FOUNDATION PRESS
THOMSON WEST

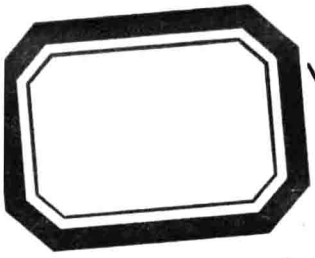
FOUNDATIONS OF Criminal Law

【影印本】

刑法基础

Leo Katz, Michael S. Moore and Stephen J. Morse
利奥·卡茨 / 迈克尔·穆尔 / 史蒂芬·莫尔斯

法律出版社
LAW PRESS·CHINA



NDATION PRESS

THOMSON
WEST

FOUNDATIONS OF Criminal Law

【影印本】

刑法基础

Leo Katz, Michael S. Moore and Stephen J. Morse
利奥·卡茨／迈克尔·穆尔／史蒂芬·莫尔斯

法律出版社
LAW PRESS·CHINA

图书在版编目(CIP)数据

刑法基础/(美)卡茨,(美)穆尔著.—影印本.
北京:法律出版社,2005.1
(法律基础影印系列)
ISBN 7-5036-5290-X
Ⅰ.刑… Ⅱ.①卡… ②穆… Ⅲ.刑法—法的理论—英文 Ⅳ.D971.01

中国版本图书馆 CIP 数据核字(2004)第 140499 号

著作权合同登记号
图字:01-2004-5257 号

责任编辑/郭 亮　　**装帧设计**/温 波

出版/法律出版社　　**编辑**/对外合作出版分社
总发行/中国法律图书有限公司　　**经销**/新华书店
印刷/北京北苑印刷有限责任公司　　**责任印制**/张宇东

开本/787×960 毫米 1/16　　**印张**/24.5
版本/2005 年 1 月第 1 版　　**印次**/2005 年 1 月第 1 次印刷

法律出版社/北京市丰台区莲花池西里法律出版社综合业务楼(100073)
电子邮件/info@lawpress.com.cn　　**电话**/010-63939796
网址/www.lawpress.com.cn　　**传真**/010-63939622

对外合作出版分社/北京市丰台区莲花池西里法律出版社综合业务楼(100073)
电子邮件/guoliang@lawpress.com.cn
读者热线/010-63939703　　**传真**/010-63939701

中国法律图书有限公司/北京市丰台区莲花池西里法律出版社综合业务楼(100073)
传真/010-63939777　　**客服热线**/010-63939792
网址/www.chinalawbook.com　　**电子邮件**/service@chinalawbook.com
中法图第一法律书店/010-63939781/9782　**中法图北京分公司**/010-62534456
中法图上海公司/021-62071200/1636　**中法图苏州公司**/0512-65193110
中法图深圳公司/0755-83072995　　**中法图重庆公司**/023-65382816/2908
中法图西安分公司/029-85388843

书号:ISBN 7-5036-5290-X/D·5007　　**定价**:48.00 元

序

刘仁文[1]

《刑法基础》一书，是由美国宾夕法尼亚大学法学院的利奥·卡茨、迈克尔·穆尔（现已转任美国圣地亚哥大学法学院沃伦讲座杰出教授）和斯蒂芬·莫尔斯三位教授合编而成的一本理论刑法学著作。既为理论刑法学著作，就不同于以刑法分则为核心的规范刑法学著作，其中心内容乃围绕刑法总则而展开。

全书除导论外，分六个部分对刑法的若干基础理论进行了阐述，第一部分是犯罪学知识。作者中像剑桥大学的迈克尔·托尼和哈佛大学的詹姆斯·威尔逊等都是国际犯罪学界的大腕级人物。传统的刑法学著作往往将这部分内容排除在外，然而正如编者所言，如果刑事立法在采纳某一条文或某项政策时，与犯罪理论和事实相脱节，那怎么能有助于减少犯罪呢？因此，欲治刑法学，必先治犯罪学。

第二部分是犯罪和刑罚的一般理论。这里的“犯罪”是刑法意义上的犯罪，即什么行为应当被规定为犯罪，它牵涉到刑法的“边界”问题。读者通过阅读波斯纳的《刑法的经济分析》等文献，定会受益。该部分还对刑罚的正当性根据进行了讨论，其中既涉及边沁的功利主义、康德的报应主义，也涉及哈特等人的刑罚一体论，还有旨在作为刑罚替代物的康复理论。

第三部分是有关影响刑事责任的因素，其中包括作为和不作为、因果关系、合法性原则、主观心态等。这些问题都是刑法学上的重大理论问题，其中有的已取得公认的观点，如遵照合法性原则，刑法不能溯及既往。但有的则仍处于聚讼阶段，如对刑法因果关系的认定，书中就列举了近因说、预见说等十种不同的观点。

第四部分是关于共犯、未遂犯和共谋犯。这三者为什么要负刑事责任，其处罚原则是什么，卡迪什和弗莱彻等美国刑法名家将向你娓娓道来。其中，对共犯中的主犯与从犯，对未遂犯与不能犯的区别等，亦有深入研讨。

---

1. 刘仁文，法学博士，经济学博士后，中国社会科学院法学研究所副研究员。曾任美国耶鲁大学、哥伦比亚大学和英国牛津大学访问学者。

第五部分是辩护事由。美国刑法将辩护事由分为两类，一类是“正当理由”，另一类是“可宽恕事项”，前者如正当防卫、紧急避险等，相当于大陆刑法的违法阻却；后者如未成年、精神病、被迫行为等，相当于大陆刑法的责任阻却。两者的区别是：(1)“正当理由”行为在实际上无害于社会甚至有利于社会，“可宽恕事项”行为实际上有害于社会，只是由于行为人主观上的原因，才得到宽恕。(2)“正当理由”的辩护权利是普遍的，属于任何一个处于这类情况的人，而“可宽恕事项”的辩护权利只限于特殊的个人。(3)“正当理由”行为人一般都认识自己行为的性质，“可宽恕事项”行为人一般不认识自己行为的性质。

第六部分是“量刑的理论与实践”。所选材料来自英国牛津大学安德鲁·艾希沃思的著作。他不仅论述了量刑的若干基本原则，如平等原则、谦抑原则等，还从刑事政策的角度描述了西方社会从上个世纪60年代盛行的“康复模式”回归到70年代后的“报应模式”，以及80年代以来得到迅速发展的“恢复性司法”。

由上可见，该书的内容是丰富的，视野是宽广的，它不仅突破了刑法的藩篱，甚至超出了纯法学的范畴，涉足哲学、经济学等诸多领域。这与我国刑法学研究乃至整个法学研究专业面日趋狭窄形成鲜明对比。由于它的覆盖范围是刑法总则中的相关问题，这些问题是任何一国的刑法都要面对的，因而可以说具有国际对话性。改革开放以来，我国对德、日、意等大陆法系国家的刑法著作引入较多，但英美法系则除了少数几本教科书，不见有好的理论著作问世，以致给人一种英美法过于注重实务、没有什么理论的印象。通过本书，我们可以发现，这是一种极大的误解。

值得一提的是，本书的三位编者并不像国内的某些编者那样省事，而是在如何编的问题上颇下了番功夫。例如，每个章、节之前，编者都撰有一个导论，对所选文献进行简单介绍，指引读者如何阅读。而每个章、节之后，又附有注释和问题，除对文中所阐述的内容提供进一步的信息外，还提出一系列尖锐的、富有挑战性的问题，让你去思考。如第一部分的最后一个问题是：“本章导论曾提醒读者，过于依赖刑法来降低犯罪率在我们的经验中还没有成功过。当你阅读完本章后，你是否接受了这一观点？你能想出其他办法使刑法在这方面能有所助益、至少是不使事情变得更坏吗？”这种启迪式的设问，使人感受到思想的无涯。而刑法理论要进一步发展，就必须仰仗于这种思想。

该书适合懂英语的大学生、研究生及教学、科研人员阅读。我相信它的面世，会对促进中国刑法学的发展做出其应有的贡献。

刘仁文

2004年7月30日于北京西郊寓所

导　言

世人为求幸福生活，必远离不法侵害，视之与免于饥饿等基本需求为同等重要。人类为自己提供基本需求的能力大小取决于社会安全程度高低。或许某些人可以抵御犯罪行为，但暴力和侵占私人财产的行径无处不在，古时各国也视其为约束对象。社会日趋复杂，有些侵害严重威胁个人自由和安全，只能由社会力量约束。与个体相比，社会力量协调力更强，效率更高。然而在没有刑律的社会，此类形式的约束也能发挥作用。塞缪尔·勃特勒的小说《埃瑞洪》[1]中塑造了一个将犯罪看作社会卫生问题的国度——埃瑞洪。在埃瑞洪，人们不会站在道德的高度对侵害行为进行惩罚或谴责，而会如同对待病菌一样积极预防之，以减少其危害性。如果这样防治偶尔引起疼痛，人们认为是药物起了副作用。这种社会似乎颇为理想，许多人也对之甚为向往。

尽管如此，现代法制社会无一例外都制定了刑法。刑法一般会定义通常什么是道德上值得谴责的犯罪行为，也规定应给予罪犯什么惩罚，使之苦痛。区分刑法与非刑法的显著特征是对罪犯的谴责、惩罚以及比民法更严格的保护程序。可社会是如何判断什么行为适用刑法，法律又是如何评判谴责、惩罚的正当性和刑法原则的正义性的呢？

传统上刑法一般分为两部分：总则和分则[2]。总则阐明适用所有罪名的原则，比如，它规定了如何定义犯罪和防卫。分则包含了各罪名的认定，如谋杀、抢劫、强奸和盗窃罪。有些刑法的总则更彻底，写明政府量化各罪行所对应的刑事责任时遵循的原则。对组成一部完整的刑法，虽说总则和分则同等重要，但本书只讨论基础的总则部分。一旦理解了总则，对政府来说，如何判断杀人和未经允许焚烧他人财产等行为是否应用刑法来约束就变得容易了。

---

1. 勃特勒（1835—1902）是英国作家和批评家。《埃瑞洪》作于 1871 年，是一部科学幻想小说。——译者

2. 两部分都没有提到刑事程序——刑事案件中规范公诉方和辩护方的规则。刑事程序法是重要的刑法学领域，但本书只讨论刑法本身。——原书编者

本书各论文均是法律、哲学和其他社会科学领域的学术成果或评论文章。刑法研究的文献繁多，其学术思想也在不断进步。犯罪在美国社会持续存在，威胁民众的安全，有时候甚至引起人们的恐慌（其他国家不外如此）。民众追求美好生活的梦想会因犯罪而破灭，犯罪者降低自己的人格，同时破坏受害者的生活。鉴于防止犯罪对维护社会良好秩序的重要意义，各国公共政策的分析者和理论家都对之显示出很大兴趣。由于犯罪行为本身对人的诱惑力，对犯罪动因以及犯罪遏制制度的学术研究日趋枝繁叶茂，心理学、社会学、经济学、人口学、精神病学甚至犯罪学本身纷纷对此展开研究。近期刑法理论深受上述学科成果的影响。

然而犯罪终究是人所为，是某一个或一群人对其他人的侵害。因此刑法学也是对人类行为的研究。随着社会科学和自然科学理论的完备，我们终将完成对人类行为这个科学难题的理解。然而科学家若要在这方面取得进步，必须具备哲学观念，即理解思想和行动两个概念。另外，刑法受道德准则的影响很深。如果一个人严重侵害了别人，社会的道德评价和惩罚行为都会不可避免地加在他身上，于是产生了一个问题：社会对他的这种谴责究竟正当不正当？科学无法解答这一疑问，因为这涉及价值问题。尽管哲学也无法直接给出答案，但人们借助它不断澄清自身的观念，也有助于问题的明朗化。有鉴于此，本书所选论文借助哲学方法和概念阐明了主观上的犯罪构成要素等关键议题。

本书第一章探讨了传统刑法教科书一般都忽略了的专题：犯罪。本章用广阔的视角纵览了美国关于犯罪的理论和实际问题，讨论了普遍认为是危害性的、邪恶的、毫无疑问是犯罪的行为。传统刑法理论没有将这类行为视为基础，但刑法是社会对不法侵害的首要对抗手段，我们也希望能够借助它减少犯罪，维护社会公正。如果刑法理论脱离了对犯罪行为最好的理论阐释和事实描述，它能切实解决问题、得到有识之士的青睐吗？再者，犯罪问题决不能仅仅依赖刑法得到解决。我们能期待刑法能用恰当的道德力量对抗和遏制犯罪，使得犯罪不至于横行无忌，而依靠刑法不至于让社会秩序更糟，如此而已。在随后的章节，我们将探讨是否可以用其他学科理论来解决我们无法避免的基本刑法难题。

从第二章开始，本书将陆续讨论刑罚和正当理由的定义、刑法所禁止行为之范畴、如何定义犯罪、哪类卷入刑事案件的人应该负法律责任、恐吓行为都多大程度应负刑事责任、对政府惩罚恶行的限制、防卫以及科刑等专题。编者在每章节前均作了导读，概括本节论文的主题，更在每节论文之后提炼出要点并设计了问题，以提供更多信息，并帮助读者分析作者观点的关键所在。

CONTENTS

INTRODUCTION

Avoiding being the victim of wrongful harmdoing is for most people as essential to a good life as avoiding hunger or the deprivation of other basic needs. Indeed, the ability of people and societies to provide for basic needs is dependent on minimal levels of security. Although private prevention practices and private responses to the behaviors commonly deemed criminal are possible, the most basic forms of force and misappropriation of property are everywhere and in all types of polities considered proper objects of state regulation. In complex societies, some forms of harmdoing threaten personal autonomy and security so grievously that they can be regulated adequately only at a societal level; the effort requires more coordination and efficiencies of scale than most individuals can provide privately. Such regulation could occur without criminal law, however. As Samuel Butler described in his novel *Erewhon,* criminal behavior could be treated as a matter of social hygiene. In such a system, harmdoing humans, like bacteria, would not be blamed or punished, practices that connote moral evaluation; instead, they would be subject to whatever prophylaxis was necessary to render them harmless. Any pain occasioned by such treatment would be the regrettable side effect rather than the precise point of the response. Such a system sounds plausible and even desirable to many people.

Despite the plausible availability of alternative forms of regulation, a specifically *penal* code is an omnipresent feature of all modem societies that have a legal system. Penal codes define crimes, commission of which is generally thought morally blameworthy, and announce punishments, which are supposed to cause pain and are generally thought to be deserved by the criminal. Blame, punishment, and, typically, more rigorous procedural protections for the alleged harmdoer than are provided by civil law are the features that distinguish penal from nonpenal regulation. But how does a society decide which forms of harmdoing require penal forms of regulation? How does the law justify state blame and punishment generally and the doctrines of the criminal law specifically?

Substantive criminal law is traditionally divided into two categories: the general part and the special part.[1] The former refers to the basic doctrines of culpability that apply to all crimes, including, for example, doctrines about how crimes and defenses should be defined. The special part includes doctrines concerning specific crimes, such as murder,

1. Neither part addresses criminal procedure—the rules for the conduct of a criminal case that guide both the prosecution and defense. Criminal procedure is an important, related field, but this book addresses only criminal law itself.

robbery, rape, and theft. The more basic general part therefore constrains how the state can define liability for specific crimes. Although both parts of the criminal law are essential to a complete penal code, this book considers only the foundational general part. Once the general part is understood, it is relatively easy to understand the issues concerning how to define particular behaviors that the state may wish to prohibit by criminal law, such as homicide or burning the property of another without permission.

The selections included in the chapters that follow come from scholarship and commentary in many fields, but, not surprisingly, they are drawn primarily from law, philosophy, and social science. The relevant literatures are vast and continue to grow. Crime is an ever-present feature of society in the United States (and elsewhere) that threatens and sometimes terrifies us. It immorally intereferes with pursuit of the good life, degrading, in different ways, both the perpetrators and their victims. Given the importance of crime to the maintenance of a well-ordered society, it is no wonder that it attracts the attention of public policy analysts and political commentators. Because criminal behavior also fascinates, research devoted to theorizing about and researching the causes and responses to crime thrives in scholarly disciplines like psychology, sociology, economics, demography, and psychiatry, as well as in criminology itself. Recent substantive criminal law scholarship has been heavily influenced by the learning of these disciplines.

Ultimately, however, crime is personal, involving an individual or individuals behaving in ways that harm their fellow citizens. The doctrines of the criminal law are thus addressed to the behavior of individual persons. Now, we tend to think that understanding human behavior is simply a scientific problem that the social and physical sciences will solve when they become sufficiently sophisticated. But the sciences can make progress toward explaining human behavior only if scientists understand what they are doing conceptually, a prerequisite aided immeasurably by philosophy, especially the philosophy of mind and action. Moreover, criminal law is largely dependent upon morality. When one person harms another grievously, moral evaluation of the harmdoer and the act inevitably occur, raising questions about whether condemnation is warranted. Science cannot answer such questions because they are not factual; they are issues of value, about which philosophy once again clarifies one's thinking, even if it does not provide answers. Consequently, many of the selections in this volume employ philosophical methods and concepts to clarify crucial issues of culpability.

The selections in chapter 1 explore a topic often largely ignored in substantive criminal law courses: the crime problem. In this first chapter we try to provide a broad overview of important theoretical and factual issues about crime in the United States. These materials cover behavior that virtually everyone would agree is harmful, evil, and unproblematically criminal. In a sense, these discussions may not seem foundational

for the substantive criminal law, which is why they are often ornitted from the standard criminal law course, but the criminal law is a primary social response to harmdoing that we hope will reduce crime as well as do justice. If the criminal law seems to adopt doctrines or policies divorced from the best theories and facts about criminal behavior, is it likely to be successful or to claim the allegiance of thoughtful people? On the other hand, it is possible that crime is a much larger problem than can be dealt with by the criminal law. Perhaps the most we can expect is that the criminal law will respond in morally adequate ways to problems that are not of its making and that in so doing it will not make a bad situation worse. As you consider the materials on substantive criminal law in the chapters that follow the first, ponder whether these unavoidable substantive criminal law issues can be resolved in ways that will have much influence on the crime problem.

The chapters that follow the first consider in turn definitions of punishment and its justifications; questions of what behaviors ought to be the subject of criminal prohibition; general issues concerning how crimes should be defined, which individuals involved in criminal activity ought to be liable, and the extent to which behavior that only threatens harm should be criminal; limitations on the state's ability to punish apparently evil conduct; defenses; and sentencing. Each chapter and major subsection is preceded by an introduction that will guide your thinking generally about the selections that follow. Each major subsection is then followed by notes and questions that provide further information and help sharpen analytic understanding of the issues.

1

The Crime Problem: Theory and Evidence

Crime seems always to be near or at the top of the nation's consciousness. It is often perceived to be our most pressing problem. Yet what concerns the average citizen is not the entire range of behaviors that modern codes criminalize, because most crimes do not directly threaten the security and safety of our persons and property. Although misbehavior in business, ill treatment of the environment, and a host of other misdeeds arguably harm society sufficiently to warrant criminal penalties and can produce outrage in particular cases, they do not create the same sense of moral outrage and fear aroused by the "traditional" crimes against persons and property. When Americans wonder what to do about crime, they are not thinking about shady practices on Wall Street or the illicit transfer of food stamps. Rather, they want to know what causes and how to prevent homicide, rape, serious assaults, arson, burglary, auto theft, robbery, and similar forms of harmdoing that virtually everyone agrees are morally wrong, frightening, and deserving of state sanction.

The criminal law is of course a central institution for responding to crime, but most courses in criminal law do not pay much attention to the "crime problem." Although brief reviews of the theories of punishment, including crime prevention mechanisms such as deterrence and incapacitation, are common, substantial attention to criminal behavior is rare. This chapter attempts to remedy this omission by providing some thought-provoking materials. Because the crime problem is huge, we

cannot cover even a tiny fraction of what a good reader in criminology would offer, but this introduction explains our choice of selections, points you to other reading, and attempts to guide your thinking about the selections that follow.

There is a rich theoretical tradition in criminology that includes explanations derived from biology, psychology, and sociology. For example, some researchers and theorists have offered genetic explanations for some criminal behavior. Others have provided individualistic, rational choice, or personality trait models. Yet others are concerned with environmental variables, such as peer group pressure, the influence of deviance labels, or the outcomes of the material conditions of society. Virtually all continue to attract adherents, but none commands the field. The causes of crime are still essentially contested territory.

Because the theoretical terrain is so rich, complicated, embattled, and dependent on basic research from allied disciplines, we have chosen not to include basic theory among the readings. Instead, the readings first address phenomenological and statistical facts about crime that any decent causal theory and proposed remedy should address. The bulk of the selections concern policy proposals concerning what to do about crime and implicitly draw on causal, explanatory theories as well as on the facts. The proposals focus primarily on "traditional" crimes, because they most concern us and because they have been the dominant subject of criminological attention. Readers should consider, however, whether proposed responses to the traditional crimes can be usefully generalized to other types of conduct that are now routinely deemed criminal. Is a general explanation for and a proposal for how to reduce crimes of violence—assuming that such are possible—likely also to apply to the dumping of toxic waste material or the operation of an unlicensed liquor still?

Writings about the crime problem that go beyond bare descriptions of facts are influenced by explicit or implicit theories of human nature and political visions. Indeed, many would argue that even which facts we collect and how we describe them, such as the commonly collected and described differences between the crime rates of the two sexes, are implicitly theory driven. For example, one would care about sex as a variable only if one thought that it was likely to have causal significance or that it was important to some political or moral agenda.

Although many bemoan the uselessness of political and moral labels such as "liberal" and "conservative," scholars and others do tend to interpret data and to make proposals that appear to fit preconceived theoretical positions. Often, it seems, the arguments are not really about data but are instead about what kind of beings humans are and about how they should live together. Readers should therefore be alert to the theory of human nature and the politics that at least in part motivate the authors of the selected essays. We have tried to include in the

selections that follow a reasonably representative sample of the political spectrum that includes the predominant views, but space constraints make comprehensiveness impossible.

Recognition that preexisting theories and politics inevitably influence scholarship about crime does not mean that all writing about the crime problem is nothing more than the expression of personal preferences. Some social science and public policy writing meets high standards of objectivity and some does not. Attention to the rigor of a writer's methodology and argument is crucial, especially when considering a topic like crime, which tends to engage and even emotionally inflame us. Ask yourself how much we really know about the causes and prevention of crime. Which assertions are soundly verified or convincingly argued and which are "armchair inductions" or weakly reasoned?

Cross-cultural and historical materials enrich our understanding of the influence of culture on criminal behavior, but space constraints again prevent the inclusion of such material. As you read the selections in this section, however, try to consider the extent to which the explanations presented for crime may be limited to the context—primarily the United States today—that they seek to explain.

What is the relevance of the substantive criminal law to the crime problem? Although some traditional justifications for punishment—notably deterrence and incapacitation—aim at crime prevention, few scholars think that the doctrines of substantive criminal law have much to do with the causes or prevention of criminal behavior. Of course, no behavior is a legal crime unless the criminal law prohibits it, and if more behaviors are prohibited, there will be more crime. But these are banal tautologies. Remember, we are concerned with harms to the person and property that are condemned morally and legally virtually everywhere and at all times. The precise contours of the substantive criminal law addressing this harmdoing are unlikely to be weighty explanatory variables for such behaviors. As we have seen, to explain crime and its rates, commentators place far more emphasis on sociological, psychological, and economic variables and on the efficiency of law enforcement, prosecution, and punishment. Redefining the mens rea elements for specific crimes or reforming the test for legal insanity, for example, is far less likely to affect crime in the streets than is the state of the economy or the perceived likelihood of apprehension, conviction, and punishment. Substantive criminal law does not have much effect on the major variables that do seem to explain crime, including the nondoctrinal operation of the criminal justice system. This will explain why so few writers about the crime problem even mention the substantive criminal law.

Is this apparently consensual supposition about the irrelevance of substantive criminal law to the crime problem correct? There are at least two important exceptions. Consider first how the decision to expand the