高级法律英语选读

刑法学

党建军　编注

外文出版社

高级法律英语选读

刑法学

党建军　编注

外　文　出　版　社

图书在版编目（CIP）数据

刑法学：英汉对照/党建军编. -北京：外文出版社，2000
（高级法律英语选读）
ISBN 7-119-02701-8
Ⅰ.刑… Ⅱ.党… Ⅲ.英语-对照读物，刑法-英、汉 Ⅳ.H319.4：D
中国版本图书馆 CIP 数据核字（2000）第 66691 号

外文出版社网址：
http://www.flp.com.cn
外文出版社电子信箱：
info@flp.com.cn
sales@flp.com.cn

高级法律英语选读

刑 法 学

编　　注　党建军
责任编辑　蔡　箐　李春英
封面设计　王　志
出版发行　外文出版社
社　　址　北京市百万庄大街 24 号　　**邮政编码**　100037
电　　话　（010）68996075/68995883（编辑部）
（010）68329514/68327211（推广发行部）
印　　刷　三河市三佳印刷装订有限公司
经　　销　新华书店/外文书店
开　　本　大 32 开（203 x 140 毫米）　　**字　　数**　140 千字
印　　数　0001—5000 册　　**印　　张**　7.25
版　　次　2000 年第 1 版第 1 次印刷
装　　别　平装
书　　号　ISBN 7-119-02701-8/H·993(外)
定　　价　11.00 元

出版前言

近年来，各高等院校的法学院系竞相重视法律英语的教学，以期培养法学专业的学生阅读法学原著的能力。与之相应，已有各种版本的法律英语教材面世。其特点是集理论法学与各部门法学于一书，为不同部门法专业的读者学习各种专业词汇和知识提供了方便之道。

我社出版的这套“高级法律英语选读”丛书，分法理学、宪法与行政法学、刑法学、民商法学、国际法学五种。其专业特点显而易见。丛书选材既体现法学发展的历史轨迹，又注意吸收当代法学研究的最新成果；既有理论探讨，又有实证分析。在此基础上，各个专业内容相互交融，既自成体系，又浑然一体。选材时，尽可能涵盖本专业各方面的内容，以扩大读者的专业词汇和知识面。非但如此，书中所选内容，多是各专业的精品，因而具有较高的学术价值，是各专业研究生及相关专业研究者不可多得的参考资料。由于英文学术原作大都篇幅宏巨，在选编时，囿于篇幅所限，不得不忍痛割爱，仅择其精华。是故，可能会给读者留下内容不完整的印象，是为遗憾之事，亦敬请读者原谅。

这套读物的问世，端赖各位编著者鼎力相助，戚渊博士参与了创意、选材、组织的全过程，在此表示感谢。

CONTENTS
目　录

UNIT 1

The Morality of the Criminal Law

刑法的道德性

David L. Bazelon[①]

1 Mr. Hoover and I both believed in criminal justice and we both believed in social justice. But J. Edgar Hoover, like some of my best friends, always believed that you could and must separate the two. I did not share that belief and I still do not. I believe that there can be no truly just criminal law in the absence of social justice in other words, you can't have one without the other.[②]

I

2 The debates currently raging over a wide range of criminal law issues can best be understood by reference to a divergence of opinion on a central question: what role should moral concepts play in the administration of criminal justice?[③] Two polar positions can be identified. Each starts from the premise that creating some kind of order is a moral imperative. Each asserts that there can be no moral development in a society in which the mighty prey on the weak. What separates the two positions are the means they would employ to achieve order and, ultimately, the types of order they seek.[④]

3 The first view, which some rightly or wrongly associate with Mr. Hoover, holds that achieving order is so important that there is little room for concerns of social justice in devising means;[5] the view explicitly suggests an amoral process, justified by a high moral end. It is thus able to endorse what seems to be the easiest means to achieving order—imposition of strong external constraints[6]. It demands that the criminal law punish disorder and make the cost of violating the law so great that few will dare to do so.[7] This view and the cluster of beliefs associated with it I shall call the "law-as-external constraint" thesis[8].

4 Standing against this thesis is the view that the law's aims must be achieved by a moral process cognizant of the realities of social injustice[9]. This philosophy sees externally imposed order—repressive order—as suffering from the same basic defect as "disorder": both lack moral authority.[10] The philosophy asserts that the moral foundation of order is tenuous at best when people obey the law solely because they fear the consequences of disobedience.[11] The only truly moral order, according to this second philosophy, is order based on the internalization of control, that is, on the members of the society obeying the law because they personally believe that its commands are justified.[12] Thus, this view demands that the law facilitate the internalization process by becoming a moral force in the community[13].

5 Lest there be any doubt, I should state at the outset that I associate myself with the latter view.[14] Furthermore, when I speak of moral force or morality in the law, I am not speaking of a righteous certitude or a mystical sense of authority. Rather, I am speaking about elements of human decency such as are embodied in the words, "Do unto others as you would have them do unto you.[15]" Whether phrased in religious or philosophical terms, this essential concept of reciprocal decency is what I mean by morality. My primary effort here will be to explore the implications of the internalization-of-control view[16], as well as the impli-

cations of the law-as-external-constraint thesis.

II

6 One arena in which the conflict between the two views can be seen is the debate over the question of what acts should be made criminal.[17] Proponents of the law-as-external-constraint philosophy translate this question into cost-benefit terms. They ask whether the resources that would be required to enforce the law are justified by the social benefits that would be reaped.[18] Thus, proposals to decriminalize so-called "victimless" offenses such as gambling, prostitution, homosexuality, fornication, and public drunkenness stand or fall on the proposition that decriminalizing such conduct would free police, prosecutorial, and judicial resources to concentrate on more serious offenses.[19]

7 Rather than posing the issue in these terms, I would ask: is the conduct in question viewed by the society as both a moral wrong and a breach of some minimum condition of social existence? In other words, although not every act regarded as immoral by the dominant community should be made criminal, no act should be made criminal if it is not viewed as immoral.[20] I believe that the criminal code should define only the minimum conditions of each individual's responsibility to the other members of society in order to maximize personal liberty.[21] Thus, along with minimum-condition questions, the moral question provides an appropriate starting point for deciding when to criminalize or to decriminalize. There will be times, no doubt, when some will vehemently disagree with, and perhaps even be morally offended by, the community's decision as to what it should condemn. But unless we are willing to allow the community the freedom to reach even "wrong" decisions, there is no hope of making the moral principles to which all can aspire.

III

8 Moral considerations are equally implicated in determining what should be done with people who engage in proscribed conduct.[7] One's views on sentencing policy should reflect one's view of the role of the criminal law. Those who look to the law for external control seek sentences which will maximize order; their primary concern is to determine how harsh sentences can be without becoming so harsh that juries will stop convicting, or police and prosecutors stop charging.[8] Those who look to the law to facilitate internal controls, however, see sentencing as a weighing of safety considerations against the dictates of what I call the "sixth sense"—the moral sense. The "internalists" may disagree whether the sixth sense would be better served by individualization and mercy on the one hand, or uniformity and equality of punishment on the other. But at least their disagreement is over what social justice would require. This disagreement, they believe, must be resolved before embarking on the necessary consideration of what community safety demands. None of those who subscribe to the internal control model believe that sentencing policy should be used to achieve repressive order.

9 Moral considerations intrude even earlier in the process of deciding what to do with people who engage in proscribed conduct. Those who see the law as a moral force insist that the law should not convict unless it can condemn.[9] According to this view, a decision for conviction requires the following three determinations: (1) a condemnable act was committed by the actor-defendant; (2) the actor can be condemned—that is, he could reasonably have been expected to have conformed his behavior to the demands of the law; and (3) society's own conduct in relation to the actor entitles it to sit in condemnation of him with respect to the condemnable act.[10]

10 To some extent the law already inquires into at least the first two of these factors. Starting in the late thirteenth century, the law went be-

yond its prior exclusive focus on physical acts which violated the penal code, to consider why the acts occurred. Through the element of intent or *mens rea*, and the defenses of mistake, duress, and most important, insanity or lack of criminal responsibility,[18] the modern law has sought to punish only what Roscoe Pound[19] termed "the vicious will."

11 But the law, like the rest of us, "promise[s] according to [its] hopes" but "perform[s] according to [its] fears." Although it has been asserted repeatedly that only a free choice to do wrong will be punished, in practice the law presumes, almost irrebuttably, that proscribed behavior is the product of a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.

12 In other words, if moral condemnation were the basis for criminal sanctions, we would have to consider—to take some contemporary examples from cases that have come before me—whether a free choice to do wrong can be found[20] in the acts of a poverty-stricken and otherwise deprived black youth from the central city who kills a marine who taunted him with a racial epithet, in the act of a man who steals to feed his family, in the act of a narcotics addict who buys drugs for his own use, or in the act of a superpatriot steeped in old war ideology who burglarizes in the name of "national security".

13 Against all that I have said and believed on the importance of focusing on moral culpability is the law-as-external-constraint thesis. Applied to either the insanity or nullification context, this view asserts that the law cannot afford its moral pretenses, cannot afford to excuse all who are not culpable. The law needs to maintain a stern visage of uncompromising force, it is said, in order to encourage those without impairment to obey all law and in order to encourage those with impairment to exercise that amount of free will which they do possess.[21]

14 I strongly suspect that those who fear that my emphasis on moral culpability would jeopardize our safety are not realistic.[22] To believe

that putting the question of culpability to juries will increase sharply the number of acquittals of dangerous defendants strikes me as unrealistic.[31] The real question, it seems to me, is how we can afford not to live up to our moral pretenses and not to excuse unfree choices or nonblameworthy acts.

IV

15 Just as moral considerations are implicated in the treatment of persons who have actually engaged in proscribed conduct, so too are they implicated in the treatment of persons accused of such conduct. The issue may be starkly posed: can the law afford to treat the accused with dignity and compassion, or must dignity and compassion give way to the need for efficiency?

16 The answer of the courts over the past two decades has been that the law can—indeed must—treat defendants humanely. A number of valuable precepts can be distilled from the great decisions of our times. Perhaps the most important of these is the insistence that each person should receive equal justice. Of course much still remains to be done before the noble ideal of equal justice will be a reality. For example, the powerful, but not the weak, have effective assistance of counsel from the earliest stages of the criminal process, enjoy freedom from confinement pending their trials and appeals, receive respectful treatment from judges, prosecutors, policemen, and probation officers, and undergo incarceration in prisons that are the least restrictive institutions possible.

17 Those who look to the law to impose external constraints are not especially troubled by such inequalities. They argue that the criminal law cannot be concerned with assuring that each accused fully understands his rights and has an equal opportunity to assert them. The law's mission is to acquit the innocent and to convict the guilty, and proce-

dures are important primarily as means to that end. Convictions must not be reversed for "procedural irregularities" if the defendant-appellant was "guilty anyhow." Collateral attacks on unfair procedures should not be entertained unless the petitioner makes a colorable claim of innocence. These views argue that the criminal system has spent too much effort perfecting justice and too little effort perfecting swift and certain punishment of wrongdoers.

18 I have always found this argument rather puzzling. I cannot understand how it can be that allowing rich defendants certain rights does not reasonably interfere with the efficient operation of the system, but that ensuring poor defendants the same rights would place an intolerable burden on it. Further, I am convinced that those who fear that too much effort has been expended perfecting the quality of justice are living in a world of make-believe. Since most cases are either dismissed by police or prosecutor, or else disposed of by guilty pleas, for most defendants the criminal process is nothing more than a series of discretionary, and often arbitrary decisions. But my disagreements with the attitudes on criminal procedure of those who subscribe to the law-as-external-constraint thesis extend to an even more fundamental level.[⊗] First, I believe the proponents of that thesis downgrade and even ignore the important role that respect for the law—as distinguished from fear of the law—can play in achieving order. Second, I believe that the manner in which we treat those accused of crime is important as an end in itself, and not simply as a means to convicting the guilty, if only because "the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."

V

19 The final and most important arena in which the tension between the two polar positions on the criminal law can be felt has nothing—and

everything—to do with the criminal justice system per se. The issue to which I refer is that of alternative responses to the crime problem. Those concerned with internalized controls urge actions designed to alleviate the social and economic causes of crime. Those satisfied with external constraints call for mandatory incarceration of convicted criminals in order to remove from the streets persons who would otherwise commit crimes and to deter other would-be criminals from violating the law.

20 In the short run, it may well be that mandatory incarceration or some other form of repression will have to be adopted to respond to the public demand for security. But if we adopt such measures, it should be with the painful awareness that any resulting order will be immoral, or at best amoral. In my opinion, it is simply unjust to place people in dehumanizing social conditions, to do nothing about those conditions, and then to command those who suffer, "Behave—or else!" The overwhelming majority of violent street crime, which worries us so deeply, is committed by people at the bottom of the socioeconomic-cultural ladder—the ignorant, the ill-educated, and the unemployed and often unemployable.[19] I cannot believe that this is coincidental. Rather, I must conclude that those people turn to crime for reasons such as economic survival, a sense of excitement or accomplishment, and an outlet for frustration, desperation, and rage. We cannot produce a class of desperate and angry citizens by closing off, for many years, all means of economic advancement and personal fulfillment for a sizeable part of the population, and thereafter expect a crime-free society.

21 What concerns me about the wave of proposals for getting tough with criminals[20] is that they often seem to be offered without any awareness of those underlying causes of crime that I have mentioned. Three intellectual justifications can be offered for the "externalists" attempt to divorce criminal justice from social justice[21] and to rely on "get tough"

solutions to the crime epidemic.

22 First, it is argued that this society cannot afford social justice. At a time when the largest city reaches the brink of bankruptcy, notwithstanding its extremely high rate of taxation, this argument is enticing. Some localities cannot even afford adequate police protection, let alone measures to provide the educational and economic opportunities which are lacking for an alarming number of their citizens.

23 Second, it is suggested that "we do not know, with any confidence, the causes of crime." In short, we do not understand all the causes of crime. But rather than focusing on what we do not know, I suggest focusing on what we do know.[⑧] We know, as I have already stated, that almost all violent crime is committed by the disadvantaged and deprived. We know, that the family is the most effective child-developing and child-socializing agent available. We know, or think we know, that the crucial period for personality formation is during infancy. And we certainly know that the grinding poverty in our ghettos wreaks destruction on the family unit and makes it impossible for parents to convey a sense of order, purpose and self-esteem to their children. In short, we know that poverty appears to be a necessary, though not a sufficient, condition for the occurence of most violent crime.

24 The real problem is that because of our limited knowledge the only apparent solution to the poverty-causes-crime problem is to alleviate the suffering of all deprived people, including noncriminals. If physical order is the only goal, this solution is undeniably wasteful since it directs resources to persons who pose no danger of physical disorder to society. But if moral order is the aim, this solution is a necessity.[⑨] The fact that some persons are resigned to their plight and that their miseries cause us no trouble is hardly a justification for allowing them to continue to suffer.

25 The first step down the long road to moral order is[⑩] to provide a

form of guaranteed income to every family as a matter of right, not grace or benevolence. Parents who are unable to put food on the table, or who can do so only by surrendering their self-respect, cannot be expected to raise children who are law-abiding, productive, and fulfilled members of society. But even if providing the poor with a guaranteed income or with educational and economic opportunities would have no effect on the crime rate, the call for such action would be no less urgent. We dare not demand a cost-benefit justification for these measures; they are right for their own sake and they are necessary for a humane society. One indication of how far we have strayed from our moral principles is the frequency with which proposals to eradicate injustices are defended solely in terms of their potential for reducing crime.

26 The third justification that is offered for divorcing crime control from social reform is a cost-effectiveness justification. It is argued that precisely because poverty is the root cause of crime, it is also the most difficult to deal with. Therefore, the argument goes, it would be wiser to concentrate on less deep-seated causes. The position is deficient in two respects.

27 In the first place, the application of cost-benefit analysis to crime control is dangerous. The more repressive the criminal law becomes, the more likely it will be to hide its "costs." Every time the criminal law erroneously confines someone on the basis of a mistaken assumption that he will recidivate unless confined, there is obviously a significant cost; but it is a hidden cost, since society rarely, if ever, learns about the error. Every time we introduce a new invasion of privacy such as wiretapping or mail opening, the invasion produces significant costs; but they, too, tend to be hidden costs, since the victims who are innocent seldom complain. The alleged costs of nonrepression, on the other hand, are often revealed in gory detail. When the system erroneously releases someone who commits a new crime, we usually learn about it.

When the search that turns up a criminal is determined to be illegal and as a result the criminal's conviction is reversed, we learn about that as well. Thus, aside from questions concerning the propriety of cost-benefit analysis for the kinds of issues dealt with by the criminal law, cost-benefit analysis, if not appropriately formulated, will provide an inadequate basis on which to make decisions regarding crime control measures.

28 But second, even if one were to make the heroic assumption that cost-benefit analysis could work and the even more heroic assumption that the most cost-effective method of crime control is repression, the argument would hardly be ended. What ultimately is at issue in the debate over alternative responses to the crime problem is a question of the goal to be pursued: repressive order or moral order. On that question, cost-benefit analysis has nothing to say. To choose moral order is to choose a long, painful, and costly process. The only option I can imagine that is less appealing is not to choose it. Creating order through repression will not be easy, and maintaining it, as the frustrations of the deprived grow, will be more and more difficult.

(*Selected from Vol.* 49, *Southern California Law Review*)

New Words and Expressions

1 criminal justice 刑事司法公正
social justice 社会公正
in the absence of 无…时，缺…时
2 rage over 在…上争论激烈
position 立场；观点
identified 确定；看作
premise 前提
imperative 命令；要求
separate 区分
3 amoral 与道德无关的；超道德的
end 目的；目标
the cluster of 一系列
4 cognizant of 认识到
injustice 非正义；不正义
disorder 无秩序状态；无序
tenuous 薄弱
disobedience 不服从；违法
facilitate 促进；推动