



京师刑事法学博士文库（5）

刑罚政策研究

Research on Penal Policy

郭理蓉 著



中国人民公安大学出版社

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高山仰止，景行行止。虽不能至，然心向往之。

——《史记·孔子世家》

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京师刑事法学博士文库

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京师刑事法学博士文库

序 言

经过精心筹划,“京师刑事法学博士文库”在北京师范大学这所拥有百年历史的著名高等学府面世。该文库在今日之北师大创办,可谓生逢其时,躬逢其势,恰逢其地。

所谓生逢其时,乃指文库诞生于中国刑事法学理论研究进入精耕细作阶段。这是一个需要并且能够产生精深的刑事法学理论专著的时代,文库的内容恰好迎合了这种时代的需要。

所谓躬逢其势,乃指文库诞生之时,恰逢中国法律改革和法治现代化运动如火如荼地展开,方兴未艾,文库有幸见证并参与到这一国家与民族法治振兴的大业之中。

所谓恰逢其地,乃指北京师范大学为文库的茁壮成长提供了良好的环境和肥沃的土壤。众所周知,北京师范大学是我国极少数目前即拥有百余年历史的著名高校之一。她发端于1902年的京师大学堂师范馆。经过百余年的历史积淀,她不仅有着深厚的文化底蕴与优良的人文环境,而且在诸多人文社会学科领域达到了国内或者世界一流的水平,培养了大批国家栋梁之材。长期办学实践形成的厚重稳健的办学风格和“学为人师、行为世范”的办学理念,为法学这一逻辑严谨、内容深邃、价值超凡的社会科学在北师大的发展提供了得天独厚的条件。古人云:“源不深而望流之远,根不固而求木之长,德不厚而思国之安”,犹如“伐根以求木茂,塞源而欲流长”。没有深厚的人文底蕴与长期的学术积淀作为基础,要想在法学领域有所建树,即便费尽一时之心力,亦难免流于肤浅,不成大气。在北师大创办刑事法学博士文

库，自始避免了先天不足。

毋庸讳言，与众多成熟并稳步前进的学科相比较，北京师范大学的法学学科还是非常年轻的学科。由于种种原因，不管是学术人才的培养和引进，还是学术理论的创新和发展，法学学科都要比其他社会学科逊色。这不仅使得京师法学在 20 世纪 90 年代错失发展的良机，而且与北京师范大学闻名遐迩的国内与国际地位极不相称。令人欣慰的是，这种情况自 2005 年有了重大改观。在北京师范大学校领导的大力支持下，以著名中年法学家赵秉志教授为院长的北京师范大学刑事法律科学研究院于 2005 年 8 月 18 日在北京隆重举行成立，成为中国国内刑事法学领域中首家且目前唯一的、专门从事刑事法学研究与人才培养的独立性、综合性学术研究机构。2006 年 4 月 26 日，在北京师范大学法律系的基础上，北京师范大学又正式成立了法学院。两院相继成立并得以迅速和良性的发展，标志着北京师范大学法学学科全面繁荣的新时代的到来。“人事有代谢，往来成古今。江山留胜迹，我辈复登临。”随着法学科学建设在北师大的全面展开，我们完全有信心经过若干年的努力，让北师大法学研究跻身于中国乃至世界法学强者之林。

“桃李不言，下自成蹊”。北京师范大学以其深厚的学术底蕴与宽松、自由的教育环境，吸引着国内外的青年学人慕名而来，追求精神的提升与文化的发展。“千里之行，始于足下”，任何宏大的事业都必须从一点一滴做起。北京师范大学刑事法律科学研究院深知，“百年之计，莫如树人”，十分重视刑事法学学科的人才建设，在建院不长的时间里，不仅引进了多位学术功底深厚、科研能力突出、在国内外有一定学术影响的中青年法学学者，而且招聘了一批毕业于国内外著名法学院、综合素质优秀、学术功底扎实的青年才俊。为了培育新人，使其在学术上不断推陈出新，北京师范大学刑事法律科学研究院凭借学校坚实宽广的学术综合实力与浓郁深厚的人文氛围，决定建立“京师刑事法学博士文库”，支持年轻的法学博士和博士后将其博士学位论文、博士后出站报告以学术专著

的形式付梓出版，以此作为促进京师刑事法学发展的重大举措之一。由北京师范大学刑事法律科学研究院的资深学者组成的编委会负责“京师刑事法学博士文库”的运作。

“京师刑事法学博士文库”主要面向北京师范大学刑事法律科学研究院所培养的法学博士、博士后以及引进的具有法学博士学位的教学科研人员。鉴于目前刑事法律科学研究院已经初步形成学历层次高、年龄结构年轻化、专业知识结构合理、团结和谐、奋发向上的学术研究梯队，本文库将同时兼顾实体法学与程序法学，以多学科、多维度的精神兼容并蓄，以开放的态度欢迎跨学科方面的研究成果，使其具有视野宽广、包容性强的时代特征。简言之，“京师刑事法学博士文库”将以质取文，唯质取材，但凡有所创新、质量上乘的著作，均可入选。

京师刑事法学博士文库编委会将主动联系新加盟的北京师范大学刑事法律科学研究院的法学博士和研究院毕业的博士生，了解其博士学位论文的选题、内容及结构等，以宁缺毋滥、铸造精品的原则及严谨、踏实、创新的学术态度从中谨慎选择优秀之作，并认真审读，提供切实的修改补充建议，供作者修正参考，并负责联系出版，虚心接受国内外刑事法学同行和社会读者的批评指正。我们希望“京师刑事法学博士文库”的作品虽属阳春白雪之作，却能洞明世事，传递俗理；虽属曲高之作，却不至于合者甚寡。同时特别申明：文库的范围不仅限于博士学位论文，只要是加盟刑事法律科学研究院的法学博士同仁创作出的学术精品，均可列入此文库见诸世间。愿同仁闻弦歌而知雅意，愿我等奏流水而遇知音。

“泰山不拒细壤，故能成其高；江海不择细流，故能就其深”。学术事业的发展与壮大依赖于理论的点滴积累。“京师刑事法学博士文库”在目前也许只是我国刑事法学学术事业中刚刚吐青的新芽，但是我们相信，它会在京师刑事法学博士文库编委会、加盟刑事法律科学研究院的诸位博士以及国内外方家学者和同行的精心培

育之下，逐步成长为国内外瞩目的参天大树，从而为繁荣、深化我国刑事法学学术研究，推动国内外刑事法学思想交流与学术合作，促进社会主义法治建设，作出有益的贡献。

北京师范大学刑事法律科学研究院
京师刑事法学博士文库编委会
二零零七年三月三日

Doctorial Series of books of Metropolitan Criminal Law Science

Preface

After carefully planned and prepared, “Doctorial Series of books of Metropolitan Criminal Law Science” has been established in this distinguished University with over a century history. We can well say that the establishment of “the Series” is on a proper occasion, in a proper situation and at a proper place.

Being on a proper occasion means “the Series” was established in the exquisite stage of China’s criminal law scientific theory. This is a stage which needs and may produce profound masterpieces of criminal law scientific theory. The content of “the Series” is just right catering for the requirements of this era.

Being in a proper situation means while “the Series” being established, China’s law reform and modernization are experiencing her development in the ascendant, just like a raging fire. “The Series” is lucky to witness and participate in the development of this great cause.

Being at a proper place means Beijing Normal University has facilitated “the Series” with healthy environment and fertile soil. It’s well known, Beijing Normal University is one of the few distinguished Universities with over one century’s history. She grew out of the Faculty of Education of Metropolitan University founded in 1902. After a century of development, through a century of accumulation, she not only holds deep-seated cultural foundation and good environment of the humanities, but also her disciplines of the humanities and social science have reached to the world standard or at the level of First Class in China. She has culti-

vated large numbers of National Talents. Firm and steady style and the conception of “studying to teach and acting to example” of running a school has provided the unique condition for the development of law science which requires rigorous logic, deep content and high value. Our ancestors said: “Fountainhead being not deep enough but hoping the water can flow farther, the root being not solid but hoping the trees can grow big, morality being not high but thinking about the safe of our State” is just as “cutting the wood in order for the exuberant trees, blocking up the fountainhead in order for the water flowing far”. Without deep-seated cultural foundation and long term academic accumulation as its base, it seems a bit superficial and ne’er-do-well to get major attainments in the field of law science, even though momentary mental and physical efforts have been used. The establishment of “Doctorial Series of books of Metropolitan Criminal Law Science” avoided the congenital deficiency from the very beginning.

No need for reticence, compared with the many ripe and steadily developed disciplines, the Law Science for Beijing Normal University is still very young. For the varieties of reasons, discipline of law science seems inferior to other social sciences, either in the cultivation and introduction of talents or in the innovation and development of academic theories. It not only made the Law Science of Beijing Normal University lost the chance of development in 1990s, but it is not matching with her famous international and national status as well. To be relieved, things have changed dramatically since 2005. With the support of the leaders of Beijing Normal University, College for Criminal Law Science of Beijing Normal University was solemnly founded in Beijing on August 18, with the noted jurist Professor Zhao bingzhi as the Dean. She has become the only independent and comprehensive academic unit in the criminal law scientific field specializing in taking on the criminal research and the talents

cultivation. Based on the Faculty of Beijing Normal University, Law School of Beijing Normal University was formally founded on July 26, 2006. Successive founding and rapidly well developing of these two schools signifies the prosperous new era is coming. "Human and nature have their own metabolization, old events have passed by. The world left wonders and interests, our generations step up". With the construction of Law Science of Beijing Normal University opening comprehensively, we believe absolutely we can enable Law Science of Beijing Normal University to rank among the world's most advanced influential universities nationally or even globally.

"If we are strict with ourselves, others will surely respect us". With deep-seated cultural foundation and free educational environment, Beijing Normal University has attracted young learners out of admiration home and abroad to pursue for spiritual promotion and cultural development. "A thousand-li journey is started by taking the first step". Any great cause should be done bit by bit. College for Criminal Law Science of Beijing Normal University knows deeply "as to a project of vital and lasting importance, human should be cultivated first". So she strongly emphasizes the construction of talents. Not long before the establishment of the college, she not only has absorbed many middle and young law experts who hold deep-seated academic foundation, good scientific research ability and academic influence home and abroad, but also has engaged a number of young talents who graduated from the famous universities home and abroad and hold good comprehensive qualities and solid academic foundations. In order to cultivate new talents and gradually make them weed through the old to bring forth the new and depend on her solid and wide comprehensive academic ability and strong and deep environment of the humanities, College for Criminal Law Science of Beijing Normal University decides to establish "Doctorial Series of books of Metropolitan

Criminal Law Science” to support young law doctors and postal doctors to put their fruits to be published in the form of academic books, as one of the great measures of promoting law science of College for Criminal Law Science of Beijing Normal University. Noted Editorial board organized by College for Criminal Law Science of Beijing Normal University is responsible for the management of “Doctorial Series of books of Metropolitan Criminal Law Science”.

“Doctorial Series of books of Metropolitan Criminal Law Science” is designed to face the young law doctors and postal doctors cultivated by College for Criminal Law Science of Beijing Normal University and the teaching and researching staff who have doctor degrees in law introduced by the College. Because College for Criminal Law Science of Beijing Normal University has preliminarily formed her united and harmonious academic research group with high record of formal schooling and reasonable specialized knowledge of structure, “the Series” will give considerations to both substantial and procedural law science and welcome multiple disciplines’ academic fruits with her open minded attitude and her spirit of multiple disciplines and sides. Thus she will hold her strongly magnanimous character of era with her wide vision. In brief, “Doctorial Series of books of Metropolitan Criminal Law Science” will choose the fruits merely according to its high quality. If the works are creative and is of high quality, it can be chosen. “Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science” will positively contact the new doctors graduated from College for Criminal Law Science of Beijing Normal University, getting to know the topic, content and structure of their essays. We will abide by the principle of putting quality before quantity and producing fine works and strict and steady and innovative academic attitude, choose the excellent works from them and carefully read and check, provide practical supplementary suggestions of amendments for the

authors to amend as a reference. We will be responsible for contacting publishing house, listen to criticisms with an open mind from our fellow scholars and social readers. We hope the works of Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science can find and know affairs of human lives, communicate common saying, even though they belong to the spring snow works; They are welcomed by many, even though they belong to the elegant works. Meantime we declare particularly the scope of "the Series" is not restricted in the field of doctoral degree essays, all the fine works or articles from the fellow law doctors in law are welcome. These articles and works can be listed in "the Series" and can be published throughout the world. May our fellow researchers know the real meaning while listening to the music; May we can meet our bosom friends while playing the flowing water.

"Mountain Taishan accepts small soils, so it can become high; Rivers and seas accept small streams, so they can become large". The development and expanding of academic causes depends on theoretical accumulation bit by bit. "Editorial board of Doctorial Series of books of Metropolitan Criminal Law Science" may be the heading sprouts in the process of academic causes of our State's Criminal Law Science. But we believe that she can gradually become towering tree, attracting the attention home and abroad. It can make beneficial contributions for making our state's academic research of Criminal Law Science, promoting exchange and cooperation of Criminal Law Scientific thinking home and abroad, and accelerating rule of law's construction of our Socialism.

College for Criminal Law Science of Beijing Normal University
Editorial board of Doctorial Series of books of
Metropolitan Criminal Law Science
March 3rd, 2007

序

——兼议“师范”

卢建平*

我自己写作不多，自己的书文本来就有限，给别人写的序就更少。只是偶尔应约给我的学生或者一二知己写一点文字。其实那不叫序，只是我自己关于其书其人的一点想法吧。当然，我这里郑重声明，这些想法绝对是我自己的，这些文字也绝对是我自己亲自写的。

郭理蓉是我在人民大学法学院指导的博士研究生。她的博士论文写的是“刑罚政策研究”，是我给她的命题作文。我之所以给她选这个题目，有两重考虑：（1）从渊源上讲，刑事政策最初就是刑法政策，甚至干脆就是刑罚政策，尽管现在刑事政策的内涵、外延均扩大了，广义刑事政策观成为主流，但无论如何，刑罚政策都是刑事政策的核心。刑事政策的研究自然不能忽略这个核心。（2）虽然这些年中国的法治尤其是刑事法治的进步举世瞩目，但基本都是在刑法理念、原则和具体的罪刑设置方面，作为刑事政策和刑事法治核心的刑罚政策和刑罚体系至今仍无大的变化，与当今世界刑罚发展趋势进行比较，我们甚至很难说，我们目前的刑罚体系是一个现代的刑罚体系！因

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此，刑罚体系的变革是一个非常急迫的问题，而要变革刑罚制度，必先变革刑罚政策。由于这个题目属于宏大叙事，而且先前写的人很少，所以她的写作过程很艰苦，其间她曾数度想放弃，但是因为我充分地行使了导师的职权，所以她的“中止”最终还是“未遂”。后来她不仅顺利地完成了论文的写作，圆满地通过了论文答辩，如愿地拿到了博士学位，而且自觉自愿地继续钻研刑罚政策问题，对博士论文进行了修改补充，写成了本书。以上是关于本书由来的交代，至于书的本身，还是由读者来评判吧！我接着想写的是我和她同在师范大学任教的体会，特别是关于“师范”的认识。

小郭在人民大学法学院一读就是十年，从学士、硕士一直到博士。这一方面说明了她对人民大学法学院痴迷的感情，另一方面也反映了她的惰性（或曰忠诚），一旦选定了地方就不轻易挪窝了。但是，学得再长，终有毕业出门的一天。2004年，她博士研究生毕业，和我的另一位博士研究生狄世深一起到北京师范大学法律系当了老师。作为她硕士研究生时的老师之一（赵秉志教授是她的硕士导师）和博士时期的导师，我当时曾经对她慰勉有加，期望她能在北京师范大学、在教师的神圣岗位上做出一番骄人的业绩。没曾想，这些话才说了一年左右的时间，我和赵秉志教授也追随着学生们的足迹，于2005年的8月来到了北师大，成为北师大法学两院（刑事法律科学研究院和法学院）的新成员，也因此成了郭理蓉和狄世深的同事。我所工作学校的变故和老师变同事的身份变化虽然都有些意外，但却都是我孜孜以求的。我喜欢当老师，并不是因