, his punishment of imprisonment is no more than 5 years. Of course, this punishment can be aggravated if there is legal authorization. For instance, Article 68 in Swiss Criminal Code states that the court, respecting a person who has been convicted

circumstances are relatively minor, he shall be sentenced to fixed-term imprisonment of not more than three years, except as otherwise specifically provided in this Law”.

- ① Article 277(1) in Chinese Criminal Law states: “Whoever by means of violence or threat, obstructs a functionary of a State organ from carrying out his functions according to law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance or be fined”.
- ② Wu Zhengxing, *On Patterns of Concurrent Crimes*, 2006, China Procuratorate Press, p76.
- ③ Article 237 in Chinese Criminal Law states: “Whoever acts indecently against or insults a woman by violence, coercion or any other forcible means shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention”.
- ④ Article 235 in Chinese Criminal Law states: “Whoever negligently injures another person and causes severe injury to the person shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention, except as otherwise specifically provided in this Law”.

of several crimes punishable by different terms of confinement, shall base its sentence on the gravest offense and shall increase the length (of the sentence) accordingly.

The author of this paper holds that the severity approach is more reasonable because if concurrent crime is not element of measuring punishment, the defendant's criminal conduct cannot be evaluated completely, so it is necessary to give the imaginative concurrence of crimes a heavier punishment for expressing attitude about criticizing the wrongdoing. Because aggravated consequential offense is similar to the special provision of imaginative concurrence of crimes, there is enough reason to increase the punishment for basic crime.^① Furthermore, criminal law only increases punishment of imaginative concurrence of crimes in condition of aggravated consequential offense because of modesty of criminal law. Therefore, even if most of imaginative concurrences of crimes are given preferential treatment, principle of equality is not broken at all.

Although it is reasonable to increase the punishment for aggravated consequential offense, there is still a problem about proportionality of increasing punishment. Although combination theory offers three approaches to explain levels of increasing punishment, these approaches are still doubtful. First, it is uncertain if combinative crime is coordinate with principle of proportionality. Chinese jurist Ke Yaocheng points out that combinative crime integrates constitutive requirements of multiple crimes, but it should have particularity in illegality or in inherent dangerousness. It is unreasonable to combine unrelated crimes together only for increasing punishment.^② Thus although aggravated consequential offense can be seen as combinative crime in broad sense, it still needs a substantive reason for increasing punishment. Second, normative analysis theory has reasonability on separating proportionality of punishment from pure mathematics through paying attention on human value so as to relieve the contradiction

① Xu Yuxiu, *Contemporary Theories on Criminal Law*, 2005, China Democracy and Legal Institute Press, p700.

② Ke Yaocheng, *Development of Criminal Law Thoughts*, 2003, China University of Political Science and Law Press, p93.

between concurrent sentences and aggravated consequential offense. However, human value is so abstract that it is impossible to let legislator aggravate punishment according to a hollow “human value” Furthermore, human value can be divided into different categories. It is necessary to answer questions such as which human value influences aggravated consequential offense, whether this value conflicts with other human value, how to solve this confliction, so on and so forth. Third, certain culpable theory can prove that aggravated consequential offense can be punished more severely than normally negligent crime, but it cannot explain unbalanced punishment of aggravated consequential offense in contrast into result-qualified crime with respect to intention. As a result, combination theory cannot offer a substantial reason about why punishment of many aggravated consequential offenses exceed the total punishment of basic crime with intention and crime of causing extended result through negligence.

Furthermore, all aggravated consequential offenses cannot be classified to imaginative concurrence of crimes. For instance, injury causing severe impairment, provided in Chinese Criminal Law, is combination of intentional injury causing minor impairment and causing severe impairment through negligence. However, both severe impairment and minor impairment reflect the result of infringing physical interest protected by law. If injury causing severe impairment was not provided in law, intentional injury is certain to include causing severe impairment. Thus the relationship between intentional injury and causing severe impairment is legal concurrence but not imaginative concurrence. It is inexact to classify all aggravated consequential offense to imaginative concurrence of crimes.

In a word, combination theory is reasonable in some ways, but it doesn't equal to imaginative concurrence of crimes.

1.2.2 Gross Negligence Theory

Mental state is divided into general negligence and gross negligence in aggravated

consequential offense of German Penal Code. For instance, negligence to cause death is the requirement of infliction of bodily harm causing death.^① However, both robbery causing death and arson causing death require gross negligence to cause death as subjective element.^② In light of these provisions, some scholars base aggravated consequential offense on gross negligence causing extended result and attach severer degree of culpability than general negligence. For instance, Chinese jurist Huang Rongjian holds that it is necessary to add some elements to aggravated consequential offense for justifying its punishment different from other imaginative concurrence of crimes and to make gross negligence the limitation of aggravated consequential offense.^③ On the other hand, Huang Rongjian argues that aggravated consequential offense is not the perfect model of gross negligence because there are many crimes of causing result through negligence, which is not contained in aggravated consequential offense.^④

Gross negligence does play a role in influence of different degrees of culpability on punishment. Crime is illegal and culpable conduct. Culpability is the requirement of conviction and very important for judging punishment. For instance, discontinuation of a crime is treated with more leniency than criminal attempt because of lesser degree of accusation.^⑤ Thus different degrees of culpability should be related to different degrees of punishment. If a defendant is grossly negligent to cause extended result, his culpability is more serious than general negligence, and so it is reasonable to punish him severer than who commits common negligent crime. However, few scholars accept this

① Section 227 in German Penal Code states that if the offender causes the death of the victim through the infliction of bodily harm (Sections 223 to 226), the penalty shall be imprisonment of not less than three years.

② Section 251 in German Penal Code states that if by the robbery (Section 249 and Section 250) the offender at least by gross negligence causes the death of another person the penalty shall be imprisonment for life or not less than ten years; Section 306c states that if the offender through an offense of arson under sections 306 to 306b at least by gross negligence causes the death of another person the penalty shall be imprisonment for life or not less than ten years.

③ Huang Rongjian, *Thinking Questions of Criminal Law on Basis of Interests*, 2009, China Renmin University Press, p308.

④ Huang Rongjian, *Thinking Questions of Criminal Law on Basis of Interests*, 2009, China Renmin University Press, p308.

⑤ Wang Zhaowu, *Ground of Reducing and Remitting Punishment of Abandonment*, 2009, *Journal of Hebei University of Technology(Social Sciences Edition)*, (1), p66.

theory, which may be due to the following reasons:

First, gross negligence theory is not enough to justify aggravated consequential offense. In light of gross negligence theory, aggravated consequential offense can be punished more severely than generally negligent crime but not intentional crime. However, punishments of many aggravated consequential offenses are equal to or severer than intentional crime of causing extended result. For instance, punishment for rape causing serious injury is more serious than that for intentional injury of causing serious impairment.^① Thus gross negligence theory is incapable to interpret disproportion of aggravated consequential offense and intentional crime.

Second, gross negligence theory cannot evaluate illegality of aggravated consequential offense. Most lesser-included offenses are different from extended result on illegality. For instance, robbery causing death is different from causing death through negligence on containing illegality of encroachment of property. If aggravated consequential offense is treated as crime of gross negligence, the basic crime would be ignored.

Third, gross negligence theory lacks superiority in contrast to combination theory. In light of gross negligence theory, aggravated consequential offense should be severer than generally negligent crime. However, aggravated consequential offense is provided after basic crime. Thus it is unreasonable to compare aggravated consequential offense to generally negligent crime. On the contrary, combination theory is more acceptable because it compares basic crime to aggravated consequential offense. Furthermore, it is clear to judge combination of two crimes, although there are many debates about difference between general negligence and gross negligence. Therefore, combination theory is easier to be applied in practice.

In sum, although gross negligence theory can offer some clues on severe

^① Article 236 (3) in Chinese Criminal Law states that whoever rapes a woman or has sexual intercourse with a girl under the age of 14 causing serious injury shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death. Article 234 (2) states that whoever commits intentional injury, thus causing severe injury to another person, shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

punishment relative to generally negligent crime, it still lacks rationality in logic and practice so that it cannot be the independent rationale of aggravated consequential offense.

1.3 Approach to Coordinate Aggravated Consequential Offense and Proportionality

Because combination theory and gross negligence theory cannot correspond with principle of proportionality, many scholars try to find approach to coordinate aggravated consequential offense with proportionality through special illegality. This approach includes proximate causation theory and dangerousness theory.

1.3.1 Proximate Causation Theory

Proximate causation theory is considered as the prelude of dangerousness theory. By the end of the Nineteenth Century, German jurists such as Kries had advocated proximate causation theory for mitigating cruelty of aggravated consequential offense. Kries held that injury, arson, abandonment and other crimes were given an aggravated punishment in condition of causing the victim to death or serious impairment. By contrast, there is no provision of aggravated consequential offense about crime of larceny, embezzlement, intimidation, fraud and so on. The distinction was based on probability of causing the extended result in the former. Thus Kries went forward to point out that aggravated consequential offense is a special kind of crime, increasing punishment, on basis of independent dangerousness causes extended result. As a result, this dangerousness not only belongs to legislative ground but also limitation in application of aggravated consequential offense. If a defendant was convicted of aggravated consequential offense, inner dangerousness of the basic crime should become the extended result, namely, there is proximate causal relationship between

basic conduct and extended result.^①

Proximate causation theory once influenced the construction of aggravated consequential offense in Germany; now it is widely accepted by many Japanese scholars. For instance, Japanese jurist Kawabata Hiroshi holds that although nowadays result-qualified crime is a classic example of criminal type discussed around causation, causation is discussed mainly on basis of aggravated consequential offense at first. Because it is unnecessary to require intention of causing extended result in aggravated consequential offense, causation plays an important role in avoiding cruel punishment.^② Japanese jurist Ishidou Koutaku also holds that causal relationship between basic crime and extended result is related to conformity of important constructive conditions in aggravated consequential offense.^③

Proximate causation theory cares not only about the relationship between dangerous conduct and result, but also dangerousness per se. Engisch held that there were two questions concerning causation. First, is the conduct related to the result? This question should be answered by abstract judgment about specific process on basis of general experience. This is judgment of proximate causation in a broad sense. Second, is there high probability in specific course of events from conduct to result? This judgment is called proximate causation in a narrow sense.^④ In fact, proximate causation in the broad sense is a kind of dangerousness.

Engisch's idea is accepted by many Japanese jurists. For instance, Syouji Kunio holds that inherent dangerousness within basic crime is probable of causing extended result to some extent. Legislator foresees this dangerousness so as to make provision of increasing punishment for preventing dangerous conduct, which is the legislative purpose of aggravated consequential offense. As a result, it is necessary to distinguish

① Vgl. J. v. Kries, a. a. O. (Anm. 4), S. 226ff. Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p134-135.

② Kawabata Hiroshi, Criminal Law: General Part, 2nd ed, 2006, Seibundoh Publishing Co., Ltd, p158.

③ Ishido Kotaku, Aggravated Consequential Offense and Causation, 1979, Chukyo Hogaku, 13(4), p9.

④ K. Engisch, a. a. O. (Anm. 16), S. 49ff. Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p137.

proximate causation in broad sense from the one in narrow sense. Realization of dangerousness as proximate causation in narrow sense is discussed after affirming dangerous conduct belonging to proximate causation in a broad sense.^①

It is disputed what factors should be considered in judging proximate causation. Generally speaking, there are three theories we can resort to. Subjective theory bases judgment of proximate causation on fact foreseen by defendant in the course of committing crime. Objective theory holds that proximate causation should be evaluated from standpoint of general people on basis of all objective factors existing in the course of committing crime and foreseeable factors which would emerge after the criminal conduct is accomplished. Compromising theory holds that factors foreseeable to general people and recognized specially by the defendant is the factual foundation of judging proximate causation.^② Compromising theory has been accepted by most of people. In light of the dominant opinion, the causal relationship between basic crime and extended result should be negated in condition that general people cannot foresee and the defendant has not foreseen the extended result.^③

Proximate causation theory is to rectify the deviation of but-for theory on expanding punishment irrationally so as to restrict the cruel punishment for aggravated consequential offense. Furthermore, proximate causation theory is similar to dangerousness theory on considering the dangerousness of basic crime as the ground of increasing punishment.^④ Thus proximate causation theory helps to justify aggravated consequential offense. However, this theory still can be queried in the following aspects:

First, proximate causation is not a very effective requirement for justifying aggravated consequential offense. Even if a defendant is convicted of common negligent crime, the proximately causal relationship between criminal conduct and

① Shoji K., *Criminal Law: General Part*, 3rd 1996, Seirin-Shoin Co. Ltd, p139-140.

② Atsushi Yamaguchi, *Case and Problem of Criminal Law: General Part*, 2004, Koubundou Publishers Inc, p36-37.

③ Ishido Kotaku, *Aggravated Consequential Offense and Causation*, 1979, *Chukyo Hogaku*, 13(4), p910.

④ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p130.

result is required. Therefore, there is no substantial difference between aggravated consequential offense and negligent crime in light of proximate causation theory.^①

Second, proximate causation in the broad sense may confuse illegality with culpability. In light of Engisch's logic, proximate causation, in a broad sense, reflects prohibition against certain attitude of causing dangerousness to specific result. Thus causation is based on defendant's attitude to violation of social code.^② However, defendant's hostile attitude to legal order belongs to content of mental state rather than illegality.^③ Therefore, if proximate causation, in the broad sense, is evaluated as a subjective element before objective contents, it cannot comply with the essential logic of determining a crime.^④

Third, relationship between proximate causation in the broad sense and act of perpetrating is confusing. Dangerousness is concurrently the substantial content of proximate causation in the broad sense and of act of perpetrating, thus it is hard to distinguish between the two requirements. Japanese jurist Maeda Masahide holds that act of perpetrating is discussed on occasion of criminal attempt, but proximate causation is discussed in premise that there is actual result.^⑤ However, if whether there is a result can decide the position of dangerousness in constitution of a crime, the system of criminal law will be disorder and unstable. Therefore, proximate causation in broad sense is not application of law but violation of law.^⑥

Fourth, basis of judgment on proximate causation is a disadvantage to evaluate causation of aggravated consequential offense. Because there are strong disagreements about basis of judgment, proximate causation theory is criticized for instability.^⑧ Furthermore, comprising theory and subjective theory evaluate the basis of

① Makino Eiichi, *Criminal Law: General Part (Volume I)*, 1958, Yuhikaku Publishing Co., Ltd, p404.

② Hayashi Yoichi, *Causation in Criminal Law*, 2000, Seibundoh Publishing Co., Ltd, p126.

③ Raitou Ken, *Criminal Law: General Part (Volume 2)*, 1983, Yuhikaku Publishing Co., Ltd, p304-306.

④ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p227.

⑤ Maeda Masahide, *Criminal Law: General Part*, 2006, University of Tokyo Press, p181.

⑥ M. Lieber, *Ueber die durch den Erfolg qualifizierten Delikte*, 1925, S.26. Cited in Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p140.

⑧ Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p138.

judgment according to the defendant's knowledge so that it is possible to mix-up objective content and subjective content.^① Besides, if defendant's mental state decides the causation, the punishment of aggravated consequential offense will be inappropriately imposed. For instance, A punches X on face and causes X to fall down. There is a nail on the floor and pierces X's head by chance and causes X to death. In light of comprising theory and subjective theory, if A has realized the nail, he could be responsible to X's death. However, common assault is not dangerous enough to cause death, so it is unreasonable to convict X of aggravated consequential offense. On the other hand, objective theory can be questioned about definition of general people. Besides, objective theory holds that unusual factors in the course of criminal conduct cannot deny the causation. By contrast, if the unusual factors occurred after the criminal conduct is stopped, they can deny the causation.^② However, causal relationship contains whole process from conduct to result. There is no substantial reason to make a difference among unusual factors in different stages of causal process.

1.3.2 Dangerousness Theory

1.3.2.1 Basic Contents of Dangerousness Theory

Different from proximate causation theory, dangerousness theory transfers the focus from proximate causation to dangerous conduct. German jurist Oehler held that some crimes were provided as aggravated consequential offense because these crimes were dangerous to human's life or physical interests, or belonged to violent crime, such as robbery, rape, or crime causing common danger, such as fire or flood. There is a common element, namely dangerous to cause extended result, in these crimes in light of experience. Thus Oehler concluded that inherent dangerousness within basic crime made aggravated consequential offense an independent type of crime.^③

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p227.

② Li Hong, *Rethinking theories of Causation in the Criminal Law*, 2004, *Chinese Criminal Science*, (5), p37-38.

③ D.Oehler, *Das erfolgsqualifizierte Delikt als Gefährdungsdelikt*, *ZStW* 69(1957), 503(512-4). Cited

Dangerousness theory is in harmony with German Penal Code wherein there are some crimes based on special dangerousness. For instance, a defendant shall be convicted of aggravated arson or additionally aggravated arson if his conduct places another person in danger of injury or death.^① Thus influence of dangerousness on punishment is easy to be accepted by German jurist. Nowadays, dangerousness theory has become dominance in academic field and judicial practice.^②

Because most people have admitted that dangerousness belongs to content of illegality, it is probable to increase punishment when the conduct creates special dangerousness. Therefore, dangerousness theory on basis of inherent dangerousness is very attractive for interpreting aggravated consequential offense. In Japan, there are also many scholars support dangerousness theory. For instance, Japanese jurist Ida Makoto holds that aggravated consequential offense is punished more severely on basis of the basic crime which creates high risk to immediately cause extended result.^③ For another example, Japanese jurist Hayashi Youichi holds that basic crime usually is dangerous to the legal interest infringed in extended result. In light of this foreseeable dangerousness, the punishment can be increased.^④

Although dangerousness theory seems to be persuasive, there is still question about how to differentiate special dangerous to extended result from normal dangerousness of basic crime. Oehler made a difference between the two kinds of dangerousness through possibility of impersonal objective. “Impersonal” was about possibility of control in spirit of human rather than rational human or cognition of general people. Even if a defendant could subjectively foresee the process of causing extended result on basis of

in Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p102.

① Section 306a(2) in German Penal Code states that whoever sets fire to an object listed in Section 306(1) Nos 1 to 6 or destroys it in whole or in part by setting fire to it and thereby places another person in danger of injury shall incur the same penalty. Section 306b(2) states that the penalty shall be imprisonment of not less than five years if the offender in cases under section 306a through the offense places another person in danger of death.

② Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou (trans), 2005, Law Press·China, p218.

③ Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, *Gendai Keijiho*, 4(12), p108.

④ Hayashi Yoichi, *Aggravated Consequential Offense and Causation*, 2003, *Gendai Keijiho*, 5(4), p51.

basic crime, it was possible to deny aggravated consequential offense because of lack of objective foreseeability. For instance, in cases in which the injured victim was killed by thunder or traffic accident, the old woman with heart disease was frightened to die because of arson, the victim went into the fire for saving his property and so on, the defendant should not be convicted of injury causing to death or arson causing to death, although he foresaw the extended result.^①

German jurist Frisch steps forward to analyze contents of dangerousness. First, some dangerousness is created through intentionally realizing constitutive requirement of basic crime. The dangerousness cannot be evaluated completely in predicating intentional crime. Second, results should actually occur as actualization of special dangerousness. Furthermore, related result should be caused in such range of dangerousness.^②

Japanese jurist Uchida Hiroshi analyzes inherent dangerousness within basic crime through different ways between potential damage offense and actual damage offense. If the basic crime is potential damage offense, Uchida Hiroshi divides dangerousness into real basic crime and unreal basic crime and gives three examples to explain this classification. First, only if a defendant uses dangerous materials to pollute the drinking water, the conduct can constitute basic crime, namely polluting drinking water causing death or injury. Second, only if the conduct endangering traffic is the real basic crime of obstructing traffic causing death or injury. Third, only if a defendant abandons the victim to the remote place, the abandonment can be real basic crime of abandonment causing death or injury.^③ By contrast, physical strength of violent conduct is an important element for judging actual damage offense as basic crime. The physical strength is based on homogeneous and immediate relationship between basic crime and

① D. Oehler, a.a.O. (Anm.9) ,S.515. Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p144-145.

② W. Frisch, a.a.O. (Anm.10) ,A.333. Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p145.

③ Uchida Hiroshi, Structure of Aggravated Consequential Offense, 2005, Shinzansha Publisher Co.,Ltd, p140-142.

extended result. If physical strength of illegal conduct gets out of control in promoting or reducing the risk level, the violent conduct is probable to cause other person to die or injury. Therefore, high risk to cause death or injury is included in “uncontrollable level of strength”.^①

1.3.2.2 Objections to Aggravated Consequential Offense

Dangerousness theory, though accepted by many people, is scorned in some ways as follows:

First, dangerousness is based on strict liability. Some critics hold that dangerousness theory will exclude negligence of causing extended result from requirement of aggravated consequential offense. For instance, Kawasaki Kazuo holds that dangerousness theory seems to coordinate with principle of culpability, but it actually covers the characteristic of strict liability, which violates the requirement of culpability.^② In light of this critique, if the special dangerousness of basic crime is the ground of aggravated consequential offense, it is unnecessary to require negligence of causing extended result as element of increasing punishment. Defendant usually foresees the extended result in course of committing very dangerous wrongdoing, but it is unforeseeable to cause the result in some cases. Thus dangerous theory corresponds with the strict liability or consequential liability.

Second, it is unreasonable to see special dangerousness as different illegality from extended result. Dangerousness theory holds that special dangerousness within basic crime is the independent illegality of aggravated consequential offense. Many people oppose to the argument for following reasons:

(1) It is unreasonable to include two kinds of dangerousness in the same provision. In light of dangerousness theory, there are two kinds of illegality in the same provision. For instance, both injury and injury causing death are provided in Article 234 of the

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p146-147.

② Kawasaki Kazuo, *Criminal Law: General Part (Crime Theory)*, 2009, Hokuju Press, p97.

Chinese Criminal Law. Chinese jurist Zheng Zeshan holds that there is no reason to divide dangerousness into general dangerousness to human life and special dangerousness to human life in the same provision.^①

(2) Dangerousness theory may cause legal loophole. Japanese jurist Hayashi Mikito holds that if dangerousness to cause death is special illegality for differentiating injury causing death from intentional homicide and negligent homicide, no matter how serious the result has been caused is, the defendant would only be convicted of normal injury. However, some serious result such as causing death will be inappropriately ignored. Furthermore, realization of forbidden dangerousness as content of proximate causation should be strictly interpreted, but it doesn't mean that illegality of injury causing death is more serious than intentional homicide and negligent homicide.^②

(3) Dangerousness theory violates principle of equality. German jurist Schubarth holds that if special dangerousness is ground of increasing punishment, aggravated consequential offense would be potential damage crime. It is unequal to make a difference between aggravated consequential offense and other potential damage crime.^③

(4) Dangerousness theory is not matching to punishment of basic crime. Chinese jurist Zhang Mingkai also holds that punishment of basic crime reflects levels of liability containing dangerousness of causing extended result, so special dangerousness should not be evaluated again as the element for increasing punishment.

(5) There is no substantial difference in dangerousness to cause the same result. Chinese jurist Huang Rongjian holds that because provision of extended result is to protect life or physical interest, so if a conduct can cause the result, it is unnecessary to distinguish in what ways it make the result happen. It makes no sense to apply independent dangerousness within basic crime to explain ground of increasing

① Zheng Zeshan, Ground of Aggravated Consequential Offense, 2010, Academic Exploration, (3), p27.

② Hyashi Mikito, Criminal Law, 2nd ed, 2008, University of Tokyo Press, p144.

③ M. Schubarth, Das Problem der erfolgsqualifizierten Delikte, ZStW 85(1973), 754(786f). Cited in Uchida Hiroshi, Structure of Aggravated Consequential Offense, 2005, Shinzansha Publisher Co., Ltd, p114.

punishment.^①

Third, there is no difference between dangerousness theory and causation theory. In light of dangerousness theory, basic crime is not potential damage crime unless the extended result has been caused. Therefore, dangerousness theory is just to make connection between whether potential damage offense is constituted and causing extended result. Furthermore, special dangerousness is limited in conduct of conforming constitutive requirement of basic crime. If the result is caused indirectly by other reasons beyond basic crime, there is no so-called special dangerousness. Thus special dangerousness is probable to cause extended result, which should be interpreted to limitation of constitutive requirement. Kagawa Tatu holds that there is no substantial distinction between this conclusion and causation theory especially proximate causation theory. Constitutive requirement of illegality should not contain causation of unlimited expansion. Important causation obviously is formed from dangerousness. Connection between conduct and result, free from important causal link, has been excluded from constitutive requirement. Special dangerousness is same as causation in function.^②

1.3.2.3 Commentary on Objections to Dangerousness Theory

Above mentioned objections to dangerousness theory offer favorable ways to reflect aggravated consequential offense, but they are not so persuasive as they seem to be.

First, dangerousness theory is not necessarily to be associated with strict liability. Dangerousness theory is advocated for limiting application of aggravated consequential offense in judicial practice. Japanese jurist Maruyama Masao correctly notes that opinion that dangerousness theory belongs to strict liability ignores the function of limiting aggravated consequential offense in objective aspect.^③ In other words, in light

① Huang Rongjian, *Thinking Questions of Criminal Law on Basis of Interests*, 2009, China Renmin University Press, p302.

② Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p94.

③ Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p198.

of dangerousness theory, special dangerousness is merely necessary but not sufficient for increasing punishment. On the contrary, strict liability is careless about the strict requirement of conviction except for extended result. In light of strict liability, the extended result is sufficient to constitute aggravated consequential offense. Therefore, dangerousness theory and strict liability conflict in focus of attention. In fact, many supporters of dangerousness theory hold that the defendant is convicted of aggravated consequential offense in condition that the extended result is foreseeable to him. Therefore, dangerousness theory may not welcome strict liability. .

Second, special dangerousness is possible to be the ground of aggravated consequential offense.

(1) Different levels of illegality can exist in the same result of infringement upon legal interest. The actual damage cannot totally manifest levels of illegality. For instance, Article 257 in Chinese Criminal Law states that if one causes death to the victim in the course of committing crime of using violence to interfere with another person's freedom of marriage, he will be sentenced to fixed-term imprisonment of not more than two years or criminal detention. The punishment obviously is slighter than injury causing death.^① Thus the two aggravated consequential offenses should be interpreted to have different levels of illegality. Chinese jurist Zhang Mingkai holds that conduct of using violence to interfere with freedom of marriage is unnecessary to be immediately dangerous to cause death to another person.^② By contrast, intentional criminal conduct of injury causing death should be concretely even immediately to be dangerous to cause death.^③ If one uses very fierce violence to interfere with another person's freedom of marriage and causes the victim to death, he will be convicted of imaginative concurrence of crimes about injury causing death and violent interference

① Article 234 (2) in Chinese Criminal Law states that injury causing death shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death.

② Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p817.

③ Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p767.

with freedom of marriage causing death.^① Thus there are different levels of illegality between violent interference with freedom of marriage and injury causing death even if both the two crimes include the extended result of causing death.

(2) The same provision can include different levels of illegality. It is not certain whether there is unique constitutive requirement in the same provision. For instance, although mental state of causing extended result usually is considered as negligence, most people agree that aggravated consequential offense can be committed through intention. If levels of subjective culpability can be divided in the same provision, it should be possible to admit that the same provision can contain different levels of objective illegality.

(3) Punishment of basic crime cannot manifest special dangerousness to cause extended result. If there is no provision states aggravated consequential offense, special dangerousness is certainly considered in punishment of basic crime. Furthermore, many basic crimes are punished by serious penalty. Thus it seems that special dangerousness cannot be considered as independent illegal element of increasing punishment. However, dangerousness is very important to constitute an aggravated crime. For instance, robbing with gun is a kind of aggravated robbery in Chinese Criminal Law.^② If robbing with gun is analyzed through concurrence theory, it is imaginative concurrence of robbery and illegal possession or concealment of gun. However, robbing with gun is much severer than the combination of robbery and illegal possession or concealment of gun. Thus most people hold that the conduct of robbing with gun should endanger victim's life or physical interest. If the defendant only robs other with an imitation gun, the conduct is not lethal to the victim so that the defendant cannot be punished as robbing with gun.^③ Accordingly, special dangerousness can become illegal element of

① 2012 Li Hong, *Criminal Law*, 2012, Law Press•China, p 700.

② Article 263 in Chinese Criminal Law states that whoever robs public or private property by violence, coercion or other methods shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined; robbing with a gun shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death and shall also be fined or sentenced to confiscation of property

③ Chen Xingliang, Zhou Guangquan, *Development of Criminal Jurisprudence*, 2006, China Renmin University

increasing punishment. There is no reason to rule out dangerousness of justifying aggravated consequential offense.

(4) Dangerousness theory will not produce loophole of punishment. The result is ingredient of illegality, but it is not sufficient to decide level of illegality. For instance, Article 129 in Chinese Criminal Law states that if persons who are lawfully equipped with guns for the discharge of official duties lose their guns and fail to report the matter immediately, thereby causing serious consequences, they shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. Therefore, if one takes the lost gun to kill other people, the owner of the lost gun, at most, would be sentenced to fixed-term imprisonment of not more than three years or criminal detention. In other words, although the conduct of losing gun without report causes death, the defendant is punished by slight penalty. Chinese jurist Li Hong holds that this crime is not serious because the act of perpetrating is not sufficiently dangerous to human life.^① In other words, dangerousness can be an element that influences the severity of punishment. Thus it is not loophole to limit punishment through special dangerousness.

Third, Dangerousness theory is different from causation theory. Although dangerousness theory and causation theory is similar in paying attention to dangerousness of basic crime, they are still different. In light of dangerousness theory, aggravated consequential offense should be limited by immediateness requirement, i.e., the extended result is caused immediately from dangerousness of basic crime. On the contrary, proximate causation theory only requires closely causal relationship between extended result and basic crime. Generally speaking, immediateness requirement is stricter than proximate causation requirement. For instance, A knocks out X and believes X is dead, so A throw X to river in order to destroy all traces. In light of

Press, p604.

① Li Hong, On Several Questions of Objective Punishment-Conditions, 2010, Journal of Henan Administrative Institute of Politics and Law, (1), p25.

proximate cause theory, there is close causal relationship between A's assault and X's death because criminal usually destroys traces after committed a crime. However, it is impossible to convict A of injury causing death according to dangerousness theory because the assault has not immediately caused death.

On the other hand, as mentioned above, basis of judgment on causation is usually discussed by supporters of proximate causation theory. However, dangerousness theory gives up basis of judgment on immediateness. If contemporary science proves that the extended result is caused immediately by dangerousness of basic crime, immediateness can be affirmed even if general people or the defendant cannot foresee the result. For instance, one's idiosyncrasy such as fragile heart is unforeseeable to general people or to the defendant. In light of proximate causation theory, if the defendant assaults a people with heart disease and cause the victim to die of heart attack, he is not liable to injury causing death. However, the defendant will be convicted of injury causing death according to dangerousness theory.

1.3.2.4 Review on Dangerousness Theory

It is reasonable that dangerousness theory pays attention to special dangerousness within basic crime for justifying aggravated consequential offense. However, if dangerousness theory is departed from combination theory, there are some troubles as follows:

First, dangerousness theory is not based on principle of mental culpability. Because dangerousness theory is based on the principle of proportionality, there is no positive connection between dangerousness theory and principle of mental culpability. Although dangerousness theory doesn't exclude mental state of causing extended result, it cannot conclude that mental state is necessary to constitute aggravated consequential offense. Therefore, dangerousness theory does not suffice to justify aggravated consequential offense in fact.

Second, dangerousness theory cannot reasonably explain the position of extended result. According to dangerousness theory, extended result belongs to the element of illegality. If special dangerousness should be the unique ground for increasing punishment, aggravated consequential offense would become potential damage crime. As a result, the extended result should belong to the objective punishment condition. However, this conclusion violates original intention of dangerousness theory.^①

Third, dangerousness theory is not appropriate to interpret certain aggravated consequential offenses. Dangerousness theory is to solve the problem of disproportional result of increasing sentence in contrast to concurrent sentences of basic crime and crime of causing extended result. However, the theory cannot be applied to all aggravated consequential offense. For instance, Article 257 in Chinese Criminal Law states that violent interference with freedom of marriage causing death is punished by imprisonment no more than seven years, which is equal to maximum penalty of causing death due to negligence. If violent interference with freedom of marriage is required to be lethal to the victim and immediately causes the victim to die, it would be too strict a limitation upon the establishment of aggravated consequential offense.

In a word, even if dangerousness theory does provide a good way to understand the ground of increasing punishment, it is insufficient for coordinating aggravated consequential offense with the principle of culpability.

1.4 Conclusion of This Chapter: Advocating Dual Combination Theory

Aggravated consequential offense should be coordinated with principle of mental culpability and proportionality. In light of Article 16 in Chinese Criminal Law, if one has no guilty mind with respect to the actual damage, he is not guilty of related crime. Thus the extended result should be attributable to the defendant in premise of mental state, i.e., the defendant is convicted of aggravated consequential offense at least with

^① Yamamoto Mitsuhide, *Illegality of Aggravated Consequential Offense*, 1990, *The Chuo Law Review*, 97(3•4), p261.

respect to negligence. As a result, aggravated consequential offense naturally is combination of basic crime as basic crime and causing extended result through negligence or intention. For instance, crime of false imprisonment causing death is combination of false imprisonment and causing death through negligence. As a result, aggravated consequential offense has more illegality and culpability than basic crime, so it is impossible to completely evaluate aggravated consequential offense by unique punishment of basic crime. In other words, it is reasonable to increase punishment when basic conduct causes extended result.

However, aggravated consequential offense is not always punished in more severe way. For instance, maltreatment causing death is sentenced to fixed-term imprisonment of from two years to seven years.^① Obviously, this punishment is very close to crime of causing death through negligence.^② Similar punishments are included in crime of carrying out retaliation and frame-ups,^③ environmental pollution,^④ violent interference with freedom of marriage, and so on. If these aggravated consequential offenses consist of very serious requirements, the corresponded punishment would be unbalanced in contrast to common negligent crime. Thus they are merely legislator's affirmations to increase punishment, rather than unnecessary substantive reasons for combination. This kind of combination can be called "formal combination".

① Article 260(1) in Chinese Criminal Law states that whoever maltreats a member of his family, if the circumstances are flagrant, shall be sentenced to fixed-term imprisonment of not more than two years, criminal detention or public surveillance; Paragraph (2) states that whoever commits the crime mentioned in the preceding paragraph and causes serious injury or death to the victim shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years.

② The maximum punishment of causing death through negligence and violent interference causing death both are to impose the criminal on imprisonment of 7 years. However, causing death through negligence at least is sentenced to imprisonment of 3 years, while violent interference causing death shall be imposed on imprisonment of no less than 2 years.

③ Article 254 in Chinese Criminal Law states that any functionary of a State organ who, abusing his power or using his public office for private ends, retaliates against or frames up complainants, petitioners, critics or persons who report against him shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years.

④ Article 338 in Chinese Criminal Law states that whoever, in violation of the state provisions, discharges, dumps or disposes of any radioactive waste, any waste containing pathogens of any infectious disease, any poisonous substance or any other hazardous substance, which has caused serious environmental pollution, shall be sentenced to imprisonment of not more than 3 years or criminal detention and/or a fine; or if there are especially serious consequences, be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine. Notice: this article is amended in "Article 46 in Amendment (VIII) to the Criminal Law of the People's Republic of China".

By contrast, most aggravated consequential offenses are provided severe punishments surpass total punishment for basic crime and causing extended result through negligence. This circumstance obviously cannot be responded in formal combination, so it is necessary to find the substantive reason for explaining the reality. Dangerousness is a good choice to be supplementary rationale of severe punishment. In light of dangerousness theory, inherent or special dangerousness is the important element to increase punishment.^① The reason of punishing aggravated consequential offense severely should resort to general prevention of potential damage offense.^② Intentional crime and negligent crime no longer belong to purely external combination and have a kind of internal connection.^③ If special dangerousness is added to illegality of aggravated consequential offense, punishable level would be heightened on the basis of combinative harmfulness of basic crime and causing extended result. In a word, substantive reason of increasing punishment in aggravated consequential offense is special dangerousness within basic crime and realization of this dangerousness.

It should be noticed that some aggravated consequential offenses don't belong to imaginative concurrence of crimes. For instance, injury causing serious impairment belongs to concurrence of provisions rather than imaginative concurrence of intentional injury and causing serious impairment through negligence, because serious injury and slight injury infringe the same legal interest. However, injury causing serious impairment still can be treated as combination of intentional injury causing slight injury and causing injury through negligence. Thus principle of concurrence can restrict the kind of aggravated consequential offense. Because punishment of injury causing serious impairment is severer than total punishment for intentional injury causing slight impairment and causing serious impairment through negligence, not only the aggravated

① Ida Makoto, A Study of limitation on Attributing Result in the Aggravated Consequential Offense, *Hogaku kenkyu : Journal of Law, 1987, Politics, and Sociology*, 60(2), p252-253.

② Enomoto Touya, Research on Illegality of Aggravated Consequential Offense and Structure, 2007, *Journal of Law and Political Studies*, (73), p124.

③ Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p231.

consequential offense is formal combination, but it also needs substantive reason for increasing punishment, i.e., conduct of injury should be inherently dangerous to hurt other seriously.

As a result, aggravated consequential offense sentenced to slight statutory penalty is formal combination of basic crime and causing extended result through negligence. On the contrary, aggravated consequential offense sentenced to serious statutory penalty needs substantive reason for combination. Thus there are dual dimensions for increasing punishment in aggravated consequential offense: (1) extended result caused by negligent conduct is the basis of increasing punishment; (2) special dangerousness exists in basic crime and realization of the dangerousness can be important element for deciding the level of increasing punishment.

Chapter 2 **Limitation of Aggravated Consequential Offense**

In formal combination, there is no special requirement on limiting aggravated consequential offense because the combination is equal to imaginative concurrence of crimes. However, punishment is so harsh in substantial combination that it is necessary to require special limitations on constituting aggravated consequential offense. Therefore, this chapter focuses on limitation of substantial combination.

Substantial combination should be analyzed on the basis of dangerousness theory. Dangerousness theory limit aggravated consequential offense through immediateness requirement. However, if the requirement becomes a unique element of limiting aggravated consequential offense, there may be questions as follows:

First, immediateness requirement confuses basic conduct with causation. Immediateness is generally considered as content of causation, but it includes content of basic conduct in fact. German jurist Roxin introduces immediateness requirement through following case: if a victim dies of falling down in the course of escaping defendant's chase for robbery, the defendant cannot be convicted of robbery causing death because chase doesn't immediately inflict victim's death.^① In this case, whether the defendant has inflicted of the dangerousness of causing death cannot decide the conviction of aggravated consequential offense. If the defendant runs after the victim for robbery in the dangerous circumstance such as cliff and the victim dies from falling off the cliff, it is hard to say that the robbery doesn't immediately cause the victim to death because the robbery put the victim in danger of falling down. In other words, immediateness requirement contains dangerousness of basic conduct and relationship between dangerousness and extended result, thus the content between conduct and

① Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p219.

causation could be mixed up according to current contents of immediateness requirement.

Second, immediateness requirement is unrelated to restriction of extended result. According to general understanding of immediateness requirement, inherent dangerousness and immediate causation are principal limitations of aggravated consequential offense. However, extended result can be abstract result. For example, causing serious consequences is the extended result of sabotaging electric power facilities.^① It is impossible to determine what consequences are the serious consequences in terms of the immediateness requirement.

Third, there has been much dispute over the question of subjective immediateness requirement. Some scholars argue that subjective immediateness corresponds to objective immediateness, so gross negligence to cause causing extended result or intention of causing special dangerousness should be mental state of aggravated consequential offense. However, most scholars oppose subjective immediateness and limit mental state of aggravated consequential offense to general negligence. Besides, some scholars hold that the intention to cause extended result is the requisite to convict the defendant of aggravated consequential offense. Thus it is necessary to clarify the relationship between mental state and immediateness requirement.

In view of questions above mentioned, this Chapter discusses limitation of aggravated consequential offense on basic conduct, extended result, causation and mental state in order to restrict the severe punishment in reasonable scope.

2.1 Limitation on Basic Conduct

Basic conduct is an important element of limiting aggravated consequential offense.

① Article 118 in Chinese Criminal Law states that whoever sabotages any electric power or gas facility or any other inflammable or explosive equipment, thereby endangering public security, but causing no serious consequences, shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years; Article 119 states that whoever sabotages any means of transport, transportation facility, electric power facility, gas facility, or inflammable or explosive equipment, thereby causing serious consequences, shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death.

However, it is still in doubt as to how to judge this element. For example, the defendant slips into the victim's house for robbery. When the victim realizes and tries to catch the defendant, the defendant fights against and runs away. In the running, the defendant negligently tramples on the baby lying on floor and causes the baby's death. Although there is immediate connection between the trample and the baby's death, the defendant may not be convicted of robbery causing death because it seems that trample is unrelated to robbery. Another case in point: the defendant makes an unarmed strike to the victim and causes the victim to fall down. Accidentally, the victim's head bumps against a spike on the floor and dies from lethal injury. Even if there is proximate causation of causing death through negligence, it is not persuasive to convict the defendant of injury causing death because unarmed strike seldom causes death.

In view of above mentioned instances, there are two aspects about judging basic conduct: (1) the connection between basic conduct and basic crime; (2) the dangerousness of basic conduct on causing extended result. Therefore, this chapter puts forward connection test and dangerousness test for limiting basic conduct.

2.1.1 Limitation of Connection Test

2.1.1.1 Connection Test

Basic conduct should be connected with basic crime to some extent; otherwise the application of aggravated consequential offense will be unlimitedly expanded. However, there are different opinions about judging connection test. Taking robbery causing death for example, Japanese jurists discuss connection test on the following theories:

First, the opportunity theory holds that because robbery usually causes injury or death, criminal law provides robbery causing injury or death in order to protect the victim's life and physical interest. Therefore, causing injury or death is unnecessary to be means of robbery. In other words, according to the theory, if only injury or death is

caused in opportunity of committing robbery, the defendant should be responsible for the extended result. Japanese jurist Ootuka Hiroshi holds that robbery causing injury or death is described in Japanese Penal Code by “causes.....to suffer injury at the scene of the robbery” and “causes.....death at the scene of the robbery” rather than “consequently” usually used in aggravated consequential offense, thus there is no reason for limiting injury and death to means of robbery.^① Japanese jurist Uchida Fumiaki holds that the defendant should be convicted of robbery causing injury or death if he uses violence to fight against arresting or to prevent money transfer.^②

Second, the means theory holds that it is insufficient to require result of causing injury or death to be caused by conduct committed in the scene of robbery. The result should be caused by assault or intimidation as means of robbery.^③ According to this theory, following cases should not be treated as robbery causing injury or death: trampling baby to death by accident in the course of running away, intentionally killing the third party for revenge in the scene of robbery, intentionally killing other joint offenders because of internal conflict, and so on.^④

Third, the close connection theory holds that the conduct of robbery should be closely connected with the conduct of causing injury or death.^⑤ It is too cruel for the defendant to be convicted of robbery causing injury or death merely because his conduct is required to occur in the scene of robbery. For instance, defendant kills victim out of resentment taking advantage of the robbery. It is unreasonable to convict the defendant of robbery causing death. Therefore, basic conduct should be limited to some extents: (1) there must be relatively close proximity in terms of time and distance between robbery and result of causing injury or death; (2) homicide and steal should be limited in continuous conducts for convicting the defendant of robbery causing death in

① Otsuka, H. *Ways of Thinking General Part of Criminal Law*, 3rd ed, 2010, Waseda Operation Press Co., Ltd 193.

② Uchida Fumiaki, *Whether Co-Principal through Negligence Can Be Confirmed?*, 1958, *The Hokkaido Law Review*, (8), p289.

③ Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p531.

④ Horiuchi Syobunu, *Criminal Law: Specific Part*, 2003, Yuhikaku Publishing Co.,Ltd, p139.

⑤ Otsuka Hitoshi, *Criminal Law: Specific Part*, 3rd ed, 2005, Yuhikaku Publishing Co.,Ltd, p231.

scene of stealing the victim after commission of homicide.^①

Fourth, the outstretched means theory holds that although close connection theory could limit conviction of robbery causing injury or death, its standard of judgment lacks in definitude. Robbery causing injury or death could be committed by assault or intimidation as means of robbery, or by assault or intimidation in some circumstances similar to constructive robbery.^② Although outstretched means theory criticizes close connection theory for uncertainty, it also fails to offer a clear boundary of expanding means. Thus this theory confronts the same critique as close connection theory does.^③

Chinese scholars also dispute on question above mentioned. Yang Xinpei inclines to means theory. He holds that robbery causing death two kinds of meanings: (1) the defendant causes the victim to death by violent means of robbery; (2) the defendant wants to rob by means of homicide.^④ Zhou Guangquan inclines to close connection theory. He holds that there should be certain connection between result of causing injury or death and conduct of robbing. This connection implies that result of causing injury or death is caused by conduct related to robbery, but it is unnecessary to require violent or compelling conduct as means of robbery immediately cause the victim to injury or death.^⑤ Zhang Mingkai inclines to outstretched means theory. He holds that robbery consists of violent or compelling conduct as means and conduct of snatching property, both of which could be basic conduct of robbery. If someone uses violence to kill the victim for avoiding arrest after committing robbery, he can be convicted of robbery causing death.^⑥

2.1.1.2 Practice of Connection Test

① Kawabata Hiroshi, *Criminal Law: General Part*, 2nd ed, 2006, Seibundoh Publishing Co., Ltd, p348-349.

② Yamaguchi Atsushi, *Criminal Law: Specific Part*, 2nd ed, Wang Zhaowu(trans), China Renmin University Press, p277.

③ Hyashi Mikito, *Criminal Law: Specific Part*, 2007, University of Tokyo Press, p220.

④ Yang Xinpei, *Comment on Robbery Causing Death*, 1987, *Science of Law*(Journal of Northwest University of Political Science and Law, (3), p38.

⑤ Zhou Guangquan, *Criminal Law: Specific Part*, 2nd ed, China Renmin University Press, p863-864.

⑥ Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p324.

Japanese courts accept opportunity theory on judging connection test. The following cases were treated as robbery causing injury or death: offender of robbery stabbed at lower belly of victim for fighting against arresting by samurai sword; offender killed the sleeping baby after killing the parents for robbery; an offender compelled the victim to hand over money, after which the offender killed the victim for fleeing after the victim stopped in front of the police box. By contrast, Japanese precedents held that the offender should not be guilty of robbery causing injury or death in circumstance that he killed the victim through making use of opportunity on the basis of new decision to commit crime.^①

Chinese courts incline to close connection theory and outstretched theory. According to judicial interpretation,^② defendant shall be convicted of robbery causing death if he intends to kill the victim for restraining the victim from resisting in the course of robbery. However, if the defendant intends to kill the victim for getting rid of the witness, he shall be convicted of concurrent sentences of intentional homicide and robbery. Obviously, this interpretation disagrees with opportunity theory.

In specific cases, Chinese courts usually convicted the defendant of robbery causing death if he caused the victim to death by violence in the course of committing constructive robbery. For example, in case of *People v. Ma Yongkang*,^③ Ma Yongkang seized Dong Junying's property by force. Cheng Zhengfei tried to pursue Ma Yongkang. Ma Yongkang stabbed Cheng Zhengfei's heart and ran away. Cheng Zhengfei was sent to the hospital but efforts to revive him were futile. The court held that Ma Yongkang seized other's property by force and used violence on the spot in order to resist arrest and caused the victim's death, which was sufficient to constitute robbery, thus he should be sentenced to death.^④ For another example, in case of *People v. Liu Hai* and so on,^⑤

① Takahashi Norio, *Criminal Law: Specific Part*, 2011, Seibundoh Publishing, Co., Ltd, p279.

② Official Reply of the Supreme People's Court on Issues concerning the Conviction on the Case of Intentional Homicide in the Course of Robbery (2001).

③ Intermediate People's Court of Guangzhou City, Guangdong Province, Judgment Paper of Penal Sentence, 2005, First Trial, No.229.

④ Article 263 in Chinese Criminal Law states that whoever robs public or private property by violence, coercion or

Liu Hai and Fang Chong robbed Wang Ming-guang's property. The defendants turned around and ran away after getting the property. However, Wang Mingguang took a stick to hit the defendants for re-seizing his property. Liu Hai stabbed at Wang Mingguang's chest and back with a knife and hurled the victim on the ground. Fang Chong continued to beat the victim. As a result, Wang Mingguang bled to death. The court held that Liu Hai and Fang Chong assaulted Wang Ming-guang for resisting arrest together. Furthermore, Liu Hai stabbed the victim and caused death. Liu Hai was sentenced to capital punishment. It is clearly to be seen that the victims of cases above mentioned were not killed by means of robbery. Furthermore judicial interpretation disagrees with the opportunity theory by convicting the defendant, who kills the victim for destroying the evidence in the course of robbery, of multiple punishments of robbery and murder. Thus the Chinese judicial practice actually inclines to the close connection theory or the outstretched means theory.

2.1.1.3 Basic Conduct Should be Limited in Conduct Conforms to Constitutive Requirement of basic crime

Although theories above mentioned have reference significance to some extent, they still are imperfect to interpret basic conduct. First, opportunity theory makes punishment of aggravated consequential offense expand to unreasonable extent. Therefore, opportunity theory could not take advantage of statutory expression of robbery causing injury or death, because prescribed way of robbery causing injury or death is not different from other aggravated consequential offenses in Chinese Criminal Law. In other words, statutory expression could not be reasonable reason to exclude the robbery causing injury or death from aggravated consequential offense. Second, means

other methods shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined; whoever falls under any of the following categories shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death and shall also be fined or sentenced to confiscation of property:.....(5) causing serious injury or death to another person in the course of robbery.

⑤ Intermediate People's Court of Wuxi City, Guangdong Province, Judgment Paper of Penal Sentence, 2008, First Trial, No.3.

theory has flaw in methodology. Means always serves to purpose. If importance of means is emphasized for defining causative action of causing extended result, purpose of seizing property would become limitation of the causative action according to means theory. However, subjective element such as purpose cannot decide nature of conduct.^② Furthermore, violence is not means of robbery in constructive robbery, so means theory cannot explain the why constructive robbery causing injury or death shall be sentenced to punishment of robbery. Third, connection theory and outstretched theory limit interpretation of basic conduct for getting the reasonable conclusion in the judicial practice. However, they both lack a clear standard, so they cannot offer feasible instruction about judicial practice in Chinese Criminal Law.

This dissertation suggests that basic conduct should be what conforms to the constitutive requirement of basic crime. Reasons are as follows:

First, aggravated consequential offense belongs to crime of committing in one conduct. Most aggravated consequential offense are special imaginative concurrence of crimes.^③ It is well known that there is only one criminal conduct in imaginative concurrence of crimes. Multiple conducts cannot satisfy the structure of illegality on imaginative concurrence of crimes. Thus aggravated consequential offense should be committed in one conduct that conforms to constitutive requirement of basic crime.

Second, the connection between basic crime and basic conduct is unrelated to mental state of causing extended result. Some scholars relate mental state with limitation of basic conduct. Ootuka Hiroshi holds that if robbery causing injury or death is aggravated consequential offense, the means theory should be accepted. By contrast, if robbery causing injury or death includes circumstance about intentional homicide, opportunity theory should be reasonable.^④ Sone Takehiko opposes means theory because he folds intentional homicide in the course of basic crime to aggravated

② Suzuki, Shigetsu, 2011, Seibundoh Publishing Co., Ltd, p55.

③ Zheng Yizhe, Theories and Application of Constitutive Requirements, 2004, Ruixing Books Co Ltd, p145.

④ Otsuka, H. Ways of Thinking General Part of Criminal Law, 3rd ed, 2010, Waseda Operation Press Co., Ltd, p192-193.

consequential offense.^① Furthermore, he advocates close connection theory for reasonably limiting application of aggravated consequential offense.^②

Nonetheless, the mental state on causing extended result is unrelated to the conviction of aggravated consequential offense. In light of combination theory, the aggravated consequential offense can be the combination of basic crime and crime of intentionally causing the extended result. It is unreasonable to support any theory on connection test through the mental state of aggravated consequential offense.

Third, the conformity of important constructive conditions theory can offer clear standard of judging basic conduct. Because both close connection and outstretched means are indistinct standard, they are easy to be misunderstood or misused. As matter of fact, close degree and outstretched degree could be evaluated by constitutive requirement of basic crime. If the conduct of causing injury or death goes beyond the constitutive requirement of robbery, the causative action of extended result would not be closely connected with basic crime, or the means of robbery would be outstretched to an unreasonable extent. Therefore, the conformity of important constructive conditions theory is the practicable way to limit the basic conduct.

In light of standards above mentioned, some details of judging basic conduct should be noticed:

First, the constitutive requirement of basic crime should include the constructive requirement. Legal fiction is an important legislative technique. The requirement of legal fiction is called the constructive requirement. Whichever of the constructive requirement or the common requirement is satisfied, the defendant would be convicted of the same crime. Therefore, there is no reason to exclude constructive requirement from the basic crime. For instance, Section 238 in Japanese Penal Code states that when a person who has committed the crime of theft uses assault or intimidation in order to retain the stolen property, evade arrest or destroy evidence, he shall be treated in the

① Sone Takehiro, *Criminal Law: Specific Part*, 5th ed, 2012, Koubundou Publishers Inc, p137.

② Sone Takehiro, *Criminal Law: Specific Part*, 5th ed, 2012, Koubundou Publishers Inc, p138.

same manner with robbery. This provision of constructive robbery actually is legal fiction of common robbery. Because assault for retaining stolen property, evading arrest or destroying evidence is requirement of constructive robbery, it can be basic conduct of robbery causing injury or death.

Second, the basic conduct of constructive robbery causing injury or death may include assault after robbing property. Robbery is different from larceny in way of infringing property. Robbery refers to seize other people's property through assault, intimidation or other conduct to hold down the victim. By contrast, larceny refers to seize other people's property through peaceful conduct. However, they are not mutually exclusive. Peaceful conduct is just the ostensible element of constitutive requirement because it does not reflect levels of illegality or culpability.^① Although the defendant uses unpeaceful conduct to seize property, the nature of larceny is not influenced at all. Therefore, the robbery can be seen as a special larceny.^② If one causes victim's death for using assault or intimidation to retain the stolen property, to evade arrest or to destroy evidence after committing the crime of robbery, he should be guilty of robbery causing death.

Third, it is possible to convict the defendant of robbery causing death in the case of killing the co-felon. If one kills his accomplice in the course of robbery, the killer would not be convicted of robbery causing death because homicide is not the requirement to robbery. However, if the defendant kills his partner because of a mistake in attack, he can be convicted of aggravated consequential offense. For instance, in the case of *People v. Li*, Li approached to the victim with knife for robbing, but he made a mistake causing his partner's death. Because the homicide can be seen as a part of robbery, it satisfies the connection test of basic conduct on robbery causing death.

Fourth, completion of basic crime does not mean that basic conduct has stopped.

① Zhang Mingkai, *System of Constitutive Requirements and Elements of Constitutive Requirement*, 2010, Peking University Press, p265.

② Hyashi Mikito, *Criminal Law: Specific Part*, 2007, University of Tokyo Press, p220.

Although basic crime has conformed to standard of completion, the basic conduct still continues on infringing the victim's legal interest. For example, robbery causing slight injury constitutes accomplished robbery according to Chinese Criminal Law.^① However, it is impossible to consider that robbery certainly stops when it is accomplished. If the defendant continues and inflicts serious injury to the victim, he shall be convicted of robbery causing serious injury. Furthermore, self defense as a justification requires the victim to use force in the case of reasonable fear to the threatened harm is imminent. However, general view holds that imminence requirement can be applied to circumstance in which the victim can take his property back on the spot after accomplished robbery.^② If the defendant causes injury or death in the course of resisting victim's defense on taking back property, he could be guilty of robbery causing injury or death.

Fifth, separate conducts of multiple crimes may combine as a single act of aggravated crime. Generally speaking, one conduct in natural meaning is the standard of judging single conduct. According to this standard, homicide in the scene of robbery is easy to be judged as multiple conducts, because homicide and robbery can be understood as different conducts in natural meaning. However, quantity of conduct cannot be evaluated beyond constitutive requirement, otherwise there is no independent conduct in some crimes that are committed by compound conducts. For example, robbery can be seen as a crime with multiple conducts including theft and assault according to purely natural meaning. Therefore, one conduct in natural meaning should be understood on the basis of constitutive requirement. Although constitutive requirement of certain crime is satisfied by multiple conducts of other crimes in natural meaning, these conducts also can be seen as a single conduct in certain circumstance.

① According to judicial interpretation in Chinese Criminal Law, if robbery has caused slight injury or seized property in certain value, the defendant should be guilty of accomplished robbery. See Article 10 of Opinion of the Supreme People's Court on the Application of Laws for the Trials of Criminal Cases Involving Robbery or Seizure (2005).

② Raitou Ken, *Criminal Law: General Part (Volume 2)*, 1983, Yuhikaku Publishing Co., Ltd, p331-332.

Therefore, although it seems that robbery and homicide should be counted as committed in different conducts, it is possible to convict the defendant of robbery causing injury or death.

2.1.2 Limitation of Dangerousness Test

In light of dual combination theory, basic conduct should satisfy the dangerousness test in substantive combination. If the conduct of basic crime doesn't endanger the victim at all, it is impossible to be treated as the basic conduct. However, there are different opinions towards the definition of dangerousness. Later part will check these opinions and conclude a practical way to judge dangerousness of causing extended result.

2.1.2.1 Difference between Basic Conduct in Form and Basic Conduct in Substance

The rationale of aggravated consequential offense plays an important role in understanding dangerousness test. According to combination theory, it is unnecessary to distinguish basic conduct from act of perpetrating basic crime. For example, Japanese jurist Hirano Ryouichi holds that one part of aggravated consequential offense is intentional crime, and another part is negligent crime.^① However, combination theory cannot explain the ground of severe punishment of aggravated consequential. By contrast, according to dangerousness theory, basic conduct should be inherently dangerous to cause extended result. However, dangerousness theory cannot be applied to aggravated consequential offense with slight punishment. Japanese jurist Morii Akira holds that although the defendant doesn't intend to cause extended result, conduct of injury and result of causing death can be probably combined together in the case of injury causing death.^② Japanese jurist Ida Makoto immediately points out that it is

① Hirano Ryuichi, *Aggravated Consequential Offense*, 1981, Law Library, (10), p57.

② Akira, *Legislation of Aggravated Consequential Offense*, Chihiro Saeki, Questions of Amendment to Japanese Penal Code, 1967, Yuhikaku Publishing Co.,Ltd, p37.

possible to consider dangerous conduct as what can be prevented through imposing severe punishment to the dangerous conduct.^①

In the opinion of this dissertation, the aggravated consequential offense can be well explained by dual combination theory. In formal combination, basic conduct is equated to perpetrating conduct of basic crime. In substantive combination, inherent dangerousness is an important element for judging basic conduct. However, some scholars hold that if inherent dangerousness of basic conduct is the ground of aggravation, act of perpetrating in basic crime should be equal to the basic conduct.^② However, act of perpetrating in basic crime may not inflict special dangerousness or cause extended result. For example, not all injury is lethal to people's life. In fact, inherent dangerousness is usually a kind of abstract dangerousness. Abstract dangerousness could reflect influence of conduct on legal interest rather than imminence of infringing legal interest.^③ By contrast, act of perpetrating in aggravated consequential offense should be greatly dangerous to cause extended result. German jurist Roxin holds that those crimes of increasing punishment on the basis of extended result should include the dangerous conduct threatening life in high degree. In light of this view, basic crime just includes basic conduct with high risk to cause extended result, but it is not equal to the basic conduct.^④ In a word, actual and imminent dangerousness to cause extended result is the nature of basic conduct. Therefore, act of perpetrating in basic crime is formal basic conduct. In act of perpetrating basic crime, the conduct with actual and imminent dangerousness to cause extended result is substantively basic conduct.

Distinction between formal basic conduct and substantive basic conduct can be applied to aggravated consequential offense of potential danger crime. Because formal

① Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, Gendai Keijiho, 4(12), p107.

② Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p93.

③ Wang Yongqian, *Research on Legislative Technique of Abstractly Potential Damage Offense*, 2013, Political Science and Law, (8), p15.

④ Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p218.

basic conduct abstractly endangers legal interest infringed in extended result, there is no particularity in basic conduct of abstract dangerousness crime. However, concrete dangerousness is the constitutive element of concrete dangerousness crime. It is still in question about how to distinguish concrete dangerousness in concrete dangerousness crime from special dangerousness in substantive basic conduct. There are two types of concrete dangerousness: (1) Concrete dangerousness in nature of conduct, such as “not meeting the standard ... to such an extent as to harm human health” in crime of unlawful collecting or supplying blood, making or supplying blood products;^① (2) Concrete dangerousness of causing result, such as “a grave danger of the spread of an A Class infectious disease” in crime of disturbing prevention and treatment of infectious diseases.^② In type (1), “extent” refers to general nature of criminal conduct rather than actual possibility of causing result. Although some conducts reach the extent to harm human health, they are not equal to special dangerousness of causing extended result. Thus if defendant’s conduct, to the extent to harm human health, is not imminently dangerous to cause extended result, the conduct cannot be seen as basic conduct. In contrast, concrete dangerousness in type (2) is in connection with actual harm. It seems that there is special dangerousness in the act of perpetrating basic crime. However, dangerousness of causing actual harm may be different from dangerousness of causing extended result. For example, spread of A Class infectious disease is alternative element of the crime of disturbing prevention and treatment of infectious diseases. The extended

① Article 334 in Chinese Criminal Law states that whoever unlawfully collects or supplies blood or makes or supplies blood products which do not meet the standards prescribed by the State to such an extent as to harm human health shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined; if serious harm has been caused to human health, he shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment and shall also be fined or be sentenced to confiscation of property.

② Article 330 in Chinese Criminal Law states that whoever, in violation of the provisions of the Law on Prevention and Treatment of Infectious Diseases, commits any of the following acts and thus causes the spread or a grave danger of the spread of an A Class infectious disease shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years: (1) failure on the part of a water supply unit to supply drinking water in conformity with the hygienic standards set by the State; (2) refusal to give disinfection treatment, according to the sanitary requirements raised by the health and anti-epidemic agencies, to sewage, wastes or feces contaminated with the pathogen of infectious diseases;

result of the crime should be a grave danger of spreading the same disease, which is more serious than the spread of an A Class infectious disease. Therefore, the dangerousness of causing extended result should be more harmful than the concrete dangerousness of basic crime.

2.1.2.2 Standard of Judging Inherent Dangerousness

As mentioned above, the substantial characteristic of basic conduct is inherent dangerousness of causing extended result. However, how to judge the inherent dangerousness is debated by scholars. Taking the example of injury causing death, there are three types of opinions.

First, conduct-dangerousness theory holds that inherent dangerousness in basic crime should be judged abstractly on the basis of circumstances at time of perpetrating the crime. According to this opinion, there is no difference between basic conduct and other acts of perpetrating of crimes which are conditional upon the certain result. For example, Japanese jurist Yamaguchi Atushi holds that basic conduct could be the conduct with special dangerousness of causing extended result, constituting the aggravated consequential offense while the result occurs as actualization of the dangerousness. However, no matter what crime has been committed, the act of perpetrating, as the cause of the result happened, should be dangerous to cause the result. Therefore, special dangerousness is the common element of all crimes punished in condition of causing the result rather than the characteristic element of aggravated consequential offense.^① For example, it would be possible to constitute injury causing death if defendant causes victim's death through crime of assault.^②

Second, result-dangerousness theory holds that the injury inflicted by the defendant is lethal to the victim. Only if the injury leads to the result of death, can the defendant

① Atsushi Yamaguchi, Kawabata Hiroshi, Status Quo and Issues of Aggravated Consequential Offense, 2003, *Gendai Keijiho*, 5(4), p28-29.

② Yamaguchi Atsushi, *Criminal Law: Specific Part*, 2nd ed, Wang Zhaowu(trans), China Renmin University Press, p53.

be convicted of injury causing death. For example, a victim moves back for avoiding assault, which leads to the result that he dies from falling on the ground and hitting his head.^① In the logic of result-dangerousness theory, inherent dangerousness can only be considered in result caused by constitutive conduct of basic crime per se. For example, if the defendant makes the victim fall down to the barrel full of powders causing the victim's death from suffocating, the defendant is not guilty of injury causing death. A second, if a victim is crushed to death after he falls down to the busy road because of suffering an assault, the defendant would not be convicted of aggravated consequential offense since the conduct of assault, as a basic constitution of crime, doesn't lead to aggravated consequence.^② Because result-dangerousness theory requires the result of injury to be dangerous to cause death, it is also called lethality theory.

Third, differentiated standard theory tries to establish different standards on judging dangerousness according to relationship between basic conduct and extended result. If basic crime and basic conduct infringe the same legal interest, the extended result would only increase the degree of harmfulness. Thus the basic conduct cannot include the dangerousness which is not inherent in the middle result of basic crime. For example, dangerousness of traffic accident is not inherent in assault, thus the assault causing the victim to die from car crash should not be treated as the crime of injury causing death. By contrast, if the basic crime and the extended result point to different kinds of dangerousness, the extended result must be caused by the dangerousness that is not inherent in the basic crime. For example, crime of false imprisonment per se usually is unlikely to cause the victim to die, thus other kinds of dangerousness could be factors of injury causing death. Therefore, if a victim dies of falling down in the course of running away, defendant's assault could be basic conduct of injury causing death. As to how to distinguish different kinds of aggravated consequential offense and

① Enomoto Touya, *Reviewing Aggravated Consequential Offense*, 2011, Seibundoh Publishing Co., Ltd, p199.

② Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p214-215.

dangerousness, this theory advocates interpretation according to the specific provision.^①

Although theories mentioned above do have some reasonability, they still should be reviewed in following aspects:

First, the conduct-dangerousness theory is unreasonable because it totally ignores the degree of dangerousness. According to this theory, if objective possibility of causing extended result is enough to conform to dangerousness test of basic conduct, aggravated consequential offense would be applied too broadly. For instance, general assault usually cannot cause death, thus it is not the regulated object of injury causing death, because a conviction of crime of causing death through negligence is sufficient for regulation and prevention. Japanese jurist Saeki Kazuya holds that if dangerousness test only is concerned in conduct-dangerousness that is realized in the extended result, the independent requirement of aggravated consequential offense would be absorbed into the requirement of negligent crime. Therefore, it is necessary to consider middle result of injury as limitation of aggravated consequential offense.^② Therefore, general assault cannot be classified as basic conduct unless the victim has an unusually weak constitution or the assault are committed in a very dangerous external circumstance.

Second, result-dangerousness theory is positive to limit aggravated consequential offense, but it may unreasonably restrain the elements of judging dangerousness including the circumstances of creating dangerousness and victim's special conditions. In the real world, apparently, identical conducts may cause different results in different circumstances. Not only are victim's conditions different in ways, but also the strength of assault varies from person to person. As long as a conduct makes victim's legal interest face high risk of suffering damage, it should have special dangerousness although it seems to be of slight harmfulness. For example, an assault to a weak man obviously is more dangerous than that to a strong man. If this conduct should place the

① Huang Rongjian, *Thinking Questions of Criminal Law on Basis of Interests*, 2009, China Renmin University Press, p299.

② Saeki Kazuya, *Relationship between basic crime and Extended Result in Aggravated Consequential Offense: Focusing on Injury Causing Death*, 2002, *The Law Review of Kansai University*, 52(3), p88-90.

victim in danger, it could be classified as basic conduct. Result-dangerousness only focuses on dangerousness of injury, thus it cannot evaluate the dangerousness of basic conduct in all sides.

Third, differentiated standard theory is unreasonable for it equates the nature of legal interest to characteristic of dangerousness. According to the logic of differentiated standard theory, if the basic crime and the extended result point to different legal interests, the extended result can be caused by the dangerousness which is not inherent in basic conduct. However, since it is uncertain that if the basic crime would place the victim in danger of death, the inherent dangerousness should be evaluated in individual cases. The relationship between the basic crime and the extended result should not influence the standard of judging dangerousness. Furthermore, if it is in strict compliance with differentiating standard theory, most basic crimes would infringe different legal interests from the extended results. For example, crime of injury and result causing death can be considered as infringement of different legal interests, because healthy and life belong to different types of interest. Thus dangerousness test would almost lose much of its significance. However, differentiating standard theory treats injury causing death, which includes infringement of different interests, as object of applying result-dangerousness standard. Therefore, differentiating standard theory lacks consistency.

2.1.2.3 Advocating Comprehensive Result-Theory

In substantive combination, aggravated consequential offense not only combines the basic crime and the crime of causing extended result but also exceeds the both crimes in illegality. Therefore, the basic conduct should be more dangerous to the legal interest, which is protected in the extended result, than common crime of causing extended result through negligence or intention. The objective elements of creating inherent dangerousness should be distinguished from elements of reflecting the abstract

dangerousness. For example, if a defendant beats the victim beside the cliff, the wrongful conduct may create a situation under which the victim falls off the cliff and injures himself. Thus the common assault can be basic conduct according to the specific circumstances. By contrast, if a victim dies from falling down and hitting against a nail on the floor after suffering assault, the defendant should not be convicted of injury causing death because general assault is not lethal. It is unclear whether the victim will fall down after suffering assault, which direction he will fall down to and which part of his body will hit against the nail. Therefore, it is impossible to affirm the inherent dangerousness in illegal conduct. In other words, dangerousness of basic conduct should objectively and actually exist, which can be seen as a kind of result in a broad sense.

However, this kind of result-dangerousness is not only created in the actual result of basic crime but also an objective elements existing in the course of committing the basic crime. German jurist Roxin holds that if result-dangerousness should be affirmed, it must be realized in result and represent the specific dangerousness result. Furthermore, elements of causing this result should also include all situations which is known after the event.^①The effect of human behavior to the external world cannot be exfoliated from objective circumstances as intermediary elements. Although it seems that there is not any intermediary elements in the assault or battery, universal gravitation potentially influences situation of the conduct in fact. Thus all factors related to the judgment of the dangerousness, in the course of committing basic crime, should belong to materials of judging inherent dangerousness. In other words, surrounding environments and victim's physical conditions existing in the course of committing basic crime should be judging materials of special dangerousness. For example, if a defendant commits assault on a busy road, the victim would be placed in the danger created by the defendant.^②In a word, this article advocates the comprehensive

① Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p275.

② Saeki Kazuya, *Relationship between basic crime and Extended Result in Aggravated Consequential Offense: Focusing on Injury Causing Death*, 2002, *The Law Review of Kansai University*, 52(3), p134-135.

result-theory, i.e., inherent dangerousness should be judged on the basis of all circumstances existing in the course of committing basic crime.

In light of comprehensive result-theory, only if all objective elements, existing in the course of committing basic crime, comprehensively demonstrate the certainty of causing extended result, it would be in conformity with the dangerousness test. Specifically, there are three aspects of judgment as follows:

First, contents of conduct are the key element of judging inherent dangerousness. Different criminal behaviors harm legal interests in different levels. Behavioral contents of injury include strength, time, lasting, tool, position of body and so on. For example, if a defendant touches the victim's arm very lightly by hand, it would not be seen as injury. However, if a defendant uses a knife to touch the victim's eye ball, it is possible to be seen as mayhem. Furthermore, to give one punch in the victim's face is much less dangerous, to healthy or life, than to strike and kick the victim's chest for a long time.

Second, victim's condition is an important element to judge inherent dangerousness. Inherent dangerousness is influenced not only by behavioral contents but also victim's conditions. For example, there are different degrees of dangerousness between assaulting a strong man and a baby. Therefore, victim's conditions are immediately related to harmful result of injury or death. For instance, if a victim suffers from heart disease, even a slight assault would increase the dangerousness of heart attack and cause the victim to die.

Third, circumstances existing in the course of committing basic crime make dangerousness in the same conduct differs. Similar conducts can create different levels of dangerousness in different circumstances. For example, if a defendant runs after the victim for robbery in a street, it would rarely kill the victim; however, if it happens along a rough mountain road, it would easily.^① Another situation is, if a defendant pushes down the victim on a sandy beach, there would be no obvious danger to the victim's

① Ida Makoto, Structure of Criminal Law in General Part, 2005, Seibundoh Publishing Co., Ltd, p428.

health or life. However, if it happens on the top of high rise, it is probable to cause death.

Notice that comprehensive result-dangerousness theory does not necessarily expand the application of aggravated consequential offense. Because comprehensive result-dangerousness is judged on the basis of objective materials, whether the defendant can foresee the elements of creating dangerousness is not related to judgment of conduct. Therefore, some scholars may argue that this standpoint will unreasonably expand the scope for applying aggravated consequential offense because the defendant is responsible for the unforeseeable result. However, it is totally unnecessary trepidation. Basic conduct is just one of the elements about limiting aggravated consequential offense. Besides basic conduct, causation and mental state are also important limitations. For instance, if a victim is afflicted with haemophilia, defendant's conduct of cutting off the victim's little finger would be seen as basic conduct because it is probable to kill him. However, the defendant cannot be convicted of injury causing death if he cannot foresee the victim's physical condition. Another example is, even if a defendant pushes a victim out from car on the highway, he could not be guilty of injury causing death if the victim is killed by a car running in wrong direction. Because the dangerousness of being killed by a car in the opposite direction on the highway is not created by the conduct of pushing, thus the result of death is not immediately actualized from the dangerousness created by the basic conduct, which could be seen as violating causation limitation.

2.1.2.4 Difference between Basic conduct and Causation

As discussed above, special circumstances can make the harmful conduct more dangerous, thus such conditions are important elements for evaluating basic conduct. Nonetheless, the traditional scholars classify these elements to the scope of causation; which means, some people may ask that whether dangerous requirement confuses the

contents of basic conduct with causation? To this question, taking the example of victim's special physique, this chapter gives a negative answer.

In judicial practice, many cases of intentional injury causing death are related to victim's special physique. Generally speaking, it is impossible to cause victim's death with common attack or violence. However, if a victim is so weak that his body is easy to have some pathological changes, common attack may place the victim in lethal situation. There are different opinions about how to punish the defendant in the condition that the victim dies from some special pathological changes inflicted by common attack.

Case 1: Defendant Cui and victim Wang fought each other because of quarrelling. Cui punched Wang's face and chest; Wang got injury and lost consciousness after falling down to the floor. Cui tried to save Wang with first aid. According to forensic report, Wang died from subarachnoid hemorrhage caused by external force under the condition that cerebrovascular pathological change has occurred. The trial court convicted Cui of the crime of injury with aggravated circumstance of causing death and sentenced him fix-term imprisonment of 5 years.^① Cui did not accept the conviction and appealed. The Appeal Court held that the victim's death was demonstrated to be caused by bleeding based on cerebrovascular pathological change in infliction of external force, therefore the causal relationship between death and assault could be demonstrated.^②

Case 2: Defendants Liang, Li, Lv and Zhao intended to assault Cha and Feng for reprisal. At first, Liang went to stop the victims and other defendants followed. Liang flapped Feng in the face and knocked Cha down on the floor. Soon afterwards, the 4 defendants beat Cha together until Cha cannot move. The conclusion of judicial expertise showed that this case is compatible with sudden death based on myocarditis. Slight injury, excited emotion, drinking and so on, could inflict outbreak of myocarditis.

① People's Court of Wei Bin District of Xinxiang, Henan Province, Judgment Paper of Penal Sentence, 2011, First Trial, No.127.

② Intermediate People's Court of Xinxiang City, Henan Province, Judgment Paper of Penal Sentence, 2011, Last Resort, No.143.

The court held that there was casual relationship between defendants' assault and victim's death because the intentional injury performed by defendants objectively induced myocarditis and caused death; Furthermore, defendants knew that their conducts of assaulting are possible to inflict injury, although they could not know about the myocarditis and the death. Given different objects and conditions, there are many possibilities about the result inflicted by intentional injury, which is not in defendant's control and precognition. Nonetheless, it was unnecessary to require defendant to precisely recognize the specific result beforehand. As long as the defendant knew that he was performing the conduct of intentional injury, and there was casual relationship between the eventual result and harmful conduct, the defendant should be guilty of negligent culpability about causing the harmful result.^①

Case 3: Defendant Deng conflicted with the victim. The victim fell over and died soon after being kicked by Deng. Autopsy report found that the victim was suddenly dead from heart attack, which is induced by sudden addition of cardiac load that resulted from acute emotion fluctuation and physical strength depletion in the course of conflict. The court held that Deng negligently inflicted injury to the victim and caused death, thus convicted him of causing death through negligence.

Case 4: Gong fought with Zhang. They were stopped and departed by others. Zhang came back to his truck. Soon afterward, Zhang foamed at the mouth and died on the steering wheel. In light of the forensic report, Zhang has slight bruises at right forearm and left thigh and died from subarachnoid hemorrhage.

The trial court held that Gong inflicted the hand play and caused the victim's death. Gong's conduct demonstrated that he intended to hurt Zhang, and he performed the conduct of intention to inflict injury to Zhang. It seemed that defendant's conduct caused only slight injury, which was unrelated to pathological changes resulting in subarachnoid hemorrhage. However, it should be noticed that although the victim's

^① Intermediate People's Court of Hangzhou City, Zhejiang Province, Judgment Paper of Penal Sentence, 2009, First Trial, No.91.

potential pathological change was objective, yet it had not become reality until Zhang's conduct; thus the inducement of pathological change can be seen as the cause. In this case, the victim's pathological change on the spot was because of the defendant's assault. It was enough to prove that the defendant's conduct was the most objective and immediate inducement of the pathological change, thus there was a causal relationship between the defendant's assault and the victim's death. Therefore, Gong's conduct accorded with constitutive requirements of intentional injury and he should be guilty of intentional injury causing death and sentenced to imprisonment of 7 years. Nonetheless, the appeal court held that according to the autopsy report, the victim's injury on the surface was slight. Furthermore, the injured area was far away from the head. In fact, Zhang died from intracranial hypertension caused by subarachnoid hemorrhage. Given the pathological pattern of victim's subarachnoid hemorrhage, which is scattered on a broad range including bottom of brain, bilateral temporal lobe, and most parts in the top of cerebral hemisphere, cerebellum and brain-stem, the outbreak of potential disease was the underlying cause of death. Although wound and altercation were also the objective inducement, they could merely prove that Gong was negligent to cause the victim's death and guilty of causing death through negligence. Thus Gong should be convicted of the crime of causing death through negligence.^①

Even if courts gave different conclusions about the relationship between victim's special physique and his death, there was a common point that all these courts focused on the causation requirement. In case 1 and case 2, courts held that the defendants were guilty of injury causing death because they intended to inflict injury to victims and there are causal relations between their assaults and victims' deaths. Therefore, even if a victim bears some diseases difficult to be found, it would be necessary to convict the defendant of aggravated consequential offense. In contrast, case 2 and case 3 reflect that courts denied conviction of injury causing death on the basis of victims' special

^① Intermediate People's Court of Nanping City, Fujian Province, Judgment Paper of Penal Sentence, 2002, Last Resort, No. 222.

physique.

Similar to judicial practice, there are different approaches on victim's special physique inflicting death. Specifically speaking, there are three of them. Scholars supporting subject approach hold that the defendant shouldn't be liable for result beyond his control. Therefore, whether a defendant foresees the victim's special physique should be considered as an element of determining correspondence of causation. If the special physique cannot be recognized by the defendant, the extended result should not be imputed to him.^① Scholars supporting compromising approach hold that the function of special physique in judging causation should be treated differently according to specific situations.^② Scholars supporting objective approach hold that causation should be judged according to all factors in the crime scene. In other words, special physique is the objective element of judging correspondence of causation. On the contrary, foreseeability to the extended result is just an element of mental state.^③

It is obvious that both judges and scholars treat cases of injury causing death on condition of victim's special physique as a question of causation. Nonetheless, this standpoint should be reviewed. First, the defendant's mental state should not be the content of causation. Causation is the objective connection between act of perpetrating and harmful result.^④ Therefore, it is unreasonable to confirm the causation requirement based on foreseeability to the result. Otherwise, relationship between objective and subjective elements will be confusing.^⑤

Second, dangerousness of basic conduct is immediately connected with potential hazard. Dangerousness of circumstance is an ingredient of special dangerousness created by basic conduct. It is well known that similar conducts will cause different

① Tatsui Satoko, A Study of Causation//Kawabata Hiroshi, etc., Research on Theoretical Criminal Jurisprudence (1), 2008, Seibundoh Publishing Co., Ltd, p21-27.

② Sun Yunliang, Inculpation of Causing Victim's Special Physique, 2012, Law Science, (12), p110.

③ Maeda Masahide, Criminal Law: General Part, 2006, University of Tokyo Press, p182.

④ Li Hong, Thinking Questions of Criminal Law in General Part, 2007, China Renmin University Press, p168-169.

⑤ Kobayashi Kentarou, Causation Theory and Objective Attribution Theory// Kawabata Hiroshi, etc., Research on Theoretical Criminal Jurisprudence (2), 2009, Seibundoh Publishing Co., Ltd, p26-27.

results in different circumstances. If a defendant made the victim falls in the dangerousness of circumstance, he has created the special dangerousness to the victim. Therefore, although conduct of basic crime inflicts the change of special physique and causes death, the defendant can be convicted of injury causing death.

Third, the objective approach confuses the perpetrating act with causation. According to the objective approach, the victim's special physique is the content of proximate cause in the broad sense. Proximate cause in broad sense refers to the dangerousness of conduct to cause result. As a result, proximate cause cannot be differed from the perpetrating act when focusing on the question of dangerousness. Maeda Masahide holds that proximate cause in broad sense is different from perpetrating act in two dimensions. On the one hand, proximate cause in broad sense is discussed only when actual result happened, but perpetrating act mainly directs to the case without result. On the other hand, there are differences between proximate cause in broad sense and perpetrating act as to the degree of dangerousness. Nonetheless, occurrence of harmful consequence cannot change the nature of perpetrating act. In other words, whether an act causes result is not the substantive reason that makes difference between perpetrating act and proximate cause in broad sense. In essence, proximate cause in broad sense also is related to the question on dangerousness of act. Furthermore, there is no reason to reduce the degree of dangerousness on perpetrating act. In other words, perpetrating act should be the same as proximate cause in degree of dangerousness. Thus the argument on difference between perpetrating act and proximate cause is untenable. In addition, there are different meanings between broad sense and narrow sense as to proximate cause. Generally speaking, supporters of objective approach do not involve abnormal causation into the proximate cause in broad sense. However, abnormal causation is the important content of proximate cause in narrow sense. To this conflict, there is little convincing explanation.

Basic conduct actually is perpetrating act of aggravated consequential offense.

Perpetrating act should be dangerous to cause harmful result. If judgment of dangerousness is transferred to the causation requirement, perpetrating act requirement will lose its substantial content. In contrast, if occurrence of dangerousness belongs to causation requirement, the content of causation will be overloaded. To sum up, argument of distinguishing proximate cause in broad sense from the perpetrating act confuses causation requirement with perpetrating act requirement.^① The potential elements of increasing risk, rather than the content of causation, such as victim's special physique, should be the ground of judging basic conduct.

2.2 Limitation on Extended Result

Almost no scholar discusses extended result in Japanese Penal Code, because extended results generally are identifiable in provisions, being limited in causing injury or death. In contrast, the Chinese Criminal Law provides many aggravated consequential offenses in terms of abstractly extended results even implicitly extended results. For example, causing especially serious consequences is the requirement of aggravation on punishing the crime of producing or selling food not up to the food safety standards.^② Causing especially serious consequences belongs to abstractly extended result. For another example, serious circumstance and especially serious circumstance are the condition of increasing punishment to the crime of producing or selling bogus drugs.^③ These circumstances contain actual results, which belongs to the implicitly extended result. The content of abstractly extended result and implicitly

① Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p140.

② Article 143 in Chinese Criminal Law states that whoever produces or sells food not up to the food safety standards which may cause any serious food poisoning accident or any other serious food-borne disease shall be sentenced to imprisonment of not more than 3 years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine; or if there are especially serious consequences, shall be sentenced to imprisonment of not less than 7 years or life imprisonment and a fine or forfeiture of property.

③ Article 141 in Chinese Criminal Law states that whoever produces or sells bogus drugs shall be sentenced to imprisonment of not more than 3 years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 10 years and a fine; or if any human death is caused or there is any other especially serious circumstance, shall be sentenced to imprisonment of not less than 10 years, life imprisonment or death penalty and a fine or forfeiture of property.

extended result is unclear, but this does not mean that there is no limitation on these results. As analyzed below, the extended result should be limited in two requirements: actual damage requirement and aggravation requirement.

2.2.1 Limitation of Actual Damage Requirement

There are different opinions about whether dangerousness can be an extended result. Chinese jurist Zhang Ming-kai holds that although abstract dangerousness is different from specific dangerousness in the degree, specific dangerousness cannot be considered as extended result of abstract dangerousness.^① For instance, the crime of producing or selling poisonous or harmful food shall be punished severely on the condition that there is serious result or especially serious result. Although the basic result of such crime is the abstract dangerousness to life or health of human, circumstances of increasing punishment of the crime does not include the specific dangerousness to life or health of human. In contrast, Chinese jurist Li Bang-you holds that the extended result contains dangerousness. Because the basic crime infringes the less important interest than the crime of causing extended result, even if the basic crime is result crime, the criminal law can prescribe dangerousness result to be extended result.^②

In fact, the relation between dangerousness and extended result is related to two questions: (1) whether dangerousness is possible to be extended result in theory; (2) whether dangerousness is extended result according to the law. To the first question, it is difficult to exclude dangerousness from extended result in theory. In a broad sense, dangerousness can be classified as a kind of result.^③ Furthermore, because specific dangerousness is more harmful than abstract dangerousness, thus it is reasonable to make a difference of the punishments. If a basic conduct causes specific dangerousness

① Zhang Mingkai, Seriously Restricting Range and Punishment of Aggravated Consequential Offense, 2005, Chinese Journal of Law, (1), p88.

② Li Bangyou, Research on Basic Theory of Aggravated Consequential Offense, 2001, Wuhan University Press, p12-13.

③ Imai Takeyoshi, etc., Criminal Law: General Part, 2009, Yuhikaku Publishing Co.,Ltd, p61.

to some important interests beyond the range of its requirement, it is possible to punish the defendant by a severer sentence than basic crime. For example, German Penal Code provides that incendiarism placing another person in danger of injury is a kind of aggravated arson.^①In a word, specific dangerousness is an important element of illegality requirement. If the statutory penalty is limited in a reasonable extent, the specific dangerousness of some important interests is a rational factor to increase punishment. Nonetheless, specific dangerousness cannot be extended result in Chinese Criminal Law due to the following reasons:

First, if specific dangerousness belongs to extended result, principle of proportionality would be challenged. Abstractly extended result or implicitly extended result may contain actual damage result. Therefore, if specific dangerousness is a kind of extended result, there would be no difference between causing dangerousness or actual damage. For example, the extended result of producing or selling food not up to food safety standards contains specific dangerousness to serious damage of people's health. If a defendant causes dangerousness or damage to person's health, he would be punished in the same statutory penalty.^②Furthermore, the penalty of aggravated consequential offense in Chinese Criminal Law is very serious, it is then unreasonable to forbid the specific dangerousness through such severe punishment.

Second, negligent dangerousness crime is not accepted by the Chinese Criminal Law. Aggravated consequential offense is a combination of basic crime and crime of causing extended result. If specific dangerousness should belong to extended result, negligent dangerousness crime would be affirmed. Although some scholars advocate negligent dangerousness crime, negligent crime should be limited in actual damage

① Section 306 in German Penal Code states that the defendant of committing arson shall be liable to imprisonment from one to ten years; Section 306a states that arson placing another person in danger of injury shall constitute aggravated arson incurring the penalty of imprisonment of not less than one year.

② Article 143 in Chinese Criminal Law states that whoever produces or sells food not up to the food safety standards which may cause any serious food poisoning accident or any other serious food-borne disease shall be sentenced to imprisonment of not more than 3 years or criminal detention and a fine; if any serious damage is caused to the people's health or there is any other serious circumstance, shall be sentenced to imprisonment of not less than 3 years but not more than 7 years and a fine; or if there are especially serious consequences, shall be sentenced to imprisonment of not less than 7 years or life imprisonment and a fine or forfeiture of property.

crime according to Article 15 in the Chinese Criminal Law. This article states that occurrence of harmful consequence is a requirement of negligent crime. Furthermore, negligent crime is punished as an exception of punishing intentional crime. The consequence of negligent crime should be limited in actual damage. Therefore, crime of causing extended result through negligence should be an actual damage crime.

Third, negligent crime should be provided clearly in the law. In light of principle of forbidding indirect punishment, if circumstance is not a factor for conviction, it cannot be treated as a factor for increasing punishment.^① If the criminal law punishes negligent dangerousness crime, there would be clear-cut provisions. However, the crime of causing abstractly or implicitly extended result is provided in the law. If extended result includes dangerousness, it would betray the principle of forbidding indirect punishment. In other words, crime of causing specific dangerousness through negligence cannot be a component of aggravated consequential offense. Therefore, dangerousness is not included in extended result.

In sum, although abstractly or implicitly extended result is possible to contain specific dangerousness in theory, extended result should be limited in actual damage result in positive law.

2.2.2 Limitation of Aggravation Requirement

Extended result should be more serious than result of basic crime on quality or quantity. First, aggravation of quantity should avoid repeated conviction of the same element. It is necessary to insist on the principle of division and cooperation, requiring legislator and judge to respect each other's duty and to cooperate for achieving the just measurement of punishment. If either of them despises this principle, there would be obvious danger on just measurement of punishment.^②

In light of this principle, judge's sentence should not be out of definite provisions,

① Zhang Mingkai, Result and Measuring Sentence: Forbidding Consequential Liability, Repeated Evaluation and Indirect Punishment, 2004, Journal of Tsinghua University(Philosophy and Social Sciences), (6), p56.

② Kawasaki Kazuo, Om Systematic Measurement of Penalty, 1991, Seibundoh Publishing Co., Ltd, p17.

otherwise it would overstep the legislator's authority. In other words, the circumstance as requirement of conviction cannot be used to measure the degree of sentence more than once.^①Therefore, extended result should be a requirement of basic crime. For example, causing the listed company to suffer from serious losses is the result requirement of breach of trust to damage the interest of listed company. Furthermore, according to the judicial interpretation, if a defendant should offer money, product, service or other property to other organizations or people for free and cause the listed company to suffer immediate loss more than 1.5 million yuan, the result requirement would be satisfied.^②Thus these circumstances should not be considered as factors of measurement of punishment.

Nonetheless, if result requirement is quantifiable, what the conduct has caused would exceed the quantity for convicting basic crime, the supernumerary result can be extended result. For example, causing serious casualty or any other serious consequences is a result requirement of negligently causing serious accident. It is impossible to exclude serious casualty from the extended result of the crime. According to the judicial interpretation, if a defendant should cause more than one person's death or more than three persons' serious injury, the result would belong to serious casualty; if a defendant causes more than 3 persons' death or more than 10 persons' serious injury, the result would belong to especially serious circumstance for increasing punishment. Therefore, we should understand the principle of forbidding repeated evaluation in formal sense.

Second, if there was a difference between basic result and extended result in quality, there are three rules of judging the extended result:

(1) Extended result should be judged according to the degree of different interests.

Generally speaking, the more important the infringed interest is, the more serious the

① Zhang Mingkai, Seriously Restricting Range and Punishment of Aggravated Consequential Offense, 2005, Chinese Journal of Law, (1), 87.

② 18 Article of Supplementary Provisions the Supreme People's Procuratorate and the Ministry of Public Security on Standards of Investigating and Prosecuting Economic Crimes II (2008).

result would be. In light of liberalism, individual interest is prior to collective interest. Furthermore, personal right is more important than property right; right to life is more important than right to health. Nonetheless, combination of several results of low degree can be more serious than one result of high degree. For example, inflicting thousands of people to slight injure can be the extended result of producing or selling food not up to food safety standards.

(2) If a result was not forbidden by the provision of basic crime, it cannot be an extended result. Extended result should be a forbidden result in the criminal law. If extended result is not forbidden in the criminal law, it cannot become the extended result of aggravated consequential offense. Otherwise, the unforbidden result will be punished indirectly through applying aggravated consequential offense. For example, a victim's husband abandoned her because she was raped. Result of divorce is very harmful to the victim, but it cannot be the extended result of rape. Nonetheless, there is no crime requiring divorce as an constitutive element. Therefore, this result cannot be extended result of divorce.

Third, abstract result cannot be limited by specific result. In some situations, both specific result and abstract result are included in extended result. Whichever the extended result is, specific or abstract, it will inflict the same aggravation of punishment. Therefore, the abstract result should be equivalent to specific result, otherwise the punishment would violate the principle of proportionality. For example, causing serious damage to victim's health and other serious circumstances are extended results of producing or selling bogus drugs. Therefore, if the serious circumstance is slighter than causing serious injury, the defendant would not be punished through provisions of aggravated consequential offense. Furthermore, specific result can limit the form of the abstract. For instance, causing a victim's or her close relatives' death, serious injury or other serious consequences are the extended results of trafficking women. Because specific result does not include slight injury, causing the victim or her close relatives to

be slightly injured cannot become the extended result of such crime.

2.3 Limitations on Causation

Causation requirement is a requirement of attributing extended result to basic conduct. Generally speaking, causation is the legal relationship between perpetrating act and harmful result. In light of analysis above, basic conduct is required to create special dangerousness of causing result, which should not be discussed in the context of causation requirement. Thus the causation requirement should focus on transferring dangerousness to actual result. There are two types of legal causation. First, if basic conduct causes the result as the determinant in specific situation, the relationship between conduct and result would belong to direct causation. Second, if a conduct is not the determinant of causing result, interference elements are possible to cut off the causal relationship. However, if a conduct is the proximate cause of interference element, the result often can be legally attributed to the conduct. This causation belongs to indirect causation.^①

Causal relationship between basic conduct and extended result in the formal combination is the same as common crime of negligence. Therefore, the causation could include the indirect causation. Nonetheless, special illegalities are necessary to justify the substantive combination. Furthermore, causation requirement is an important part of illegality. Therefore, the substantive combination in aggravated consequential offense should be required more strictly than other crimes. Many jurists supporting dangerousness theory limit the causation of aggravated consequential offense in the immediateness test, i.e., basic conduct should immediately transfer special dangerousness to extended result. Nonetheless, it is controversial as to how to apply the immediateness test. Some treat the rule as proximate cause rule. In contrast, others differentiate proximate cause rule from immediateness test. Moreover, there are

① Atsushi Yamaguchi, Causation (2)/Nishida Nonyoki, etc., Disputes of Criminal Law, 2007, Yuhikaku Publishing Co., Ltd, p23.

different opinions in the latter approach, which focus on whether psychological element can influence judgment of immediateness. Because of the importance of immediateness test, this part will pay attention to validity of this rule and try to give a reasonable interpretation for applying the rule.

2.3.1 Understanding the Immediateness Test

2.3.1.1 The Basic Contents of Immediateness Test

Immediateness test is also called immediateness requirement or immediateness theory. According to the test, causation of aggravated consequential offense should be limited in a direct relationship between basic conduct and extended result. Before the World War II, the Reich Court had referred to the immediate relation. There are several classic cases about the origin of immediateness rule as follows.

The Reich Court, i.e., the Supreme Court in previous Germany, in 1881 held that the Section 309 in the German Criminal Code undoubtedly required conviction of arson causing death to be based on immediate relationship between defendant's requisite negligent conduct causing the warehouse to be burned and the victim's death. In other words, the death should be directly caused by fire and smoke as the further effect of related arson.

In the judgment about a case in which the victim trapped inside and died from a sheet of fire, which was made in 1907, the Reich Court held that the victim's death could not be attributed to arson or arson by negligence unless there is an immediate relationship between the victim's death and the fire.

The Reich Court, in a case of 1910 in which the defendant hit the victim's belly by a loaded gun while the gun fired accidentally and killed the victim, ruled that the conviction of injury causing death should be conditioned that the injury should be the immediate reason of causing the death.

In a case in 1924, the Reich Court held that causing grievous bodily harm should

be convicted on the basis of injury as requisite result provided in Section 223. The judgment is about a case in which the defendant hit the victim with a whip, which caused the victim to fall down and go blind, thus the court denied the conviction of causing grievous bodily harm.

Cases mentioned above show that immediate relationship is the reason of denying aggravated consequential offense based on the premise of affirming the relationship between basic conduct and extended result. In other words, immediateness test applies a stricter standard than proximate cause test and but-for test does. Because immediateness test can reduce the risk of abusing serious sentence, many scholars advocate limiting aggravated consequential offense through this test. Japanese jurist Ida Makoto holds that although running away from assault is the proximate cause of the victim's falling down and injury, it is difficult to convict the defendant of injury as aggravated consequential offense of assault.^① Therefore, immediateness test is seen as a special application of causation requirement, i.e., basic conduct creates high risk of causing extended result and makes the risk actually become an extended result. According to the test, if a basic crime was not committed by dangerous a way or the dangerousness hasn't become actual result because of interference of other elements, the extended result should not be attributed to the basic conduct.

2.3.1.2 Immediateness Test and Objective Attribution

Both immediateness test and objective attribution rule are related to liability of causing results, but they are in difference in following aspects:

First, immediateness test is different from the objective attribution rule on historical origins. Objective attribution rule originates from Aristotle's theories. According to his opinions, moral is the judgment on attitudes of internal discovery. Objects of compliment and criticism are based on the attitude of human mental state.^② It

^① Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, Gendai Keijiho, 4(12), p109.

^② Yamanaka Keiichi, *Theories on Objective Attribution in Criminal Law*, 1997, Seibundoh Publishing Co., Ltd,

is obvious that the imputation rule in ancient times belongs to subjective imputation rule, which is different from objective attribution rule in modern times.

objective attribution rule derived from the trend of correcting expanding causal relationship. In the nineteenth century, naturalism took an important role in the causation theory. As a result, but-for test based on the equivalence theory as a kind of naturalistic causation theory, irrationally expanded the scope of affirming causation requirement.^① However, beginning from the twentieth century, appraised jurisprudence was substituted by positivist jurisprudence. As a result, but-for test, which focused on formalism, began to be replaced by kinds of causation theory as substantial idea of crime. Many scholars search the reasonable attribution of result rather than the physical relationship between conduct and result. Among those theories, proximate cause theory influences most in the modern time. The objective attribution theory began with the proximate cause theory and offered a more accomplished system to judge whether the result is attributed to the conduct.

Based on the judgment of objective possibility, an idea of proximate cause theory, objective attribution theory constructs the concept of dangerousness on the core of criminal jurisprudence, in order to determine the attribution of result according to the judgment of dangerousness. As Jescheck and Weigend said, only if a defendant performed the requisite conduct, which inflicted harm to object protected by law, and the dangerousness in the result conforms to constitutive requirement became reality, can the result caused by human conduct be related to formulation of objective attribution. Furthermore, factors such as lacking of or reducing dangerousness and exceeding the reach of constitutive requirements can influence the judgment of objective attribution.^② Therefore, objective attribution is a subversion of formalism on criminal law.

p280.

① Yoshida Toshio, Causation and Objective Attribution (Volume II), 2010, The Gakuen Review, (146), p196.

② Hans-Heinrich Jescheck, Thomas Weigend, Textbook of German Penal Code: General Part, Xu Jiusheng(trans), 2001, China Legal Publishing House, p350.

In contrast, immediateness test was born in the principle of culpability. As mentioned above, aggravated consequential offense was considered to be inherently unprincipled. Although the combination theory resolved the problem of aggravated consequential offense on violating mental principle of culpability, the balance of crime and penalty is still questionable. Therefore, immediateness test, as an element of special illegality, has been suggested for achieving a just conclusion. That is to say, the immediateness test is different from objective attribution theory in the end.

Second, there is a difference between imputation theory and immediateness test on content. The objective attribution theory is only to reconstruct the system of analyzing attribution of a result on the basis of existing standards, rather than offering a new standard for determining causation requirement. As Chinese jurist said, the occurrence of objective attribution showed that person had given up searching for single standard of attribution. Its rules are multifarious and disorderly, thus there is no way to apply a unified standard on all questions of attribution. As a result, objective attribution theory directs at trying hard to submit and construct the fundamental framework of dealing with the attribution of result.^① In a word, objective attribution theory just is the theory of integrating different rules rather than offering a new rule for the attribution of criminal result. In contrast, immediateness test is a special limitation of aggravated consequential offense on the basis of reconstructing the illegality. Therefore, these two theories concern to different questions.

Third, immediateness test is stricter in limiting application of aggravated consequential offense than objective attribution theory does. Although both objective attribution theory and immediateness test oppose but-for test in expanding the scope of attribution, they have different standards of limitation. The objective attribution theory counters with but-for test on confusing physical causation and legal causation. According to the objective attribution theory, proximate cause is the test for attribution

^① Lao Dongyan, *Distribution of Risk and Attribution in the Criminal Law: Rethinking Causation Theories*, 2010, *Trubune of Political Science and Law*, (6), p105-106.

of criminal result.^①In contrast, immediateness theory opposes but-for test on the basis of principle of culpability rather than method of analysis. Furthermore, even if basic conduct is the proximate cause of extended result, it is possible to be not in line with immediateness test. In other words, immediateness test offers a stricter standard to limit aggravated consequential offense than the objective attribution theory does.

2.3.1.3 Objections to Immediateness Test and Related Evaluations

Some scholars hold that there is no special imputation theory on aggravated consequential offense, which should also be limited by objective attribution theory, thus it is unnecessary to apply immediateness test to judge causation requirement. For instance, Japanese jurist Machino Hajime approves of dangerousness theory to interpret the construction of aggravated consequential offense. Nonetheless, he holds that the reason of increasing punishment for aggravated consequential offense is the unworthiness of conduct and high foreseeability of the extended result caused by defendant's conduct. The immediateness test should not be an additional limitation on aggravated consequential offense.^② For another instance, Japanese jurist Yamanaka Keiichi points out that German courts once required that extended result should be caused immediately by basic crime, but the immediateness test was not applied in the judgments of later period. According to Yamanaka Keiichi's opinion, special imputation theory is unnecessary and should be merged into generally objective attribution theory.^③ Nonetheless, these objections cannot be accepted because of following reasons:

At first, if special dangerousness is the ground of increasing punishment, it is necessary to pay attention to the immediateness relationship between dangerousness and result. Special dangerousness cannot independently satisfy the requirement of justifying

① Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p244.

② Machino Hajime, Comment on "A Study of Statutory Punishment for Aggravated Consequential Offense", 1991, *The Horitsu Jiho*, 63(12), p119.

③ Yamanaka Keiichi, *Theories on Objective Attribution in Criminal Law*, 1997, Seibundoh Publishing Co., Ltd, p173.

severe punishment. For instance, German Penal Code provides that conduct with dangerousness causing death is one circumstance of aggravating punishment. If a defendant committed the crime of arson in the condition of placing another person in danger of death, he shall be imposed on the sentence of imprisonment not less than 5 years. On the other hand, German Penal Code provides that arson causing death is the aggravated consequential offense of arson, which is punished by imprisonment for life or for not less 10 years. It is obvious that the punishment for arson causing death is severer than the total punishment of arson causing danger in life and causing death through negligence. Although dangerousness causing death is an element of special illegality, it is doubtful why arson causing death is imposed such severe punishment. In sum, it is impossible to completely depend on special dangerousness for explaining the reasonability of aggravated consequential offense. The legislator only provides an extended result as aggravated circumstance on the basis of general possibility of causing serious result in certain crime, thus severe punishment cannot be applied to the defendant who causes extended result, which is in accordance with the legislative object.^① Furthermore, there are some crimes that are imposed to exceedingly severe punishment, such as kidnapping causing death in Chinese Criminal Law. The immediateness test can reduce the harmfulness of some legislation on irrational punishment. In sum, immediateness test serves as important content of illegality to justify the degree of increasing punishment.

Additionally, even if special dangerousness is treated as reflection of conduct-unworthiness, immediateness test is necessary to limit aggravated consequential offense. Two Korean jurists hold that aggravated consequential offense is punished more seriously than the crime purely committed through negligence causing extended result in that the extended result is the realization of potential dangerousness generally included in intentional basic crime. In this point, the conduct-unworthiness of

^① Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press·China, p219.

aggravated consequential offense is more serious than normal negligent crime.^① It is clear that the two Korean jurists analyze the reasonableness of aggravated consequential offense on the basis of conduct-unworthiness theory. Nonetheless, they also hold that extended result should be immediately caused by basic conduct without any interference.^② It shows that conduct unworthiness theory does not reject immediateness test.

Thirdly, German precedents cannot determine the reasonableness of immediateness test. It must be admitted that the immediateness test was derived from German precedents. Furthermore, some judicial precedents in Germany recently modified the immediateness test. For instance, the Supreme Court of Germany expanded the application of immediateness test in a case of 1992. In this case, the defendant had a quarrel with the victim and used a hammer of 550 grams to assault the victim's head and caused her to fall down on the floor. The defendant continued to hit the victim's head over and over again. As a result, the victim lost her consciousness. However, the defendant took the victim for dead and ran away. In the course of running away, the defendant came across his elder male cousin and told him the fact of homicide, but his cousin was skeptical about the victim's death and went to confirm. When the cousin found the victim, he also thought that the victim was dead. However, the cousin believed that the defendant did not properly hide the body. Therefore, the cousin threw the victim to a pool full of water and then hung the victim on a doorknob.

According to the forensic analysis, the victim died from being drowned in the water. The court held that the Germany Criminal Law was to prevent the inherent dangerousness of inflicting injure. On the other hand, the court held that although the third party intervened in the relationship between the defendant's assault and the victim's death, the immediate relation of realizing the dangerousness should be affirmed.

① Jin Rixiu, Xu Fuhe, *Korean Criminal Law: General Part*, 11th ed, Zheng Junnan(trans), 2008, Wuhan University Press, p449.

② Jin Rixiu, Xu Fuhe, *Korean Criminal Law: General Part*, 11th ed, Zheng Junnan(trans), 2008, Wuhan University Press, p452.

Therefore, the court convicted the defendant of injury causing death. The conclusion of this case is considered to be violating the immediateness test.^① Different opinions of judicial precedents reflect that the immediateness test is indecisive in the judicial practice. Nonetheless, German judicial precedents cannot be the reason of denying or advocating the immediateness test. Judicial practice is possible to improperly broaden the application of aggravated consequential offense. In a word, although the immediateness test was found in German precedents, it is irrational to totally connect reasonableness of the test with inclination of German precedents.

In brief, the immediate relationship between basic conduct and extended result should be the limitation of aggravated consequential offense. Nonetheless, there are three questions on understanding immediateness test. The first is that what evaluative criterion is included in immediateness test. The second is whether the material for judging immediateness test belongs to objective element or subjective element. The third is that when the judge should evaluate immediate relationship. These questions will be discussed in following types of interference.

2.3.2 The Interference of Defendant's Conduct and Immediateness Test

The interference of defendant's conduct is an important category of causation. According to the proximate cause theory, if defendant performs a second criminal conduct, which immediately causes the result and is proximately related to the first, the first conduct would be treated as proximate cause of result.^② The theory is applied to the case of integral intention. In the case of integral intention, because the defendant's second conduct does not belong to abnormal interference, the legal link between the first conduct and the result should be affirmed. Furthermore, the result occurs in the reality is totally consistent with the result that is attempted to realize, thus the

① Saeki Kazuya, Relationship between basic crime and Extended Result in Aggravated Consequential Offense: Focusing on Injury Causing Death, 2002, *The Law Review of Kansai University*, 52(3), p88-90.

② Han Zhongmo, *Principle of Criminal Law*, 2002, China University of Political Science and Law Press, p2002.

intentional crime should be accomplished.^①This augmentation is based on a premise that the result caused by the second conduct is legally connected with the first conduct. In other words, the result is attributed to the originally dangerous conduct because the originally dangerous conduct affects the following conduct and leads to the result.^②

In Japanese precedents, the proximate cause theory is accepted. After the first conduct was committed intentionally as perpetrating act, the defendant inadvertently commits the second conduct. If the second conduct is not unusual and abnormal, the legally causal relationship between the first conduct and the harmful result can be affirmed.^③ The inclination of Japanese precedents can be explained by three cases.

(1) The defendant attempted to kill the victim and pushed the victim into the river from a cliff. However, the victim was hung on a tree on the cliff and lost his mind. The defendant pretended to help the victim and went down to unloose the victim's body from tree. As a result, the victim was killed by the second conduct. The court convicted the defendant of accomplished murder.^④

(2) The defendant wanted to strangle the victim with rope. When the victim stopped struggling, the defendant took the victim for dead and hid the victim in the sandy beach. As a result, the defendant died from joint effect of strangling and sand breathed in. The trial court convicted the defendant of accomplished murder. The defendant disagreed with this conclusion and held that there was deviation in the course of committing crime, thus the intention of murder should be denied. To the objection, the appeal court held that according to the universal opinion of social life, there was casual relationship between the defendant's conduct of strangling and the victim's death. The causation cannot be denied on the basis of defendant's mistake on victim's death.^⑤

① Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p254.

② Lin Dongmao, *Instruction of Criminal Law*, 5th ed, 2009, China Renmin University Press, p189.

③ Ida Makoto, *Criminal Law*, 2008, Yuhikaku Publishing Co.,Ltd, p184-185.

④ Court of Cassation of Japan, Taisho era(12.3.23), *Criminal Record*, Vol.2, P254. Cited in Maeda Masahide, *Criminal Law: General Part*, 2006, University of Tokyo Press, p192

⑤ Court of Cassation of Japan, Taisho era(12.4.30), *Criminal Record*, Vol.2, P378].Cited in Hirasawa Osamu, *Elements for Punishing and Sufficient Constitutive Requirements*, Chuo-Gakuin University 2010, *Review of Faculty of Law*, 23(2), p3(108)-4(107)..

(3) The defendant intended to harm the victim and throttled him. The defendant took the victim for dead when the victim fell into suspended animation. To make the victim seem to be drowned, the defendant threw the victim into a river. As a result, the victim was drowned actually. The court held that the defendant should be convicted of injury causing death if he caused the victim to death through intention of illegitimate injury. In the occasion that some movements without the intention of homicide additionally combined to result in death, there is causal relationship between the conduct of intentional injury and the result of death.^①

The proximate cause theory not only is applied to the intentional crime but also aggravated consequential offense. Japanese precedents accepted the proximate cause test, thus courts generally attributed the extended result to the first conduct on condition that the first conduct is the proximate cause of committing the second conduct. For instance, the defendant of committing rape mistook the victim for being killed by his assault, thus he threw the victim outdoor and victim froze to death.^②

In judicial practice of China, proximate cause theory is a dominant approach to solve the problem of interference of defendant's second conduct. For instance, two defendants used overpowering drug on a victim for taking the chance to steal money. Nonetheless, the victim woke up when defendants took her money and fought with defendants. Defendants sealed the victim's mouth with rubberized tapes and caused the victim to lose consciousness. Defendants felt that victim was not breathing and mistook her for dead. Defendants used four black plastic bags to cover the victim's head and bind seven layers of plastic tape to fix the victim's neck. Then, defendants put the victim in the luggage. According to forensic analysis, the victim died from defendants' conduct of covering the victim's head with plastic bags. Thus the second conduct of

① Court of Cassation of Japan, Taisho era(7.11.30), Criminal Record, Vol.24, P1461. Cited in Nakamura Shuji, Cases concerning general limitations, act, omission, and causation, Action, Omission, Causation, 2010, Kumamoto Law Journal, (3), p112.

② Supreme Court of Japan, Showa era (36.1.25), Casebook, Vol.15, No.1, P266. Cited in Cited in Maeda Masahide, Criminal Law: General Part, 2006, University of Tokyo Press, p192.

destroying traces should be the immediate cause of victim's death. Nonetheless, the court held that although defendants did not intend and expect to kill the victim, their cruel conducts actually caused the victim to die from choking, thus there are necessary casual relationship between their conducts and victim's death, which was compatible to the legal characteristic of robbery causing death rather than the crime of causing death through negligence. In terms of the court's opinion, defendants in the case were convicted of robbery causing death through intention on the basis that the causation requirement was affirmed. Therefore, the court accepted the proximate cause theory in fact.^①

In contrast, German precedents of supporting immediateness test inclined to deny that the result is attributed to the defendant in the interference of defendant's unintentional conduct. In a German case of 1991, the defendant caused the victim to be in a coma in the perpetration of strangling the victim, but the defendant did not intend to kill the victim. Because the victim lost sign of life, the defendant mistook the victim for dead and used a leather belt to strangle the position where there was criminal trace in the victim's neck for faking a suicide case. The second strangling conduct caused the victim's death. The court held that the crime of injury causing death required the conduct of injury to accompany with special dangerousness of causing death, and the causal process belonged to abnormal process. As a result, the court held that the defendant was not guilty of injury causing death.^②

In cases mentioned above, it is inadvisable to apply only one theory. To the intentional crime, proximate cause theory is more reasonable than immediateness theory. Although victims were presumed to be dead in unconscious state, the intention of homicide in the first conduct entirely reflect defendants' culpability. Furthermore, it is unnecessary to require special illegality for limiting common intentional crime. In the

① Intermediate People's Court of Sanya City, Hainan Province, Judgment Paper of Penal Sentence, 2003, First Trial, No.19.

② BGH StV 1993, 75. Cited in Yamamoto Mitsuhide, Immediateness Requirement in Aggravated Consequential Offense, 1999, Yamaguchi Journal of Economics, Business Administrations and Laws, 47(2), p40-41.

usual scope of the human experience, it is foreseeable that defendants would destroy the traces in case their criminal acts come to light. It is possible to affirm the legally causal relationship in the intentional crime. Although the second conduct is unintentionally committed for causing the result, the proximate connection between the first conduct and the actually harmful result in the end should not be denied.

Nonetheless, proximate cause theory cannot be directly applied to aggravated consequential offense. In the substantive combination, aggravated consequential offense should have special illegality. The proximate cause theory just explains the legality of normal crime. It is necessary to use a stricter test to regulate causation requirement. Specifically speaking, causation requirement should be satisfied by immediateness test rather than by proximate cause test. Immediateness test should be applied in two aspects: physical rule and psychological rule. Because the second conduct is separated from the first conduct in the physical distance, therefore, if the result is caused immediately by the first conduct, the second should be psychologically connected with the first. Nonetheless, psychological rule should be interpreted in the level of spiritual freedom, rather than extensively treated as thought of trepidation and people's general reaction.^② Accordingly, if a defendant destroys traces for avoiding prosecution, the result immediately caused by the second conduct should not be attributed to the first conduct.^④ The defendant has free will when he destroys traces. His trepidation is not enough to be evaluated as reducing or losing criminal ability. The second conduct should not be immediately related to the first.

Besides, the second conduct is not the natural extension of the special dangerousness created by the first conduct. In the end of committing the first conduct, special dangerousness has disappeared, thus the second conduct causing the victim's death or other extended result actually creates new dangerousness. It is unreasonable to attribute the result of second conduct to the first.

^② Shimada Soichiro, *Basic Theories on Principal and Accomplice*, 2002, University of Tokyo Press, p292.

^④ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p246.

2.3.3 The Interference of Third Party's Conduct and the Immediateness Test

There are three types of interference of third party's conduct: (1) the defendant's and the third party's conducts can both independently cause extended result; (2) the defendant's basic conduct can independently cause extended result, while the third party's can't; (3) neither the defendant's and the third party's conduct can independently cause extended result, but the combination of their conducts eventually causes. I will separately discuss these types of third party's interference.

The first type belongs to the discontinuity of causation in principle. Generally speaking, if the result is caused on the basis of independent influence of other factors before the previous conduct causes the result, the causal relationship between the previous conduct and the result is discontinued by factors of intervention. For instance, a defendant intends to poison the victim, but the third party shoots the victim by a gun and causes death before the poison kills the victim. Because the conduct of poisoning is not the condition of causing the victim's death, relationship between the defendant's conduct and the victim's death does not satisfy but-for test. Furthermore, but-for test is regarded as the premise of proximate cause test and immediateness test, thus the discontinuity of causation based on the third party's independent conduct can intercept the imputation.

Nonetheless, if the third's interference is for rescuing the victim, we maybe get another conclusion. Rescue can reduce or eliminate the dangerousness in principle. Therefore, special dangerousness of basic conduct should include the dangerousness created through rescuing the victim. If conduct of rescue causes the victim to die from injury, the defendant should be liable to the harmful result.^① On the other hand, if the conduct of rescue violates the basic rule of rescue operation and substantially and immediately increases the risk of harming the victim's legal interest, the rescue would

^① Deng Yongding, *Judicial Determination on Aggravated Abduction for the Purpose of Blackmail and Combination Crime*, 2010, *The Rule Law Forum*, (3), p132.

become an illegal conduct imperiling the victim. As a result, the causal relationship between the defendant's basic conduct and the result of death should be interrupted when the rescue immediately causes the result. For instance, a defendant sets fire to a building. When the fire spreads to a house where a father and his child still in, the father throws his child down from tenth floor in the state of emergency and causes his child's death. It is obvious that the father's rescue creates extra dangerousness of arson, thus the victim's death should not be attributed to the arsonist.

In cases of rescue operation, the interference of medical conduct is most controversial. Generally speaking, medical conduct cannot intersect causal relationship between basic conduct and extended result. For instance, in the Japanese case of dying from encephalitis, the defendant assaulted the victim's head with wand. The condition of injury normally can be healed in two or three months. Nonetheless, the doctor's inappropriately treatment did not effectively prevent the encephalitis inflicted by the assault, hence the victim died from encephalitis after a month. To this case, the court affirmed the causal relationship between the assault and the victim's death and convicted the defendant of injury causing death.^①

There are different standpoints on the precedent mentioned above. Some agree with the court. For instance, Japanese jurist Kobayashi Kentaro holds that if the victim's death caused by the wrong operation is foreseen adequately, the detailed content of wrongness is not important in the circumstance that the specific form of wrongness is unforeseen; hence the but-for test can be satisfied. In Kobayashi's opinion, the case of unforeseeable operation is limited in a very narrow scope, such as doctor's intentional conduct to kill the patient or accident happened in the way of sending the patient to the hospital.^②

In contrast, some express disapproval. Japanese jurist Ootani Minoru argues that

① Supreme Court, Heisei era (2.11.20), Casebook, Vol.44, No.8, P837] Nakamura Shuji, Cases concerning general limitations, act, omission, and causation, Action, Omission, Causation, 2010, Kumamoto Law Journal, (3), p113.

② Kobayashi Kentarou, Causation and Objective Attribution, 2003, Koubundou Publishers Inc, p214.

the foreseeable fact to general people is that the patient will be healed after being wounded. In terms of operation judgment on whether medical rescue is proximate cause of victim's death, people in general, in the course of committing the crime, cannot foresee the doctor's medical conduct would cause the victim to die.^① Japanese jurist Ohtsuka Hiroshi holds that it can say that the element of interference takes a more important role than the basic conduct does if it should independently cause the result, thus the equitable approximation of causation should be denied unless the victim is sent to a horrible hospital where medical accidents continuously happen, which is to say, the victim is impossible to avoid the accident when he is sent to the hospital.^②

Opinions mentioned above should be reflected in two aspects. On the one hand, the defendant's foreseeability to medical malpractice cannot be regarded as standard of judging immediately causal relationship. In present days, relationship between doctor and patient is in a tense state, thus people in general lack confidence on the doctor's credit. Thus the foreseeability to the medical malpractice can be universally affirmed in the country. Although general people are foreseeable to medical malpractice, the immediate connection between conduct of injure and result of death cannot be straightway affirmed. Furthermore, defendant's foreseeability to the objective facts does not affect the connection in real world. If scientific method cannot prove the causal relationship, we would not affirm the relationship by defendant's mental content.

On the other, the abnormality of medical malpractice should not be regarded as element of judging immediate causation. Some scholars hold that if doctor's erroneous operation is very rare to happen, which means it belong to abnormal condition, hence the causation should be denied.^③ Nonetheless, the standard of how to judge abnormality is compatible to public idea, which is inconsistent with the objectivity of immediateness test. Furthermore, abnormality is important content of proximate cause doctrine to judge

① Oya Minoru, *Criminal Law: General Part*, 2nd ed, 2008, Li Hong(trans), China Renmin University Press, p205.

② 大塚裕史. 2008. 刑法総論の思考方法. 東京: 早稲田経営出版:134.

③ 2012 Li Hong, *Criminal Law*, 2012, Law Press•China , p105.

causation requirement. As mentioned above, immediateness test is stricter than proximate cause test. If abnormality is the standard of judging causation requirement, it would actually violate the immediateness test.

This dissertation holds that relationship between medical malpractice and basic conduct is the key to solve the problem of causation being interfered by medical treatment. It is of public knowledge that medical treatment is to help the patient and for reducing or eliminating the victim's risk. If medical malpractice should be a serious misfeasance, it creates new dangerousness of independently causing the result besides on basic conduct. As a result, if the new dangerousness immediately transfers to the actual result, the causal process from special dangerousness of basic conduct to the extended result should be intercepted. In other words, the immediate causation is unsatisfied. Nonetheless, if victim's wound is in an unapparent place or local medical technology is very backward, basic conduct of injury will immediately put the victim in a very dangerous place; hence the probability of medical malpractice to cause victim's death or serious injury will obviously be raised. It is irrational to exclude the objective circumstances from elements of judging special dangerousness. Therefore, although medical malpractice is connected with extended result in the nearest distance, the extended result of causing death should be attributed to the basic conduct of injury in the adversely medical condition.

As to the second type, because the third's party cannot independently cause extended result, hence the causal relationship between basic conduct and extended result cannot be immediately intercepted. Japanese precedents usually affirm the causation in this type of interference. In the case of south port of Osaka, the defendant assaulted his housemaid with instruments such as washbasin because of the housemaid's ill-behavior and causes the victim to lose consciousness. The defendant disposed off the victim to the freight yard of a construction company in the south port. As a result, the victim died from serious injury. Nonetheless, according to forensic analysis, because the third party

assaulted the victim additionally, although the defendant's conduct inflicted fatal injury to the victim, the victim's death time was brought forward. In this case, the court held that if the defendant's basic conduct inflicted fatal wound, although the third party's conduct hastened the victim's death, there still was causal relationship between the defendant's conduct and the victim's death.^①

Many scholars support the judgment mentioned above. For instance, Japanese jurist Yamanaka Keiichi holds that if the first causal force is powerful enough to overwhelm the second dangerousness, the first dangerousness would just be modified by the second to the limited extent. The second dangerousness has a little of specific impact and participation to cause the result, hence it cannot be seen as beginning of series of new dangerousness. For another instance, Japanese jurist Oya Minoru holds that defendant's conduct of inflicting injury is sufficient to cause result of death, and the proximately causal relationship between the perpetrating act and the result can be affirmed. The interference of abnormal condition is not important to the causal relationship between defendant's conduct and victim's death. Thus the proximate cause test can be affirmed.

Nonetheless, human life is invaluable and its length should be attached great importance. Without the third party's interference, an assaulted victim will die, eventually but later. Therefore, it is impossible to ignore the shorten effect of third party's conduct on the length of victim's life, or the putative causation will take the place of the realistic causation.^② It is well known that the putative causation is consistently rejected by criminal jurists. The third party's conduct according to the realistic causation test, actually breaks off the legal link between defendant's basic conduct and harmful result. In the case mentioned above, although the defendant committed basic crime which causes fatal injury sufficient to kill the victim, because of

① Supreme Court, Heisei era (2.11.20), Casebook, Vol.44, No.8, p837. Cited in Nakamura Shuji, Cases concerning general limitations, act, omission, and causation, Action, Omission, Causation, 2010, Kumamoto Law Journal, (3), p127

② Hirano Ryuichi, Several Questions of Crime Theory, 1981, Yuhikaku Publishing Co.,Ltd, p42.

the interference of the third party's conduct, the victim's death time is hastened. In other words, the dangerousness of causing victim's death is realized by the third party, rather than by the defendant's basic conduct. Therefore, immediateness test is not satisfied and the defendant should not be guilty of injury causing death.

The third type is usually regarded as overlapping causation, which is the case of plural causes that are insufficient to independently inflict the result, but they can bind together to make the result happen, e.g., both defendant A and defendant B intend to kill the victim, they separately put poison at 50% toxicity without any collusion, and the victim is poisoned to death in the end. In the overlapping causation, although each conduct of poisoning is the necessary condition of causing death, but defendant A's conduct cannot be regarded as the proximate cause or the immediate cause of killing the victim. According to the compromising theory of proximate causation, either defendant A or defendant B could foresee that the counterpart would perform the same conduct, furthermore, people usually are incapable to foresee that two defendants, without communication, would poison a victim at the same time.^① According to the objective theory of proximate causation, it is obvious that defendant A's poisoning conduct does not objectively and independently cause the victim's death, hence he cannot be convicted of accomplished murder.^② Because the immediateness test also is evaluated through objective and scientific theorem, it should not allow convicting the defendant of aggravated consequential offense when the basic conduct does not objectively and independently causes extended result. As a result, if two conducts performed at the same time, neither of defendants should be liable to the result according to the immediateness test. Nonetheless, if two defendants committed crime in succession, the first one should not be liable to the extended result, but the second one should be, because the first one's conduct is intercepted by the second one's conduct.

In a Japanese case happened in Nagoya, defendant Assaulted the victim with a

① Oya Minoru, *Criminal Law: General Part*, 2nd ed, 2008, Li Hong(trans), China Renmin University Press, p202.

② Asada Kazushige, *Criminal Law: General Part (Adding Edition)*, 2005, Seibundoh Publishing Co., Ltd, p142.

stick and caused the victim to be seriously wounded in the head. After which, the defendant A threw the victim into the river. The victim slowly swam across the river, but defendants B and C threw the victim into the river of eight feet depth again.^①The victim lost his ability of movement because of serious cerebral concussion, thus he could not raise his head up above the surface of water and died from drowning. The court held that when the defendant inflicted cerebral concussion to the victim, which caused the victim's death because of depriving the defendant's ability to raise head, although the cerebral concussion was not the immediate cause of death and the third party's conduct brought about the result, the defendant should also be convicted of injury causing death.^② Japanese jurist Nishida Noriyuki held that when there was interference of abnormal conditions, it was doubtful to affirm the causation requirement.^③ As a matter of fact, the key question of the case is whether the third party's conduct is the immediate cause to the victim's death rather than whether the interference is abnormal. If the causal relationship between third party's conduct and extended result satisfies the immediateness, the defendant's conduct would not be the immediate cause of the result. The special dangerousness created by the defendant's basic conduct was reduced when he swam across the river. Therefore, the victim was relatively safe if there was not the third party's interference. The third party's conduct not only raised the dangerousness of causing the victim to death but also transferred dangerousness to the result, thus the immediate relationship between the defendant's assault and the victim's death was intercepted.

2.3.4 The Interference of Victim's conduct and Immediateness Test

If the victim endangers himself after the defendant committed basic crime, it is possible to cut off the causal relationship of basic conduct and extended result. Personal

① The defendant A is not cooperated with the defendant B and the defendant C.

② Supreme Court, Heisei era (2.11.20), Vol.44, No.8, Casebook, Vol.44, No.8, P837. Cited in Nakamura Shuji, Cases concerning general limitations, act, omission, and causation, Action, Omission, Causation, 2010, Kumamoto Law Journal, (3), p113

③ Nishida Nonyoki, Criminal Law: General Part, 2nd ed, 2010, Koubundou Publishers Inc, p111.

interest, if unrelated to public interest, should be governed by the subject of legal interest.^①Therefore, Japanese jurist Kobayashi Kentarou holds that if the result is caused by the victim himself, the result would not be the prevention object of the criminal law because the victim dominates or tolerates the result.^②Nonetheless, the victim's adventure is not necessarily to make he himself to take responsibility to all harmful results, because the victim's adventure may be the indispensable way to avoid infringement. Thus victim's conduct is an important element of judging immediate causation.

2.3.4.1 Victim's Injury and Death Caused in the Course of Running Away

Victims usually take risks of injury even death for escaping from defendant's assault. To this circumstance, there are different approaches among jurists. The enforcement approach holds that the immediate relationship between basic conduct and extended result is decided by the fact that whether the victim is forced to take the risk. If a victim risks his life to escape from the defendant's assault, which is analogical to the defense of necessity, the causal relationship between basic conduct and extended result should not be intercepted. Nonetheless, if a victim dies from accident which is caused through extremely negligence in the course of running away, it is possible to deny the existence of immediate relationship.^③

In contrast, the pathology theory denies the significance of fears on the causation requirement. In light of this theory, because the victim's escaping is pathologically unconnected with basic conduct, relationship between basic conduct and extended result should not be affirmed in principle. However, if basic conduct causes the victim to be mentally disturbed even unconscious so that the victim risks his legal interests or immediately injures himself, it is possible to apply the pathology theory to affirm the

① Feng Jun, *Self Responsibility in the Criminal Law*, 2006, China Legal Science, (3), p100

② Kobayashi Kentarou, *Causation and Objective Attribution*, 2003, Koubundou Publishers Inc, p62.

③ Shimomura Yasumasa, *Immediate Relationship between basic crime and Extended Result in Aggravated Consequential Offense*, 1989, *The Chuo Law Review*, 96(1•2), p7.

causation requirement. For instance, a defendant breaks the victim's cranium through violent acts, which causes onset of confusion. The defendant's assault would be consistent with immediateness test if the victim jumps out from the window and fall down to die in the abnormal mental state.^①

The pathology theory attempts to strictly interpret immediateness test. Japanese jurist Uchida Hiroshi is one who supports. He holds that the causal link beginning from defendant's conduct to eventual result should be explained by a certain theorem which is enacted in a right and strict way. Taking the example of injury causing death, the theorem of injury is pathological change of human organs. If the physical force on the basis of homogeneously immediate relation to the extended result is exerted to the human body and the defendant cannot determine to increase or reduce quantity, i.e., the quantity of force is uncontrollable, hence the force will include high risk of causing injury or death. It can say that whether the relationship between basic conduct and extended result should only include every medical and pathological causal link, and the explanation of causation requirement according to the theorem mentioned above, should be content of immediateness test.^② Therefore, the psychological theorem, such as the victim's interference on the basis of his fears, is not included in the content of pathological theorem. If extended result is caused on the basis of psychological theorem, the defendant should be liable to the result.

It is obvious that the pathological theory extremely limits the application of aggravated consequential offense. For instance, in the case of injury causing death, the result of death should be immediately caused by injury on the basis of pathological theorem. If the victim runs away in a dangerous place because he is intimidated by the defendant, the psychological theorem would have an important role in the conduct of risk. According to the pathological theory, even if the victim dies from falling down from the

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co., Ltd, p242.

② Uchida Hiroshi, *Constitutive Requirements of Aggravated Consequential Offense*, 2005, *Journal of Criminal Law*, 44(3), 303-304.

cliff, the immediateness test should not be affirmed. Only if the intimidation immediately influences the physical and pathological conditions, can the immediateness be affirmed. For instance, a defendant threatens an old man suffering from heart disease for robbery, which immediately endangers the victim's. If the victim is too afraid to die of heart disease, the result of death can be attributed to the intimidation.^① Differently, if a defendant commits intimidation in a very dangerous place, because the influence of surrounding is not the content of pathology, the death caused by falling down would not be attributed to the intimidation according to pathological theory. Nonetheless, the conclusion cannot be accepted by all, thus Uchida Hiroshi, offers a compromising suggestion that when a victim takes risk to run away in dangerous place for necessity to rescue himself, the conduct of running away can be seen as perpetration of indirect principal.

Although the pathological theory effectively limits the application of aggravated consequential offense, the psychological theorem cannot be ignored in the judgment of causation requirement. Victim has right to escape from assault, especially when basic conduct has created special dangerousness. If victim's escape, because of fears, absolutely breaks off the immediate causation, the result of death would be attributed to the victim's conduct, which substantially deprives the victim's essential right of avoiding unlawful attack. Therefore, it is very unfair to the victim if the pathological theorem cannot be regarded as the single standard of judging immediateness test. Furthermore, the pathological theory amends itself for applying the immediateness test to intimidation, which is committed in dangerous place, causing extended result. Nonetheless, indirect principal is punished according to innocent instrumentality rule, providing that a person is the principal with mens rea required for the commission of offense, and uses a non-human defendant or a non-culpable human defendant to commit crime.^② In other words, the indirect principal dominates the causal link through the

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p294.

② Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p468.

mental priority over the non-human defendant or the non-culpable human. If indirect principal theory is applied to judge immediate causation, psychological force to the victim must not be ignored. Therefore, when pathological theory uses indirect principal theory to remedy its theoretical loop, it has given up its standpoint. It is necessary to take the degree of intimidation, when there is victim's interference, into account.

In light of dangerousness test, basic conduct should have special dangerousness of causing extended result. Therefore, as long as defendant commits basic conduct, it will produce objective force of suppressing victim's free will.^① Nonetheless, there are two aspects need to be noted:

First, the legal interest infringed by basic conduct may be different from the legal interest risked by victim. Generally speaking, the severity of legal interest infringement can decide the possibility of the victim's risk for escaping. However, if basic conduct destroyed victim's free will to a great extent, although it does not immediately endanger the victim, it is possible to affirm the immediateness test when the victim dies from escaping in a dangerous way. On the one hand, the physical attack inflicts pathological injury to victim's nervous system so that victim's judging ability is reduced or deprived, the victim's autonomy on risk-taking should be denied. The defendant should be convicted of aggravated consequential offense when the victim dies from taking the risk of running away, on condition of insanity or diminished capacity, from the defendant's assault. For instance, a defendant causes victim's injury and lacking of clarity through battery. The victim climbs on the window for escaping from further assault but accidentally falls and dies. Although ostensibly the basic conduct does not endanger the victim's life, there is immediate connection between the victim's recklessness and wound in head, thus the result should be attributed to the battery as basic crime.

On the other, even if basic conduct does not immediately cause victim's pathological injury, victim's autonomy of taking high risk to escape from the non-lethal

^① Shimomura Yasumasa, Immediate Relationship between basic crime and Extended Result in Aggravated Consequential Offense, 1989, *The Chuo Law Review*, 96(1•2), p7

conduct can be denied on condition that he suffers from extreme stress and pain from the defendant's basic conduct and almost totally out of mind.^① For instance, a defendant unlawfully imprisons the victim in a dirty, dark and disgusting cellar and leads, coarsely, a life worse than pigs and dogs to the victim, which can be regarded as a kind of mental force in extreme degree. If the victim risks his life to escape and dies from it, the escape would not be a conduct based of free will, and the result of death would be attributed to the unlawful detention. Similarly, immediate causation should include following facts of causing death: robbing a victim suffering from heart disease or insanity;^② violently chasing a victim in extremely dangerous place;^③ robbing a victim with lethal weapon.^④

Second, effect of psychological compulsion should immediately derive from the special dangerousness of basic conduct. Special dangerousness of basic conduct should immediately influence victim's choice of taking risk to escape. For instance, a defendant intentionally stabs the victim's back with a sword, the victim is so frightened that he jumps out from the window, falls over and dies. In this case, the defendant's conduct of stabbing is very dangerous to the victim's life and the victim's conduct of jumping off is to escape from stabbing. The causal link is compatible to psychological theorem, thus immediateness test can be satisfied. However, psychological element should not be applied to judge the immediate causation in following aspects:

(1) If the dangerousness has been reduced, psychological force cannot continue to be element of judging immediateness. Taking a German case for example, defendant A and B gathered several people to chase and beat foreigners, the victim ran away to the front of his house. In fact, the victim has temporarily got rid of the defendants, but he did not know it and presumed that the defendant was behind him. The victim tried to

① Li Lei, Unlawful Imprisonment Judicial Decision of Causing Serious Injury, 2007, Death, Law Forum, (4), p205.

② Zhou Guangquan, Criminal Law: Specific Part, 2nd ed, China Renmin University Press, p89.

③ Zhang Mingkai, Criminal Law, 4th ed, 2011, Law Press·China, p864; 2012 Li Hong, Criminal Law, 2012, Law Press·China , p 728.

④ 2012 Li Hong, Criminal Law, 2012, Law Press·China , p 728

open the door but failed. Because the victim was extremely panicked, he gave the door a hard kick to open it and broke the door. As a result, fragments of the door cut off his aorta of thigh and caused his death. The court held that the victim's conduct was natural and right when he faced fierce attack. Human primitive instinct made the victim flee in helter-skelter in face of violent crime. It was unimportant that whether the victim recognized that the defendant did not catch up with him. Although the defendants could not instantly attack the victim, it was foreseeable that the victim asked for help, kicked and broke the door, thus the defendants should be liable to injury causing death.^① Nonetheless, according to the specific circumstance of the case, special dangerousness created by basic conduct has already abated; thus there was no objectively special dangerousness to the victim. The victim's fright just came from false appearance. The defendants, therefore, should not be convicted of injury causing death.

Furthermore, when special dangerousness of basic conduct is not rightly recognized by victim, pathological force should not be element of immediate causation. Although basic conduct has special dangerousness of causing extended result physically, if victim did not know about the dangerousness, result inflicted by the victim's conduct of taking risk should not be attributed to the basic conduct. For instance, the defendant, a police, intends to seriously injure the victim, a thief. However, the victim presumes the defendant is arresting him and takes risk of jumping down from the fifth floor. As a result, the victim dies. In the case, the conduct of chasing includes substantial danger to the victim's health and the victim dies from running away from the conduct, but the victim does not know the defendant's real intention, which means his fright is not immediately connected with the special dangerousness. Hence it is unreasonable to affirm immediate relationship between the victim's death and the basic conduct.

In light of the doctrine mentioned above, several Chinese precedents are reviewed as presented below:

^① BGHSt 48, 34. Cited in Enomoto Touya, *Reviewing Aggravated Consequential Offense*, 2011, Seibundoh Publishing Co., Ltd, p186-189.

A. In case of People vs. Liu on unlawful detention, the defendant unlawfully detained the victim in a house for making him join an organization of pyramid sale. The victim took an opportunity and ran away from the window, but accidentally he fell down and suffered serious injury. The court held that the defendant unlawfully detained the victim for drawing him into organization of pyramid sale, which caused the victim to be seriously injured when he ran away, thus the conduct has constituted unlawful detention and the defendant should be punished by imprisonment of three years with four years probation.^①

B. In case of People vs. Li on unlawful detention, victims A and B rented a minibus to go home. Two victims argued with the defendant on the parking location and refused to pay the rental unless the defendant sent them to the appointed location. The defendant conversely intimidated that he would send the victims to a faraway place if they did not pay out the money. After the defendant drove the minibus to a short distance, two victims separately jumped out from the minibus. As a result, two victims died. The court convicted the defendant of unlawful detention and sentenced him to imprisonment of fourteen years and deprived his political right for three years.^②

C. In case of People vs. Tian and Others on intentional injury, the defendants Tian and others assaulted and pursued the victim. As the result, the victim fled into a river and his body eventually was found in the river. According to the forensic analysis, the victim died from drowning and head-injury. The court held that the defendants pursued and assaulted the victim with weapon and caused the victim to die, which constituted intentional injury causing death.^③

In the case A, although the defendant unlawfully confined the victim's freedom, he did not committed other crimes to threaten or infringe on the victim's legal interests,

① People's Court of Chengxiang District of Putian City, Fujian Province, Judgment Paper of Penal Sentence, 2011, First Trial, No.299

② Intermediate People's Court of Anyang City, Henan Province, Judgment Paper of Penal Sentence, 2011, Last Resort, No.418.

③ Superior People's Court of Ningxia Hui Autonomous Region, Judgment Paper of Penal Sentence Attaching Civil Judgment, 2010, Last Resort, No.23.

furthermore, the victim jumped from the window when the detention just lasted a short time, thus it was difficult to say that the defendant's conduct sufficiently forced the victim to take risk of life for escaping. Therefore, the defendant should not be guilty of unlawful detention causing death and the court's decision should be supported.

In the case B, defendant Li just threatened the victims that he would drive them to a faraway place, but he did not committed other crimes immediately endangering the victims' lives and health, thus the defendant's conduct did not produce severe mental force to the victims. Furthermore, the defendant just asked for rental in a reasonable extent. Thus it could not apply the psychological theorem when victims chose to jump out from the minibus for getting rid of custody. It is debatable that the court affirmed the immediate relationship between the detention and the victims' deaths.

In the case C, there was no evidence about how the victim fell down into the river. Nonetheless, the defendants should be liable to the victim's death in the level of illegality. If the defendants physically caused the victim fell into the river through assault, the immediate causation would be certainly affirmed because the assault pathologically induced the special dangerousness of making the victim be drowned. Furthermore, even if the victim jumped into the river by himself, it was unnecessary to exempt the defendants from liability of causing death. According to details of the case, several defendants relentlessly pursued and assaulted the victim. Furthermore, the head-injury was an important element of causing the victim to die according to the forensic analysis, i.e., the victim's head was injured when he jumped into the river. Therefore, the defendants' conduct not only psychologically forced the victim to take risk of jumping into river but also physically reduced the victim's ability of surviving in the water. In sum, the defendants should take responsibility of injury causing death.

2.3.4.2 Victim's Suicide and Immediateness Test

There are different opinions about whether a defendant should be convicted of aggravated consequential offense on the occasion of victim commits suicide. The question will be answered though analyzing following cases:

In Case of People vs. Xie and Others on unlawful detention causing death, the defendant Xie and other defendants disputed with the victim on the compensation of traffic accident. The defendants did not allow the victim to go home unless he would like to pay for the compensation. When the defendants had lunch with the victim in a restaurant, one of the defendants conflicted with the victim again. The victim said that he did not have money and would give his life to the defendants. Then the victim went into the restaurant for drinking water, but he did not find. Suddenly, the victim ran across the street, got a bottle of pesticide from a farm-supply store and drank off it. As a result, the victim died from acute intoxication. The court held that the defendants deprived the victim's personal freedom for asking for compensation. The defendants neither wished nor knowingly let the victim's death happen. Furthermore, when the victim required to drink water and got a distant from the defendants' overlooking, the defendants could not foresee the victim attempted to suicide by taking poison. The suicide was the victim's positive conduct, which was not immediately related to the defendants' unlawful detention.^①

In Case of People vs. Chen and Others on unlawful detention, the defendants unlawfully detained the victim on the ninth floor of a hotel for collecting debt. Because the victim was afraid of assuming liability, he took an opportunity to commit suicide by jumping out of the window from the ninth floor. The court held that the defendants unlawfully and forcibly deprived other people's personal freedom for debt collection, which constituted crime of unlawful detention. Because the victim committed suicide in the perpetration of detention, although the defendants did not immediately cause the victim's death, their unlawful detention was legally connected with the victim's death,

^① People's Court of Linchuan District of Fuzhou City, Jiangxi Province, Judgment Paper of Penal Sentence, 2007, First Trial, No.5.

thus they should undertake corresponding criminal responsibility. Therefore, the victim's death in the course of detention should be the aggravated circumstance to the defendants.^①

The two cases mentioned above stated different judicial positions about suicide during unlawful detention. In the case of *People vs. Xie*, the court underlined the positiveness of victim's suicide and denied the immediate relationship between the victim's death and the unlawful detention. Ostensibly, the judgment accepted the immediateness test. Nonetheless, the defendant's foreseeability was the standard of judging the immediate causation in the case, which distorted the content of immediateness test. In contrast, in case of *people vs. Chen and Others*, although the court held that the unlawful detention did not immediately cause the victim to die, the legal causation should be affirmed, since the detention resulted in the victim's suicide through jumping off the high building. The judgment did not accept the immediateness test, which obviously conflicts with the standpoint of the dissertation.

Suicide is analogical to risky escape in the aspect that they are both physically committed by victim. The difference is, victim who commits suicide intends to finish his life by himself, while victim who takes a risk for escaping usually tries to avoid the dangerousness to his life. Therefore, on the one hand, the case on victim's suicide can borrow a mirror from psychological theorem of the victim's escape. On the other, the specific standard of judgment should be more strictly applied in the victim's suicide than in the victim's risk for escape. Specifically speaking, the defendant's basic conduct, which is punished for causing the victim to suicide, not only makes the victim be panic-stricken, but also extremely even absolutely represses the victim's ability of autonomy.^② According to the psychological theorem, only if the perpetration is sufficient to make the victim feel such an intolerable stress or pain that general people

① Intermediate People's Court of Guangzhou City, Guangdong Province, Judgment Paper of Penal Sentence, 2007, Last Resort, No.269.

② Atsushi Yamaguchi, *Research on Criminal Law through New Precedents*, 2nd ed, 2008, Yuhikaku Publishing Co.,Ltd, p29.

would give up their lives, the victim's suicide can be attributed to the defendant's conduct.^① For instance, if a defendant confines the victim in an extremely disgusting place and rapes the victim every day, the victim's suicide should be the aggravated element of rape causing death. In contrast, if a defendant just restrains the victim's freedom in a common place and does not go further to hurt the victim or just beats the victim slightly, it would be impossible to convict the defendant of detention causing death when the victim commits suicide. In sum, the detentions in the two cases mentioned above are committed in a relatively slight circumstance and do not company with other serious crimes, thus they are not sufficiently forceful to bring about the suicides.

3.3.4.3 The Victim's Rejection or Delay to Undergo Therapy

In cases where defendant intentionally injures the victim and worsens the injury or even endangers the victim's life, the causal relationship between the basic conduct and the victim's death would usually be affirmed in judicial practice.

In Germany, there are three classic precedents. First, the victim was injured to fracture by the defendant's assault. The doctor explained the related risk to the victim, but the victim rejected to be treated and asked for leaving. Although the victim visited the doctor again in two days, he has already got tetanus and died before long.^② Second, the victim was infected of strep because of the defendant's mistreatment. Furthermore, the victim knew the probability of infection. Although the infection was very dangerous, the result of death could be prevented by proper treatment. However, the victim rejected treatment and died from the infection.^③ Third, the victim who suffered alcoholism was assaulted on the head and arm. Because his arm was broken, it is necessary to check his health for avoiding danger to life. Nonetheless, the victim rejected the check so as to go

① 2012 Li Hong, *Criminal Law*, 2012, Law Press•China , p664.

② OLG Köln, *Beschl.v.5.7.1963* = NJW 1963, 2381. Cited in Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p180.

③ BGH, *Urt.v.30.9.1970-3 StR 146/70* = MDR 1971, 16f. Cited in Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p180.

back to drink. After three days, the victim died of cerebral hemorrhage triggered by the assault mentioned above.^①

In cases mentioned above, German courts held that victims' deaths could be attributed to defendants' assault. Especially in the last case, the court held that the causal link could not be broken off by the victim's conduct of rejection to the therapy while it apparently supported the immediateness test. According to the court's opinion, it was undoubted that immediate causation should be the requirement of injury causing death, i.e., dangerousness of defendant's conducts, including the lethal danger to victim and the inherent dangerousness provided in the Section 223 of German Penal Code, is realized in the victim's death. The immediate causation could not be interrupted through rejection to necessary treatment. Although the alcoholic rejected treatment for drinking and he definitely knew the dangerousness, general experience was not violated.

Japanese courts accept proximate cause test rather than immediateness test as the standard of judging causation requirement, thus they usually attribute extended result to basic conduct as internal inducement although victims endanger themselves. For instance, several defendants conspire to assault a victim by beer bottles. One of the defendants used a broken beer bottle to stab the victim's neck and caused the victim to hemorrhage. The victim was sent to the hospital for emergent operation. The injury began to stabilize after the operation. However, the victim reasonably asked for leaving and rudely plucked out the infusion tubes, thus the injury was exacerbated. Finally, the victim died of cerebral dysfunction incurred by circular impediment in the head. To the case, the Japan Supreme Court held that the defendant committed crime of injury by violence, which was possible to kill the victim. Although the victim did not abide by the doctor's instruction, which was to rest quietly to recuperate, and obstructed the treatment, the relationship between the injury caused by the defendant's assault and the

^① BGH, Urt.v.9.3.1994-3 StR 711/39 = NStZ 1994, 394. Cited in Uchida Hiroshi, Structure of Aggravated Consequential Offense, 2005, Shinzansha Publisher Co.,Ltd, p181.

victim's death should be affirmed.^①

In China, courts usually reach the same conclusion as Japanese courts and German courts do. In the case of *People vs. Zhu and Dang* on intentional injury, the defendant Zhu suspected his wife, the victim, had an affair and fought with her. In the course of fighting, another defendant Dang kicked on the victim's buttock. When the victim turned to beat Dang, Zhu pulled on the victim's arm and caused her to fall down. The victim's head bumped against the floor. The defendants stepped forward to stamp on the victim's head until drawn away by other people. After falling down, urinary incontinence and temporary coma occurred to the victim. When doctors came to the scene, the victim proclaimed that she was OK. Furthermore, she refused to go to the hospital and drove away. Afterward, the victim died from seriously cerebral injury. The trial court convicted two defendants of intentional injury causing death. The defendants appealed for abrogating the judgment and reducing the punishment in that the victim refused to be treated and missed the best time of treating. The appeal court held that the victim's rejection to therapy had already been considered as an element of lightening the punishment in the trial court's conviction, thus the defendants' ground could not be accepted.^②

Although judicial practice inclines to deny the influence of victim's rejection to therapy on the causation, some jurists opposed such inclination. Japanese jurist Yamaguchi Atsushi holds that when initial injury is not very serious and it is foreseeable that the injury can be cured through general or common therapy, or the treatment will exert good effect on the victim's state, but the victim's extremely improper conduct intervenes in the causation so that his state takes a sudden turn and becomes worse rapidly and eventually transferred to the result of death, it is doubtful that whether the opinions of precedents should be accepted.^③

① Supreme Court, Heisei era (16.2.71), Casebook, Vol.58, No.2, P169. Cited in Yamanaka Keiichi, *Criminal Law: General Part for Law School*, 2005, Seibundoh Publishing Co., Ltd, p288.

② Superior People's Court of Shanxi Province, Judgment Paper of Penal Sentence, 2012, Last Resort, No.00013]

③ Yamaguchi Atsushi, *Criminal Law: General Part*, 2nd ed, Fu Liqing(trans), China Renmin University Press, p63.

Japanese jurist Uchida Hiroshi also holds that it just is a kind of possibility to survive on condition of accepting the therapy. However, because the possibility is regarded as a lethal element according to the principle of protecting interest, rejection to therapy should be reasonably explained rather than excluded as the middle item.^①

In the opinion of this dissertation, the relationship between victim's rejection to therapy and attribution of extended result should be analyzed according to specific circumstances. Generally speaking, there are three types of them:

The first type is: victim has foreseen the risk but rejects to be checked or treated. In the circumstance that the doctor makes right judgment and calls attention to the victim on hidden danger but the victim refuses medical treatment, the defendant generally should not be liable to deterioration of the victim's health, for which the reason is that the right judgment is a very important factor to cure the injury and prevent the risk. When doctor's advice or treatment reduces the dangerousness created by basic conduct, defendant should not be liable to the result of other factors. If victim refuses reasonable check or treatment, the immediate factor of causing death would be the victim's unreasonable conduct, thus the death cannot be attributed to defendant.

Maybe some would hold that "victim will be cured if undergoes therapy" belongs to presumptive causation. Because causation in the criminal law is necessary to be limited in the causation of reality, thus the presumptive causation cannot deny objective attribution.^② Exteriorly, effect of treatment is merely a presumption before it starts. Nonetheless, victim has the power to decide how to dispose his interests. No one can forcibly conduct treatment to victim. Forced treatment is punishable because it violates the victim's autonomy.^③ If a victim refuses therapy on the fatal injury, the possibility of saving the victim's life would be discontinued in reality. Therefore, the victim actually places himself in danger through the rejection and should take responsibility of the

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p245

② Zhou Guangquan, *Criminal Law: General Part*, 2nd ed, China Renmin University Press, p96.

③ Kawabata Hiroshi, *Criminal Law: General Part*, 2nd ed, 2006, Seibundoh Publishing Co., Ltd, p315.

result. In other words, the rejection, rather than be a presumptive causation, is the real causation. If victim's conduct independently causes the result, the immediate relationship between defendant's conduct and the result would be interrupted. Certainly, if injury is too serious to be easily cured, even if the victim undergoes the therapy, the dangerousness of defendant's basic conduct cannot be immediately eliminated or reduced, thus the result should be attributed to the basic conduct. In other words, the self-response to liability of victim's rejection to treatment just cannot be affirmed unless the interest is possible to be disposed. When a victim is unable to cease the development of the causal process, he has no possibility of disposing his interests in the causation, thus the result cannot be attributed to the victim's disposition.

The second type is: after being diagnosed and treated by the doctor, the victim intentionally refuses following treatment. This type is similar to the first type. Although German courts agree with immediateness test by holding that the victim's rejection does not exceed general human experience in this type of case, thus the defendant should be liable to the extended result. Generally speaking, victim is entitled to refuse therapy. Furthermore, there are many patients reluctant to undergo therapy in real life. Therefore, it makes people easily ignore the relationship between rejection to therapy and victim's death.

Nonetheless, victim's exercise of rights is not a reason of attributing its result to other's conduct. For instance, everyone has rights to dispose their money, but the result of profligacy cannot be attributed to others. Furthermore, general experience should belong to the standard of proximate cause theory rather than the immediateness theory. Therefore, Japanese jurist Uchida Hiroshi, holds that German courts cry up wine and sell vinegar.^①In fact, after the victim was sent to the hospital and treated, the dangerousness of basic conduct has been restricted, i.e., the risk of death has been reduced in the course of treatment. If the victim's condition takes a turn for the worse

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p182

because of the rejection to therapy, the result would immediately be derived from the dangerousness raised by the rejection. Therefore, the immediate cause of death should be the rejection to the treatment rather than the basic conduct.

The third type is that: victim does not know the hidden risk of his injury well and refuses to check his condition. If doctor does not foresee the hidden dangerousness and just advises the victim go to the hospital for general body check, the victim cannot be expected to have enough possibility of foreseeing the result of rejection to therapy, thus it is difficult to say that the desperation of victim's condition, or even the result of death, is effectively controlled in victim's hands. Furthermore, according to the basic idea of human rights, it is too unfair to require the victim, who does not know the serious problem of his body, to ask for therapy. Therefore, although rejection to therapy causes harmful results, if the victim does not foresee the severity of injury and the basic conduct is the immediate cause of the injury, the defendant should be liable to the results.

3.3.4.4 Victim's Improper Self-Treatment

Victim's improper self-treatment could be the factor of intercepting the relationship between basic conduct and extended result. For instance, victim applies the so-called "god-water", a liquid used for religious course but actually mixed with pathogenic bacterium, to the wound after he is injured by the defendant, eventually, he dies from erysipelas. This type is similar to the interference of taking risk for escape. They both are ways to avoid special dangerousness. However, victim cannot know the harmfulness of improper self-treatment, while can recognize the dangerousness of running away to some extents.

In the case of improper self-treatment causing extended result, psychological test and physical test can also be applied to analyze the causal relationship between basic conduct and extended result. In the psychological aspect, victim's fanatical belief to the religion is the critical reason of applying the god-water for healing the wound. The fact

that whether the basic conduct causes serious or slight injury is not immediately related to the application of god-water. In the physical aspect, the basic conduct initially causes slight injury, and the eventual physical reason of worsening the victim's injury is the erysipelas caused by pathogenic bacterium in the god-water.^① Therefore, the application of god-water is immediately related to the victim's death, thus the result cannot be attributed to the defendant.

2.3.4.5 Victim's Conduct of Rescuing Other People

It is controversial that whether immediate causation should be affirmed in the case that victim suffers extended result for taking risk to rescue other people. For instance, victim dies from rescuing other people who are trapped in fire inflicted by arsonist. There are three opinions about how to determine the defendant's liability of arson.

The first opinion holds that either the bona fides third party or the people abides the law should be at their own risk when they voluntarily go to rescue other people in highly dangerous place. According to this opinion, the source of dangerousness is not important in determining the liability. If the victim takes risk at his own will, he would be responsible to the harmful result by himself. Nonetheless, if the rescuer be a fireman, it is possible to attribute the result of rescuer's death, caused in the course of fire fighting, to the defendant, for the arson increases times of risking the fire and raises the degree of dangerousness to the fireman. The dangerousness of burning the fireman to death is influenced by the arson, thus there is causal relationship between the fireman's death and the arson.^②

The second opinion holds that the imputation of rescuer's death should be analyzed according to principle of balance in interest and risk, which should be analyzed on the basis of specific circumstances. If the rescuer has legal duty to fight against the fire, the relationship between the arson and the casualty should be affirmed when the victim

① Hayashi Yoichi, *Causation in Criminal Law*, 2000, Seibundoh Publishing Co., Ltd, p303.

② Hayashi Yoichi, *Causation in Criminal Law*, 2000, Seibundoh Publishing Co., Ltd, p307.

helps other people in danger according to the legal duty. If the rescuer violates the provision of laws and regulations, or the death is inevitable or in all probability in the course of fire fighting, result of casualty inflicted by the succor should not be attributed to the arsonist. In contrast, if the rescuer has no duty to extinguish the fire, it would be necessary to balance the interest and risk according to the necessity, the relationship between the rescuer and the rescued party and the importance of the rescued interest.^①

The third opinion holds that if the autonomy of taking risk is denied, casualty created by the succor should be a kind of transferring risk, thus the result can be attributed to the defendant. According to the opinion, whether the succor can be analogical to the necessity is the critical question on the division of liability. Thus the result of dying from rescuing the child of the rescuer's own, in the course of running into the scene of fire, can be attributed to the defendant. Nonetheless, if the rescuer just dies for saving property, the succor should intercept the causal relationship between the rescuer's death and the basic conduct of arson.^②

In comparison, the second opinion is better. First, the first opinion is unreasonable in that it treats the rescuer of people, other than except fireman, as self-destruction. If the relationship between the rescuer and the rescued party were close, they would have a strong feeling about depending on each other. When the rescued party is placed in danger, the rescuer will feel enormous pressures, thus it is difficult to say that there is not enough force to restrict the rescuer's free will. Second, the third opinion is unacceptable because it ignores the objective dangerousness and judges the liability of taking risk to rescue people completely depending on the rescuer's mental state. Third, the second opinion distinguishes legal duty, necessity and important relationship between the rescuer and the rescued party and so on, thus it can measure off the degrees of attribution on various circumstances of the succor.

Nonetheless, the second opinion limits the rescued party in the close relative,

① Wang Gang, Rescuer's Injury and Principle of Self Responsibility, 2010, Chinese Journal of Law, (3), p28.

② Kobayashi Kentarou, Causation and Objective Attribution, 2003, Koubundou Publishers Inc, p98

which could expand the application of self-responsibility. The lover or the cohabitant of the rescuer could also be the important factor of exerting huge psychological pressure on the rescuer, thus the dangerous situation of these rescued parties can deny the optional nature of succor. In the opinion of this dissertation, the rescuer's legal interest is in stable condition before performing the succor. When the rescuer enters the fire scene, he actually places himself in a danger place, thus the result of his death is compatible to his will and should not be punishable. Nonetheless, extended result should be attributed to the defendant in following circumstances: First, if basic conduct produces special dangerousness to the extremely important interest such as the life of the rescuer or his families, the succor actually is in accordance with the requirements of necessity. Because necessity is the legal defense for crimes, it is impossible to require the rescuer to take responsibility of performing the necessity. Thus the defendant should be liable to the harmful result of causing rescuer's death or serious injury. Second, if there are some close relations between the rescuer and the rescued party, the succor actually is a psychologically forced conduct without optional nature. Although succor is not compatible to the constitutive requirement of necessity, the rescuer needs not to be responsible for the succor. Therefore, the rescuer's death should be attributed to the arson as basic conduct. Third, if the rescuer has legal duty to save the interests endangered by the defendant, it is obligated to perform the succor. In other words, the rescuer has no option on whether he should take risk. Therefore, it is impossible to ask the rescuer for undertaking the responsibility of his death unless it violates laws, regulations or instructions.

2.4 Limitation on Mental State

In light of principle of culpability, defendant cannot be convicted of aggravated consequential offense unless he acts at least negligently with respect to extended result. The requirement is provided in the Section 18 of the German Penal Code. Although

there is no apparent provision on the requirement in Japanese and Chinese criminal laws, most jurists of the two countries agree with the German provision. For instance, Chinese jurist Li Hong holds that one of requirements on aggravated consequential offense is that the defendant has culpability toward the extended result. The conviction of aggravated consequential offense requires the defendant to, at least, negligently cause the extended result.^① Japanese jurist Sakuma Osamu holds that aggravated consequential offense should be restricted by principle of culpability in modern criminal laws as the remnant of strict liability in ancient time. Although the extended result is caused, the defendant should be convicted of aggravated liability on condition that the defendant negligently causes the result.^② Nonetheless, it is still doubtful whether the negligence causes extended result is sufficient to the culpability of aggravated consequential offense. Generally speaking, the subjective element should correspond to the objective element in the constitutive requirement. Furthermore, the German Penal Code provides that the defendant should, at least by gross negligence, cause extended result, such as arson causing death, in some specific provisions; while other provisions just state that negligence is the basic line of culpability of aggravated consequential offense. In contrast, there is no similar provision in the Chinese Criminal Law and the Japanese Penal Code. Therefore, it is necessary to discuss on how to define the mental state of aggravated consequential offense.

2.4.1 Reviewing the Dual Degree of Mental State

As mentioned above, some aggravated consequential offenses are conditioned by gross negligence as mental state. For instance, Section 306c of the German Penal Code provides arson causing death, which requires the defendant to cause the victim's death with gross negligence at least. In contrast, Section 227 of the German Penal Code provides injury causing death, which just requires for a general negligence to the

① Li Hong, *Criminal Law*, 2012, Law Press•China, p316.

② Sakuma Osamu, *Criminal Law: General Part*, 2009, Seibundoh Publishing Co., Ltd, p120.

extended result as basic line of mental state. Therefore, the requirement of mental state is provided in a dual form in the German Penal Code. Nonetheless, in the Chinese Criminal and the Japanese Penal Code, there is no provision on the mental state of aggravated consequential offense in both general parts and specific parts. Therefore, it is doubtful that whether the mental state should be understood as the provision of the German Penal Code does.

In the opinion of this dissertation, it is unreasonable to divide general negligence and gross negligence in aggravated consequential offense. In fact, there are three reasons why the division is provided in the German Penal Code. First, the dual degree of mental state is to correspond with the statutory punishment. In the German Penal Code, some aggravated consequential offenses are punished much more seriously than the others. For instance, rape causing death is sentenced to imprisonment for life or not less than ten years, while injury causing death is sentenced to imprisonment not exceeding three years. Comparatively, the punishment of the former is way severer than the latter, thus their mental states should be divided into different degrees, i.e., the former requires gross negligence at least while the latter just general negligence at least.^①Second, some scholars holds that in the circumstance of legally requiring gross negligence, the constitutive requirement of the basic crime should be realized in high danger out of the law with respect to the extended result. Because general negligence is punished in the constitutive requirements of basic crime, gross negligence which cannot be included in the general negligence is required in correspondence with special dangerousness.^②Third, some scholars hold that gross negligence is an objective element of illegality rather than subjective. For instance, the German jurist Roxin holds that the focal point should be set to the illegality in the course of understanding the provisions of the German Penal Code on gross negligence. In other words, the term of gross negligence firstly should be applied to especially dangerous conduct rather than a kind

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p152.

② Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p157.

of attitude which is worth to be punished. If the defendant exposes its highly dangerous conduct, we should allow of making a presumption of extreme recklessness when the defendant's ability and comprehension are compatible to the different standard from judging the basic crime.^①

The first approach focuses on the balance of punishment in different aggravated consequential offenses. In the Chinese Criminal Law, the extent of increasing punishment is narrowed in the formal combination of aggravated consequential offense, thus it is unnecessary to require the defendant to cause extended result through gross negligence. In contrast, the gross negligence should be a necessary element in substantive combination of aggravated consequential which is punished seriously. Nonetheless, there is no formal combination in the German Penal Code. Furthermore, the difference of punishments in different consequential offenses cannot be the reason of accepting the dual degree of negligence in aggravated consequential offense, because the punishment of basic crime can influence the punishment of aggravated consequential offense. For instance, the injury is punished less seriously than the arson. Therefore, it is possible to punish the injury causing death less seriously than arson causing death. In fact, the frame of reference on the punishment of aggravated consequential offense is the combined punishment of the basic crime and the negligently causing extended result, because the critical problem on confliction of aggravated consequential offense and principle of proportionality is that the aggravated punishment usually exceeds the punishment of multiple crimes. As a result, it is unreasonable to divide the negligence into different degrees on the basis of purely comparing punishments of different aggravated consequential offenses.

The second approach determines the degree of negligence according to the relationship between basic crime and extended result. Nonetheless, the construction of aggravated consequential offense is based on the severity of punishment on aggravated

^① Claus Roxin, *German Penal Code: General Part (Volume I)*, Wang Shizhou(trans), 2005, Law Press•China, p732

consequential offense, rather than on the relation of included crimes. Although both the basic crime and the crime of causing extended result infringe the same legal interest on quality, the aggravated consequential offense is possible to be limited in a strictly constitutive requirement on condition that the basic conduct of committing basic crime creates high dangerousness of causing extended result. Furthermore, the special dangerousness of basic conduct is the ground of aggravated punishment in the substantive combination, thus the special dangerousness cannot be treated as the limitation out of the law. Additionally, it is difficult to definitely distinguish the same quality from legal interests of homogeneity and legal interests of heterogeneity. For instance, the German Penal Code does not require the gross negligence to limit the injury causing death. Nonetheless, injury, which is related to the interest of personal body, should be different from death, which is related to the interest of human life, on quality. If they are treated as the same interest on quality, other personal interests, such as woman's sexual freedom, can also be classified to the same kind of interest as human's life. Therefore, the difference or the identity of basic crime and extended result on quality is not persuadable for distinguishing the degree of negligence in aggravated consequential offense.

The third approach denies the classification of gross negligence to the mental state and offers another way to explain the provision on the degree of negligence. Nonetheless, if gross negligence is treated as content of illegality, aggravated consequential offenses, which are provided with the content, should have higher degree of illegality than others, which have not the content. However, there is no sufficient evidence to prove that arson causing death is more dangerous than injury causing death to human's life. Therefore, although gross negligence is the element of illegality, it is just an ostensible and indicative element.

In conclusion, it is unnecessary and unreasonable to distinguish different degrees of negligence in aggravated consequential offense.

2.4.2 Advocating Gross Negligence Test

There are different opinions about the base line of subjective requirement of aggravated consequential offense. The mainstream of dangerousness theory holds that the illegality of aggravated consequential offense not only includes extended result but also immediate relationship between basic conduct and extended result. Accordingly, the constitutive requirement of aggravated consequential offense should also have the aspect of subjective immediateness. In other words, the negligence of causing extended result should be different from that in general offense, which is called gross negligence.^①

Nonetheless, many scholars oppose the opinion mentioned above. First, some scholars hold that defendant's negligence is limited in the gross negligence. For instance, two German jurists hold that in light of the meaning and purpose, only if the defendant acts indifferently, recklessly or imprudently, should it be punished by criminal law, because crime should be limited in conduct of seriously violating social norm. If the function of criminal law exceeds the boundary, the application of punishment will be decided arbitrary, and the criminal law will lose the effect of prevention.^② According to this opinion, both the aggravated consequential offense and the general negligence should require gross negligence to be the subjective requirement. Therefore, there is no difference between negligence of causing extended result and general negligence.

Second, some scholars hold that negligence of causing extended result should not include gross negligence. For instance, Chinese jurist Xu Yuxiu holds that the opinion of requiring the aggravated consequential offense to be limited in gross negligence causing extended result violates the principle of equality and culpability. On the one hand, although it is possible to require gross negligence to be the condition of aggravating punishment in aggravated consequential offense, but although defendant

① Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p149-150.

② Günter Stratenwerth, Lothar Kuhlen, *Criminal Law: General Part I —Crime Constitution*, Yang Meng(trans), 2006, Law Press•China, p417.

causes extended result through gross negligence in the crime without the provision of aggravating, it should be convicted of imaginative concurrence of basic crime and crime of causing extended result, which is unfair. On the other, if gross negligence is the subjective requirement of aggravated consequential offense, it would be harmful to the function of criminal law on protecting legal interests. Furthermore, there is no legal ground to limit the subjective requirement of aggravated consequential offense in gross negligence.^① Therefore, although defendant does foresee the special dangerousness, it should be compatible to the subjective requirement of aggravated consequential offense on condition that the defendant is possible to foresee the special dangerousness.^②

Third, some scholars hold that the aggravated consequential offense is a kind of dangerous intentional crime rather than the combination of intentional crime and negligent crime. For instance, Chinese jurist Ke Yaocheng holds that aggregate consequential offense is a unique crime, of which the construction contains basic conduct, on the basis of danger, causes extended result. Therefore, there is a special relationship between subjective and objective aspect of such conduct. In other words, aggravated consequential offense only has a single intention causing dangerousness rather than so called dual culpability.^③ Chinese jurist Xu Famin agrees with Ke Yaocheng's opinion. He holds that aggravated consequential offense is the realization of the dangerous basic conduct, thus the criminal liability of it is severer than that of basic crime, but the intention to the result is just an intention of inflicting dangerousness, which has a comparatively slight degree of illegality.^④

In light of dual combination theory, this dissertation supports gross negligence test in substantive combination. First, general negligence test could induce objective

① Xu Yuxiu, *Contemporary Theories on Criminal Law*, 2005, China Democracy and Legal Institute Press, p538-540.

② Atsushi Yamaguchi, Kawabata Hiroshi, *Status Quo and Issues of Aggravated Consequential Offense*, 2003, *Gendai Keijiho*, 5(4), p31.

③ Ke Yaocheng, *Development of Criminal Law Thoughts*, 2003, China University of Political Science and Law Press, p132.

④ Xu Fmin, *Research on Structure of Aggravated Consequential Offense*, 2006, *Science of Law(Journal of Northwest University of Political Science and Law)*, (2), p74.

culpability. Basic conduct has special dangerousness to cause extended result, thus the defendant, more or less, is possible to foresee the extended result when he intends to commit the basic conduct with high dangerousness, i.e., it is difficult to deny the defendant's negligence to cause the extended result. For instance, injury causing death reflects a quantitative-qualitative change from injury to death. If defendant recognizes his conduct is injury, he would be able to foresee the possibility of the quantitative-qualitative change. When the defendant intends to injure other people, it can abstractly foresee that the injury is possible to cause the victim to die. Therefore, the judgment of basic conduct overlaps with the judgment of general negligence. Hence, if the mental state of aggravated consequential offense is judged on the basis of the general negligence, it may end up with decline of subjective requirement. As the Chinese jurist Zhang Mingkai said, the specific part of criminal law provided the aggravated consequential offense to increase punishment for basic crimes that usually are possible to cause extended result. It showed that the law had limited the aggravated consequential offense that could not be applied arbitrarily. Therefore, the defendant of committing basic crime usually could foresee the extended result, thus the defendant should have negligence to cause the extended result.^① In other words, the general negligence theory is equal to giving up the subjective requirement of aggravated consequential offense.

Second, gross negligence test does not violate the principle of equality. The criminal law always has legal loophole on preventing crimes, because the principle of "no punishment without law" inevitably leads to a consequence that some harmful conducts cannot be punished because they are not forbidden in the criminal law. For instance, conduct of abducting and trafficking man has obvious social harmfulness, but it cannot be punished as crime of abducting and trafficking women and children in that the criminal law does not provide it as an independent crime. Furthermore, the

^① Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p171.

punishment of aggravated consequential offense is restricted by legislation, such as indecent causing death, which belongs to aggravated consequential offense in the Japanese Penal Code but not in the Chinese Criminal Law. If gross negligence test cannot be accepted on the basis of equality principle, aggravated consequential offense should not be provided in the criminal law because its existence is to violate the principle. However, Professor Xu holds that aggravated consequential offense is the reasonable form of punishing the combination of multiple crimes.^① Therefore, her objection to gross negligence is unpersuasive.

Third, it is unreasonable to limit all negligent crimes by gross negligence requirement. Although criminal conducts should reach the degree of blameworthiness in criminal law, it cannot say that the degree of negligence is necessary to be limited in gross negligence. In fact, the reasonability of pure gross negligence standard is related to the object of judging negligence. There are two theories on judging the general negligence. The behavior theory does not require that defendant can foresee the harmful result. As long as defendant recognizes that his behavior violates law, harmful result created by unlawful behavior is foreseeable to the defendant.^② In many cases, although defendant violates the standard of conduct, lack in foreseeability to the specific result is possible. For instance, defendant does not keep a proper distance from victim's car. When the victim suddenly brakes, the defendant's car crushes into the victim's car and causes the victim's death. According to the behavior theory, the defendant should be convicted of negligently causing traffic accident. However, although the defendant violates the standard on keeping proper distance, he cannot foresee the victim's sudden brakes.^③ In other words, general negligence is so easy to be affirmed that the defendant's freedom of action may be unreasonably restricted. Thus the pure gross negligence standard can be applied to correct the inclination of abusing punishment.

① Xu Yuxiu, *Contemporary Theories on Criminal Law*, 2005, China Democracy and Legal Institute Press, p700.

② Ida Makoto, *Structure of Criminal Law in General Part*, 2005, Seibundoh Publishing Co., Ltd, p116-117

③ Nishida Nonyoki, *Criminal Law: Specific Part*, 5th ed, 2010, Koubundou Publishers Inc, p260-261.

In contrast, the result theory is sufficient to prevent unjust imputation.^① Actually, there is no difference between general standard according to the result theory and gross standard according to the behavior theory. If we accept the result theory, it is unnecessary to limit the defendant's culpability through gross negligence standard. As mentioned above, the aggravated consequential offense should be stricter than the general negligent crime on the degree of negligence. Therefore, it is unreasonable to advocate the pure gross negligence standard. Furthermore, according to the result theory, gross negligence standard could unreasonably restrict the conviction of negligent crime. For instance, if defendant commits injury when he cannot foresee the victim's special physique, it cannot constitute gross negligence of the victim's death. In other words, although the defendant causes the victim's death, the defendant just can be convicted of injury according to the negligence standard. However, this conclusion is unacceptable for excessively limiting the punishment. As a result, neither the behavior theory nor the result theory can support pure gross negligence standard.

Forth, it is doubtful on the theoretical premise of intention causing dangerousness theory. It cannot deny that intention causing dangerousness theory is very similar to the gross negligence theory on judging mental state of the aggravated consequential offense. According to the intention causing dangerousness theory, defendant foresees the high risk of causing extended result and wishes or allows the risk to occur when he intentionally inflicts the risk.^② In other words, defendant's foreseeability on condition of intentionally causing high risk obviously is greater than that of general negligence. Therefore, defendant's intention causing dangerousness is almost equal to negligence causing result. Nonetheless, the intention causing dangerousness theory treats the consequential offense as crime with single subjective element of aggravated consequential offense, i.e., intention of causing special dangerousness.^③ That is to say,

① Li Hong, *Thinking Questions of Criminal Law in General Part*, 2007, China Renmin University Press, p285.

② Li Xiaotao, *Reviewing Structure of Aggravated Consequential Offense*, *Journal of Central South University(Social Science Edition)*, 2008(6), p770.

③ Ke Yaocheng, *Development of Criminal Law Thoughts*, 2003, China University of Political Science and Law

aggravated consequential offense belongs to intentional crime of causing dangerousness. Nonetheless, punishments for many aggravated consequential offenses are equal to or severer than that for intentional crime of causing result in the Chinese Criminal Law. For instance, both murder and injury causing death shall be sentenced to fix-term imprisonment from three years to ten years, life imprisonment or death penalty. Furthermore, Kidnapping for ransom causing death shall be sentenced life imprisonment or death penalty, which is severer than the crime of murder. Therefore, intention causing dangerousness theory cannot balance the relation of intentional crime causing result and intentional crime causing dangerousness. Actually, intention causing dangerousness theory ignores illegality and culpability of the basic crime, which is the wrong about judging the construction of aggravated consequential offense. On the contrary, the gross negligence theory can be based on the substantive combination theory, which not only restricts the mental state of causing extended result, but also attaches importance to the illegality and the culpability of basic crime, thus this theory has technical superiority over the intention causing dangerousness theory.

Fifth, it is possible to accept the gross negligence theory in the Chinese Criminal Law. According to the Chinese Criminal Law, there are two kinds of negligent crime, i.e., inadvertently negligent crime and cognitively negligent crime. The inadvertently negligent crime refers to an act committed by a person who should have foreseen that his act would possibly entail harmful consequences to society but fails to stop it through his negligence. The cognitively negligent crime refers to an act committed by a person who should have foreseen the consequences, readily believes that they can be avoided, so that the consequences occur.^① Furthermore, the Chinese Criminal Law does not expressly distinguish the degree of two kinds of negligent crime. Therefore, the dominating opinion holds that the criminal law usually cares less about whether

Press, p132.

① Article 15 in the Chinese Criminal states that a negligent crime refers to an act committed by a person who should have foreseen that his act would possibly entail harmful consequences to society but who fails to do so through his negligence or, having foreseen the consequences, readily believes that they can be avoided, so that the consequences do occur.

defendant recognizes the result.^① Nonetheless, we must pay attention to two facts: On the one hand, almost all scholars talk in the same vein that the object of recognizing extended result unnecessarily includes extended result in aggravated consequential offense. No one holds that defendant negligently causes extended result when he foresees the extended result. Thus whether defendant recognizes extended result immediately determines the mental state of aggravated consequential offense. On the other, most people hold that intention not only is distinguished from negligence on the purposefulness, but also on the degree of cognition, i.e., the degree of recognizing the result in the intention is higher than that in the negligence. Some scholars step forward to point out that indirect intention refers to actual possibility of recognizing the harmful result while cognitive negligence refers to presumptive possibility of recognizing the harmful result.^② In fact, the presumptive possibility of causing result is similar even equal to the possibility of causing dangerousness. Therefore, it is possible to treat the cognitive negligence as the gross negligence. When defendant foresees the dangerousness of causing result, it can be convicted of causing result through gross negligence. Furthermore, the specific part of Chinese Criminal Law does not expressly distinguish gross negligence from general negligence in aggravated consequential offense, although all aggravated consequential offenses are limited in gross negligence requirement, it is unnecessary to worry about unlawful restriction on explaining the mental state.^③ Therefore, two kinds of negligence are separately applied to different circumstances in the Chinese Criminal Law. The general negligence should be applied to general negligent crime and aggravated consequential offense of formal combination. The gross negligence should be applied to aggravated consequential offense of substantive combination.

① Wang Shizhou, *Contemporary Criminal Law*, 2011, Peking University Press, p137.

② Wang Zuofu, *Research on Chinese Criminal Law*, 1988, China Renmin University Press, p174-175.

③ Guo Li, *Research on Construction of Consequential-aggravated Crime*, 2013, China People's Public Security University Press, p154-155

2.4.3 Specific Judgment of Gross Negligence

Many scholars offer idea about drawing a clear line between general negligence and gross negligence. For instance, German jurists Jescheck and Weigend hold that gross negligence refers to serious violation to the duty of attention or the circumstance that defendant does not pay attention to what everyone should realize in the specific condition. Japanese jurist Suzuki Shigetsugu holds that if defendant has not foreseen the extremely high dangerousness because of obvious hastiness, it can be convicted of crime through gross negligence. However, these opinions just attach importance to the severity of negligence but lacks in clear standard of judgment.^①

In the Anglo-American Criminal Law, similar to the continental criminal law, recklessness is different from negligence. Furthermore, there also are different opinions on understanding the recklessness. Judgment of recklessness once was based on the objective standard. If defendant created substantive dangerousness of causing the result, recklessness could be affirmed. Nonetheless, nowadays, the standard of judging the recklessness has transferred to subjective approach, i.e., the defendant disregards the substantive and unjust dangerousness he recognized.^②The American Law Institute Model Penal Code inclines to the subjective standard. The code provides the recklessness as following contents:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering known to him, such disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the defendant's situation.^④Nonetheless, some scholars do not agree with limitation of recognizing the substantive dangerousness on the judgment of recklessness. According to the objection,

① Suzuki, Shigetsu, 2011, Seibundoh Publishing Co., Ltd, p126.

② Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p135.

④ Model Penal Code§2.02(2)(c)(1985).

if the defendant believes that it is creating unjustifiable dangerousness to some extents and disregards the actual dangerousness, it would be possible to affirm the recklessness.^① Some scholars go forward to hold that the cognition of dangerousness need not reach the degree of certainty even the degree of probability. “Indeed, if there is no social utility in doing what he is doing, one might be reckless though the chances of harm are something less than 1%”.^② Additionally, some scholars divide recklessness into different degrees, i.e., indifference and absurdity, which are applied to different crimes. For instance, the indifference can be applied to the second degree of murder while the absurdity manslaughter.^③

The opinions of differentiating two kinds of recklessness can be used for lessons. In the Anglo-American Law, recklessness is applied to many general crimes. If recklessness is restricted in stringent condition, it is possible to excessively overindulge some crimes. On the contrary, some serious crimes in the Anglo-American Law are conditioned of recklessness, such as murder. If recklessness is always in the slight degree, it is possible to abuse penalty. Therefore, recklessness should be divided into two degrees. Actually, negligence of aggravated consequential offense in the substantive combination can be similar to the absurdity, which requires defendant to recognize the actual risk of causing harmful result.

Note, however, that the cognition of dangerousness is different from that of result. The former does not require defendant to recognize the actual existence of special dangerousness. If defendant knew that there is actual risk of causing result, it should constitute intention rather than recklessness.

In fact, so called cognition of dangerousness just require defendant to foresee that the dangerousness of causing result is possible to occur. Because occurrence of dangerousness is based on related factors, the conviction of gross negligence should

① Larry Alexander. 2009. *Crime and Culpability: A Theory of Criminal Law*. Cambridge University Press:26-28.

② Wayne R. LaFare, *Criminal Law*, 5th ed, 2010, Thomson/West, p285.

③ CMV Clarkson, HM Keating, SR Cunningham. 2010. *Clarkson and Keating Criminal Law*. SWEET & MAXWELL:177-178.

require defendant to recognize basic factors of causing result. Taking the injury causing death for example, there are several factors for judging the mental state of causing extended result.

(1) Defendant's cognition of strength and times of assault can immediately determine the determination of gross negligence. If the defendant causes the victim to die from serious injury in the course of successively beating up the victim's face and belly, the gross negligence of causing death should be affirmed because the defendant recognizes the severe violence of creating special dangerousness to life.^①

(2) Defendant's cognition of victim's condition should be judged according to different circumstances. If assault inflicts victim's heart disease and causes the result of death, the defendant should not be convicted of injury causing death unless he foresees the victim's special physique. Of course, it is unnecessary to require the defendant to precisely know about the victim's specific disease. As long as the defendant foresees that the victim is unhealthy, it belongs to cognition of dangerousness. For instance, when the defendant robs an old man who is short of breath and full of white hairs, he can foresee that his conduct will inflict harmful result on the victim's body. In contrast, if the victim is apparently a strong man, there could be another conclusion. Although the victim eventually dies of heart disease created by assault, the defendant cannot be convicted of liability for gross negligence unless he certainly knew the victim's condition.

(3) Defendant's cognition of dangerousness of weapon for criminal conduct is an important element of judging the gross negligence of causing extended result. If defendant does not recognize the nature of weapon for criminal conduct, although the weapon is lethal to human's life and eventually causes the victim's death, the defendant should be convicted of injury causing death for lack of gross negligence to the result. For instance, a defendant assaults the victim with a wooden stick, but he does not know

^①Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p159-160.

there are some spikes in the stick. Although the spikes lunge at the victim's heart and causes death, the defendant has no gross negligence to the dangerousness of the spikes, thus he should not be guilty of gross negligence causing death.^① Nonetheless, it is usually unclear on the specific condition of weapon for criminal conduct. For instance, in a Japanese case, the defendant committed robbery with gun. The victim was killed by a bullet from the defendant's gun in the course of threatening the victim. The defendant argued that he had unloaded the gun for avoiding injury and death. However, the court held that the defendant's argument is unconvincing, thus the emission of bullet still can be treated as the result of defendant's conduct. To the court's conclusion, some scholars held that had the gun been unloaded, it was impossible to convict the defendant of robbery causing death.^② In fact, the key question about the controversy is how to allocate the burden of proof. The subjective element can only be and should be judged on the basis of objective evidence, or the conviction would be inclined to depending on defendant's oral confession. In the case above, because the objective evidence showed that the defendant intended to rob the victim with a gun, and the gun was readied by the defendant beforehand. Therefore, every reasonable man could foresee that the gun, used in the robbery, was loaded. The evidence of robbery with armed gun can prove defendant's cognition of the loaded gun beyond a reasonable doubt. Unless the defendant could prove that he absolutely did not know about the fact that the gun was loaded, or he should be convicted of robbery causing death.

(4) Cognition of dangerous circumstances should be treated as element of judging the gross negligence. If victim dies from taking risk to run away in a dangerous circumstance, the defendant cannot be convicted of causing death through negligence unless he foresee the dangerousness of circumstances. For instance, if defendant assaults the victim beside a cliff, he would obviously be able to foresee that the victim is

① Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, *Gendai Keijiho*, 4(12), p110.

② Enomoto Touya, *Research on Illegality of Aggravated Consequential Offense and Structure*, 2007, *Journal of Law and Political Studies*, (73), p129-130.

possible to fall off the cliff. Nonetheless, if defendant pursues the victim for robbery in a dangerous building, the condition of the building is unnecessary to be known by the defendant. Therefore, only if the defendant has cognition of the dangerousness on the circumstance of committing robbery can he be convicted of robbery causing death when the victim dies from falling off the building.

2.3.4 Mistake in Attack and the Gross Negligence

In the occasion of mistake in attack, the judgment of gross negligence is debated in the circle of scholar. Mistake in attack is a kind of mistake of fact, which refers to the fact that the defendant's conduct damages the third party's legal interest, which is not the object of the intentional attack. In aggravated consequential offense, mistake in attack occurs usually. For instance, defendant assaults victim A, who is drunk. Because the victim A cannot stand stably, he bumps against the victim B and causes the victim B's death, which is the result of mistake in attack committed by the defendant.

There are two main approaches of solving the problem on how to determine the defendant's liability of mistake in attack. The theory of concrete conformation holds that defendant cannot be liable to the result of damaging the third party because the actual damage is inconsistent with the defendant's cognition and intention.^① The theory of statutory conformation holds that although defendant's cognition is inconsistent with the actual result in specific fact, it is possible to convict the defendant of accomplished crime if the cognition is compatible to the result in the constitutive requirement.^② According to the theory of concrete conformation, defendant's cognition of the specific fact should be consistent with the actual result, thus the gross negligence cannot be affirmed in the case of mistake in attack, in which the result is not what the defendant recognizes. In contrast, according to the theory of statutory conformation, as long as the defendant has possibility of foreseeing the actual result, the result can be

^① Liu Mingxiang, *Mistake in Attack and Principle of Judging It*, 1994, *Jurists' Review*, (5), p29.

^② Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p251.

imputed to him,^① thus the theory is possible to affirm the gross negligence in mistake in attack.

Comparatively, the theory of statutory conformation is more reasonable. Culpability not only is psychological fact but also normative element. The judge must conclude the culpability through evaluating the psychological relation, which creates the defendant's conduct, according to the certain standard of value judgment.^② It is unreasonable to limit the judgment of culpability according to the consistency of cognition and result as pure fact. In fact, the theory of concrete conformation cannot keep consistency in judging mistake in target and mistake in attack. According to the theory, if defendant mistakes the victim as whom he wants to attack, i.e., making a mistake in target, the defendant should be liable to the actual result. However, both the mistake in target and the mistake in attack belong to inconsistency of defendant's cognition and actual result, thus it is doubtful to separately treat them. Furthermore, the theory of concrete conformation probably comes to the unreasonable conclusion. For instance, defendant wants to kill someone's cat, but actually kill the victim's dog for mistake in attack. According to the theory, the defendant could not be convicted of any crime.^③ As a result, although the object that the defendant wants to attack is different from the object suffering the actual damage, the accomplished crime should be affirmed in the case that two objects coincide in the nature of relevant constitutive requirements.

According to the theory of statutory conformation, as long as defendant is possible to foresee the result of damaging the third party, he can be imputed to intentional liability of the result.^④ Nonetheless, the theory cannot substitute for the subjective limitation of aggravated consequential offense. In a Japanese case, the defendant assaulted a drunk, who could not stand stably and bumped into the victim, the victim fell

① Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, Gendai Keijiho, 4(12), p109.

② Li Wenjian, *Research on the Concept of Culpability: Substantial Basis of Condemnation*, 1998, Sanrong Co., Ltd., p301.

③ Maeda Masahide, *Criminal Law: General Part*, 2006, University of Tokyo Press, p 245.

④ Ida Makoto, *Theories on Aggravated Consequential Law*, 2002, Gendai Keijiho, 4(12), p109.

down and suffered injury. The court held that the result of causing injury and causing death should occur in the object of violence. If the result of causing death or injury occurred in the third party rather than the object of violence, it should be insufficient. Only if the defendant caused extended result through gross negligence according to Section 208 of the Japanese Penal Code, could the defendant be convicted of crime of causing death or injury. Therefore, the court denied the defendant's responsibility of causing the third party's death in aspect of causation.^① Nonetheless, although the causation can be affirmed in the case, the defendant cannot be convicted of grossly negligent crime unless he foresees the drunk's and the victim's state. If the defendant does not recognize that the assaulted man is a drunk or the victim stands beside the drunk, gross negligence to the victim's injury cannot be affirmed.

2.4.5 Intention to Cause Extended Result

Besides the lowest bound, many scholars debate on the least upper bound of subjective requirement in aggravated consequential offense. The general view holds that the subjective form in aggravated consequential offense not only includes negligence but also intention to cause extended result. The objection holds that the general view confuses justification with legislation, because the view just creates intentional aggravated consequential offense for remedying the disproportional punishment. Furthermore, although intentional aggravated consequential offense is punished in light of imaginative concurrence of crimes, the punishment can be kept in proportionality. For instance, although robbery causing death and rape causing death are both considered to be punished more severely than murder, they could all be sentenced to death penalty.^②

In the opinion of this dissertation, the general view should be supported. First,

① Superior Court of Osaka, Showa era (16.1.23), Criminal Casebook, Vol.16, No.1, P23. Cited in Dando Shigemitsu, Criminal Law: Specific Part, 3rd ed, 1990, Soubunsha Co. Ltd, p415.

② Nishimura Katsuhiko, On Concept of Aggravated Consequential Offense, 1985, Lawyers Association journal, 37(8): 1893-1914, p10-12.

according to the Chinese Criminal Law, denial of intentional aggravated consequential offense inevitably leads to disproportionate conclusion. For instance, robbery causing serious injury in the Chinese Criminal Law can be punished by life imprisonment and death penalty. Furthermore, punishment for injury causing grievous bodily harm cannot exceed imprisonment of ten years. If robbery does not include intentionally causing serious injury, robbery causing serious injury through negligence would be severer than that through intention, which is unacceptable. Second, intentional aggravated consequential offense is a reasonable existence rather than an expedient for proportionality of punishment. Defendant's intention to cause extended result cannot change the fact that the aggravated consequential offense belongs to combination of basic crime and crime of intentionally causing extended result. Therefore, the combination of basic crime and intentionally causing extended result also has the aggravation of illegality and culpability. If negligent aggravated consequential offense is punishable, intentional aggravated consequential offense should not be rejected.

Certainly, some aggravated consequential offenses cannot include the circumstance that defendant intends to cause the extended result. First, subjective element of aggravated consequential offense cannot violate legal provision. For example, murder is conditioned of defendant's intention to cause death. If injury causing death includes intentional homicide, the crime of murder would be a superfluous provision. Therefore, injury causing death should not include intentional homicide. Second, the subjective requirement of aggravated consequential offense should be consistent with the principle of proportionality. In the formal combination, crime of intentionally causing extended result is punished more seriously than aggravated consequential offense. Third, the subjective element should be consistent with common sense. For instance, the object of rape is limited in living people. If defendant kills someone, he cannot continue to commit rape. Therefore, rape causing death is impossible to be committed in the course of intentional homicide.

3.5 Conclusion of This Chapter

In substantive combination of aggravated consequential offense, the limitation mainly includes four aspects: basic conduct, extended result, causation and mental state.

The judgment of basic conduct should be compatible to the connection test and the dangerousness test. The connection test requires the basic conduct to match the constitutive requirement. The basic crime should be understood in a substantive way. In other words, the legally fictitious requirement, the defendant's conduct which is committed after completion, the conduct for keeping the state of illegality in the continuous crime and the conduct of causing partner's death on the basis of mistake in attack can match the constitutive requirement of basic crime. The dangerousness test requires the conduct of committing basic crime to be inherently dangerous to cause extended result. The inherent dangerousness should be judged by objective material and through scientific theorem. Victim's special physique, dangerousness of circumstances and method of committing basic crime should be important elements of judging the degree of dangerousness.

Extended result should be judged by the actual damage test and the aggravation test. First, extended result is limited in actual result. Second, extended result should be severer than the harmfulness of basic crime in aspects of quantity and quality.

The causation requirement should focus on immediateness test. According to the immediateness test, basic conduct should immediately determine the occurrence of extended result. If there are other factors interfere in the causal relationship between basic conduct and extended result, the immediateness test should not be matched unless these factors are immediately caused by basic conduct according to pathological theorem and psychological theorem.

In the aspect of mental state, defendant cannot be liable to extended result unless he causes the result through gross negligence at least for matching the proportionality. Furthermore, the concept of intentional aggravated consequential offense should be

accepted. In principle, aggravated consequential offense includes the combination of basic crime and crime of intentionally causing extended result. Nonetheless, if the conviction of intentional aggravated consequential offense violates legal provision, the intention of causing extended results should not be included in the subjective element of aggravated consequential offense.

Chapter 3 Special Criminal Patterns and Aggravated Consequential Offense

3.1 Complicity in Aggravated Consequential Offense

This part considers joint offense or, more specially, the circumstances under which a person who does not personally commit aggregated consequential offense may be held accountable for the conduct of another person with whom he associated or solicited himself. Partition in aggravated consequential offense is related to the overlapping question of complicity and aggravated consequential offense, thus this part will focus on the relationship between rationale of aggravated consequential offense and nature of complicity. Specifically speaking, there are three basic questions to be solved in this part. The first question refers to the possibility of convicting the defendant of aggravated consequential offense in complicity. If the answer is “Yes”, the following question would be: which kind of complicity can be convicted of aggravated consequential offense? If the second answer also is “Yes”, the third question will point to the specific requirement of complicity in aggravated consequential offense.

At present, the circle of academy and the judicial practice usually affirm the existence of complicity in aggravated consequential offense on the basis of the principle of attributing entire liability to partial conducts. According to the general opinion, if joint offenders commonly commit basic crime, they should commonly be liable to the extended result. Nonetheless, there is a hidden trouble in this logic, i.e., the principle of attributing the entire liability to partial conducts can only be applied to the complicity. In other words, it is impossible to apply the principle to prove the reasonability of complicity in aggravated consequential offense; otherwise it is to put the horse before the cart. In fact, some scholars begin to disagree with the traditional opinion, while

other scholars try to endorse it in new ways. Therefore, it is necessary to rethink the three questions mentioned above. This part will analyze these questions according to the specific provision of complicity in the Chinese Criminal Law.

3.1.1 Different Approaches of Analyzing Participation of Aggravated Consequential Offense

There are two approaches on judging the reasonability of complicity in aggravated consequential offense. First, the result approach bases the standard, which is to judge that whether aggravated consequential offense can be convicted through complicity, on the extended result. According to the result approach, the possibility of constituting the complicity in causing extended result determines immediately whether the defendant can be convicted of aggravated consequential offense, because his partition in other person's criminal conduct immediately causes the extended result. Second, the basic crime approach holds that the complicity in basic crime is the standard of attributing the extended result to the joint offenders. According this opinion, the complicity in aggravated consequential offense actually is decided by the pattern of committing the basic crime. There is a great difference between the above two approaches. The basic crime approach can avoid the question about whether defendants committing negligent crimes can be guilty of complicity, while the result approach can't because the mental state of causing extended result can be gross negligence. Thus the choice in approaches above will determine the answer of the question about complicity in aggravated consequential offense.

3.1.1.1 basic crime Approach

The basic crime approach is widely accepted in judicial practice and academic circle for it can effectively avoid the discussion on the metal state of causing extended result. Nonetheless, if extended result is the constitute requirement of aggravated consequential offense, it would be impossible to ignore the influence of extended result

to the conviction of aggravated consequential offense. Therefore, the ground of increasing punishment is related to the judgment of complicity in aggravated consequential offense.

(1) Unity Theory and basic crime Theory

The unity theory happens to agree completely with the basic crime theory. According to the unity theory, extended result purely belongs to the objective condition for limiting punishment, thus as long as the defendant causes extended result in the course of committing basic crime, he can be convicted of aggregated consequential offense. Obviously, there is no obstruction of agreeing with complicity in the unity theory. Japanese jurist Saitou Kinsaku holds that defendants committing negligent crime cannot become intentional collective, thus they cannot commit complicity. Nonetheless, he also considers that the perpetrators' common conducts are treated as that in the crime committed by subjects of accomplice with common intention. Because subjects of accomplice with common intention act together, all partners can be convicted of a crime as an organic whole. Therefore, if several defendants conspire to commit robbery and one of them causes the victim's injury, all defendants should be convicted of robbery causing injury.^① It is thus clear that Saitou Kinsaku only applies the theory of subjects of accomplice with common intention to the basic crime, thus in his opinion, extended result certainly can be attributed to subjects of accomplice with common intention. Saitou Kinsaku does not regard extended result as requirement in respect to defendant's mental state. In other words, he supports the complicity in aggravated consequential offense on basis of unity theory.

The unity theory once dominated the judicial practice for a time. In a German case of 1925, two defendants collaboratively assaulted the victim by rabble, rubber pipe and shoe heel embedded with iron panel and so on. The defendant A uses shoe heel to hit the victim's head to death. The trial court held that it is unclear about defendant B's

^① Saitou Kinsaku, Re-examination of the Theory of the Subject of Joint-Will, 1954, *Waseda Law Review*, 29(2•3), p177.

intention to defendant A's assault, thus she was only convicted of causing bodily harm by dangerous means. Nonetheless, the German Reich Court held that because the joint intention of defendant A and defendant B contained defendant A's assault with the shoe heel, thus the infliction of grievous bodily harm should be attributed to the defendant B according to the general principle, because infliction of grievous bodily harm belongs to pure result crime. In other words, the fact that injury objectively caused the victim to die was sufficient for the conviction of infliction of bodily harm causing death, which was unnecessary to require the defendant to recognize what weapon the partner used.^①In sum, in the case, the German Reich Court treated the aggravated consequential offense as a kind of strict liability.

In another German case, happened on 7 May 1886, four defendants jointly committed a crime. Initially, defendant A cut the victim's face. Soon afterward, the defendant B assaulted the victim's head by a stone and caused the victim to lose consciousness. Defendant C and defendant D continued to beat up the victim. Eventually, the victim suffered grievous harm on basis of the defendant B's assault. The defendant B certainly inflicted grievous bodily harm, but other defendants' criminal liabilities were not unclear. The trial court held that defendants can all be liable to the injury, but the extended result cannot be attributed to all defendants. Nonetheless, the Reich Court held that the trial court misunderstood the law, and thereby rescinding the original judgment. According to the opinion of the final judgment, co-principals were based on the intention of jointly committing the crime, thus all results caused by the crime can be treated as the result on basis of all defendants' joint intention. Therefore, all defendants should be liable to the extended result. In other words, aggravated consequential offense can be committed in complicity. If one of joint perpetrators unintentionally caused extended result, independently or collaboratively, all defendants with same intention in committing the crime should be convicted of aggravated

^① RGSt.,Bd.59S.389,bes.390 f. Cited in Sakuma Osamu, Co-Principal in Aggravated Consequential Offense, 1983, The Nagoya journal of Law and Politics, (96), p123-124.

consequential offense.^①

In Japan, courts also accepted the unity theory, thus they just restricted the complicity in aggravated consequential offense by but-for test. In a case of 1947, the victim was the agent who engaged in selling saccharine. The defendant, in conclusion with other person, robbed the victim's saccharine. In the course of robbery, the victim suffered injury caused by assault with stick for six or seven times. The trial court convicted the defendant of robbery causing injury. The defendant appealed in reason that the Court of Cassation never accepted the complicity in negligent crime, thus if the defendant did not intend to cause the extended result, he should not be convicted as the co-principal on aggravated consequential offense.^② Similarly, the Court of Cassation in a case of 1928 held that if some of joint offenders committing basic crime caused extended result, and there was the causal relationship, on but-for test, between the conduct causing the result and the collaborative commission, thus no matter whether the co-offender immediately caused the extended result or not, he should absolutely be convicted of aggravated consequential offense.^③

(2) Combination Theory and basic crime Approach

Many supporters of combination theory also advocate the basic crime approach. For instance, Japanese jurist Yamaguchi Atsushi holds that the severe punishment of aggravated consequential offense is not only based on extended result, but also on mental state that with respect to the extended result in terms of culpability. In this meaning, aggravated consequential offense belongs to the combination of intentional crime and negligent crime.^④ On the other hand, Yamaguchi holds that if defendant is convicted of co-principal on basic crime, there is no reason of rejecting to convict the defendant of co-principal on aggravated consequential offense. Furthermore, in terms of

① See Vgl.RGSt.,Bd.44,S.137. Cited in Sakuma Osamu, Co-Principal in Aggravated Consequential Offense, 1983, The Nagoya journal of Law and Politics, (96), p123..

② Supreme Court of Japan, Showa era (22.11.5), www.courts.go.jp/hanrei/pdf/js_20100319123319323646.pdf.

③ Court of Cassation of Japan, era (3.4.6), Cited in Otsuka Hitoshi, Co-Principals of Aggravated Consequential Offense, 1977, The Nagoya Journal of Law and Politics Hosei Ronsyû, (70), p24.

④ Yamaguchi Atsushi, Criminal Law: General Part, 2nd ed, Fu Liqing(trans), China Renmin University Press, p189

accomplice and solicit, he holds that in light of the principle of culpability, although it is possible to deny the complicity in narrow sense on aggravated consequential offense, the negligence to the extended result is just an element to limit the imputation of extended result, thus whether the complicity in negligent crime can be affirmed should not be the question on judgment of complicity in aggravated consequential offense of narrow sense.^①

Of course, the combination theory treats the crime of causing extended result as the normal negligent crime, thus the causation of the crime should be compatible to the proximate cause test. In aggravated consequential offense, the commission of basic crime, which includes the conduct of perpetration, assistance and solicitation, generally can be treated as the proximate cause of the extended result. Therefore, if defendants jointly commit basic crime and one of their conducts causes extended result, other defendant would be convicted of aggravated consequential offense. For instance, Chinese jurist Lin Shantian held that if defendants perform joint act according to joint decision, and thereby cause extended result, and if the extended result is caused by one of defendants and is foreseeable to other defendants, every principals commit the basic crime should be liable to the extend result. In contrast, if the extended result is unforeseeable to all defendants, the defendant who cannot foresee the result is unnecessary to be guilty of aggravated consequential offense, although he brings about the illegality of basic crime with the defendant who can foresee.^②Therefore, the combination theory may attribute extended result to actors who jointly commit the basic crime. Nonetheless, this approach actually transfers the complicity in aggravated consequential offense to aggravated consequential offense in complicity, thus it belongs to an extended result approach rather than the basic crime approach.

(3) Dangerousness Theory and basic crime Approach

^① Yamaguchi Atsushi, *Criminal Law: General Part*, 2nd ed, Fu Liqing(trans), China Renmin University Press, p363-364.

^② Lin Shantian, *Criminal Law: General Part (Volume II)*, 2012, Peking University Press, p55-56.

Nowadays, many scholars support the basic crime approach through dangerousness theory. Because Section 18 of the German Penal Code expressly affirms the complicity in aggravated consequential offense, German jurists and judges generally accept the imputation of causing extended result for joint offender. Furthermore, complicity in negligent crimes is almost denied by most German jurists for the expression of German Penal Code,^① thus the extended result approach cannot be chosen for confirming the complicity in aggravated consequential offense. Simultaneously, dangerousness theory is accepted by most of jurists and judges in Germany. In addition, many persons apply the special dangerousness to connect basic crime with extended result so as to treat aggravated consequential offense as an integral crime rather than a combination of intentional crime and negligent crime. In other words, German jurists avoid the division of complicity in the basic crime and complicity in the extended result on the basis of dangerousness theory. Their logic is that because the rationale of increasing punishment is based on the special dangerousness of basic crime, it is impossible to separately judge the basic crime and the extended result. If complicity in basic crime can be affirmed, complicity in aggravated consequential offense certainly can be affirmed. As Hans-Heinrich Jescheck and Thomas Weigend said, aggravated consequential offense was punished on the ground that the defendant caused special dangerousness related to the basic crime.^② If multiple persons jointly commit crime in aggravated consequential offense, the basic crime is always the start point for judging the complicity. Whether the aggravated punishment should be applied to one of participators is only decided by whether the defendant is possible to foresee the extended result.^③

In the German case of 1964, the defendant A and other two, O and S, jointly

① Section 25(2) of German Penal Code states that if more than one person commit the offense jointly, each shall be liable as a principal; Section 26 states that any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal; Section 27 states that any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted of sentenced as an aider.

② Hans-Heinrich Jescheck, Thomas Weigend, Textbook of German Penal Code: General Part, Xu Jiusheng(trans), 2001, China Legal Publishing House, p320.

③ Hans-Heinrich Jescheck, Thomas Weigend, Textbook of German Penal Code: General Part, Xu Jiusheng(trans), 2001, China Legal Publishing House, p686.

intended to enter M's house for stealing money. The defendant A did not personally commit the crime, but he still wanted to share the loot. The defendant A advised the other two defendants to take a stick for hitting the victim's hindbrain in order to make him lose consciousness. Defendant O and S accepted defendant A's suggestion and beat the victim's head for several times. The trial court convicted the defendant of solicitation on serious robbery, i.e., robbery causing death. The defendant tried to appeal against the judgment. The German Supreme Court held that the relationship between the aggravated consequential offense and the lesser included result did not refer to the independent requirement in every aspect. Furthermore, strictly speaking, there was no so-called solicitation on serious robbery. In fact, there was only solicitation on robbery or solicitation related to act of negligently causing death.^① German jurist Roxin agrees with such opinion. He holds that extended result caused negligently should be added simultaneously in the principal and the solicitation. It is unreasonable to limit the possibility of attributing extended result to the principal.^②

In Japan, many jurists also accept the basic crime approach on the basis of dangerousness theory. For instance, Japanese jurist Otsuka Hitoshi holds that basic crime imposes apparent risk of causing extended result, thus the defendant is sufficiently possible to foresee the occurrence of extended result and has the duty of prudently avoiding the extended result. In joint perpetrators, although some offenders inflicts extended result, other offenders generally can be treated as jointly violating the objective duty of care, thus joint principals on aggravated consequential offense should be confirmed.^③ Japanese jurist Sakuma Osamu holds that in aggravated consequential offense, basic crime can be jointly committed, and thereby imposes the classic dangerousness of causing extended result. To this extent, if defendants jointly commit

① Claus Roxin, German Supreme People's Court Precedents: General Part of Criminal Law, He Qingren, Cai Guisheng (trans), China Renmin University Press, p226.

② Claus Roxin, German Supreme People's Court Precedents: General Part of Criminal Law, He Qingren, Cai Guisheng (trans), China Renmin University Press, p227.

③ Otsuka Hitoshi, Criminal Law: General Part, 4th ed, 2008, Yuhikaku Publishing Co.,Ltd, p199.

basic crime and make the high risk become extended result, they should be treated as the integral co-principal. In other words, because defendants jointly perpetrate basic crime, they should be liable to the extended result for liability on negligence.^① Japanese Okano Michio rejects the complicity in negligent crime on the basis of subjects in joint decision theory. However, he supports the dangerousness theory on the ground of aggravated consequential offense, thus he holds that aggravated consequential offense is not a combination of intentional crime and negligent crime but the single crime on the basis of inherent dangerousness of basic conduct. Therefore, although the defendant negligently causes the extended result, the co-principal in aggravated consequential offense can be confirmed.^②

Furthermore, some Japanese jurists not only confirm co-principal in aggravated consequential offense but also solicitation and accomplice in aggravated consequential offense. Japanese jurist Hashimoto Masahiro holds that aggravated consequential offense is punished severely for the classic dangerousness independently embedded in the basic crime, i.e., the extended result that is accompanied by apparent dangerousness is foreseen in the objective experience, thus the defendant is imposed on the objective duty of care for avoiding the foreseen extended result.^③ Accordingly, Hashimoto Masahiro holds that the subjective aspect of co-principal in negligent crime is that the defendant violates the common objective duty of care on causing the extended result when he commits the basic crime with other defendants, thus there is no problem on confirming the complicity in aggravated consequential offense. Nonetheless, Hashimoto Masahiro holds that there is no relation between the duty of care in co-principal and that in accomplice and solicitation. Because the accomplice and the solicitation cannot dominate the causation, although they negligently cause the extended result, they cannot

① Sakuma Osamu, *Criminal Law: General Part*, 2009, Seibundoh Publishing Co., Ltd, p373.

② Okano Michio, *Criminal Law: General Part*, 2nd ed, Seibundoh Publishing Co., Ltd , p338-340.

③ Hashimoto Masahiro, *Co-Principal in Aggravated Consequential Offense*, 1989, *The Hitotsubashi Review*, 101(1), p20.

be confirmed in aggravated consequential offense.^①

Some Chinese jurists advocate the similar opinion. Chinese jurists Lin Yagang and He Ronggong hold that in aggravated consequential offense that includes the basic crime committed intentionally and the crime of causing extended result through negligence, the defendant who is committing the basic crime should have duty of foreseeing the extended result according to the foreseeability. If the defendant violates the duty through negligence, he should take the responsibility of causing the extended result.^② Chinese jurist Yuan Jianwei goes further to hold that when the defendant commits the basic crime, he recognizes the apparent dangerousness caused by his conduct, i.e., he indirectly intends to cause the dangerousness. If the extended result is caused, the defendant should be imposed of aggravated punishment. Therefore, the complicity in aggravated consequential offense should not be limited in the principal. The solicitation and the accomplice can also be confirmed in aggravated consequential offense.^③

3.1.1.2 Extended Result Approach

(1) Standpoint of Extended Result Approach on Supporting the Complicity in Aggravated Consequential Offense

In Japan, many jurists connect extended result approach with negligent complicity. Japanese jurist Yamanaka Keiichi holds that in aggravated consequential offense, judgment of complicity faces a question that whether defendants have joint intention to cause the extended result as in negligent co-principal. If the negligent co-principal can be confirmed, the co-principal in the aggravated consequential offense usually can be confirmed. Japanese jurist Kimura Kamezu holds that joint act theory bases the sufficient subjective requirement of co-principal on the joint decision to perform the

① Hashimoto Masahiro, Co-Principal in Aggravated Consequential Offense, 1989, *The Hitotsubashi Review*, 101(1), p23-24.

② Lin Yagang, He Ronggong, Discussing Criminal Liability of Co-Principals in the Aggravated Consequential Offense, 2002, *Journal of Zhengzhou University(Philosophy and Social Science Edition)*, (4), p45

③ Yuan Jianwei, Aggravated Consequential Offense in Complicity, 2013, *Journal of Hebei Vocational College of Public Security Police*, (2), p47

conduct. It is unnecessary to require that defendants should have joint intention to cause the result. Therefore, in aggravated consequential offense, joint actors should be liable to all results in the case that they have joint decision to perform the conduct.^① Japanese jurist Uchida Hiroshi, holds that if the crime of causing extended result, as the negligent crime, can be committed by co-principal, it is necessary to confirm the joint decision to perpetration and the fact of joint perpetration. If multiple defendants conspire to commit a crime on basis of dangerous conduct, they should bear the joint duty of preventing the extended result that is to be caused by the joint conduct unintentionally, thus the extended result caused by a part of defendants' joint conduct can be attributed to all defendants who are treated as integral negligence.^②

Different from negligent co-principal, few Japanese jurists embrace negligent accomplice and negligent solicitation. Therefore, accomplice and solicitation in aggravated consequential offense are hardly based on the two kinds of negligent complicity. Nonetheless, the extended result approach does not totally conflict with the complicity of narrow sense in aggravated consequential offense. Japanese jurist Hyashi Mikito holds that the negligent complicity of narrow sense is rejected for preventing the punishment overly interfering people's normal life. Nonetheless, if defendants jointly commit aggravated consequential offense, the co-principal and the participator both have intention to some extents, thus it is unreasonable to deny the complicity of narrow sense in the aggravated consequential offense for avoiding excessive interference.^③

(2) Standpoint of Extended Result Approach on Objecting to Complicity in Aggravated Consequential Offense

Many scholars supporting the extended result approach hold that the form of defendant's mental state immediately influences whether he can be the joint offender in

① Kimura Kamezu, *Criminal Law: General Part*, 1959, Yuhikaku Publishing Co.,Ltd, p405.

② Uchida Hiroshi, *Co-Principal of Robbery Causing Death//Nishida Nonyoki, One Hundred Important Cases of Criminal Law: I*, 2008, Yuhikaku Publishing Co.,Ltd, p163.

③ Hyashi Mikito, *Criminal Law*, 2nd ed, 2008, University of Tokyo Press, p443.

the attribution of extended result,^① thus they object to complicity in aggravated consequential offense.

In Japan, there is no lack of scholars rejecting to the complicity in aggravated consequential offense on the basis of extended result approach. Japanese jurist Sone Takehiro holds that if the negligent co-principal cannot be confirmed, the conviction of aggravated consequential offense in the case that he does not foresee the extended result will be criticized for violating the principle of culpability. In simple crime, defendant personally causes the extended result, thus as long as he can foresee the result, it would be sufficient to convict him of aggravated consequential offense. Nonetheless, in complicity, although defendants jointly commit basic crime and have negligence with respect to the extended result, they cannot be convicted of co-principal in aggravated consequential offense. In other words, if joint intention as the requirement of co-principal is unrelated to extended result, joint actors cannot be convicted of co-principal.^② Japanese jurist Kagawa Tatsuo holds that the joint decision, as the requirement of co-principal, should be considered as unanimity for jointly intending to commit the crime. Because basic crime cannot be separated from extended result, thus the complicity in aggravated consequential offense is just limited in the complicity in intentional basic crime and intentional aggravated consequential offense.^③ Japanese jurist Nishimura Katsuhiko holds that the co-principal that requires defendants to jointly perpetrate crime and the complicity of narrow sense that is based on other defendant's perpetrating act cannot be applied to aggravated consequential offense. The extended result, as the fact happening after criminal conduct, cannot be included in joint actors' intention, thus the joint actors can be convicted of complicity in basic crime. Therefore, the actor who immediately causes the extended result is convicted of aggravated consequential offense, while other joint offenders can be convicted of joint co-principal

① Zhao Hui, On Co-Principal of Aggravated Consequential Offense, 2005, Journal of Wuhan University of Technology(Social Science Edition), (3), p384.

② Sone Takehiro, Important Questions of Criminal Law, 2005, Seibundoh Publishing Co., Ltd, p329.

③ Kagawa Tatsuo, Nature of Aggravated Consequential Offense, 1978, Keio University Press, p136-155.

in basic crime.^①

Although almost all German jurists confirm the complicity in aggravated consequential offense, there are still a small number of scholars holding dissenting opinion. German jurist Ziege holds that since the complicity in negligent crime does not exist, aggravated consequential offense in respect with negligence to extended result should not be applied in the complicity. Nonetheless, “at least negligently” does not exclude the case in which the defendant intends to cause extended result. Therefore, if defendant at least intentionally causes extended result, he can be an exception for constituting aggravated consequential offense in complicity as the intentionally joint crime.^② German jurist Oehler denies the complicity in negligent crime, thus he does not confirm the complicity in aggravated consequential offense in the case that the defendant negligently causes extended result.^③ German jurist Hein Karl holds that the requirement of complicity of narrow sense should be totally compatible to the principle that is provided in the Section 26 and Section 27 of the German Penal Code, i.e., only if the defendant intentionally induces another to intentionally commit an unlawful act or assists another in the intentional commission of an unlawful act, can he be convicted of complicity. In his opinion, the Section 18, on aggravated consequential offense, and the Section 11(2), on combination of intentional crime and negligent crime, of the German Penal Code cannot be the reason of violating the principle on punishing the complicity of narrow sense. Therefore, the application of the Section 18 should be limited in the circumstance that the defendant intentionally causes extended result in the commission of intentional basic crime.^④

In China, many scholars also denied the complicity in aggravated consequential offense on the basis of the extended result approach. They usually hold that the Article

① Nishimura Katsuhiko, Rethinking Aggravated Consequential Offense(3), 1979, The Hanreijiho, (933), p 9.

② Vgl. H.-J.Ziege, a.a.O.Anm.3, S.179f. Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p364.

③ Vgl.D.Öehler, Das erfolgswqualifizierte Delikt und die Teilnahme an ihm, GA 1954, S.37ff., 41f.Cited in Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p364-365.

④ Karl Heinz Gössel, Interpretation on Complicity of Aggravated Consequential Offense, 1982, Ida Makoto(trans), 55(4), p95.

25 of the Chinese Criminal Law require the conviction of complicity to be based on the defendant's intentional communication, thus joint defendants cannot be convicted of complicity without communication for causing extended result.^① Nonetheless, these Chinese scholars do not immediately deny the attribution of extended result in the case that the defendant jointly commits basic crime. There are about three analytic ways of attributing extended result to joint defendants as follows:

First, joint offenders of basic crime can separately be liable to extended result. Chinese jurist Huang Hanyi holds that according to the nature of co-principal, there is no communication between defendants in commission of jointly negligent crime, because the concept of "communication" is limited in intentional crime. Therefore, co-principals cannot exist in jointly negligent crime. Nonetheless, Huang Hanyi still attributes extended result to the co-principal of basic crime. He holds that if participator of co-principals in basic crime can foresee the extended result but does not actually avoid it, he should immediately be liable to the extended result as the simple perpetrator.^② Chinese jurist Li Bang-you holds the similar opinion. He holds that only if defendants jointly intend to cause the extended result, can they be convicted of complicity in aggravated consequential offense. Nonetheless, if several defendants communicate each other to jointly commit basic crime and someone of them negligently causes extended result, the conviction of complicity in aggravated consequential offense is unrelated to the defendant's negligence to cause the extended result. If other defendants have negligence to the extended result, they can be convicted of aggravated consequential offense as the simple perpetrator.^③

Second, defendants who jointly commit basic crime have the duty of precluding extended result. If they do not perform their duty and negligently cause the extended

① Zhang Lihong, Research on Complicity in Aggravated Consequential Offense, 2006, Journal of Inner Mongolia University for Nationalities(Social Sciences), (5), p108-109.

② Huang Hanyi, New Opinions on Criminal Law: General Part, 2010, Yuan Zhao Press, p272-273.

③ Li Bangyou, Research on Basic Theory of Aggravated Consequential Offense, 2001, Wuhan University Press]172-176.

result, they shall be convicted of aggravated consequential offense. Chinese jurists Wu Haichun and Chen Hongbin hold that in the circumstance that defendants negligently cause extended result, they cannot be convicted of complicity in respect of the extended result. Nonetheless, the basic conduct is highly dangerous on causing extended result. If defendants jointly commit basic crime, every defendant should have duty of preventing other defendants to cause extended result. Therefore, if defendant cause extended result through his negligent conduct, he would belong to the actor of aggravated consequential offense. In contrast, other defendants should be convicted of aggravated consequential offense because of failing to avert the extended result.^①

Third, negligent co-principal can be transferred to negligent simple perpetrator, thus joint actors who negligently cause extended result should be convicted of aggravated consequential offense as the simple perpetrator. Chinese jurist Chen Jialin holds that although defendants jointly commit the basic crime as co-principal, they cannot be convicted of aggravated consequential offense in the case of negligently causing extended result. Nonetheless, the joint duty of care actually can be understood as the personal duty of care, thus the negligent co-principal can be transferred to the synchronous crime. As a result, when joint actors commit the basic crime that is possessing inherent dangerousness on causing serious result, every actor is obligated to supervise other actors and to avert the serious result. In the circumstance that extended result occurs, every actor should be liable to the simple perpetrator of aggravated consequential offense because they negligently cause the extended result.^②

3.1.2 Advocating the Extended Result Approach

3.1.2.1 Objection to the basic crime Approach

In the opinion of this dissertation, the basic crime approach cannot be accepted.

① 吴海春,陈洪兵. 2006. 结果加重犯论及立法的再检讨—以故意伤害致死、强奸致死和抢劫致死为切入点. 辽宁警专学报,(6): 19.

② 陈家林. 2006. 结果加重犯的共同正犯浅论. 河北法学, (12): 80-81.

First, because unity theory violates the principle of culpability, it almost loses supporters in the circle of academy now. The German Penal Code denied this theory through statutory provision. Japanese jurists generally acknowledge that the principle of culpability requires the attribution of extended result to be connected with the defendant's mental state. Chinese instruction cases also pay attention to the negligence of causing extended result. Therefore, it is impossible to go on supporting the complicity in aggravated consequential offense through unity theory.

Second, in light of combination theory, both extended result and basic crime are constitutive requirement of aggravated consequential offense. Strictly speaking, the complicity in aggravated consequential offense should be the combination of complicity in basic crime and complicity in crime of causing extended result. In other words, the combination theory should conflict with the basic crime approach.

Third, scholars supporting the basic crime approach through dangerousness theory usually base the subjective requirement of complicity on joint intention. According to the dangerousness theory, which integrates the basic crime and the extended result, the content of joint intention is unnecessary to include the knowledge on the extended result. However, it is actually not the truth. Although the aggravated consequential offense is based on the special dangerousness of basic crime, the extended result cannot be ignored in judging the content of defendant's mental state. One of the important elements on criminal intention is knowledge about the constitutive requirement that includes conduct, result, causation and other statutory factors of illegality. Because extended result belongs to the content of illegality, if the defendant foreseen the result, his intention of causing the result can be confirmed. If the defendant is convicted of an intentional crime that is required to cause the result, the result actually is equal to the objective condition of punishment. In other words, the dangerousness theory borrows the idea of unity theory to support the basic crime, which has deviated from its original intention.

Some jurists are aware of the problem mentioned above, thus they try to modify the basic crime for matching the dangerousness theory. Japanese jurist Enomoto Touya holds that the joint crime consists of intention of jointly committing the crime and fact of joint perpetration. In aggravated consequential offense, the so-called joint perpetration is accompanied with the special dangerousness of causing extended result. Every participator's knowledge of conduct immediately causing extended result should be corresponded with the special dangerousness. If the immediate actor creates the dangerousness that is not included in the content of other participators' intention and the dangerousness transfers to extended result, they would not immediately face to the liability of committing aggravated consequential offense. Accordingly, the joint principal in aggravated consequential offense should be denied.^①Maruyama Masao expresses the similar opinion. He holds that although defendants can be convicted of jointly committing basic crime, they are unnecessarily convicted of jointly committing aggravated consequential offense. According to the dangerousness theory, it is insufficient to require the extended result to be foreseeable for defendant.^②As a result, they still hold that the knowledge of special dangerousness can conclude the joint intention. In light of their modification to the basic crime approach, co-principals should be limited in the joint knowledge of special dangerousness. Nonetheless, this conclusion still makes the dangerousness theory fall into self-contradictory. As mentioned above, the dangerousness theory constructs the aggravated consequential offense by subjective requirement and makes it severer than normal imaginative concurrence of crimes. On the other hand, when several defendants commit a crime and one of them simultaneously commits another crime, other defendants cannot be convicted of the second crime in the case that they just foresee the apparent dangerousness rather than intend to cause the result of the second crime. Therefore, in terms of the modification to

① Enomoto Touya, Research on Illegality of Aggravated Consequential Offense and Structure, 2007, Journal of Law and Political Studies , (73), p251.

② Maruyama Masao, On Aggravated Consequential Offense, 1990, Seibundoh Publishing Co., Ltd, p390.

the basic crime, the subjective requirement of complicity in aggravated consequential offense is looser than that in imaginative concurrence of crimes. Some scholars may argue that the aggravated consequential offense is expressly provided in the statutory law, thus it can be considered as the expanded punishment for complicity. Nonetheless, in the Chinese Criminal Law and the Japanese Penal Code, there is no specialized provision of complicity in aggravated consequential offense, thus it is unreasonable to equate the joint knowledge of special dangerousness with joint intention.

In conclusion, the basic crime approach inevitably borrows the idea of unity theory. In the dual combination theory, extended result is the important content of illegality, thus it should restrict the conviction of complicity in aggravated consequential offense. In other words, although defendants can be convicted of complicity in basic crime, they cannot immediately be liable to extended result. If crime of causing extended result cannot be committed by complicity, joint offenders just take the responsibility of basic crime. Therefore, the extended result approach is a reasonable way to judge the complicity in aggravated consequential offense. Because the subjective requirement of aggravated consequential offense includes defendant's negligence or gross negligence to cause the extended result, the extended result approach is closely connected with related standpoint on the complicity in negligent crime. According to this relationship, the dissertation will rethink standpoints of the extended result approach on judging the complicity in aggravated consequential offense.

3.1.2.2 Understanding the Extended Result Approach

As mentioned above, there are still two conclusions on the complicity in aggravated consequential offense. The affirmative opinion usually confirms the co-principal in negligent crime. In contrast, the objection usually denies the co-principal offense. Although some Japanese scholars deny the complicity of narrow sense, they are just for avoiding the excessive punishment. Essentially, they do not reject the possibility of aiding or abetting the principal through negligence. It can say that extended result

approach connects the complicity in negligent crime with the complicity in aggravated consequential offense.

Nonetheless, it should be noted that some Chinese supporters of extended result approach do not give up attributing extended result to joint offenders of basic crime, while they deny the complicity in negligent crime. It thus is necessary to rethink the standpoint for better understanding the extended result approach.

First, dangerousness theory cannot support that joint offenders of basic crime are immediately liable to extended result. If perpetrating conduct is treated as the perpetrating conduct of causing extended result, the basic crime approach can lead to reasonable conclusion for determining the co-principal in aggravated consequential offense. Nonetheless, accomplice is different from principal on the dangerousness of causing result. Although the principal of committing basic crime can be equal to the principal of causing extended result, it is unreasonable to equate the accomplice of committing basic crime to the criminal conduct of proximately causing extended result. Therefore, the logic of supporting the basic crime through proximate cause test cannot be applied to assistance and solicitation unless the logic simultaneously is combined with the expanded principal theory. However, the expanded principal theory ignores the essential difference between principal and accomplice, thus it is unacceptable in the circle of academy.^① In fact, Chinese and Japanese scholars generally support the narrowed principal theory that treats accomplice as the fact of expanding the punishment for protecting legal interest.^② According to the narrowed principal theory, accomplice of basic crime cannot lead to accomplice of aggravated consequential offense. Furthermore, the combination theory cannot explain the severe punishment of partial aggravated consequential offenses. In light of substantive combination theory, basic conduct should have special dangerousness of causing extended result. However,

① Nishida Nonyoki, *Criminal Law: General Part*, 2nd ed, 2010, Koubundou Publishers Inc, p 326.

② Zhang Mingkai, *Criminal Law*, 4th ed, 2011, Law Press·China, p355; Nishida Nonyoki, *Criminal Law: General Part*, 2nd ed, 2010, Koubundou Publishers Inc, p327.

the perpetrating conduct of basic crime, uncertainly, is compatible to the condition. Thus it is irrational to equate the commission of basic crime to the perpetrating conduct of causing extended result. As a result, the basic crime approach cannot be reasonably based on the combination theory.

Second, it is unreasonable to require all joint offenders of basic crime to avert extended result. It is controversial on whether preceding dangerous act can be the source of omission. Furthermore, although the source can be accepted, it is limited in strict requirement. For instance, the preceding dangerous act should place the legal interest in urgent danger^① or inevitably inflict imminent danger.^② Nonetheless, all joint offenders of lesser offense are not compatible to the requirement. Additionally, the omission approach judges the conviction of aggravated consequential offense according to every defendant's omission. If all participating acts can create obligation of averting extended result, abettors and accessories would all be treated as co-principal. In other words, it is equal to diminish the difference between co-principal and participator in the accomplice and solicitation. The conclusion obviously violates the provision on complicity in the Chinese Criminal Law, thus it cannot be accepted at all.

Third, it is impossible to transfer all co-principals to simple principal. Indeed, some cases related to co-principal can be understood as simple principal. For instance, builder and supervisor both undertake the duty of care about the quality of a construction. If they do not perform the duty, the building would reach no safe standard. In the case that the building collapses and causes someone to die, many scholars hold that the builder and the supervisor have joint duty of care for guaranteeing the quality of construction, thus they should be responsible to the result as joint offenders in the negligent crime. Nonetheless, the supervisor's duty is to drive the builder to work according to the rule. Although the builder does not know about the supervisor's carelessness and the

① Zhang Mingkai, Antecedent Behavior of Omission, 2011, Chinese Journal of Law, (6), p145.

② Pan Yue, On Conditions of Antecedent Actions Producing Obligations of Acting, 2006, Law Science Magazine, (3), p39.

supervisor does not know the builder's, they should be responsible to the result caused by their negligence. Therefore, their duties are independent. In other words, this case belongs to the concurrence of negligence rather than the joint negligence, thus the supervisor and the builder should be treated as simple principal. If every defendant who commits basic crime the independent duty of avoiding extended result, they should be convicted of aggravated consequential offense when one of them causes extended result. Nonetheless, many factual cases just are related to the joint negligence. For instance, two defendants shoot at the same time and one of their bullets kills the victim. This case cannot be classified as simple perpetration.^① Therefore, it is unreasonable to make complicity of basic crime become that of joint negligent crime that causes extended result.

In a word, in light of the extended result approach, if criminal law does not provide the complicity in aggravated consequential offense, it should be conditioned on the complicity in negligent crime. If defendants cannot be convicted of joint negligent crime causing extended result, they should not be responsible as complicity in aggravated consequential offense.

3.1.2.3 Applying the Extended Result Approach in the Chinese Criminal Law

Strictly speaking, complicity is not only a judicial question but also a legislative question. Although different theories may advocate different requirements of complicity, theoretical interpretation cannot get rid of legislation. If statute law expressly denies complicity in negligent crime, there is no room for discussing this kind of complicity. In the Japanese Penal Code, complicity is not statutorily provided in the condition of joint intention, but the complicity in negligence is confirmed by many scholars. In contrast, the Article 25(2) of the Chinese Criminal law provides that a negligent crime committed by two or more persons jointly shall not be punished as a joint crime, thus most of

^① Li Hong, Questioning Negligently Joint Co-Principal, 2007, People's Procuratorial Semimonthly, (14), p28.

Chinese scholars does not confirm the complicity in negligent crime.^① As Chinese jurist Zhao Bingzhi says, complicity should be divided into factual complicity and legal complicity. The factual complicity includes intentional complicity and negligent complicity. In contrast, the legal complicity is a confirmation of the factual complicity.^② In the Chinese Criminal Law, the legal complicity obviously cannot include the complicity in negligent crime. Therefore, if defendants jointly cause extended result through negligence, it would be impossible to convict them of complicity in aggravated consequential offense.

Nonetheless, it is still unclear that whether defendants separately commit the intentional crime and the negligent crime can be committed in the legal complicity. Most scholars hold that complicity should be limited in joint intention as subjective requirement. For instance, although defendant intends to cause the result, he cannot be convicted of complicity in the case that other defendants just negligently cause the result. Nonetheless, the so-called joint intention requirement is incompatible to the essence of complicity.

The criminal commonness theory and the joint conduct theory debate on the essence of complicity. In the beginning, the debate was limited on co-principal, but it has been extended to solicitation and accomplice now.^③ The criminal commonness theory usually holds that several defendants' conducts should be related to the same constitutive requirement; otherwise they cannot be convicted as joint offenders.^④ Therefore, joint offenders should have joint intention to commit the crime.^⑤ In other words, only when defendants jointly intend to cause the extended result, can they be convicted of complicity in aggravated consequential offense. On the contrary, the joint conduct theory holds that the complicity refers to crimes that are

① On Joint Offenses, 2nd ed, 2006, China Renmin University Press, p399-400.

③ Zhao Bingzhi, Contemporary Criminal Law, 2009, China University of Political Science and Law Press, p221-222.

④ Asada Kazushige, Criminal Law: General Part (Adding Edition), 2005, Seibundoh Publishing Co., Ltd, p 408.

⑥ Ida Makoto, Structure of Criminal Law in General Part, 2005, Seibundoh Publishing Co., Ltd, p350.

⑧ Sone Takehiro, Important Questions of Criminal Law, 2005, Seibundoh Publishing Co., Ltd, p314.

separately committed by different defendants but as integral illegality, thus it is punished according to defendants' separate intention and negligence.^①In light of the joint conduct theory, the integral intention no longer limits the conviction of co-principal as constitutive requirement. Therefore, it is possible to convict the defendant, who intends to cause extended result, through utilizing others' negligent conduct, of complicity in aggravated consequential offense.

In the opinion of this dissertation, the joint conduct theory is more reasonable than the criminal commonness theory.

First, the joint conduct theory can be compatible to the objectivism theory. The traditional joint conduct theory once decided the objective and subjective element of complicity. If defendants have joint conduct of committing crime, they would be convicted of complicity in severer crime. For instance, defendant A wants to rob the victim while defendant B wants to rape the same victim. If the defendant B brings out the victim's death, the defendant A would be convicted of co-principal in robbery and rape and be liable to the victim's death.^②Thus the joint conduct theory was criticized as subjectivism's production. Nonetheless, the complicity should belong to the content of illegality, thus the joint conduct theory can be applied to judge the objective element of complicity. Therefore, most current supporters of joint conduct theory only analyze the liability of complicity in objective illegality, and hold that the subjective culpability should be decided by specific defendant's mental state. As a result, it is unreasonable to equate the joint conduct theory to subjectivism or equate the criminal commonness theory to objectivism.

Second, the joint conduct theory is compatible to the personal culpability. In light of personal culpability, defendant can only be liable to the result caused by his culpable conduct. Because the defendant contributes the force to other defendants' conducts on

① Asada Kazushige, *Criminal Law: General Part (Adding Edition)*, 2005, Seibundoh Publishing Co., Ltd, p 467.

② Zhang Mingkai, *Advocating Partial Criminal Commonness Theory*, 2001, *Journal of Tsinghua University(Philosophy and Social Sciences)*, (1), p39.

causing illegal result, the provision of complicity expands the punishment to the defendant who causes the result on the condition of combining with other defendants' conducts.^① Although the complicity seems to attribute the result to the defendant who does not causes the result, it factually allocates the liability to the defendant who has contribution in bringing out the result in different levels. Therefore, personal culpability requires the complicity to be based on the integral illegality of joint conducts. Furthermore, the joint conduct theory currently bases joint offenders' specific liability on individual defendant's harmful conduct and mental state, thus the complicity just is a form of personal liability. In contrast, the criminal commonness theory cannot interpret the complicity reasonably. Basically, there are two kinds of criminal commonness. The thorough criminal commonness theory holds that only if defendants jointly intend to commit the same crime, can they be convicted of complicity.^② According to this opinion, defendant is not punished for another person's conduct and can be freed from another person's mental state, but it also violates personal culpability. The partial criminal commonness theory wants to remedy the loophole of thorough criminal commonness theory; it holds that so long as multiple crimes coincide in partial requirements, joint actors can be convicted of complicity in the coincided part.^④ Nonetheless, this remedy for theoretical loophole actually requires defendant to undertake unreasonable liability. As Chinese jurist Li Hong says, the partial criminal commonness theory fictionally affirms the superposition of different crimes, which causes defendant liable to crime committed by another person.^⑤ As a result, it is possible that the partial criminal commonness violates personal culpability.

In light of the joint conduct theory, complicity belongs to the objective illegality. Intention and negligence are both subjective requirements. In other words, joint actors' joint intention cannot limit complicity as the content of subjective requirement. If

① Kawabata Hiroshi Theories on Complicity, 2008, Seibundoh Publishing Co., Ltd, p27.

② Kamei Gentaro, Difference between Principal and Accomplice, 2005, Koubundou Publishers Inc, p19-21.

④ Zhang Mingkai, Basic Standpoints of Criminal Law, 2002, China Legal Publishing House, p268-269.

⑤ Li Hong, Reasonableness of Joint Criminal Conduct Theory and its Application, 2012, Law Science, (11), p114.

defendant intends to commit a crime and recognizes that his conduct and the other's conduct may jointly cause dangerousness to other's legal interest, he may be compatible to the subjective element of complicity in the crime. Of course, complicity should be limited in the causation requirement. Therefore, if defendant's conduct is unrelated to other's conduct in the psychological test and the physical test, the defendant cannot be liable to result caused by other's conduct. For instance, defendant A intends to kill the victim for robbery. When he is shooting, he finds that defendant B is shooting at the same time. If the defendant B kills the victim while the defendant A cannot inflict the victim of any bodily harm, the defendant A would just commits attempt in the robbery. In contrast, if defendant has hit the victim's leg and causes the victim to fall down and defendant B takes the chance and kills the victim, the defendant A can be convicted of robbery causing death.

3.2 Attempt in Aggravated Consequential Offense

The punishment to attempted crime is much slighter than that to accomplished crime. Thus, whether attempt should be considered into aggravated consequential offense is an important issue in practice. However, in academia, consensus has not reached yet on account of the complicated construction of aggravated consequential offense. While judicial interpretation inclines to the negative choice, there are still some to the positive. Some scholars advocate the establishment of the attempt on aggravated consequential offense in the case that basic crime is attempted, but some insist that lack of extended result should be the sign for establishing the attempt in aggravated consequential offense. Besides, there are still scholars approve both of the viewpoints above. Therefore, whether and when the attempt should be considered into aggravated consequential offense are urgent issues to be solved. This dissertation finds a reasonable solution by analyzing the essence of attempt in aggravated consequential offense.

3.2.1 Theoretical Overview

There are two types of approach on attempt in aggravated consequential offense, namely, attempt in basic crime and lack of extended result, which will be introduced as follows.

3.2.1.1 The basic crime Approach

In Japanese Penal Code, there is a considerable controversy over attempt in basic crime and attempt in aggravated consequential offense. The general ideology and legal precedents of Japan reflect that once extended result occurs, aggravated consequential offense is accomplished and should be punished accordingly, hence there isn't so-called attempt in aggravated consequential offense.^① Moreover, although defendant has perpetrated basic crime, which yet is not the perpetrating act of aggravated consequential offense. For example, the perpetrating act of robbery can be direct cause for victim's death, but it is unnecessary to be the perpetrating act of robbery causing death. Thus, the attempt in aggravated consequential offense is unable to establish.^② Besides, aggravation of punishment on the ground of extended result is the particularity of aggravated consequential offense, thus when extended result is caused, no matter whether the basic conduct is accomplished or attempt, it should be comprehended as accomplished aggravated consequential offense.^③ The Japanese Supreme Court has made a decision that for robbery with violence and damage to victims, accomplished robbery causing injury is established even if the perpetrating robbery for another person's property is unaccomplished. And the trial court before the World War II has also pointed out that, when defendant killed victims for forcibly seizing property, accomplished robbery accompanying murder is established even if the criminal failed to seize the property.

① Kawabata Hiroshi, *Integral Structure of Criminal Law Theory*(2): Taking Aggravated Consequential Offense for Example, 2003, *Gendai Keijiho*, 5(5), p91.

② Nishimura Katsuhiko, *Rethinking Aggravated Consequential Offense*(2), 1979, *The Hanreijiho*, (930), p15.

③ Kimura Kamezu, *Criminal Law: General Part*, 1959, Yuhikaku Publishing Co.,Ltd, p371.

On the contrary, some scholars insist on the positive answer to the attempt in aggravated consequential offense, such as jurist Hirano Ryuichi and Maruyama Masao from Japan. Hirano Ryuich held that there were two types of aggravated consequential offense. One was that with damage as the first result and death the second, such as injury causing death; the other was that, by means of violence, with occurrence of theft as the first result and occurrence of death the second, such as robbery causing death. In the former circumstance, the second result would be unlikely to occur without the happening of the first, thus there is no concept of attempt since the second result occurs. Rather, in the latter circumstance, the second result may occur even if the first result does not occur. In this situation, attempt should be established.^① Also, Maruyama Masao raises that, from the perspective of attaching importance to whether the basic result will occur or not, attempt in basic crime may affect the establishment of attempt. Thoroughly implement of dangerousness theory may cut off the relationship between attempt in basic crime and attempt in aggravated consequential offense, yet the inherent danger in dangerousness theory is the reason for establishing aggravated consequential offense, but not for establishing accomplishment. Therefore, the effect of attempt in basic crime on the attempt in aggravated consequential offense cannot be excluded. However, when attempt in basic crime is under impunity, it is not equivalent to the attempt in aggravated consequential offense, and aggravated consequential offense cannot be established.^②

In German Penal Code, it is widely acknowledged that attempt in basic crime leads to attempt in aggravated consequential offense.^③ Initially, attempt in basic crime was served as the criterion of attempt in aggravated consequential offense because of the following two reasons: aggravated consequential offense on basis of intention had not yet been accepted, and extended result had been served as the objective punishable

① Hirano Ryuichi, *Criminal Law: General Part I*, 1972, Yuhikaku Publishing Co.,Ltd , p309.

② Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p314-316.

③ Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p331.

condition.^① After the German Penal Code added the restriction “at least negligence” on the subjective element of extended result, the above two theoretical basis have no longer existed.

Despite all these, the German academic still put a high value on attempt in basic crime. German scholars Jescheck and Weigend hold that, due to the attempt in basic crime, defendant has already caused serious consequence, which may results from negligence or recklessness. In this situation, if there is a relationship between the result and the behavior, the punishable point of attempt in the aggravated requirement can be identified. For example, if victim dies from violence before rape, it can be convicted as attempt in rape causing death. However, if the extended result is based on the result of basic crime, it should not be punishable, as it does not have sufficient basis to attributable to serious results.^②

Furthermore, German jurist Roxin proposes that cases of attempt in basic crime should be treated differently. If defendant intentionally causes extended result, despite of the attempt in basic crime, the attempt in aggravated consequential offense may be affirmed. In other words, “whether the classic dangerousness constructed by basic conduct is on the basis of the result or the conduct itself” should be decided according to the structure of each crime. For example, bodily injury, on the basis of result of injury, usually leads to more damage or death to the victim. It is rare that behavior of basic crime has deadly effect, and it cannot be taken as a reason for aggravating the result.^③

In Chinese criminal law, most of scholars accept that attempt in basic crime is the standard of attempt in aggravated consequential offense. Chinese jurist Wang Zhixinag holds that the complete requirement is the sign of accomplished crime. Extended result is only a condition for applying the statutorily aggravated punishment, not the unique

① Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p302-304..

② Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p629.

③ Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p333.

condition for establishing accomplishment in aggravated consequential offense. If basic crime is unaccomplished, constitutive requirements of aggravated consequential offense should be incomplete. Also, encouragement to stop the crime is another important reason for attempt in basic crime influencing the attempt in aggravated consequential offense. For example, when a robbery has led to serious injury, if attempt in the basic crime can be affirmed, it can prompt the defendant to give up further behavior. Besides, aggravated consequential offense led by attempt or completion of basic crime should be treated differently in measuring punishment, as they have different social harmfulness.^② Chinese jurist Lu Shizhong points out that, though the constitutive requirement changes, the criminal nature of aggravated consequential offense does not change and remains as same as that of basic crime. Therefore, standard of accomplished aggravated consequential offense attaches to that of basic crime. In other words, it depends on the happening of the result of basic crime.^③ Furthermore, they both support the difference between the establishment and the accomplishment of aggravated consequential offense, encouraging crime determination and principle of proportionality.

Oppositely, the negative theory do not agree that attempt in basic crime should be treated as the attempt in aggravated consequential offense. Chinese jurists Wu Zhengxing and Li Renfu insist that aggravated consequential offense of attempt is different from the attempt in aggravated consequential offense, as the former is a type of aggravated consequential offense and is not suitable for being punished according to statutory circumstances of reducing punishment.^④ Chinese jurist Ma Kechang is one of the negative approach supporters, who holds the following viewpoints: Firstly, in the case of attempt in basic crime, the lesser punishment is not applied for aggravated

② Wang Zhixiang, *New Research on Attempt in Aggravated Consequential Offense*, 2007, *Studies in Law and Business*, (3), p124.

③ 陆诗忠. 2013. 结果加重犯既遂之争议问题新探. *政治与法律*, (5): 125.

④ Wu Zhenxing, Li Renfu, *Objection to Attempt of Aggravated Consequential Offense*, 1993, *Contemporary Law Review*, (2), p15.

consequential offense, but for basic crime. Secondly, there is no necessary connection between the attempt in basic crime and the attempt in aggravated consequential offense, since extended result is not the objective penalty requirement. Thirdly, extended result is the constitutive requirement of aggravated consequential offense. Thus, the accomplished crime, not the attempt, should be established when extended result occurs. Finally, it is the extended result not the basic crime that the aggravated consequential offense legislation focuses on. Therefore, when extended result occurs, accomplishment should be established directly without considering whether that of basic crime is established.^① Chinese jurist Zhao Bingzhi takes the similar opinion. He accounts that, basic crime has special risk of leading to extended result, which is the basis of aggravated punishment for aggravated consequential offense, so aggravated punishment should be used to prevent the extended result. Therefore, there is no relationship between the result of basic crime and the establishment of aggravated consequential offense. And the occurrence of extended result means that constitutive requirements of aggravated consequential offense is complete, then the attempt in aggravated consequential offense has no chance to be established.^②

3.2.1.2 The Extended Result Approach

In Japanese academia, relationship between lacking of extended result and attempt in aggravated consequential offense is determined by the form of defendant's liability to aggravated consequential offense. They hold the following view point: The nature of aggravated consequential offense is combination of intentional crime and negligent crime. However, if the crime causes deaths or injuries, statutory punishment is greatly improved, or even more serious than that for intentionally causing extended result. Thus, we should admit that intention to cause extended result could be the mental state of

① Ma Kechang, *Comparative Research on Aggravated Consequential Offense*, 1993, Wuhan University Journal(Philosophy & Social Science Edition), (6), p122.

② Zhao Bingzhi, *Research on Attempt of a Crime*, 2nd ed, 2008, China Renmin University Press, p264-266.

aggravated consequential offense.^①The view point has been verified from the perspective of liability form Japanese jurist Uchida Fumiaki proposed that “For the usual aggravated consequential offense, such as injury causing death and abandonment causing death or injury , does not include the mental state of intention to cause extended result, when defendant intends to kill or injure the victim, murder or injury is established. In such situation, there is exception beyond the principle of requiring the defendant to recognize the result. However, when the crime causes ‘death’, such as robbery causing death, rape at the scene of robbery causing death and over turning trains causing death, it absolutely involves intention.”^②

Besides, some scholars verified the viewpoint above in terms of the principle of proportionality. In the Japanese Criminal Law, three kinds of robbery are defined in Section 204, including robbery causing injury, robbery negligently causing death and robbery intentionally causing death, which are established, when robbery causes injury, causes death without intention and intentionally causes death, respectively. Japanese professor Uematsu Tadashi points out that, the statutory punishment of robbery causing death shall be life imprisonment as the minimum sentence is more serious than that of murder. For instance, defendant shall be imposed on imprisonment of 5 years as the minimum sentence. Thus the three kinds of robbery should be clearly defined in the criminal law. If robbery accompanying murder is not defined, the punishment for robbery negligently causing death and that for murder in scene of robbery will be imbalance.^③

It is widely accepted that if aggravated consequential offense includes the circumstance of intentionally causing extended result, lacking of extended result can be taken as the standard of attempt in the aggravated consequential offense. For example, Japanese professor Dandou Shigemitsu considers that, in special occasion, the intention

① Kimura Kamezu, *Criminal Law: General Part*, 1959, Yuhikaku Publishing Co.,Ltd, p172-173.

② .UchidaFumiaki, *Instruction to Criminal Law (Volume I)*, 1995, Seirin-Shoin, p219.

③ Uematsu Tadashi, *Criminal Law II : Specific Part*, 8th ed, 1988, Keiso Shobo Co. Ltd, p398-401.

of causing extended result can be considered as one of the constitutive requirements of aggravated consequential offense, thus the attempt in aggravated consequential offense certainly can be constituted.^①

There are still a few scholars being doubtful about the general opinion. Japanese professor Shimura Yasumasa is one of them. If the circumstance that the defendant intends to cause extended result is taken as aggravated consequential offense, the boundary between intentional crime and aggravated consequential offense will be undefined. Besides, if the subjective element of causing extended result is limited in the negligence, aggravated consequential offense can be understood in the united way. Therefore, aggravated consequential offense should not include the intention of causing extended result.^② Then, if defendant only has negligence for the extended result, the attempt in aggravated consequential offense should not be established as the attempted crime through negligence is not established.^③

Japanese professor Kagawa Tatsuo is another scholar who denies the aggravated consequential offense on basis of intention, and he provides different argument. In his opinion, the general opinion and judicial precedents actually are not to accept aggravated consequential offense on basis of intention, but to make combinative crime of basic crime and intentional crime be included into provisions on aggravated consequential offense.^④ Constitutive requirements of combinative crime are comprised of two different requirements, each of which can independently lead to a crime, that is, combinative crime is comprised of several independent behaviors. Aggravated consequential offense depends on the happening of extended result to aggravate punishment. Therefore, aggravated consequential offense should not be established if extended result has not occurred. The combinative crime claimed by the general opinion

① Dando Shigemitsu, *Criminal Law: General Part*, 3rd ed, 1990, Soubunsha Co. Ltd, p357.

② Shimomura Yasumasa, *Attempt in Aggravated Consequential Offense*, 1958, *The Chuo Law Review*, 65(4), p24-25.

③ Shimomura Yasumasa, *Attempt in Aggravated Consequential Offense*, 1958, *The Chuo Law Review*, 65(4), p34.

④ Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p 46-47.

and judicial precedents just has “one inseparable behavior”, thus it is more appropriate to treat the Section 240 as aggravated consequential offense.^① Meanwhile, combinative crime is a new crime formed by two constitutive requirements. According to the Section 240 of Japanese Penal Code, defendant who commits basic crime causing death and causing injury would be sentenced as different crimes, and then one Section contains two combinative crimes, e.g., robbery in the scene of murder comprised by robbery and murder, or, robbery in the scene of injury comprised by robbery and injury, at the same time, which is impossible and inappropriate in legislation.^②

In addition, according to the definition of aggravated consequential offense, it does not contain case of intentionally causing the extended result, which yet should not be denied. This kind of case is neither combinative crime nor aggravated consequential offense on basis of intention, but aggravated consequential offense and imaginative concurrence of intentional crimes. For example, robbery causing death with the intention to commit homicide should be sentenced as the crime of robbery causing death which is defined in Section 240, but for the circumstance without any result, it can only be treated as the imaginative concurrence of attempted murder and robbery.^③

Accusation to disproportional punishment can be settled by division of external disproportion and internal disproportion. It seems that robbery causing death is treated as the combinative crime of robbery and murder, the statutory punishment for it (death penalty, life imprisonment or fix-term imprisonment of not less than 3 years) is relatively slighter than that for robbery causing death (death penalty or life imprisonment). However, murder contains two statutory punishments, death and life imprisonment, thus there will not be any disproportion of punishment by raising the slightest sentence in actually sentencing.^④

① Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p51-52.

② Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p 49-50.

③ Kagawa Tatsuo, *Nature of Aggravated Consequential Offense*, 1978, Keio University Press, p125.

④ Nagaoka Ryuichi, *The Proportionality Principle*//Okamoto Masaru, etc., *Modern Problems of Criminal LAW: Treatises for Congratulation to Abe Junji's Seventy Yeas*, 2004, The First Law Co., Ltd, p87.

In the German Penal Code, as “at least negligence” is stipulated in the Section 18, there is no controversy about the existing of aggravated consequential offense on basis of intention. Therefore, not causing extended result is likely to be the sign of the attempt in aggravated consequential offense. Moreover, when defendant intends to realize the extended result, whether basic crime is accomplished is not important to the establishment of aggravated consequential offense. For example, in order to get rid of the annoying relative, defendant deliberately sends his relative to a close-by mental hospital. The hospital finds that his relative is spiritually healthy and asks him to discharge. In this case, the defendant can be convicted of the attempt in serious unlawful imprisonment in the German Penal Code.^① Another example is, defendant shoots the victim’s genitals and intends to make the victim lose fertility. If the extended result does not happen, the defendant would be convicted of attempt in causing grievous bodily harm.^② On the contrary, a few scholars insist that the crime can be treated as aggravated consequential offense only when a serious result has been caused. Thus, lacking of extended result cannot be the measure of attempt in aggravated consequential offense.^③

Chinese academia generally affirms aggravated consequential offense on basis of intention, thus the general opinion tends to confirm the attempt in aggravated consequential offense when extended result does not occur. Chinese jurist Jin Zegang considers that for defendant holds attitude of intention for the happening of extended result, it is necessary to distinguish these aggravated consequential offenses according to the results. Besides, if the extended result defendant intends to cause really happens, the attempt in aggravated consequential offense can be established even if attempt in basic crime can’t. For example, a defendant, with purpose of intentional injury, splashes concentrated sulfuric acid to the victim’s face, and the victim is not injured for timely

① Hans-Heinrich Jescheck, Thomas Weigend, *Textbook of German Penal Code: General Part*, Xu Jiusheng(trans), 2001, China Legal Publishing House, p630.

② Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p 331.

③ Günter Stratenwerth, Lothar Kuhlen, *Criminal Law: General Part I —Crime Constitution*, Yang Meng(trans), 2006, Law Press•China, p417

dodging. Then, the attempt in intentional injury should be established.^① Chinese Jurist Wang Zhixiang supports that absence of extended result should be taken as the measure of the attempt in aggravated consequential offense. He gives reasons as follows. Firstly, it is not mutually exclusive between aggravated consequential offense as the aggravated constitution of a crime and the attempted crime as the revised constitution of a crime. Aggravated consequential offense belongs to the derivative constitution of a crime, which corresponds to the common constitution of a crime. The derivative constitution of a crime also has the possibility of constituting attempted crime. Besides, if aggravated consequential offense on basis of intention does not cause extended result, it conforms to the basic character of attempted crime. Therefore, it should not reject the possibility to establish attempt in aggravated consequential offense. Secondly, taking absence of extended result as the measure of attempt benefits the implement of proportionality. In aggravated consequential offense on basis of intention, if attempt is not established when extended result does not occur, it may lead to disproportional punishment. For example, in the case that defendant attempted murder on purpose of robbery, if he cannot be convicted of attempted crime of robbery causing death, he can only be convicted of the attempted murder. However, the sentence to attempted murder is slight, ranging from fix-term imprisonment of 3 years to 10 years, thus the punishment is too light.^②

Oppositely, the negative approach disagrees that absence of extended result is the measure of attempt in aggravated consequential offense. Chinese jurist Ma Kechang holds that the subjective element of causing extended result can only be made by negligence. In this kind of crime, aggravated punishment will be carried out due to the extended result. Thus, if the extended result does not occur, aggravated consequential

① Jin Zegang, On Construction and Attempt of Aggravated Consequential Offense, 2001, Journal of SJTU(Social Science Edition), (2), p63.

② Wang Zhixiang, New Research on Attempt in Aggravated Consequential Offense, 2007, Studies in Law and Business, (3), p120-121.

offense is not established, nor is the attempt in aggravated consequential offense.^① Professor Lu Shizhong holds that the revised constitution of crime can only be used to revise the normal constitution of crime, but it is not suitable to the derivative constitution of crime.^②

3.2.2 Standpoint of this Dissertation

3.2.2.1 Attempt in basic crime is the Standard of Attempt in Aggravated Consequential Offense

Whether attempt in basic crime can be the standard of the attempt in aggravated consequential offense depends on, firstly, the position of basic crime in aggravated consequential offense. If basic crime is an important part of aggravated consequential offense, there should be some association between attempt in basic crime and the attempt in aggravated consequential offense. On the contrary, if basic crime is just a representation of special dangerousness for causing extended result, it has limited effect on aggravated consequential offense beyond the illegality of the special dangerousness.

The theoretical construction of aggravated consequential offense restricts the position of basic crime logically. Although there is no certain relationship between the theoretical constructions of aggravated consequential offense and the influence of attempt in basic crime, the position of basic crime varies in different theoretical constructions logically. Then, theoretical constructions have a different attitude towards attempt in basic crime. If the illegality of basic crime is trivial to aggravated consequential offense, it should not be a judgment for the attempt in aggravated consequential offense. On the contrary, if illegality of basic crime is the basis of punishment for aggravated consequential offense, it is possible to establish the attempt in aggravated consequential offense because basic crime is unaccomplished.

① Ma Kechang, *Comparative Research on Aggravated Consequential Offense*, 1993, Wuhan University Journal(Philosophy & Social Science Edition), (6), p123.

② Lu Shizhong, *New Research on Disputed Questions on Accomplished Aggravated Consequential Offense*, 2013, *Political Science and Law*, (5), p124-125.

More specifically, the single construction theory takes extended result as the objective condition that is auxiliary of the basic crime. Then the property of basic crime determines that of aggravated consequential offense. Therefore, the attempt in basic crime should establish the attempt in aggravated consequential offense. And if extended result does not occur, attempt should not be established. If aggravated consequential offense consists of basic crime and the crime of causing extended result, it is possible to admit the effect of the attempt in aggravated consequential offense on aggravated consequential offense. Meanwhile, the lacking of extended result may also lead to attempt in aggravated consequential offense. The dangerousness theory attaches attention from the inherent danger led by basic crime to the happening of extended result, thus the illegality of basic crime may be ignored. So from the view of dangerousness theory, aggravated consequential offense is an aggravated kin of crime which is caused under the special dangerousness of basic crime, and it is possible to decrease the existence value of basic crime. But lacking of extended result is significant for the attempt in aggravated consequential offense.

According to the dual combination theory advocated in this paper, aggravated punishment for aggravated consequential offense firstly is based on the combination of basic crime and crime of causing extended result. It is obvious that illegality and culpability of aggravated consequential offense can exceed that of the combined separate crimes, thus such criminal pattern certainly can be punished by the aggravated punishment. Meanwhile, legislators pay attention to the fact that some basic crimes may lead to inherent dangers in the extended result. And base on these dangers, legislators can add substantial content to the combination of basic crime and crime of causing extended result, thus it is possible to impose the severity of punishment on the defendant who creates the special dangerousness in the course of committing basic crime. Therefore, basic crime is vital to legalize the punishment for aggravated consequential offense. On the circumstance of attempted basic crime, the illegality of

aggravated consequential offense is uncompleted. Thus it is reasonable to be treated as the attempted crime in order to reduce the punishment according to the principle of proportionality.

Some scholars may concern that the lenient punishment in statutorily aggravated punishment may indulge criminals. However, if basic crime is attempted offense, defendant is punished by aggravated sentence on the basis of the leniency. In Chinese criminal law, the principle of punishment towards attempted crime is giving a slighter or mitigated punishment. Then, there is not any difference between the following two methods: one is that firstly slights or mitigates, and then aggravates the statutory punishment; the other is that firstly aggravates then slights or mitigates the statutory punishment. For example, if the defendant does not accomplish the perpetrating robbery, he can be given a mitigated punishment, i.e., fix-term imprisonment of less than 3 years. Then, to aggravate the punishment on the basis of fix-term imprisonment of less than 3 years, he will be sentenced to fix-term imprisonment from 3 to 10 years. Oppositely, to reduce the punishment on the basis of fix-term imprisonment of not less than 10 years, life imprisonment or death, he may be sentenced to fix-term imprisonment of not less than 10 years as the basis is life imprisonment. Therefore, strictly speaking, the attempt in basic crime does not lead to slighter punishment. On the contrary, this method remedies the risk caused by harsh statutory punishment in Chinese criminal law.

Moreover, Japanese Penal Code scholars disagree with taking attempt in basic crime as a sign of the attempt in aggravated consequential offense, as they worry about the reduction and exemption of the punishment on the abandonment. In Japanese Penal Code, the punishment on abandonment (or discontinuation) can be reduced or exempted in the Section 43 of the Japanese Penal Code. Japanese scholar professor points out that in the circumstance that death occurs, if the attempt in robbery causing death is judged according to the attempt in robbery, it is possible that the case of stopping theft after death will be treated as abandonment of robbery causing death and the defendant will be

exempted from the punishment. It is unnecessary to admit the possibility of such as light punishment.^①

Similarly, in the German Penal Code, the principle of punishment towards the abandonment is the personal ground for punishment elimination. Meanwhile, Germany jurists support that the attempt in basic crime is regarded as the standard of the attempt in aggravated consequential offense, which results in the problem of excessively slight penalty. One case took place in German: Several defendants took guns for theft. The guns were used to threaten victims if they should try to revolt. But there was an accident happened. A defendant shot one victim unintentionally and caused the victim's death. The other defendants were very angry and condemned the shooter strictly. Also they stopped the theft and left without any booties. Germany federal court considered that the provision of abandonment could be applied to this case and then only sentenced the defendants of negligent homicide(Section 222 in German Penal Code).^② Parts of people disagree with the judgment. For instance, German jurist Roxin points out that in aggravated consequential offense, it is possible to completely understand the integral crime in the context of "constitutive conduct" through language. In other words, it is to understand the attempted basic crime that is combined with extended result. But he did not deny the significance of attempt in basic crime.^③He added that "This basic crime (or attempt) and this extended result constitute a uniform 'constitutive conduct' that is impossible to abandon after the occurrence of extended result, and thereby making the attempt on the basic crime, which is punishable, continues to exist as the connective point of aggravating punishment".^④

German jurist Roxin's solution may be an expedient. But it is doubtful that whether there is a clear boundary between the requirements for the obstacle attempt and the

① Atsushi Yamaguchi, *Close-up to Criminal Law: General Part*, 2003, Seibundoh Publishing Co., Ltd, p38.

② Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p 428.

③ Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p 429.

④ Claus Roxin, *German Penal Code: General Part (Volume II)*, Wang Shizhou, Lao Dongyan, Wang Ying, etc. (trans), 2013, Law Press•China, p 429-430.

abandonment attempt. In other words, in German or Japanese Penal Codes, taking attempt in basic crime as a sign of the attempt in aggravated consequential offense may cause lighter punishment. However, in the Article 24(2) of the Chinese Criminal Law, whether the injury is caused is taken as the standard towards the punishment to abandonment. Besides, the statutory punishment is really very strict towards the criminals who lead to victim's death in some situation such as robbery and rape. Then, even if the punishment reduces from death to life imprisonment, it would not go far to be excessively slight. Thus, in Chinese criminal law, it is relative reasonable to take the attempt in basic crime as the reason for determining the attempt in aggravated consequential offense, and it does not have the problem of punishing the abandonment that is existed in German and Japanese Penal Codes.

In conclusion, attempt in basic crime can be taken as the sign of the attempt in aggravated consequential offense sufficiently. But some crimes do not have in special danger to cause in extended result in some attempt in basic crime situation. Then attempt in basic crime doesn't exist towards these crimes. For example, in terms of the intentional injury in the Chinese Criminal Law, if crime does not cause serious injury, defendant should not be convicted of injury causing serious bodily harm or death. Of course, as mentioned above, the special danger of basic conduct should be judged according to all the objective risk factors. In the circumstance that particular intention of inflicting bodily harm to the victim does not become actual result, the extended result may be caused by the victim's special constitution or surrounding risk factors. In such situation, if the special dangerousness has immediately become the actual result, the lesser result should be included in the extended result. Therefore, the basic crime is accomplished rather than attempt, and the establishment of injury causing death or serious harm cannot be denied on the ground of the attempt in the basic crime.

3.2.2.2 Discussion on the Situation in which Extended Results Don't Happen

Whether extended result occurs is taken as the sign of attempt in aggravated consequential offense depends on the relationship between aggravated consequential offense and combinative crime. Aggravated consequential offense on basis of intention is taken as combination of intentional basic crime and intentional crime of causing extended result, and the happening of the result is not taken as the requirement for establishing the intentional crime. In terms of the viewpoint mentioned above, the attempt in aggravated consequential offense can be established in the circumstance that the extended result does not occur. The position of extended result in laws has direct significance for judging the establishment of attempt in aggravated consequential offense. If extended result is considered as the requirement for establishing aggravated consequential offense, lacking of extended result can only deny the establishment of aggravated consequential offense, and the attempt in aggravated consequential offense cannot be established. On the contrary, if extended result is just to imply the criminal conduct of intentional crime or negligent crime, it is possible to constitute the attempted crime in the absence of extended result. This paper insists that extended result is the requirement for establishing aggravated consequential offense, but not for accomplishment. Therefore, if extended result is not caused, aggravated consequential offense would not be established, nor would the attempt in aggravated consequential offense. The specific reasons are as follows.

Firstly, it is not mutually exclusive between aggravated consequential offense on basis of intention and necessity of extended result. Nowadays, the influence of occurrence of extended result mainly depends on the substance of intentional aggravated consequential offense. According to the approach, if aggravated consequential offense on basis of intention is convicted, lacking of extended result is just the sign of the attempt in aggravated consequential offense. But defendant's attitude towards the extended result cannot determine the property of extended result directly. For example, in crime of losing firearms without report, provided in the Chinese

Criminal Law, the subjective requirement includes the intention of causing serious result.^① Meanwhile, general opinion considers that if serious consequence does not occur, defendant cannot be convicted of the crime of losing firearms without report.^② Thus, even if some illegal elements are based on intentional subjective factor, the judgment should not exclude these elements as the necessity to the criminal's establishment. Similarly, in the circumstance that defendant intends to cause extended result, the objective property of the extended result does not thus change. Some scholars may consider that aggravated consequential offense can be generated by the basic crime with intention combined with the intentional crime of causing extended result. Therefore, when the intentional crime is not accomplished, the aggravated consequential offense should be attempted crime. But there is a difference between defendant's intention to cause extended result and intentional crime of causing extended result on limiting the aggravated consequential offense. The intentional crime consists of the accomplished crime and the attempted crime. The intentional crime, as a component of combinative crime, is likely to be limited as accomplished crime with intention. It means that the happening of the extended result may be sufficient to establish the aggravated consequential offense on basis of intention.

Secondly, there is some difference between aggravated consequential offense and original combinative crime. Many people take the aggravated consequential offense on basis of intention as combinative crime. For example, robbery with intention to murder is understood as combination of robbery and murder. Then when the murder is unaccomplished, death caused by robbery causing death should be convicted as attempt.^③ But it is not suitable to consider the aggravated consequential offense on basis of intention as combinative crime. Combinative crime is formed by independent crimes

① Li Hong, On Several Questions of Objective Punishment-Conditions, 2010, Journal of Henan Administrative Institute of Politics and Law, (1), p24; Zhou Guanguan, Objective Punishment Conditions, Chinese Journal of Law, 2010 (6); Research on the Form of Mental State Requisite to the Crime of Losing Gun without Reporting, 2005, Law Review, (5), p118.

② Zhang Mingkai, On Attempted Offense, 1998, Law Press·China, p28.

③ Chen Hongbin, On Robbery Causing Serious Injury and Death, 2013, Legal Forum, (5), p105.

with different constitutive requirements, thus that it is by one conduct or multiple conducts aggravated consequential offense is committed is the key to confirm whether aggravated consequential offense is combinative crime or not..

In the majority of cases, it is obvious that the conduct of committing aggravated consequential offense is limited in one conduct, such as cases in which defendant perpetrates crime of intentional injury causing death or kills people in the scene of robbery. As Japanese scholar Hirano Ryuichi said, although combinative crime was unnecessary to be understood in the united meaning and it was possible to regard the crime of infringing more than two legal interests as combinative crime, the combinative crime usually was limited in the crime of combining more than two different criminal conducts. The crime of robbery causing death was just a crime of simultaneously including negligence and intention rather than the combination of more than two conducts, thus it was unreasonable to be called as combinative crime.^①

On some occasions, aggravated consequential offense may have two types of behaviors. For example, defendant A robbed B, and B revolted in the scene. In order to suppress the resistance, A killed B deliberately. In this situation, it seems that there are two criminal behaviors, robbery and murder. But the single conduct should be judged through the objective consistency, such as the same kind of conduct, the invariability of circumstances on perpetrating, the consistency of infringing legal interests and the consistency of causation.^② In the whole process, the robbery was being carried on and the two crimes were aimed at the same person. It means that there was causality between the murder in robbery and the death result. All of the actions belonged to one behavior. Furthermore, if the conduct of committing murder simultaneously was treated as the perpetrating act of robbery causing death and murder, it is possible to repeatedly judge the illegal requirement of endangering another person's life on measuring the punishment, which is forbidden in reality. Thus, aggravated consequential offense on

① Hirano Ryuichi, *Aggravated Consequential Offense*, 1981, Law Library, (10), p57-58.

② Ke Yaocheng, *Introduction to Criminal Law*, 2007, Yuan Zhao Press, p454.

basis of intention contains only one behavior. And it should not be equal to combinative crime that contains two behaviors.

Third, aggravated consequential offense does not include combinative crime. In Japanese Penal Code, for the circumstance where with defendant's intention to cause extended result, some scholars directly determine it as combinative crime, but not aggravated consequential offense. This theory is referred to as including intention theory.^① For example, circumstance that robbery and murder is committed simultaneously is understood as combination of robbery and murder, i.e., robbery intentionally causing death. According to this logic, the provision on aggravating punishment can applied to the circumstance that extended result does not occur. However, this logic is still doubtful, for the reasons as follows:

First of all, the stipulation for extended result is generally prompted with terms such as “consequently...” or “cause...”. These terms explicitly indicate the necessity of causing extended result to the provision of aggravation. Besides, intentional crimes, such as murder and injury, do not have similar stipulation. Then, if these provisions are to be applied to general intentional crime, the application will exceed the possible meaning of law, and thereby violate the principle of no punishment without law.

Then, the Chinese Criminal Law makes a clear distinction between abduction causing death and abduction accompanied with murder. Obviously, the former belongs to aggravated consequential offense, as causing death is the element of aggravating the punishment; the latter belongs to combinative crime, since statutory punishment is aggravated for the additional murder.^② If the stipulation for abduction causing death contains the circumstance that defendant intends to kill the victim, the provision for abduction accompanied with murder will be unnecessary. Besides, one who robs aircraft and causes death, serious injury or serious damage to the aircraft also should

① Otsuka, H. *Ways of Thinking General Part of Criminal Law*, 3rd ed, 2010, Waseda Operation Press Co., Ltd, p186-187.

② Zhang Mingkai, *Research on Homicide in Abduction for the purpose of blackmail*, 2006, *Law Review*, (3), p19-21.

be sentenced to death. Meanwhile, Article 121 in the Chinese Criminal Law does not define robbing aircraft with intention to murder separately. It is believed that the stipulation for abduction with intention to murder is a special provision, but not the provision of attention.

Next, according to the theory of contained intentional crime, if criminal of a basic crime kills the victim or implements other crime on purpose, he will be punished according to the stipulation of aggravated punishment. Then, the scope of aggravated punishment will be widely expanded, which is unacceptable. Besides, according to the judicial interpretation, robbery causing death is established only when death is happened in the process of robbery. If the defendant kills the victim after robbery, it would be explicitly excluded in robbery causing death. Judicial interpretation emphasizes that murder “for suppressing the resistance” must be happened “in the process of seizing the victim’s property”, which emphasizes the necessity of basic conduct being as the cause of death. However, in the context of combinative crime, robbery causing death is established as long as death is caused in the same chance with robbery, and it is not restricted by forms, which belongs to the opportunity theory.^① So, even if homicide for getting rid of the witness is happened after robbery, it will be handled as robbery causing death as long as behaviors are in the same chance. It should be emphasized that, as to homicide for getting rid of witness after robbery, it is likely to impose multiple sentences on defendant. Therefore, the theory of combinative crime is not matched with the judicial practice in China. In the Chinese Criminal Law, robbery causing death and other similar circumstances do not include the combination of robbery and murder.

Fourth, the objective illegality embodied in extended result has important function for restraining the abusing of severe punishment. As mentioned above, in the Chinese Criminal Law, statutory punishment for aggravated consequential offense sometimes is

^① Nakamori Yoshihiko, *Criminal Law: Specific Part*, 2nd ed, 1996, Yuhikaku Publishing Co.,Ltd, p136-137.

too severe. For example, statutory punishment for robbery causing serious injury is fix-term imprisonment of not less than 10 years, life imprisonment or death. It is excessively severe for the circumstance that without serious injury. Therefore, it is necessary to put the happening of extended result as a requirement for establishing aggravated consequential offense.

In conclusion, for circumstance that extended result does not occur, defendant should only be punished according to the stipulation applied for basic crime, not for attempt in aggravated consequential offense or for attempt in combinative crime.

3.3 Conclusion of this Chapter

Complicity and attempt are two special dimensions of aggravated consequential offense. Extended result should be treated as the measure for judging the complicity in aggravated consequential offense. According to the joint conduct theory, complicity in aggravated consequential offense can be established as long as basic conducts jointly cause extended result. Chinese criminal laws do not admit negligent complicity, thus for the circumstance that defendant only has negligence to extended result, complicity in aggravated consequential offense is not established. However, for circumstance that can be transferred to independent crimes, it is likely to establish the aggravated consequential offense of complicity. For the circumstance that defendant intends to cause extended result, complicity in aggravated consequential offense can be established even though other participants only has negligence to the extended result. Physical causation is important to judge the complicity. If defendant performs a conduct that is very important to physically cause the extended result, although participants do not communicate with each other, they should be convicted of co-principal. Therefore, it is possible to affirm the unilateral co-principal in aggravated consequential offense.

basic crime is an important component of aggravated consequential offense, thus its attempt has great significance to reduce the degree of aggravation. Therefore, in

accord with the principle of proportionality, if basic crime is unaccomplished after the perpetrating act, defendant should be convicted of attempt in aggravated consequential offense. In other words, attempt in basic crime should be used as the sign of the attempt in aggravated consequential offense. Furthermore, aggravated consequential offense on basis of intention is not combinative crime. Extended result is the requirement for establishing aggravated consequential offense. Combinative crime is not included in aggravated consequential offense. Thus, for the circumstance that extended result does not occur, it is impossible to convict the defendant of attempt in aggravated consequential offense. In the case, the defendant should be just punished on the basis of basic crime.

Chapter 4 Indirect Model of Aggravated Consequential Offense

Generally speaking, aggravated consequential offense is usually considered as a crime that is required to be conditioned on the extended result and that is punished more seriously than the basic crime. In most circumstances, although aggravated consequential offense is different from basic crime on the punishment, they belong to the same crime. However, in the Chinese Criminal Law and the American Law, if defendant causes extended result such as killing the victim, he will be convicted of another crime that is more serious. For instance, in China, there are some crimes transferred to other crimes because of causing extended result. We usually call these crimes transferred offense. In the United States, felony murder is punished as aggravated crime in contrast to general felony on the basis of causing death. In fact, these crimes are punished more severely than basic crime, so it is necessary to clarify that whether they belong to the indirect model of aggravated consequential offense. If aggravated consequential offense includes these indirect models, the rationale mentioned above will be applied to related circumstances. Furthermore, the indirect model can be a mirror for perfecting aggravated consequential. Therefore, indirect model of aggravated consequential offense is an important issue. In this part, two indirectly aggravated models will be discussed: consequential transferred offense and felony murder rule.

4.1 Rethinking Range of Aggravated Consequential Offense

Aggregated consequential offense is defined through combing definition with characteristic in Chinese academic circle. Nevertheless, most of the definitions and characteristics raised in the field are confusing. Three cases in point:

Dr. Li Bangyou's definition of aggregated consequential offense: a pattern of crime in which perpetrator commits a fundamental crime, which causes an extended result that can be attributed to the perpetrator, and to such extended result the criminal law provides aggravated statutory punishment. According to this definition, Dr. Li holds that aggregated consequential offense contains structural characteristics as follows: fundamental crime; extended result; the extended result must be that can be attributed to the perpetrator; criminal law provides aggravated statutory punishment for such extended result. ①

Dr. Nie Lize defines aggregated consequential offense as "a crime pattern in which perpetrator commits a conduct that conforms to the constitutive elements of fundamental crime, which leads to a result beyond the constitutive elements of fundamental crime, and thus the criminal law provides aggravated punishment for it." Dr. Nie summarizes the characteristics as follows: fictional laws, hierarchical legal interests, parallel crimes and equivalent causality.②

Dr. Lu Yurong holds that aggregated consequential offense is a crime pattern in which extended result that beyond the constructive scope of fundamental crime is caused when perpetrator performs basic conduct, and thus the punishment is aggravated.③ Dr. Lu further points out that the basic characteristic of aggregated consequential offense includes two parts: constructive features and punishment features. Specifically, the constructive features are about the nature and the basic crime of aggregated consequential offense, as well as the subjective attitude of the perpetrator to the extended result, and the relationship between aggregated consequential offense and consequential offense.④

① Li Bangyou, *Research on Basic Theory of Aggravated Consequential Offense*, 2001, Wuhan University Press, p6-19

② Ne Lize, *Research on Structural Patterns of Aggravated Consequential Offense*, 2010, *Journal of Political Science and Law*, (4)39-40

③ Lu Yurong, *Research on Aggravated Structure Offense*, 2004, China People's Public Security University Press, p145

④ Lu Yurong, *Research on Aggravated Structure Offense*, 2004, China People's Public Security University Press, p153-159

Obviously the theories above confused definition with related application elements, in other words, they have had two domains, namely the laws and regulations screen and the application limitation, covered in the same time. Such covering may leads to adverse consequences. Repeated discussion is one. Dr. Li Bangyou puts “extended result must be that can be attributed to the perpetrator” as a characteristic of aggregated consequential offense. As to whether a result is “attributable”, there are two standards: perpetrator’s intention or negligence to the extended result, and inherent causality between perpetrator’s conduct and the result it caused. The contents of the two standards, however, are also contents of subjective requirement and casual element in applying aggregated consequential offense.^① Dr. Li Bangyou, in his summarizing of constructive feature of aggregated consequential offense, expatiated on the characteristics and the causality again.^② Hence, contents about manifestation and limitation rules were discussed repeatedly.

Confusing is another. For example, Dr. Guo Li regarded and discussed the offense form of basic crime and the offense form of aggravated consequence as subjective fault in aggregated consequential offense at the same time,^③ which was confusing. Because the concept of basic crime is an opposite to the concept of aggregated consequential offense, and provisions on which, before whether provisions on aggravated punishment on basis of negligent offense are for aggregated consequential offense is settled, should not be called as aggregated consequential offense, let alone the so-called basic crime. The point is, what the offense form of basic crime refers to is which provisions are for aggregated consequential offense. On the contrary, the offense form of aggravated consequence can only be discussed when aggregated consequential offense is confirmed. It is unadvisable to put them in the same domain. In sum, those definitions mixed form

① Li Bangyou, *Research on Basic Theory of Aggravated Consequential Offense*, 2001, Wuhan University Press, p13-14

② Li Bangyou, *Research on Basic Theory of Aggravated Consequential Offense*, 2001, Wuhan University Press, p40-60

③ Guo Li, *Research on Construction of Consequential-aggravated Crime*, 2013, China People’s Public Security University Press, p142

with essence cannot perform the function of question classification for theoretical construction, and so to which we should introspect.

Given the mistakes mentioned above, it is necessary to redefine aggregated consequential offense, and to rethink the relation between aspect of form and aspect of essence of this concept. Legal concept, generally, consists of two aspects, form and essence, that focus differently. For instance, the concept of “crime” in China includes two basic features: criminal illegality and social harmfulness. Social harmfulness is obviously of the essence aspect; it means a crime must infringe legal interests to the material. However, criminal illegality is not only of the form aspect; it requires that crime is limited to those conducts that should be punished according to law. In this regard, the constitutive requirements must be reached, the harmfulness degree must be a punishable degree, and the perpetrator must be liable for his harmful conducts and results.^① It is not hard to find that, form aspect only accounts for small part in the basic characteristic of crime. It is because, probably, given the principle of “nullum crimen sine lege (no crime without a law)”, only conducts forbidden by law can be deemed as crime; moreover, crimes of numerous kinds have various features in cases, and thus it is necessary to confirm the essence through a basic and clear base line, so as to guide the determination of crime in judicial practices. For this reason, crime concepts put much weight on essence aspect.

However, the definition of aggregated consequential offense should emphasize the form aspect, so as to judge which provisions in legal texts are for aggregated consequential offense, or to confirm the manifestation pattern of aggregated consequential offense. If a definition of aggregated consequential offense was centered on the form aspect, it is to define the legal range of aggregated consequential offense. Oppositely, the essence aspect of aggregated consequential offense is for judging the limitation rule of, or the range of, aggregated consequential offense’ s establishment in

^① Zhang Mingkai, *On Attempted Offense*, 1998, Law Press·China, p88-89

different cases. Only when the legal range of aggregated consequential offense is clear, can its application be.

Furthermore, although the judgment to aggregated consequential offense must conform to legal provisions, there is no specific provision for aggregated consequential offense but merely scholars' generalizations on related crimes. The presence of multifarious aggravated punishment in domestic criminal law obfuscated the presence of aggregated consequential offense in provisions. As a result, which provisions are for aggregated consequential offense is urgent to be answered; or, the manifestation of aggregated consequential offense in law should be valued, to put it in another way. In the mean time, as to characteristic, it should be prominent and beyond controversy; otherwise it is merely an exclusive standpoint of one, and is far from convincing. One has reason to believe that it is possible to describe the substance of aggregated consequential offense in definition, but there is still enormous controversy on the ground for aggravated punishment and application rule; thus it is arbitrary and will be in vain to center the definition of aggregated consequential offense on a controversial substance. Rather, we had better center it on clear and detailed formal characteristic to confirm the legal range. Only by which can the definition guide judicial practice effectively in judging whether the provisions on aggregated consequential offense should be applied. For the reasons above, it is advised to center the definition of aggregated consequential offense on the form aspect.

According to legal texts, there are two basic features in the form aspect of aggregated consequential offense. First, aggregated consequential offense must be imposed aggravated punishment on the basic crime basis. A crime for which there is only one grade of statutory punishment can't be aggregated consequential offense. Aggravated punishment refers to imposing several grades of statutory punishment to one crime at the same time, but a punishment of multiple grades may not be aggravated one.

Second, the cause for aggravated punishment should be the legal result. There are various causes for aggravating punishment provided in criminal law. For instance, in crime of gun robbery, the conduct is the cause; in crime of robing financial institute, the object; and so forth. In terms of aggregated consequential offense, extended result must be the cause. However, it remains to be further explored whether extended result should be the only cause for aggravated punishment, or whether it should be as same as basic crime.

According to the features above, we can define aggregated consequential offense as: aggregated consequential offense refers to a type of crime in which when extended result occurs on the basic crime basis it is possible to aggravated the punishment for it according to law. In light of this definition, the manifestation of aggregated consequential offense is not strictly limited; hence the following pages will present analysis on crimes that are controversial in their legal nature, so as to prove that the indirect model of aggregated consequential offense should be affirmed.

4.2 Consequential Transferred Offense

Transferred offense refers to crime that will transfer to another crime once the legal conditions are satisfied. Many elements are possible to make a crime transfer to another, such as specific act, extended result, personal status and so on. The consequential transferred offense, requiring the element of extended result, is one object of this paper. Three elements of consequential transferred offense are explicitly stipulated by law: basic crime; transferred crime and extended result.

In the Chinese Criminal Law, legal contents cover consequential transferred offense include: (1) Article 238(2) states that if defendant is accused of unlawful detaining causes injury, disability or death to the victim by violence, he or she shall be convicted and punished in accordance with crime of murder or injury; (2) Article 247 states that if the defendant is accused of exacting a confession by torture or extorting

testimony by violence, which causes injury, disability or death to the victim, he or she shall be convicted and given a heavier punishment in accordance with crime of murder or injury; (3) Article 248 states that If the defendant is accused of maltreating prisoner, which causes injury, disability or death to the victim, he or she shall be convicted and given a heavier punishment in accordance with the crime of murder or injury; (4) Article 292 states that where people are gathered to engage in affrays, thus causing serious injury or death to a person, he shall be convicted and punished in accordance with the crime of murder or injury; (5) Article 333 states that whoever commits an act on illegally arranging for another person to sell blood or compelling another person to sell blood by violence or threat, thus cause injury to another person, shall be convicted and punished in accordance with the crime of injury.

Legal theorists debate about the character of consequential transferred offense fiercely in two theoretical approaches: legal fiction approach and provision of attention approach. However, it is doubtful that the character of consequential transferred offense is limited in the two theories. Consequential transferred offense and aggravated consequential offense are very similar in requirement and legal effect. Therefore, it is worthy to study on whether it is possible to see the consequential transferred offense as a type of aggravated consequential offense, which is more reasonable than the two current theories. This dissertation will prove that the consequential transferred offense is neither legal fiction nor provision of attention but an indirect model of aggravated consequential offense.

4.2.1 The Provision of Attention Approach

Provision of attention is to remind judges, prosecutors and polices of some crimes in special conditions. For instance, Article 241(2) in the Chinese Criminal Law provides that whoever buys an abducted woman and forces her to have sexual intercourse with him shall be convicted and punished in accordance with the provisions of Article 236 of

this Law. This provision is to make lawmen focus on rape in the course of abducting. If someone rapes an abducted woman in the course of abduction, he will not only be convicted of abduction but also rape. However, even if there is no provision for this attention, above mentioned circumstance still is treated in this way.

Some people consider that consequential transferred offense is a provision of attention on murder and injury. Provision of attention is indicative provision used to prevent judge from misunderstanding meaning of law, so there is no difference on requirement between provision of attention and applied provision. Therefore, consequential transferred offense should be limited in requirement provided in provision of application. In other words, only if defendant intends to kill the victim, he or she can be guilty of consequential transferred offense.^① Provision of attention approach is in accordance with principle of culpability, but it is still not a good approach for interpreting consequential transferred offense for following reasons:

4.2.1.1 Lack of Reason for Providing Legislation of Consequential Transferred Offense as Provision of Attention

Consequential transferred offense is not reasonable legislation unless there is a reason for differentiating the basic crime from murder and injury in cases.^② However, there is no reason for legislating consequential transferred offense as provision of attention.

Generally speaking, lawmakers would set up provision of attention with reasons as follows: First, contents of the applied provision is unclear so that it is difficult to determine the commission of a crime. For instance, some scholars hold that a person can be guilty of larceny even if he or she obtains or causes another to obtain a profit without physical property. However, other jurists insist that the object of larceny should

① Zhao Bingzhi, Xu Chenglei, Comprehension and Judgment on Causing Casualty or Death in the Course of Extorting a Confession by Torture, 2004 Journal of Henan Administrative Institute of Politics and Law, (2), p51; Chen Xingliang, Normative Criminal Jurisprudence, 2nd ed, 2008, Chin Renmin University Press, p696.

② Zhang Mingkai, Principles for Interpreting Specific Part of Criminal Law, 2nd ed, 2011, China Renmin University Press, p642.

be limited in property.^①In the Chinese Criminal Law, profit and property belong to the same legal interest. Therefore, Article 265 is used to call attention of judges on convicting the defendant of larceny when he or she steals other person's telephone network.^②

Second, some cases are difficult to be determined because the requirements of some crimes are very similar. For instance, the crime of misappropriating public funds is very similar with the crime of misappropriating the funds of one's own unit in objective requirements.^③Therefore, this kind of act is reminded to be guilty of misappropriating public funds through Article 272 (2).^④

Third, because some crimes are punished with similar sentences, it is difficult to measure the most serious crime in concurrence of these crimes. For instance, if defendant intends to kill the victim for robbery, it belongs to concurrence of robbery and murder. The principal punishments of robbery causing death are as serious as that of murder, so which crime should be convicted finally is unclear. However, fine is the supplementary of robbery but not of murder and thus robbery is more serious than murder. Therefore, judicial interpretation points out that this case should be convicted as

① Xia Limiao, Considering Whether Interest of Property Can be the Object of Theft, 2010, Theory Research, (36), p99.

② Article 265 in Chinese Criminal Law: Whoever, for the purpose of making profits, connects secretly with communication lines of another person or duplicates telecommunication codes of another person or, uses the telecommunication equipment or facilities while clearly knowing that they are connected secretly or duplicated shall be decided a crime and punished according to the provisions of Article 264of this Law.Note: Article 264 in Chinese Criminal Law is about larceny.

③ Article 272(1) in Chinese Criminal Law: Any employee of a company, enterprise or any other unit who, taking advantage of his position, misappropriates the funds of his own unit for personal use or for loaning them to another person, if the amount is relatively large and the funds are not repaid at the expiration of three months, or if the funds are repaid before the expiration of three months but the amount involved is relatively large and the funds are used for profit-making activities or for illegal activities, shall be sentenced to..... ; Article 384 in Chinese Criminal Law states: Any State functionary who, by taking advantage of his position, misappropriates public funds for his own use or for conducting illegal activities, or misappropriates a relatively large amount of public funds for profit-making activities, or misappropriates a relatively large amount of public funds and fails to return it after the lapse of three months, shall be guilty of misappropriation of public funds and shall be sentenced to.....

④ Article 272(2) in Chinese Criminal Law: If an employee who is engaged in public service in a State-owned company, enterprise or any other State-owned unit or any person who is assigned by a State-owned company, enterprise, or any other State-owned unit to a company, enterprise or any other unit that is not owned by the State to engage in public service commits any act mentioned in the preceding paragraph, he shall be convicted and punished in accordance with the provisions of Article 384 of this Law.Note: Article 384 in Chinese Criminal Law is about misappropriating public funds.

robbery.^①

Fourth, sometimes there are disadvantageous factors that make it hard to give right conviction. For instance, the place where defendant sells abducted woman usually is undeveloped areas full of feudalistic thought about male chauvinism. After some victims are forced to marry, if defendant violates victim's right, it may be mistaken for domestic internal contradiction. Therefore, Article 241(2) to (3) state that the abducted woman's right is not allowed to be invaded.^②

Fifth, combined punishment for several offenses and punishment for one crime may be confused. If someone makes arrangements for another person (victim) to illegally cross the national border (frontier) and intends to kill the victim in process of committing crime,^③ the defendant should be punished for murder combined with arrangement for another to illegally cross national border (frontier). However, because arranging act and killing act are very close in time and space so that it is easy to regard the two acts as one criminal act and punish the defendant only for one crime. Therefore, criminal law gives a signal to punish defendant for plural crimes in above mentioned case.^④

Presumptive reasons mentioned above are not convincing for regard consequential transferred offense as provision of attention. First, constitutive requirements of murder and injury are simple and clear, thus the two crimes and other crimes cannot be confused easily. Second, transferred crime and basic crime are very different so that it is

① Official Reply of the Supreme People's Court on Issues concerning the Conviction on the Case of Intentional Homicide in the Course of Robbery (2001).

② Article 241(2) to (3) in Chinese Criminal Law: Whoever buys an abducted woman and forces her to have sexual intercourse with him shall be convicted and punished in accordance with the provisions of Article 236 of this Law; whoever buys an abducted woman or child and illegally deprives the victim of his or her personal freedom or restricts his or her personal freedom, or commits any criminal acts such as harming and humiliating the victim, shall be convicted and punished in accordance with the relevant provisions of this Law.

③ Article 318(1) in Chinese Criminal Law: Whoever makes arrangements for another person to illegally cross the national border (frontier) shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years and shall also be fined.....

④ Article 318(2) in Chinese Criminal Law: Whoever, in addition to the crime mentioned in the preceding paragraph, kills, injures, rapes, or abducts and sells the persons for whom he makes arrangements to illegally cross the national border (frontier) or commits other criminal acts against them or kills, injures or commits other criminal acts against the inspectors shall be punished in accordance with the provisions on combined punishment for several crimes.

unnecessary to point out how to distinguish them by consequential transferred offense. Although some basic crimes are composed of requirements including violence, they are less likely to be confused with transferred crimes. Otherwise, all violent crimes will be distinguished from murder and injury by consequential transferred offense; but it is not the fact.^①In the Chinese Criminal Law, most of violent crimes are provided without consequential transferred offense. For instance, if someone uses violence to interfere with another person's freedom of marriage and causes death, it is aggravated consequential offense of using violence to interfere freedom of marriage but not consequential transferred offense.^②Third, generally, transferred offense is punished much more severely than the basic crime, so, if the two crimes are overlapped, transferred crime would be applied certainly and there is no doubt about which crime should be convicted. Fourth, victim's right is almost impossible to be ignored because of consequential transferred offense. For instance, defendant cannot infringe the right of victim detained illegally. On the contrary, Article 238(1) in the Chinese Criminal Law states that if defendant resorts to battery or humiliation unlawfully for detaining another person, he or she shall be given a heavier punishment. It can clearly be seen that victim of crime of unlawfully detaining other people is protected specially. Therefore, consequential transferred offense is unnecessary to be emphasized for protecting victim's right as provision of attention. Fifth, there is no statement about combining punishment for several offenses in provision on consequential transferred offense, so consequential transferred offense is not useful to distinguish single crime and plural crimes. In short, there is a lack of reason for seeing consequential transferred offense as provision of attention.

4.2.1.2 Irrationality of Provision of Attention Approach

① Chen Hongbin, Difference Between Suggestive Regulation and Legal Fiction Under Subdivision of Criminal Law, 2010, Journal of Nanjing Agricultural University(Social Sciences Edition), (3), p76.

② Article 257 in Chinese Criminal Law: Whoever uses violence to interfere with another person's freedom of marriage shall be sentenced to fixed-term imprisonment of not more than two years or criminal detention; Whoever commits the crime mentioned in the preceding paragraph and causes death to the victim shall be sentenced to fixed-term imprisonment of not less than two years but not more than seven years.

The attention of provision is for applying law better. Therefore, if consequential transferred offense belongs to provision of attention, it should divide transferred crime and basic crime distinctly, but the truth of the matter is very different.

First, the content of provision of attention should be describing conduct but not result. Conduct patterns are more exuberant than result patterns. For instance, result of losing property can be caused by crimes of theft, fraud or forcible seizure of money or property. It is to say that conduction can reflect the image of crime better than result. If result is content of provision of attention, it would be unhelpful to identify different crimes. In fact, act is the content of provision of attention in the Chinese Criminal Law. For instance, Article 241(3) states that whoever buys an abducted woman or child and illegally deprives the victim of his or her personal freedom or restricts his or her personal freedom, or commits any criminal acts such as harming and humiliating victim, shall be convicted and punished in accordance with the relevant provisions of this Law. Therefore, result should not be the content of provision of attention.

Second, Article 333(2) in the Chinese Criminal Law should not belong to provision of attention.^① According to Article 333(1), whoever illegally arranges for another person to sell blood shall be sentenced to fixed-term imprisonment which is more serious than punishment of common bodily injury but less serious than serious bodily injury resulting. Therefore, “causing injury to another person”, provided in Article 333(2), shall be interpreted into “causing serious bodily injury to another person” if it should be a provision of attention. However, if someone compels another person to sell blood by violence or threat, he or she will be punished more severely than someone intends to harm the health of another person causing serious bodily injury, so it is impossible to interpret this Paragraph into the same meaning as arranging to sell blood or compelling

^① Article 333(1): Whoever illegally arranges for another person to sell blood shall be sentenced to fixed-term imprisonment of not more than five years and shall also be fined; whoever compels another person to sell blood by violence or threat shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined; Paragraph(2) states : Whoever commits an act mentioned in the preceding paragraph, thus causing injury to another person, shall be convicted and punished in accordance with the provisions of Article 234 of this Law.

to sell blood. The legislative purpose of provision of attention is to make unclear cases clear. If the content of provision of attention is ambiguous, it will make judicial practice more confusing and eliminate the existence value of provision of attention.

Third, “violence” is not an effective term to reflect “intent”. Some commentators consider that using “violence” means that defendant recognized the act will cause extended result.^① However, actus reus cannot include the content of mens rea,^② so there is no connection between violence and intent of murder or injury. Otherwise, all forcible crimes should be intentional crime, which violates the criminal law. Therefore, “causes injury, disability or death to the victim by violence” is not a good way to draw attention on cases about murder and injury.

4.2.1.3 Lack of Persuasion to Support Provision of Attention Approach

Many commentators consider that consequential transferred offense should be interpreted as provision of attention technically. Some people argue that mens rea determines the nature of crime; hence, defendant cannot be guilty of transferred offense unless mens rea has been transferred.^③ Some people argue that it is unfair to see “causes injury, disability or death to the victim by violence” of unlawful detaining as negligence to harm or kill, because the sentence will be less serious if there is no violence but extended result on causing serious injury and death.^④ Some people argue that the provision of attention approach is helpful to understand difference of crimes. Because death is possible to be caused by murder or injury, if mens rea is omitted, it is doubtful whether consequential transferred offense causing death belongs to murder or injury causing death.^⑤

① Qiu Wei, Four Kinds of Specific Part in Criminal Law, 2011, Journal of Henan Administrative Institute of Politics and Law, (Z1), p236.

② Illegality requirement is not equal to culpability requirement. See Oya Minoru, Criminal Law: General Part, 2nd ed, 2008, Li Hong(trans), China Renmin University Press, p281.

③ Chen Qingan, Wu Jiaming, 2008, Journal of Henan University (Social Science), (3), p26-28.

④ Qiu Wei, Four Kinds of Specific Part in Criminal Law, 2011, Journal of Henan Administrative Institute of Politics and Law, (Z1), p236.

⑤ Li Ziping, Zhan Hongxing, Questioning Argument on the Transferred Murder, 2006, Legal Science, (5), p116.

Nonetheless, the technical reason mentioned in the preceding paragraph is not persuasive. First, it is uncertain that whether transferred offense is required with single constitution of crime. There are many types as to the constitution of crime. One of these types is called alternative constitution of crime, which includes several independent requirements that are sufficient to convict defendant for a crime, thus it is unnecessary to limit the conviction of transferred crime in all requirements enumerated by law. For instance, stealing a relatively large amount of public or private property, committing thefts many times, committing a burglary or carrying a lethal weapon to steal or picking pockets are alternative requirement of larceny. Furthermore, alternative requirements can be scattered in different provisions. For instance, Article 269, Article 264 and Article 263 provide special requirements of robbery. Therefore, if consequential transferred offense is related to the alternative requirement, we cannot restrict transferred offense in the united requirement. Only if there is only one constitution of transferred crime, it is possible to limit the consequential transferred offense in the intention of causing transferred result. However, the provision of attention approach presumes transferred crime as single constitution of crime and goes ahead to argue that intention is the requisite for transferred crime. In fact, it is repeating its standpoint with different speaking,^① making a mistake of arguing in circle.

Second, mens rea is not a unique element of determining the sentence. It is different between aggravated consequential offense and consequential transferred offense on actus reus. There is no provision about “violence” in the former, while the latter is committed with violence. It is well known that violence is a very important element for reflecting illegal level. As a result, consequential transferred offense with element of violence is more punishable than aggravated consequential offense without element of violence. Therefore, even if consequential transferred offense is punished more severely than aggravated consequential offense, it doesn’t mean that their

^① Ingeborg Puppe, Classroom for Training Legal Thought, 2010, Cai Shengwei(trans), Yuan Zhao Press, p201.

subjective elements are different.

Third, there is no dilemma for identifying aggravated consequential offense and intentional crime. Although intention of causing transferred result is not an element of consequential transferred offense, it is easy to make a difference of injury causing death and murder. For instance, if someone kills another person negligently, he or she will be guilty of murder according to the theory of legal fiction.

4.2.2 Legal Fiction Approach

Some commentators consider that consequential transferred offense is legal fiction for murder and injury. The object of legal fiction is to apply a provision on some requirement (T1) to another requirement (T2).^① Legal effect of requirement T1 can be applied to another requirement T2 by treating T2 (the second requirement) as fictional means of T1 (the first requirement).^②

The legal fiction approach doesn't mean that there is no limitation on consequential transferred offense. Specifically speaking, legal approach limits the consequential transferred offense in two conditions. First, the extended result should be foreseeable to the defendant. Second, in the consequential transferred offense of unlawfully arranging another person to sell blood and force another person to sell blood, injury, as the extended result, should be limited to serious injury.

The legal fiction approach pays attention to the specialty of consequential transferred offense, getting rid of limitation of intent to cause extended result, and it limits consequential transferred offense with reasonable requirements, so it is an acceptable approach. However, this approach is not persuasive enough because of following reasons.

(1) Possibly Violating the Principle of Proportionality

Supporters of legal fiction approach argue that because some acts are so harmful to

① Karl Larenz, *Research on Methodology of Jurisprudence*, Chen Aie(trans), 2003, The Commercial Press, p142.

② Zippelius, *Methodology of Jurisprudence*, Jin Zhenbao(trans), 2009, Law Press·China, p50.

legal interests that they should be punished by severe penalty, thus the legislator create legal fiction for avoiding unfairly slight punishment.^① For instance, lawmaker considers that it is unbalanced for extorting confession by torture causing serious injury and death with basic punishment of extorting confession by torture, so Article 247 in the Chinese Criminal Law states that defendant causes injury, disability or death to the victim in process of extorting confession, he or she shall be convicted and given a heavier punishment in accordance with the provisions on injury and murder.^② This idea actually is about proportion of punishment in legislative level. However, the key point of whether punishment is appropriate doesn't rest on balance in punishment of different crimes but balance between crime and punishment.^③ Even if what defendant has done exceeds illegality of basic crime because of extended result, it doesn't mean that the defendant should be punished by sentence of injury and murder. Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical.^④ If consequential transferred offense is used to fill vacancy as legal fiction regardless of necessity, it is possible to punish the defendant beyond culpability and go against principle of proportionality.

Most of supporters of legal fiction approach consider that consequential transferred offense is immediate addition of intentional basic crime and negligent crime on extended result. In other words, consequential transferred offense is only an overlap of basic crime and negligent crime. Generally, overlap of different crimes should be punished according to the most serious crime, so it is impossible to upgrade the sentence of consequence transferred offense. Even if we accept the idea about treating overlap of different crimes as substantially multiple crimes,^⑤ punishment for consequential transferred offense should be no more than the total punishment for basic

① You Jinliang, *Analysis on Value of Legal Fiction*, 2010, Jiang-huai Tribune, (6), p119.

② You Jinliang, *Analysis on Value of Legal Fiction*, 2010, Jiang-huai Tribune, (6), p119.

③ Hyashi Mikito, *Criminal Law*, 2nd ed, 2008, University of Tokyo Press, p70-71.

④ Cesare Bonesana di Beccaria. 1819. *An Essay on Crimes and Punishments*. Tran, Edward D. Ingraham: 15.

⑤ Zhuang Jin, *Imaginatively Multiple Crimes or Substantially Multiple Crimes: Imaginative Concurrence of Crimes Should Be Punished by Multiple Punishments*, 2006, *Modern Law Science*, (2), p109-114.

crime and causing extended result through negligence. However, most of consequential transferred offenses are punished beyond combined punishment for several crimes. In short, legal fiction approach cannot explain why the punishment for consequential transferred offense is so serious.

Furthermore, the legal fiction approach cannot achieve a fair conclusion in some cases.

First, the legal fiction approach will cause imbalance between negligent crime and intentional crime. The characteristic of consequential transferred offense is that: even if lawmaker knows legal facts, provided by essential provision and legal fiction, are different, they are treated in the same way through fiction.^①Therefore, if defendant intends to cause extended result, the consequential transferred offense should not be established according to legal fiction approach. However, some consequential transferred offense is provided with provision about punishing heavier. For instance, Article 238 in the Chinese Criminal Law states that any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence and causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or Article 232 of this Law. Therefore, in these consequential transferred offenses, punishment for causing extended result negligently is more serious than that for intending to cause extended result.

Second, the legal fiction approach is difficult to interpret the Article 333(2) in the Chinese Criminal Law.^②Many supporters of legal fiction approach interpret “injury” provided in Article 333(2) as serious injury for matching the proportionality. However,

① Huang Maorong, *Method of jurisprudence and Modern Civil Law*, 2001, China University of Political Science and Law Press, p284.

② Article 333 (1) in Chinese Criminal Law states that whoever illegally arranges for another person to sell blood shall be sentenced to fixed-term imprisonment of not more than five years and shall also be fined; whoever compels another person to sell blood by violence or threat shall be sentenced to fixed-term imprisonment of not less than five years but not more than 10 years and shall also be fined; Article (2) states that whoever commits an act mentioned in the preceding paragraph, thus causing injury to another person, shall be convicted and punished in accordance with the provisions of Article 234 of this Law.

injury causing serious health damage is sentenced to fixed-term imprisonment of not less than three years but not more than 10 years, and coercion to sell blood is sentenced to fixed-term imprisonment of not less than five years but not more than 10 years. Therefore, we will see a very ridiculous conclusion that coercion to sell blood causing serious health damage will be transferred to the less serious crime of injury causing serious health damage according to legal fiction approach.

(2) Possibly Violating of Due Process of Law

Supporters of legal fiction approach argue that if intention to murder and injury is the requirement of consequential transferred offense, it is doubtful about how to establish liabilities of criminal acts. Therefore, the consequential transferred offense should be a legal fiction. Although defendant does not intent to kill or injury the victim, murder and injury should be punished.

However, it is not reasonable to accept legal fiction approach for easing the prosecutor's burden of proof. "Due process of law requires all power about depriving of life, freedom and property cannot be used unless opinion given by the party is listened".^① If consequential transferred offense is an irrefutable presumption, right of defending mental state will be deprived. Therefore, presumption on constituting criminal liability should only be accepted as shifting of burden of proof and allowing defendant to refute.^② For instance, the American Law Institute Model Penal Code states that recklessness and indifference for constituting murder liability are presumed if the defendant is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.^④ Furthermore, irrefutable presumption and legal fiction are different concept in fact. Realization of justice is a goal of legal fiction, but realization of law is goal of

① Wang Mingyang, *Administrative Law*, 1995, China Legal Publishing House, p383.

② Lao Dongyan, *Taking Criminal Presumption Seriously*, 2007, Chinese Journal of Law, p36.

④ Model Penal Code, §210.2.

presumption; it is unnecessary to examine fact and logic of legal fiction, but presumption is restricted by logic of usual connection of one fact and the next.^①

(3) Misunderstanding Relation between Legal Fiction and Principle of Complete Judgment

Some legal fiction approach supporters argue that this approach is favorable toward carrying out principle of complete evaluation.^② For instance, unlawful detention and murder are mutually independent. In light of legal fiction approach, negligence is the only subjective element for constituting consequential transferred offense; so, defendant will be guilty of detention and murder if he intentionally kills the victim. If the defendant intends to inflict injury to the victim in the process of detaining, he should be convicted of two crimes. On the contrary, intention to injury is necessity for applying Article 238(2) in accordance with provision of attention approach, so the defendant should only be guilty of injury when he intends to kill the victim in the process of detention because Article 238(2) is to punish detention and injury as one crime. Therefore, the legal fiction approach tends to see the provision of legal fiction as fictional one crime, and consequently multiple crimes cannot be completely evaluated when intentional crime of causing extended result is independent of the basic crime.

However, legal fiction approach is not the only choice for respecting the principle of full evaluation. Defendant will be punished by combined sentence in cases that several acts infringe several legal interests. Whether Article 238(2) is legal fiction or not, the defendant will be guilty of murder besides unlawful detention. Furthermore, the provision of attention approach argues that defendant may constitute substantial plural crimes if he intends to kill the suspect suddenly when he extorting confessions by torture.^③ Therefore, there is no necessity to accept legal fiction for principle of full

① Lu Peng, On Difference between Conclusive Presumption and Fiction, 2003, Journal of Tongji University Social Science Section, 14(1), p64-65.

② Zhang Mingkai, Principles for Interpreting Specific Part of Criminal Law, 2nd ed, 2011, China Renmin University Press, p648.

③ Wang Zuofu, Research on Chinese Criminal Law, 1988, China Renmin University Press, p936.

evaluation.

4.2.3 Advocating the Aggravated Consequential Offense Approach

As mentioned above, neither the legal fiction approach nor the provision of attention approach is a reasonable way for interpreting consequential transferred offense, and thus it is necessary to find a new way to make this kind of crime reasonable. Generally, aggravated consequential offense is considered to be a type of crime punished more severely in case that basic crime causes extended result. There are two characteristics of aggravated consequential offense. First, legal effect of aggravated consequential offense is to heighten the punishment. Second, extended result is the requirement of aggravated consequential offense. In opinion of this paper, consequential transferred offense is a special type of aggravated consequential offense to heighten the punishment through changing the name of the crime.

First, consequential transferred offense is substantially similar to aggravated consequential offense. “Lawmaker considers the special legal point at liberty”,^① said Karl Engisch. There are two legal points of aggravated consequential offense: (1) legal result beyond basic crime; (2) aggravated punishment beyond essential statutory punishment. Consequential transferred offense contains the two characteristics, too. On the one hand, extended result is the requirement of consequential transferred offense. For instance, maltreating prisoner cannot transfer to murder unless the act causes victim’s death. On the other, statutory punishment for consequential transferred offense should be severer than that for basic crime according to the legal text. For instance, defendant of affray is sentenced to fixed-term imprisonment of not more than three years,^② but if the defendant kills someone negligently, he will be guilty of murder, which would be sentenced to death, life imprisonment or fixed-term imprisonment of

^① Karl Engisch, *Instruction on Legal Thought*, Zheng Yongliu(trans), 2004, Law Press-China, p13

^② Article 292 in Chinese Criminal Law: Where people are gathered to engage in affrays, the ringleaders and the active participants shall be sentenced to fixed-term imprisonment of not more than three years.

not less than 10 years.^①

Punishment for consequential transferred offense is not always obvious. For instance, Article 232 in the Chinese Criminal Law states that defendant will commit murder in process of violently extorting confession causing victim's injury, disability or death.^② The slightest punishment for injury is imprisonment of public surveillance, and the slightest punishment for violent extortion of confession is criminal detention. Therefore, the injury in Article 247 in the Chinese Criminal Law should mean serious injury rather than slight injury.^③ Obviously, because the crime of coercion to sell blood is punished more severely than crime of injury, legal fiction approach supporters argue that coercion to sell blood cannot be transferred unless the essential act causes serious injury. However, coercion to sell blood is also more seriously than causing grievous bodily harm. Therefore, it is questioned on how to interpret Article 333(2). In the opinion of this dissertation, "injury" in this paragraph can be divided into serious injury and utter disability. Injury causing grievous bodily harm is punished more seriously than is unlawful arrangement for selling blood; thus unlawful arrangement for selling blood can transfer to the crime of injury when the defendant causes grievous bodily harm. Furthermore, if defendant causes death or, by resorting to especially cruel means, causes severe injury to the person, or cripples the person to utter disability, he shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death,^④ which is more serious than punishment for arrangement for selling blood. Therefore, as long as the act causes utter disability or death, arrangement for selling blood can transfer to crime of injury.

① Article 232 in Chinese Criminal Law: Whoever intentionally commits homicide shall be sentenced to death, life imprisonment or fixed-term imprisonment of not less than 10 years.

② Article 247 in Chinese Criminal Law: Any judicial officer who extorts confession from a criminal suspect or defendant by torture or extorts testimony from a witness by violence.....If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provisions of Article 234 or 232 of this Law.

③ Du Wenjun, Research on the Nature of Dual Aggravated Consequential Offense of Intentional Injury, 2008, Political Science and Law, (9), p61; Chen Hongbin, Research on Patterns of Causing Serious Injury and Death, 2012, Lanzhou Academic Journal, (3), p146.

④ See Article 234(2) in Chinese Criminal Law.

We should note that arrangement for selling blood could transfer to injury without resorting to especially cruel means. The requirement on “resorting to especially cruel means” reflects the degree of objective wrongfulness. By contrast, coercion to sell blood is a very serious crime for which the punishment is severer than that for injury causing grievous bodily harm. Furthermore, utter disability is near to death in objective harmfulness. Therefore, it is acceptable that causing utter disability and causing death are punished in the same level. Of course, basic crimes of other consequential transferred offenses are similar to injury causing slight harm on punishment, so it is unreasonable to apply the severest punishment of injury, although these basic crimes cause utter disability to victims without resorting to especially cruel means.

To sum up, aggravated consequential offense and consequential transferred offense are substantially similar in legal construction.

Second, appellation of a crime cannot determine contents of the crime. Although basic crime is different from transferred crime on appellation, they can be the same kind of crime on aggravating the punishment. Appellation of crime is strong abstraction of specifically essential nature of crime.^① In respect of whether charge of basic crime is changed, aggravated consequential offense and consequential transferred offense seem to be different in nature. However, appellation of crime is formal and abstract so that it cannot express integrated relevant value contained in criminal type. Furthermore, appellation of crime is influenced by legislative idea and technique,^② so it is not necessary to reflect the nature of crime. Therefore, there is no decisive effect in appellation of crime for judging criminal type. It is common that appellation of crime is not coincidence with actual extent of criminal type.^③ Alternative constitution of a crime relates to different requirements in the same appellation of crime. For instance, legal

① Liu Yanhong, *Research on Name of a Crime*, 2000, China Fangzheng Press, p62.

② Ou Jinxiong, *Rethinking Reasonable Quantity of Criminal Charges and Criminal Kinds and its Legislation*, 2001, *Journal of the National Procurators College*, (1), p33-34.

③ Jin Tao, *On Accusations of Disarray and Accusations of Emptiness*, 2008, *Journal of Guangxi Administrative Cadre Institute of Politics and Law*, (1), p44-45.

fiction and essential provision are related to different requirements of a crime, but they provide crimes with the same appellation. On the other side, although appellations are different, constitutions of crime also can be the same. For instance, distinction between fraud and financial fraud in appellation of crime does not purport the two crimes are different in essential construction.

In the Japanese Penal Code, appellation of aggravated consequential offense can be different from basic crime. For instance, Japanese commentators usually consider that injury provided in Section 204 not only contains intentional injury but also assault causing injury.^①For that matter, injury is aggravated consequential offense charging appellation of basic crime. Of course, assault causing injury in the Japanese Penal Code is different from consequential transferred offense in the Chinese Criminal Law. The former is not provided in statute but construed to be requirement of injury by scholars and judges. On the contrary, consequential transferred offense is a statutorily criminal type in criminal law. However, law needs to provide aggravated consequential offense as a special criminal type with severe punishment. Therefore, if assault causing injury belongs to aggravated consequential offense without statutory provision, statutory consequential transferred offense should be treated as aggravated consequential offense.

The Chinese Criminal Law does not reject aggravated consequential offense charging appellation of crime from Chinese legislation. For instance, Article 133A(1) states that whoever races a motor vehicle on a road with execrable circumstances or drives a motor vehicle on a road while intoxicated shall be sentenced to criminal detention and be fined; whoever commits any other crime while committing a crime as mentioned in the preceding paragraph shall be convicted and punished according to the provisions on the crime with heavier penalty. Because crime of causing traffic casualties is punished by fixed-term imprisonment of not more than three years or criminal detention, which is heavier than punishment of dangerous driving. Then, if dangerous

^① Yamaguchi Atsushi, *Criminal Law: Specific Part*, 2nd ed, Wang Zhaowu(trans), China Renmin University Press, p52; Nishida Nonyoki, *Criminal Law: Specific Part*, 5th ed, 2010, Koubundou Publishers Inc, p42.

driving causes a serious accident, as constitutive requirement of crime of causing traffic casualties, dangerous driving will be transferred. Scholars consider this case as aggravated consequential offense.^① Therefore, there is no obstacle to affirm aggravated consequential offense in the cases that appellation of crime is changed.

To sum up, distinctions between consequential transferred offense and aggravated consequential offense in the form of aggravated punishment cannot negate the fact that consequential transferred offense belongs to substantial aggravated consequential offense.

4.3 Felony Murder Rule

It is well known that Anglo-American law and Romano-Germanic family belong to different legal system. Furthermore, aggravated consequential offense is always considered as a concept of continental criminal law. By contrast, felony murder is considered as the special homicide in American law. Thus very few scholars connect aggravated consequential offense with felony murder. However, felony murder is more serious than the lesser included felony because in which victim's death is caused. It is very similar to aggravated consequential offense in many ways. Therefore, it is necessary to reflect relationship between felony murder and aggravated consequential offense again.

The theory of felony murder is about that a defendant may be charged even if he does not have to have intention to kill one who dies during the course of felonies.^② We can find three characteristics about felony murder from its concept.

First, felony murder rule is applied to cases happened in the course of felonies. Crimes are classified for various purposes, the principal classification being that which divides crimes into felonies and misdemeanors.^③ Many American criminal codes

① Li Hong, *Criminal Law*, 2012, Law Press•China, p478.

② Cynthia Lee. 2009. Angela Harris, *Criminal Law: Cases and Materials*, 2d ed, West Press:373.

③ Wayne R. LaFare, *Criminal Law*, 5th ed, 2010, Thomson/West, p36.

provide felony and misdemeanor with different punishments. Felony may be punishable by death or long-term imprisonment while misdemeanor by fine or short-term imprisonment. Model Penal Code differentiates felony from misdemeanor statutorily combining hierarchy of punishment.^①Of course, as mentioned following, all felonies are not qualified to apply felony murder rule, many states limit felony murder in requirement of predicate felony.

Second, felony murder rule is to determine the commission of murder. Murder is similar but not equal to intentional homicide. The common law definition of “murder” is “the killing of a human being by another human being with malice aforethought”.^②“Malice aforethought” includes intention, but not limits in intention. This term is a legal term about killing a victim in following states of mind: A. the intention to kill a human being; B. the intention to inflict grievous bodily injury on another; C. an extremely reckless of disregarding the value of human life (so-called “depraved heart” murder); D. the intention to commit a felony during the commission or attempted commission in which death is caused (so-called “felony murder”).^④

Third, felony murder must happen in cases that defendant kills the victim. In other words, causing death is the basic requirement of felony murder rule. If a defendant intends to kill the victim in commission of felony but fails, he should not be applied felony murder rule but attempted murder.

Because murder is more serious than the predicate felonies in felony murder rule, when the predicate felonies transfer to murder, the defendant will receive a heavier punishment. Furthermore, causing death is an extended result of predicate felony. In this way, felony murder rule can be a rule about aggravated punishment in line with extended result. Then, it is doubtful about relation between felony murder and aggravated consequential offense. This part will review the relation so as to decide

① Model Penal Code §1.04.

③ Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p509.

④ Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p509-510.

whether aggravated consequential offense is limited in continental criminal law. And, because felony murder rule is the most disputed and most important subject in aggravated felony in the U. S, this paper will focus on discussion on felony murder.

4.3.1 History of Felony Murder Rule

The English origins of felony murder rule are obscure. Scholars consider that the earliest sources are not judicial decisions but scholarly commentaries.^① Commentators usually trace the first manifestation of the felony-murder rule to the Lord Dacres case in 1535.^② Lord Dacres and some companions agreed to enter a park without permission to hunt, which was an unlawful act, and to kill anyone who should impede them. While Lord Dacres was a quarter of a mile away, a member of his group killed a gamekeeper who confronted him in the park. Although Lord Dacres was not present when the killing occurred, he, along with the rest of his companions, was convicted of murder and was hanged.^③ Felony murder rule is not a common rule in the English Criminal Law;^④ in the end, the Homicide Act 1957 abolished this rule.^⑤

What really makes felony murder rule develop is statues of U.S. states. After American Revolution, a number of new states began legislative reforms to codify murder. One of the earliest states to do so was Pennsylvania. In 1794, this state enacted a murder degree statute that divided murder into first-degree capital murder and second-degree murder.^⑥ In Pennsylvania, the penalty for felony-murder is constricted by imposing capital punishment only for such felony-murders as occurred in the perpetration of arson, rape, robbery or burglary. All felony-murders in Pennsylvania,

① Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 1999, *Arizona State Law Journal*, 31(3), p764.

② Michael C. Gregerson, *Case Note: Criminal Law-Dangerous, Not Deadly: Possession of A Firearm Distinguished from Use under the Felony Murder Rule-State v. Anderson*, 2004, *William Mitchell Law Review*, 31(2), p611.

③ This case is cited by American Supreme court for explaining history of felony murder rule in case of *People v. Aaron*. At the same time, Supreme Court cites contrary opinion about denying this case to be an example of felony murder rule. See *People v. Aaron* 299 N.W.2d 304, 307 (Mich. 1980).

④ Leonard Birdsong, *Felony murder: A historical Perspective by which to Understand Today's Modern Felony Murder Rule Statute*, 2006, *Thurgood Marshall Law Review*, 32(1), p26.

⑤ *Homicide Act, 1957*, 5&6 Eliz. 2 Ch. 11 & 1.

⑥ Leonard Birdsong, *Felony murder: A historical Perspective by which to Understand Today's Modern Felony Murder Rule Statute*, 2006, *Thurgood Marshall Law Review*, 32(1), p26.

other than those above, as is committed in the perpetration of one of the common law felonies specified in the degree statute, are murder of the second degree.^① Strictly speaking, Pennsylvania did not enact integral felony murder rule, because it was restricted in aggravated punishment for murder in perpetration of predicate felonies. In America, the first legislation of felony murder rule was passed by Illinois in the Criminal Code of 1827. As an exception to the definition of involuntary manslaughter, the clause stated "that where such involuntary killing shall happen in the commission of an unlawful act which in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be . . . murder."^②The twentieth century began with most states having in various ways felony murder rule enacted.

Nowadays, felony murder rule is accepted by most jurisdictions, but some states abolished the rule. In case of *People v. Aaron* in 1980, the Michigan Supreme Court abolished felony murder in that Michigan has no statutory felony-murder rule, which allows the mental element of murder to be satisfied by proof of the intention to commit the underlying felony. According to this court, a defendant is convicted of murder, as that term is defined by Michigan case law, it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm.^③Hawaii and Kentucky abolished the felony murder rule by legislation.^④The Model Penal Code in 1962 takes a blending way on denying felony murder rule with defining murder in purpose or knowing criminal homicide and reckless criminal homicide under circumstances manifesting extreme indifference to the value of human life, and making an exception about presuming recklessness and indifference if the

① *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958).

② James W. Hilliard, *Felony Murder in Illinois the "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 2001, *Southern Illinois University Law Journal*, 25, p355.

③ *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980).

④ Haw. Rev. Stat. Ann. § 707.701 (Michie 1998) and Ky. Rev. Stat. Ann. § 507.020 (Michie 1997). Also See Houck, Kara M., *People v. Dekens, The Expansion of the Felony-Murder Doctrine in Illinois*, 1999, *Loyola University Chicago Law Journal*, 30(2), p362, n53.

defendant is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.^①

In the jurisdictions of accepting felony murder rule, there is a trend to limit the rule. California Supreme Court has stated repeatedly that felony-murder is a “highly artificial concept” and “deserves no extension beyond its required application.”^②The California Supreme Court began to restrict the application of felony-murder rule in the 1960's. In 1951, the Court declared the felony-murder rule “was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker.”^③In fact, there are different requirements for limiting felony murder rule by jurisdictions. For instance, many states recognize an “independent” felony” or “collateral felony” limitation on the rule, which means that the felony murder rule only applies if the predicate felony is independent of, or collateral to, the homicide.^④In case of *People v. Smith*, defendant has two daughters: three-and-a-half-year-old Bethany (Beth) and two-year-old Amy, lived with David Foster. On the day Amy died, she refused to sit on the couch instead of the floor to snack. The defendant got angry, took Amy into the children’s bedroom, spanked her and slapped her on her face … … Eventually, the defendant knocked the child backwards and she fell, hitting her head on the closet door. The court has restricted the scope of the felony-murder rule by holding it inapplicable to felonies that are integral part of and included in fact within homicide and concluded that the defendant was not guilty of felony murder.^⑤Besides this requirement, felony murder rule is limited by requirement such as “inherently dangerous felony”, “the res gestae requirement” and so on.

① Model Penal Code § 210.2.

② Satchell, 6 Cal. 3d at 34, 489 P.2d at 1365, 98 Cal. Rptr. at 37; David George Hester, *State v. Thomas: The North Carolina Supreme Court Determines that There are basic crimes of Felony Murder*, 1990, *North Carolina Law Review*, 68, p1143.

③ *People v. Chavez*, 37 Cal. 2d 656, 669 (1951)

④ Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p527.

⑤ *People v. Smith*, 35 Cal.3d 798, 678 P.2d 886 Cal.Rptr.311(1984).

Recently, American jurisdictions step forward to limit felony murder in other aspects besides requirement. Firstly, procedure is a very important aspect in limiting felony murder. In *State v. Thomas*, Thomas was convicted of felony murder. In trial, the prosecutor offered evidence to prove Thomas guilty of felony murder. However, Thomas had a different edition of evidence from prosecutor to affirm voluntary manslaughter. However, trial court only instructed the jury on how to convict the felony murder, but not mention the way to convict voluntary manslaughter. The North Carolina Supreme Court held that a defendant might always show, by evidence, not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence supports it, the defendant would be entitled to have it submitted to the jury. Therefore, the trial court's failure to instruct the jury on the basic crime of involuntary manslaughter is reversible error. The verdict and judgment below are, therefore, vacated and the defendant is given a new trial. The court's reasoning clearly indicates that any lesser degree of homicide would be a basic crime of felony murder if the evidence and indictment in the case support the finding that defendant committed a lesser degree of homicide. This well-reasoned rule probably will result in fewer defendants being convicted of felony murder in North Carolina.^①

Secondly, death penalty is limited in cases of felony murder. For instance, since 2005, the United States Supreme Court has issued a trilogy of opinions affirming the proposition that children and adolescents are different from adults in fundamental-and constitutionally relevant-ways.^② In *Roper v. Simmons*, the Supreme Court held that if the court imposed death penalty on juveniles who committed murders, it would violate the Eighth Amendment's prohibition against cruel and unusual punishment.^③ In case of

① David George Hester, *State v. Thomas: The North Carolina Supreme Court Determines that There are basic crimes of Felony Murder*, 1990, *North Carolina Law Review*, 68, p1143.

② Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper*, *Graham & J.D.B.*, 2012, *Connecticut Public Interest Law*, 11(2), p297.

③ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Graham v. Florida in 2005, the Court held that it is similarly unconstitutional to impose life imprisonment without parole sentences on juveniles convicted of non-homicide offenses.^① And, the Court held in 2012 that “mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violate the Eighth Amendment's prohibition on ‘cruel and unusual punishments.’”^② These cases express the strict limitation on sentence for juveniles who are guilty of felony murder.

To take another example, American jurisdictions also limit sentence of accessories. In case of Enmund v. Florida, at approximately 7:30 a. m. on April 1, 1975, Sampson and Jeanette Armstrong approached the backdoor of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car. When Thomas Kersey retrieved a water jug to help Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, fired back, and killed both of the Kersseys. The Armstrongs dragged the bodies into the kitchen, took Thomas Kersey's money, and fled to a nearby car, where the petitioner, Earl Enmund, was waiting to help the Armstrongs to escape. Enmund appealed but the Florida Supreme Court affirmed the conviction and sentences. However, after reviewing the aggravating circumstances, the Supreme Court consolidated two of them, and rejected the trial court's conclusion that the murders had been “heinous, atrocious, or cruel,” since the evidence showed that the Armstrongs had killed the Kersseys in a gun battle arising from Mrs. Kersey's armed resistance, and not that Enmund had killed them in an effort to eliminate them as witnesses.^③

However, courts of the United States never restrict it blindly. In case of Tison v. Arizona, petitioner brothers, along with other members of their family, planned and

① Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

② Evan Miller, Petitioner v. Alabama; Kuntrell Jackson, Petitioner v. Ray Hobbs, Director, Arkansas Department of Correction, 2012 WL 2368659 (June 25, 2012).

③ Enmund v. Florida, 458 U.S. 782, 787 (1982).

assisted the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. Petitioners entered the prison with a chest filled with guns, armed their father and another convicted murderer, later helped to abduct, detain, and rob a family of four, and watched their father and others murder the members of that family with shotguns. Although they both stated that they were surprised by the shooting, neither petitioner made any effort to help the victims, instead, they drove away in the victims' car with the killers. The Court held that even if the petitioners did not kill the victim immediately, they satisfy the aggregating circumstances because the appellant's involvement in the crimes was not minor, but, rather, as specifically found by the trial court, "substantial." Far from merely sitting in a car away from the scene of murder as getaway driver to a robbery, the petitioners were actively involved in every part of the kidnapping-robbery and were physically present during the entire sequence of criminal activities culminated in murdering the Lyons family and in the subsequent flight. The appellant's high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fell well within the overlapping second intermediate position that focuses on the defendant's degree of participation in the felony.^①

Courts of United States are indecisive, because, for one thing, the application scope of felony murder rule reflects the collision between protection of human right and social defense, and thus it is difficult to unidirectionally limit or broaden the scope; for another, there are different circumstances in different cases that influence the necessity of applying capital punishment. Taken as a whole, the American courts prudently apply felony murder rule. We can foresee that felony murder rule will be applied in a restricted scope in America for a long time.

^① Tison v. Arizona, 481 U.S. 137 (1987).

4.3.2 Debate on Abolishing Felony Murder

Some critics argue that felony murder rule is an irrational rule. First, critics charge that felony murder is to threaten those prospective felons with a small chance of a large penalty, which would subject them to a punishment lottery, but there is little reason to expect such punishment lotteries to deter efficiently. In addition, felony murder declines marginal disutility of incarceration, severe but uncertain punishment may undermine deterrence in other ways. Uncertain punishment may create an impression that extraneous factors, such as corruption or prejudice, determine punishment. Excessive punishment may erode the moral authority of the law, and reduce the voluntary obedience to law.^① Second, many commentators consider felony murder rule as strict liability. Some complain that the felony murder doctrine results in convictions unrelated to individual blameworthiness.^② Other critics argue that application of the rule infringes upon the drug suppliers' fourteenth amendment right to due process of law. Due process requires that the states prove the causation element of felony-murder beyond a reasonable doubt.^③ Third, some argue that felony murder rule violates the eighth amendment's prohibition of cruel and unusual punishment because equating them with murderers ensures that their sentences will be disproportionate to the actual crime they committed.^④

However, many people oppose previous arguments of denying felony murder. For instance, Guyora Binder replies to objections of felony murder in several points. First, Guyora disproves “punishment lottery argument”. He holds that according to the argument, all penalties conditioned on actual harm, including all penalties for homicide, are punishment lotteries. Model Penal Code generally equalized the punishment of

① Guyora Binder, *The Culpability of Felony Murder*, 2008, *Notre Dame Law Review*, 83(3), p981-986.

② David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticism: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 2009, *Harvard Journal of Law & Public Policy*, 32(3), p1160.

③ Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drug*, 1986, *Georgia Law Review*, 20(3), p692.

④ Lynne H. Rambo, *An Unconstitutional Fiction: The Felony-Murder Rule as Applied to the Supply of Drug*, 1986, *Georgia Law Review*, 20(3), p692.

attempts, conspiracies, and accomplished crimes. Thus, the logic of the punishment lottery argument precludes punishable harm at all. If deterrence theory demands such a massive and unlikely transformation of our criminal law, it would fail as a guiding principle for constructive interpretation.^① Moreover, Guyora suggested that there are utilitarian reasons to support felony murder through punishing actual harms and these considerations transcend simple deterrence theory. A state may avenge a victim who is deprived of the opportunity to personally win honor at the offender's expense. It is an enormously important cooperative achievement by punishing actual harm. It precludes cycles of organized retaliatory violence, secures the dignity of individual, and thereby frees individuals to organize their lives around the pursuit of non-martial virtues. Yet, in asserting a monopoly on retaliatory force, the state deprives individuals and groups of the option of securing their own dignity. In doing so, the state undertakes an obligation to each individual to act on his or her behalf.^②

Second, Guyora holds that relationship between felony murder and strict liability is not so simple. Many people argue to divide strict liability into formal liability and substantive liability. Formal liability accepts offense elements as given, requires an analysis of culpability as to each of these elements considered separately, and assumes that if some minimally acceptable form of culpability as to each of those elements is shown, then criminal liability expresses some genuine form of fault. By contrast, a substantive conception of strict liability and fault examines the offense elements themselves, considers the interrelationship among offense elements, culpability terms, and relevant ultimate harm, and requires a substantive criterion of fault that might not correspond simply and directly to formal culpability requirements.^③ If an offense requires an objective element without a corresponding subjective element, the objective element would be a strict liability element. According to Simons' terminology, an

① Guyora Binder, *Making the Best of Felony Murder*, 2011, *Boston University Law Review*, 91(2), p422–433.

② Guyora Binder, *Making the Best of Felony Murder*, 2011, *Boston University Law Review*, 91(2), p726-727.

③ Kenneth W. Simons. *When is Strict Criminal Liability Just?*, 1997, *Journal of Criminal Law and Criminology*, 87(4), p1087.

offense with no subjective elements is a pure strict liability offense; an offense with at least one strict liability objective element is an impure or partial strict liability offense. When critics condemn felony murder as a strict liability offense they similarly equate impure formal strict liability with substantive strict liability.^①

Third, Guyora considers that the Eighth Amendment argument builds on the doctrine that the Cruel and Unusual Punishment Clause forbid disproportionate punishment, including lengthy terms of imprisonment. However, Proportionality is generally identified either comparatively or instrumentally. Comparative proportionality measures punishment against one that is provided for other offenses, or the same offenses in other jurisdictions. Instrumental proportionality assesses punishment in terms of its service to its justifying purposes. Comparative proportionality is unlikely to condemn felony murder liability as such because such liability is widespread, and many non-homicide offenses now carry lengthy terms of incarceration.^② On the other hand, instrumental proportionality has been defined far less restrictively for incarceration than for capital punishment. In considering the proportionality of incarceration, however, the Supreme Court has generally declined to prioritize desert, and has permitted lengthy sentences for nonviolent offenses on the basis of speculative inaccommodative considerations. Thus, instrumental proportionality is unlikely to require that felony murder be conditioned on culpability under current law.^③

Fourth, Guyora agrees that the Eight Amendment requires a culpable mental state for various offenses regulating. However, Constitution leaves legislatures broad discretion in defining those elements. The Constitution may require that crimes involving severe punishment and denunciation for causing harmful results be conditioned on some measure of culpability with respect to those results. But even if this requirement is not clearly established, courts should interpret ambiguous statutes so

① Guyora Binder, Making the Best of Felony Murder, 2011, Boston University Law Review, 91(2), p424.

② Guyora Binder, Making the Best of Felony Murder, 2011, Boston University Law Review, 91(2), p430.

③ Guyora Binder, Making the Best of Felony Murder, 2011, Boston University Law Review, 91(2), p430-431.

as to avoid possible conflict with the requirements of due process. Thus, when courts interpret ambiguous felony murder laws, they should presume a legislative intent to follow other jurisdictions by conditioning liability on a dangerous felony or foreseeable causation of death.^①

Besides Guyora's argument, some believe that the felony murder rule serves the purpose of providing a clear and unambiguous crime definition and it is better than the Model Penal Code containing several vague concepts that are likely to produce inconsistency and arbitrariness in verdicts.^② Obviously, supporters of felony murder get the upper hand in previous debating. Felony murder rule is applied in most jurisdictions. Nowadays, the primary problem of felony murder is what the rationale should be for this rule.

4.3.3 Rationale of Felony Murder Rule

4.3.3.1 Deterrence

Most people think that the primary rationale for felony-murder rule is deterrence.^④ The rationale consists of two different approaches. The first one is to justify felony murder by avoiding felony causing deaths. For instance, Holmes attributed felony murder to prevention of causing deaths to others, and he said "somehow or other deaths which the evidence makes accidental happen disproportionately often in connection with other felonies, or with resistance to officers, or if on any other ground of policy it is deemed desirable to make special efforts for the prevention of such deaths The law may, therefore, throw on the defendant the peril, not only of the consequences foreseen by him, but also of consequences which, although not predicted

① Guyora Binder, Making the Best of Felony Murder, 2011, Boston University Law Review, 91(2), p432-433.

② David Crump, Reconsidering the Felony Murder Rule in Light of Modern Criticism: Doesn't the Conclusion Depend upon the Particular Rule at Issue?, Harvard Journal of Law & Public Policy, 2009, 32, p1163—1164.

④ Dana K. Cole, Expanding Felony-Murder in Ohio: Felony-Murder or Murder or Murder-Felony?, 2009, Ohio State Law Journal, 63(1), p21.

by common experience, the legislator apprehends”.^① Another approach, namely the deterrence approach, views felony murder as a way to deter inherently dangerous felony. In case of *People v. Washington*, the court held that “one purpose of the felony-murder rule is to deter felons from killing negligently or accidentally. However, another equally cogent purpose is to deter them from undertaking inherently dangerous felonies in which, as the majority state, a ‘killing was a risk reasonably to be foreseen……In every robbery there is a possibility that the victim will resist and kill.’”^②

Nelson E. Roth and Scott E. criticize both deterrence rationales for being logically flawed and neither has proven to have a basis in fact. “The illogic of the felony-murder rule as a means of deterring killing is apparent when applied to accidental killings occurring during the commission of a felony … any potential deterrence effect on unintentional killings is further reduced because few felons either will know that the felony-murder rule imposes strict liability for resulting deaths or will believe that harm will result from commission of the felony”.^③ Dressler holds that advocates of the felony-murder rule cannot provide empirical evidence to support the deterrence thesis.^④ However, felony murder is not the crime of substantive strict liability. Many courts require that causing death is foreseeable in convicting felony murder. Furthermore, it is unreasonable to deny the deterrence function of felony murder rule. American jurist Crump holds:

The assumption that the rule cannot deter accidental killings is extravagant. If that was the case, the law would have long since discarded every principle based on negligence, as well as strict liability, on the ground that accidents are not persuasive. Finally, the rule may well deter intentional killings. If defendant falsely claims that the gun discharged accidentally, and the jury cannot tell beyond a reasonable doubt whether this claim is true, the result would be acquittal without the felony

① Oliver Wendell Holmes, *The Common Law*, Little, Brown and Company Press, 1881, p59.

② *People v. Washington*, 62 Cal.2d 777, 790, 402 P.2d 130, 139, 44 Cal.Rptr. 442, 451 (1965).

③ Nelson E. Roth, Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 1985, *Cornell Law Review*, 70(3), p451-452.

④ Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p523.

murder rule.^① Thus felony rule can make defendant make effort to avoid causing death. Of course, the first approach ignores difference between murder and manslaughter, and the second ignores the position of causing death in felony murder, so they are not accomplished. In sum, both the two approaches are contents of deterrence rationale and make felony murder justify together.

4.3.3.2 Reaffirming the Sanctity of Human Life

Some supporters of felony murder rule argue that the rule serves a purpose of condemnation by distinguishing crimes that cause deaths, thus reinforcing the reverence of human life.^②In *Commonwealth v. Almeida*, the Pennsylvania Supreme Court reaffirmed the principle: “he whose felonious act is the proximate cause of another's death is criminally responsible for that death and must answer to society for it exactly as he who is negligently the proximate cause of another's death is civilly responsible for that death and must answer in damages for it.”^③In other orders, if the criminal is required to pay for debt to the society, the defendant of felony murder should bear more debt than those who commit other felons. This rationale inclines to retributive theory that is not enough to justify felony murder rule because manslaughter also takes life of people but is distinguished from murder. However, this theory still can be a reference in respect of limiting the condition to cause death for increasing punishment.

4.3.2.3 Enhancing the Connection between Moral Blameworthiness and the Imposition of Criminal Liability

Some consider that felony murder rule's purpose is to serve policy about connecting criminal law and moral liability. For instance, Crump said, “the felony murder doctrine often arguably does result in crime gradation that corresponds to

① David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticism: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 2009, *Harvard Journal of Law & Public Policy*, 32(3), p1163.

② David Crump & Susan Waite Crump, *In defense of the Felony Murder Doctrine*, 1985, *Harvard Journal of Law and Public Policy*, 8(2), p367-368.

③ *Commonwealth v. Almeida*, 68 A.2d 596, 599-600 (Pa. 1949).

blameworthiness”.^①“Murder is not the same offense as attempted murder, even though the two crimes have similar *mentes rea*. Murder is a more serious crime, even if the main difference is the result. The felony murder rule, like classical criminal law in general, is founded on the proposition that the result is sometimes a factor that aggravates or reduces the severity of a crime. Specifically, the felony murder rule reflects a judgment that a robbery that causes a human death is not merely a robbery but something more serious; it is more akin to a murder than to a robbery”.^②This viewpoint notices that result is a critical element to determine analogy of crimes in light of normative purpose.

4.3.3.4 Dual Culpability

Guyora Binder said that an "expressive theory of culpability that assesses blame for harm on the basis of two dimensions of culpability, including the defendant's expectation of causing harm and the moral worth of the ends for which the defendant imposes this risk."^③Guyora Binder called the first dimension cognitive culpability and the second normative culpability. “The relevance of both cognitive and normative dimensions of culpability to deserved punishment for homicide is what I have called the principle of dual culpability”, Guyora Binder said. In light of Guyora Binder’s opinion, “we punish crimes more severely when they do actual harm to particular victims because such crimes degrade those victims. The law has a special obligation to vindicate victims by punishing such crimes because it precludes victims from using vengeance to vindicate themselves... a felon can deserve punishment for causing death unintentionally in the course of a felony. Such an unintended injury can express disrespect for a victim if the felon was aware of or was inattentive to a risk of death and accepted or ignored

① David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticism: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 2009, *Harvard Journal of Law & Public Policy*, 32(3), p1162.

② David Crump, *Reconsidering the Felony Murder Rule in Light of Modern Criticism: Doesn't the Conclusion Depend upon the Particular Rule at Issue?*, 2009, *Harvard Journal of Law & Public Policy*, 32(3), p1162.

③ Guyora Binder, *Making the Best of Felony Murder*, 2011, *Boston University Law Review*, 91(2), p434.

the risk for an end that did not justify it”.^①

Because Guyora Binder concluded that purpose to commit a felon plus negligent homicide is equal to intent to kill according to normative culpability, it seems that Guyora Binder only focuses on complex of different mental states. However, dual culpability is not reflection of legal fiction but normative imputation. Normative culpability is about possibility of condemnation,^② and normative culpability of continental criminal law usually is took attention to see possibility of anticipation as the constitutive requirement of a crime. However, normative culpability is related to what is the important element of condemnation in specific normative purpose, so it should contain contents about how to evaluate different level of culpability. Different kinds of culpability may be equivalent in a substantial standard. Thus felony murder and intent-to-kill murder may deserve the same culpability.

4.3.3.5 Transferred Intent

Some use transferred intent theory to explain felony murder. Strictly, there is no standard formulation of transferred theory. However, its core implications are easy to understand. For instance, Aint ends to kill B, and shoots at B, misses, while hits C, a bystander, and kills C. In terms of transferred intent theory, A will be guilty of murder because his killing intent transfers from B to C. Absent transferred intent, the mens rea element for murder might not be satisfied and A then would be liable for only the attempted murder of B and perhaps some lesser offense with respect to C.^③ Using the transferred intent theory, law can constructively "transfer" culpability from any wrongful aim to any wrongful but unintended result.^④ In the case of *State v. O'Blasney*, the court held that “By proof of the perpetration of a separate felony, general malicious

① Guyora Binder, *Making the Best of Felony Murder*, 2011, *Boston University Law Review*, 91(2), p434.

② Zhang Xiaohu, *Analysis on Contemporary Essential Elements and Their Integration*, 2013, *Journal of National Prosecutors College*, (1), p137.

③ Anthony M. Dillof, *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*, 1998, *Buffalo Criminal Law Review*, 1, p.504-507.

④ Guyora Binder, *The Culpability of Felony Murder*, 2008, *Notre Dame Law Review*, 83(3), p971.

intent is transferred from that crime to the homicide, thus elevating the homicide to the crime of murder”.^①

In another case of *People v. Cantrell*, the psychiatrists unanimously concluded that defendant was acting impulsively and without premeditation, malice or intent to kill when he choked a boy to death, the psychiatrists were also unanimous in explaining such opinion on ground that the choking was a panic reaction triggered by boy's screams while the defendant was performing a lewd sexual infringement on him and that the defendant was not suffering from any diminished capacity at the time he engaged in that sexual act. However, the court held that elements of premeditation and malice are eliminated by the felony murder doctrine, and the only criminal intent required is the specific intent to commit the particular felony.^② Commentators usually conclude the case to rationale underlying transferred intent theory.^③

Dressler comments this approach as “a misuse of the transferred intent doctrine”.^④ Transferred intent theory only allows intention to transfer from a victim to another unintended victim or from a particular criminal method to another unintended method.^⑤ However, if transferred intent theory is used underlying felony murder rule, intention to commit a slighter crime will transfer to intention to a severer crime. It is unfair to convict the defendant severer liability according to the extended result such as killing someone. Furthermore, transferred intent approach ignores difference between murder and manslaughter,^⑥ so it comes into conflict with principle of culpability.

① *State v. O'Blasney* 297 N.W.2d 797, 798(S.D., 1980).

② 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792, 793(1973).

③ Clayton T. Tanaka, Larry M. Lawrence. *Developments in California Homicide Law IV: The Felony-Murder Doctrine*, 2003, *Loyola of Los Angeles Law Review*, 36(4):1486-1487.

④ Joshua Dressler, *Understanding Criminal Law*, 5th ed, 2009, Lexisnexis, p525.

⑤ CMV Clarkson, HM Keating. 2010. *SR Cunningham: Clarkson and Keating Criminal Law: Text and Materials*, 7thed, Sweet & Maxwell, Limited:191-192.

⑦ Nelson E. Roth, Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 1985, *Cornell Law Review*, 70(3), p478-485.

4.4.2 Comparison between Aggravated Consequential offense and Felony Murder Rule

Some scholars compare the two kinds of crime and conclude that they are different model on heightening punishment in following reasons. First, felony murder rule imputes death caused in commission or attempted commission of felony to the defendant. By contrast, the ambit of consequence in aggravated consequential offense is broader: not only about death, but also serious injury, property loss and other results. Second, the mental state requirement of felony murder is about intent to commit the predicate felony and negligence to cause death. On the contrary, aggravated consequential offense contains mental state about intent to cause extended result. Third, the fundamental distinction between the two kinds of crime is legal effect. Felony murder rule is about transferring felony to murder and the defendant is guilty of murder in the end. Counter to this model, aggravated consequential offense is punished immediately according to statutorily aggravated punishment without transferring basic crime to another crime.^① However, we can still find that aggravated consequential offense and felony murder are substantially similar and belong to the same criminal type for following reasons.

4.4.2.1 Common Origins of Aggravated Consequential offense and Felony Murder Rule

Aggravated consequential offense and felony murder rule are both descended from principle of “*versari in re illicita*”: one acting unlawfully is held responsible for all the consequences of his conduct.^② The Principle of “*versari in re illicita*”, which was used to decide whether the cleric is qualified at first, took shape from the end of the 12th centuries to the 13th centuries. Clerics then have to be pure within and they will be imputed to take responsibility of result happening accidentally in legal practice

① Guo Li, *The Analysis on the Nature of Consequence-aggravated Crime*, 2010, Hebei Law Science, (5), p142.

② Maruyama Masao, *On Aggravated Consequential Offense*, 1990, Seibundoh Publishing Co., Ltd, p182. Also See Anthony M. Dillof. 1998. *Transferred Intent: An Inquiry into the Nature of Criminal Culpability*”, *Buffalo Criminal Law Review*: 1, p509-510.

according to this principle. There is a famous case about recognizing “*versari in re illicita*”. Several deacons and Christians were going back to home together after their work in a vineyard. They played farm tools and injured a person, after 8 days the injured died. This case usually is taken as an example of carrying out the principle of “*versari in re illicita*”. Because clerics were not allowed to play with Christians, their playing was treated as illicit act, so the defendant was responsible to this act causing death.^①

Principle of “*versari re illicita*” has a profound implications for continental or Romano-Germanic criminal law. For instance, the Italian Criminal Law provides that there are three types of aggravated consequential offense: (1) the extended result is related to specific criminal purpose, such as Section 243 in Italian Penal Code; (2) the extended result is related to culpability regulated in basic crime; (3) the extended result goes beyond regulating of basic crime. The third type of aggravated consequential offense is considered as remnant of “*versari re illicita*” and strict liability.^② To take another example, although German theory rejects “*versari re illicita*” to be rationale of aggravated consequential offense, one cannot deny the fact that the German Penal Code once accepted this doctrine. For instance, Section 134 in *Constitutio Criminalis Carolina* states that barber and shooter hold no liability for death causing by haircut and shooting an arrow in a right place; however, Section 146 in this law states that defendant should be liable for causing death in an inappropriate place or to a crowd of people.^③

In Anglo-American law system, “*versari re illicita*” plays an important role in practice and theory of criminal law.^④ English jurist and cleric Bracton held that accidental killing was no homicide “because a crime is not committed unless the

① ホセ・ヨンバルト, 1981. 古代刑法における *Llompert Jose*, *Objection to versari in re illicita in the Ancient Criminal Law and Function of Accident in the Modern Criminal Law*, 1981, *Sophia Law Review*, 24(3), p248.

② Tullio Padovani, *Outlines of Italian Criminal Law*, Chen Zhonglin(trans), 1998, Law Press·China, p228-231.

③ Uchida Hiroshi, *Structure of Aggravated Consequential Offense*, 2005, Shinzansha Publisher Co.,Ltd, p53.

④ Some people holds that felony murder comes from theory of tainting. See Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 1999, *Arizona State Law Journal*, 31(3), p765. Some people holds that felony murder comes from evil mind theory. See Nelson E. Roth, Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 1985, *Cornell Law Review*, 70(3), p478-485. However, these theories are coordinated with *versari* theory.

intention to injure exists” and “in crimes the intention is regarded, not the result.”^① Coke gave an example, as if A, meaning to steal a deer in the park of B, shoot at the deer, and by the glance of the arrow kill a boy hidden in bush: this is murder, for that the act was unlawful, although A had no intent to hurt the boy or knowledge of him.^② However, even if unlawful act can lead to murder, it may not be a felony murder, because unlawful act and felony are very different in legal character. English common law began to enact felony murder rule for restricting abusing penal from 18 centuries.

After mentioned analysis, origins of aggravated consequential offense and felony murder rule both can be traced back to the principle of “*versari re illicita*”. Therefore, felony murder rule and aggravated consequential offense are not parallel products of two legal systems but related closely in history.

4.4.2.2 Common Construction of Aggravated Consequential offense and Felony Murder Rule

Although there are some differences between aggravated consequential offense and felony murder, they are almost similar in legal construction. First, the two criminal types both require an essential criminal act. Predicate felony is requirement of felony murder and predicate basic crime is requirement of aggravated consequential offense. Many crimes belong to predicate felony in Anglo-American law while to basic crime in Romano-Germanic family, such as rape, robbery and so on. In fact, felony is different from basic offense in concept and range; despite that, as pre-criminal acts, they are no different in the nature. For instance, the Japanese Penal Code provides that forcible indecency causing death belongs to aggravated consequential offense, but there is no aggregating provision about forcible indecency and indignity in the Chinese Criminal Law. Therefore, it is unreasonable to exaggerate the difference between felony and basic crime.

① Guyora Binder, *The Origins of American Felony Murder Rules*. 2004, *Stanford Law Review*, 57(1), p75.

② Michael C. Gregerson, *Case Note: Criminal Law-Dangerous, Not Deadly: Possession of A Firearm Distinguished from Use under the Felony Murder Rule-State v. Anderson*, 2004, *William Mitchell Law Review*, 31(2), p612.

Second, the two criminal types both require an aggregating result beyond pre-criminal act. Causing death is necessary to constitute felony murder and extended result is required by aggravated consequential offense, and causing death is one of the extended; so there is no substantial difference for them. Furthermore, extended results are very different in each criminal law of countries. In the German Penal Code and the Japanese Penal Code, extended results usually are limited in causing death or inflicting serious bodily injury. Therefore, it is possible to restrict extended result to causing death. In fact, some aggravated consequential offenses are as same as felony murder in limiting causing death. For instance, in the Chinese Criminal Law, kidnapping for ransom or other profit and interfering marriage by violence are punished by more serious sentence if the essential criminal act causes death. Therefore, whether extended result is limited in causing death cannot prove aggravated consequential offense to be different from felony murder rule.

Third, the two criminal types both are punished more serious than basic crime or predicate felony.^① Under early English law, felonies and murders were both punishable by death. However, the punishment for felonies became slighter in the course of reforming Anglo-American Criminal Law. In America, there are few felonies punished by capital sentence.^② Some commentators consider that creation of a separate offense of first degree murder in many American jurisdictions was motivated in large part by what was seen as the need to identify those killings for which death would be the appropriate and sometimes mandatory penalty.^③ Murder will be punished by life imprisonment in states without death penalty,^④ but other felonies cannot be imposed such serious penalty. Therefore, transferring common felony to murder is equal to heighten statutory punishment. In other words, legal effect of felony murder contains aggravated

① Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 1999, *Arizona State Law Journal*, 31(3), p765.

② Chu Huaizhi, *Introduction to Criminal Law of United States*, 2nd ed, 1996, Peking University Press, p385.

③ George E. Dix, M. Michael Sharlot, *Criminal Law: Cases and Materials Sixth Edition*, West, p440.

④ Qi Guangren, *Comparing Murder in Anglo-American Criminal Law and Intentional Homicide in Chinese Criminal Law*, 2004, *Journal of Beijing Union University(Humanities and Social Sciences)*, (6), p69.

punishment, in addition to change the name of crime. Thus, aggravated consequential offense actually coincides with felony murder in legal effect.

Fourth, the two criminal types both require that defendant negligently or recklessly cause death or other extended results. It turned to a general idea that defendant would not be guilty of felony murder if he cannot foresee his act will cause death. Likewise, commentators of continental criminal law consider that defendant has no liability of aggravated consequential offense when the extended result is unforeseeable. Even if intent is not requirement of felony murder and belongs to mental state of some aggravated consequential offense, intent and negligence is not related as opposition but in different level. Furthermore, murder in the course of felony may be an aggregating circumstance of murder. In other words, it is possible to constitute felony murder with intent to kill. For instance, in case of *Robbins v. State*, the Supreme Court of Ohio held that although in homicide committed in administering poison, or in perpetrating, or attempting to perpetrate, either of the felonies mentioned in the statute, the turpitude of the felonious act is made to supply the place of the deliberate and premeditated malice requisite in the first class of murder defined, yet the purpose to kill, expressed in the statute, applies to each of the several classes of murder in the first degree.^① Besides, in respect of some aggravated consequential offense such as kidnapping causing death, mental state of the defendant is limited in negligence or reckless. Therefore, there is no substantial difference of between mental state in felony murder and in aggravated consequential offense.

4.4.2.3 Felony Murder and Aggravated Consequential Offense Face Similar Conundrum

There is common problem in aggravated consequential offense and felony murder in principle of culpability. Many people consider that mental state about the result is not required by the principle of *versari in re illicita*, so felony murder and aggravated

^① *Robbins v. State*, 8 Ohio St. 131 (1857).

consequential offense will become strict liability in light of this principle. Furthermore, felony murder and aggravated consequential offense both have problem on severe punishment and both are regarded as vestige. Therefore, judges and scholars find some similar ways for explaining why their punishments are so severe. For instance, high risk of basic crime and predicate felony is one of the reasons to make the two doctrines justified.

As mentioned above, aggravated consequential offense and felony murder came from the same source and should belong to the same criminal type. Japanese commentator Morii Akira once pointed out: “manslaughter in Anglo-American law is equal to injury causing death. Anglo-American law very broadly imposes result to defendant according to principle of ‘*versari in re illicia*’ ... Homicide Act 1957 in England did not provided that all cases of causing death are guilty of aggravated consequential offense, which implied we should take attention to the approach of Anglo-American Law.”^① Obviously, Morii almost treats felony murder as a type of aggravated consequential offense. This paper stands at a same position with Morii. In fact, whether pre-crime is changed to other crime is the most important difference between felony murder and aggravated consequential offense. However, this is not a convincing argument to break up the relation of felony murder and aggravated consequential offense. “Legislator authorized to consider about special legal point for deciding various kinds of premise on constitution of fact.”^② Legal point of aggravated consequential offense includes extended result and imposition of severer penal beyond basic crime. The characteristics are also exhibited in felony murder. When a usual felony transfers to murder, it means the defendant will be punished more severely by an indirect way. Thus felony murder should be an indirect model of aggravated consequential offense contrasting to direct model on heightening the punishment.

① Akira, *Aggravated Consequential Offense*, 1961, *Kyoto Law Review*, 69(2), p89.

② Karl Engisch, *Instruction on Legal Thought*, Zheng Yongliu(trans), 2004, Law Press-China, p13.

4.4.3 Enlightenment of above Mentioned Rationale

Even if rationales above mentioned are used to justify felony murder, they also can help understanding aggravated consequential offense.

First, deterrence approach can help dividing illegality of aggravated consequential offense into dangerousness and result. If dangerousness within basic crime and extended result should both be deterred, there would be two kinds of illegality in aggravated consequential offense. In light of double deterrence approach, dangerousness and result are independent for increasing punishment. Therefore, deterrence approach can make up for defect of dangerousness theory about focusing on dangerousness.

Second, reaffirming the sanctity of human life can help limiting ranges of extended result. In the Chinese Criminal Law, many extended result is not specific. For instance, Article 119 states causing serious consequences is the extended result of sabotaging means of transportation.^① How to decide the range of serious consequences is a question. Although it is impossible to limit the consequences in causing death, reaffirming the sanctity of human life points to important interests of life. It can prompt us to understand aggravated consequential offense with serious penalty as a kind of crime causing serious result, or the defendant doesn't deserve the aggravated culpability.

Third, mental culpability and proportionality are important elements to enhance the connection between moral blameworthiness and liability. Moral blameworthiness cannot be affirmed by objective element. No matter how serious the result is, we cannot blame innocent defendant morally. Both principle of mental culpability and principle of proportionality are restrictions to aggravated consequential offense, while they have different approaches for justifying it. Furthermore, if felony murder is akin to

① Article 116 states that whoever sabotages a train, motor vehicle, tram, ship or aircraft to such a dangerous extent as to overturn or destroy it, but with no serious consequences, shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years. Article 119 in Chinese Criminal Law states that whoever sabotages any means of transport, thereby causing serious consequences, shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death.

intentional murder, they should be similar in illegality and culpability. Therefore, felony usually is required to be clearly in danger of causing death. Accordingly, aggravated consequential offense should be limited in special illegality and culpability for justifying the severe punishment.

Fourth, dual culpability theory is a reflection about integration of combination theory and dangerousness theory in aggravated consequential offense. In light of dual culpability theory, there are two kinds of blameworthiness in felony murder, i.e., intention to illegal act and mental state for causing dangerousness to other's life. A brief look at past and present will enable us to see that dual culpability actually contains contents of combination theory to a certain extent. Even if the key point of dual culpability is to construct reasonability of felony murder on the basis of subjective element, distinction and importance of felony and causing death are similar to combination theory. Furthermore, dual culpability theory requires inherently dangerousness or foreseeable dangerousness for constituting felony murder,^① which is close to dangerousness theory. Thus it is possible to integrate combination theory and dangerousness theory for interpreting aggravated consequential offense.

4.5 Conclusion of this Chapter

Aggravated punishment is the basic characteristic of aggravated consequential offense. It is unreasonable to limit aggravation directly. If lesser included crime transfers to another severer crime, the punishment is indirectly increased. Whether punishment is increased directly or indirectly, the defendant should face severe punishment because of causing extended result. Thus aggravated consequential offense should include indirect model. In other words, aggravated consequential offense refers to crime with substantially increased punishment because of causing extended result. In light of this definition, felony murder can be an indirect model of aggravated

^① Guyora Binder, Making the Best of Felony Murder, 2011, Boston University Law Review, 91(2), p553.

consequential offense. Therefore, practices and theories of felony murder can offer references for understanding aggravated consequential offense. Furthermore, transferred consequential offense in the Chinese Criminal Law also belongs to aggravated consequential offense, rather than attention of provision or legal fiction. Therefore, rationale of aggravated consequential offense can restrict application of transferred consequential offense. On the other hand, the aggravated consequential offense in indirect model should be punished on the basis of the transferred offense. It is an effective way to limit the punishment for aggravated consequential offense as the substantial combination. For instance, one who commits crime of abduction for the purpose of blackmail causing death should be punished by death penalty while murder is possible to be punished by imprisonment. Many scholars criticize the statutory punishment for abduction for the purpose of blackmail causing death is too severe to be justifiable. If this aggravated consequential offense is provided in individual model such as transferring to murder, the unjustifiable punishment can be avoided. Therefore, the individual model not only can be limited in the rationale of direct model of the aggravated consequential offense, but also can be the limitation of maximum punishment of aggravated consequential offense.

Chapter 5 Conclusion of this Dissertation

This dissertation mainly discusses about how to reasonably determine aggravated consequential offense. First, it is unreasonable to treat the aggravated consequential offense as strict liability. Although aggravated consequential offense once derived from the *versari* theory and was not required to be based on the subjective element of causing extended result, it is impossible to totally cut off the relationship between aggravated consequential offense and principle of culpability. According to the Article 5 and the Article 16 of the Chinese Criminal Law, aggravated consequential offense not only should be limited in the negligence on causing extended result, but also the special requirement for severe punishment. Therefore, aggravated consequential offense is unrelated to the strict liability in the Chinese Criminal Law.

Since the extended result is the important content of illegality, aggravated consequential offense can be punished more severely than basic crime is when the defendant negligently causes extended result. In other words, aggravated consequential offense belongs to the combination of basic crime and crime of causing extended result. Furthermore, according to the legislation of the Chinese Criminal Law, aggravated consequential offense can be divided into two kinds of combination, i.e., formal combination and substantial combination. In the formal combination, the punishment is slight, thus it is unnecessary to be conditioned on the special requirement. In contrast, the punishment in the substantial combination is similar or equal to or severer than the concurrent punishment for the basic crime and the crime of causing extended result, thus the kind of aggravated consequential offense should be limited in special requirements: the basic conduct requirement, the extended result requirement, the causation requirement and the mental state requirement. In addition, these requirements are judged by different tests. First, the basic conduct requirement should be judged by

connection test and dangerousness test. The connection test refers to the connection between basic conduct and constitutive requirement of basic crime. The dangerousness test refers to the high risk of basic conduct on causing extended result. Second, the extended result requirement should be judged by actual harmfulness test and aggravation test. According to the actual harmfulness test, the extended result should be the actual result forbidden by the criminal law. According to the aggravation test, the extended result should be more harmful than the result forbidden in the basic crime in quality or quantity. Third, the causation requirement should be judged by the immediateness test. The test requires that basic conduct immediately should cause the extended result on the basis of psychological theorem or physical theorem. Forth, the mental state requirement should be judged by the gross negligence test. The test requires defendant to foresee the objective fact as the basis of causing special dangerousness and the immediate relationship between basic conduct and extended result.

Besides limitation mentioned above, the dual combination theory also can reasonably determine the attempt and the complicity in aggravated consequential offense. First, according to the combination theory, the complicity in aggravated consequential offense includes the complicity in basic crime and the crime of causing extended result. Because the Chinese Criminal Law does not punish the complicity in negligent crime, defendant cannot be convicted of complicity in the aggravated consequential offense when he negligently causes the extended result. Nonetheless, in light of joint conduct theory, the joint intention is the content of psychological causation in complicity rather than the requirement of complicity, thus only if the defendant intends to causes the extended result, he can conform to the subjective requirement of complicity in the aggravated consequential offense. Second, according to the combination theory, basic crime and extended result both are important contents of aggravated consequential offense. If a defendant cannot accomplish the basic crime, he

should be convicted of attempt in the aggravated consequential offense. Nonetheless, if the defendant has not caused the extended result, he should not be convicted of aggravated consequential offense.

The dual combination theory can be applied to all models of aggravated consequential offense. In the Chinese Criminal Law and the United States Criminal Law, there is an indirect model of aggravated consequential offense, i.e., the consequential transferred offense and the felony murder. When basic crime is transferred to another crime, defendant should be punished more severely than whom of the basic crime is on the basis of extended result. There is no difference between direct model and indirect model of aggravated consequential offense on the problem of justifying the severe punishment, thus they should be limited in the same rationale. Moreover, the indirect model not only imposes severe punishment on defendant, but also controls the punishment in an acceptable extent. It can be treated as the limitation of maximum punishment on aggravated consequential offense in future.

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