刑事法学译丛
VICONO

刑法哲学

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PHILOSOPHY OF CRIMINAL LAW

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刑法哲学

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《刑法哲学》中文版第一版序

在我的心目中，本书是针对英美刑法所撰著的。我描述了我所称之为英美刑法的正统理论，对于我认为反映了英美刑法理论进步的大量修正意见，我为之进行了论辩。当然，在全世界范围内，英美刑法仍然有着重大影响。各国的法学家们有充分的理由使自己熟悉奠定英美刑法理论基础的那些问题的优劣。但是，国际性的学者们把握这种理论，并非仅仅因为他们对比较法有兴趣。在为中文版撰写这个简短序言时，我逐渐意识到了我为之论辩的理论的更为广泛的重要意义。

在《刑法哲学》一书中，我力求识别我认为在刑事司法中处于核心地位的一些原则，对于刑事司法来说，个人的道德权利具有特别重要的意义；而且，在追求功利主义的目的时，一般不愿意侵犯这些权利。我所描述的刑事责任基本原则，似乎同样适用于那些不同于英美的刑事司法制度。每一种制度都必须努力尊重那些不应为刑事立法所侵犯的一系列权利。例如，任何国家都不允许因为行为人不能控制的事态而惩罚行为人。我已经论证，这一思想表达了只是有了**犯罪行为**才追究刑事责任这一原则的合理内核。如果我的观点正确，那么，所有渴望保护个人权利的刑法制度就应当受到这样一个制约因素的限制。

不同国家的不同物质条件，将会影响是否尊重个人权利和在什么程度上尊重个人权利，以及为了达到功利主义的目的可以作出哪些妥协。没有任何单一的公式可以确定这一平衡是怎样受到冲击的。《刑法哲学》一书为所为之辩护的理论提供了一个框架，在这个框架中，对这些难题可能已作出一些判断。

道格拉斯·N·胡萨克
新布伦斯维克，新泽西州
1993 年 8 月

PREFACE TO THE CHINESE EDITION OF PHILOSOPHY OF CRIMINAL LAW

Sixteen years have passed since the original publication of my Philosophy of Criminal Law. Nine years have passed since the book was first translated into Chinese by Professor Xie Wangyuan. I have been impressed both by the interest in my book in China as well as by the excellence of Xie's translation. He has asked me to write a brief preface for his new translation, and I am happy to accept his invitation.

From the perspective of a legal philosopher —— my own approach —— surprisingly little about the criminal law has changed. Theorists still need to interpret the several fundamental principles of criminal liability I identified in 1987: legality, actus reus, mens rea, concurrence, harm, causation, defenses, and proof. The substantive criminal law continues to apply these principles in novel and controversial ways. These fascinating developments reinforce the centrality of my fundamental principles to an understanding of the philosophical foundations of the criminal law.

Still, a great deal has changed in Anglo – American criminal law in the past sixteen years. The most significant

trend is the massive increase in the size and reach of the criminal justice system. By almost any measure, the United States has enacted too many criminal laws and inflicts too much punishment. Commentators are reluctant to estimate the number of criminal offenses, but the figure may run into the hundreds of thousands. No living person can begin to describe more than a tiny fraction of the criminal laws that currently exist. And these numbers (whatever exactly they may be) are bound to rise, as criminal statutes are easily enacted but seldom repealed. Anyone who studies contemporary criminal codes is likely to be impressed by their scope, by the sheer amount of conduct they render punishable.

Data about the extent of punishment are more reliable. At the present time, approximately 2. 1 million Americans are incarcerated in jails and prisons, and 6. 5 million are under the supervision of the criminal justice system —— which includes probation and parole. These statistics are unprecedented in the history of democratic governance, and should shock our sense of justice. Still, few believe that these trends will be reversed in the near future. No existing political constituency (except for a handful of academics) favors a reduction in the scope and breadth of the criminal law. Only severe economic recessions have led politicians to seriously entertain the possibility that we must reduce the size and scale of our criminal justice system.

A philosophical response to these problems requires a theory of criminalization——a set of constraints that must be satisfied before the state may enact a statute that subjects offenders to punishment. Sadly, existing criminal law appears to conform to no theory at all. According to William Stuntz, "criminal law... adheres to no normative theory save that more is always better." Still, some conditions must be satisfied in the United States in order to create a criminal offense. Unfortunately, these conditions are woefully inadequate to justify the imposition of the criminal sanction. Let me briefly describe the test of criminalization that criminal statutes must pass. Most laws burden (that is, limit or restrict) liberties. When the constitutionality of these laws is challenged, courts respond by dividing liberties into two kinds: fundamental and non-fundamental. The constitutionality of legislation that restricts a fundamental liberty is subjected to "strict scrutiny" and is evaluated by applying the onerous "compelling state interest" test. Virtually all criminal laws, however, limit non-fundamental liberties, and are assessed by applying the much less demanding "rational basis" test. Under this test, the challenged law will be upheld only if it is substantially related to a legitimate government purpose. The legitimate government purpose need not be the actual objective of the legislation——only its conceivable objec-

tive. Since only those laws that lack a conceivable legitimate purpose will fail this test, courts almost never find a law to be unconstitutional when non – fundamental liberties are restricted. As a result, the state needs only some conceivable legitimate purpose to enact the great majority of criminal laws on our books today. Persons who break these laws can be punished simply because the state has a rational basis to do so.

On the other hand, the state needs an extraordinary rationale to punish persons who exercise fundamental liberties. The Constitution effectively precludes the state from criminalizing travel, prayer, or political speech, for example. Outside the narrow range of fundamental liberties, however, it is only a slight exaggeration to say that the state can decide to criminalize almost anything. A hypothetical case may help to demonstrate the extent of state power in the criminal arena —— and the potential injustice of this power. Suppose that legislators become alarmed by the fact that too many persons are unhealthy and overweight. Initially, they attempt to facilitate the efforts of consumers to eat a better diet by enacting legislation requiring distributors of fast foods to display nutritional information on their packaging. If the constitutionality of this law were challenged, it would seem appropriate for courts to defer to legislators by invoking the rational basis test. Suppose, however, that

legislators came to believe (as is probably the case) that better information would have little impact on the problem of obesity. Imagine that they decided to prohibit——on pain of criminal liability——the consumption of designated unhealthy foods. Suppose that sausage were placed on this list. Once again, the rational basis test would be applied to assess the constitutionality of this law. This hypothetical crime is almost certainly constitutional, since the liberty to eat sausage does not seem to qualify as fundamental. The state has an uncontested interest in protecting health, and it is at least conceivable that proscribing the consumption of sausage would bear a substantial relation to this interest. Admittedly, many foods are more detrimental to health than sausage, and not all sausages are especially detrimental to health. But the fact that a criminal law is underinclusive and/or overinclusive is not regarded as a constitutional impediment under the rational basis test. In other words, a criminal statute may proscribe some instances of conduct that do not contribute to the statutory objective, and need not proscribe each instance of conduct that does contribute to the statutory objective.

What is remarkable about the foregoing approach is its complete indifference to the distinction between criminal and noncriminal legislation. It is one thing for noncriminal laws that burden non – fundamental liberties to be evaluated

by the rational basis test. But it is quite another when criminal legislation is assessed by that same standard. The criminal law is different——importantly dissimilar from other kinds of law. The extraordinary procedural protections surrounding the criminal sanction are sensible only on the assumption that the criminal law is unlike other bodies of law. What is so distinctive about the criminal law? The answer, I believe, is that the criminal law is different in that it subjects persons to state punishment. All punishments violate rights in the absence of a compelling justification. Contemporary constitutional law provides an inadequate theory of criminalization because it fails to provide a justification sufficient to override these valuable rights.

Without a respectable theory of criminalization, the criminal law has expanded rapidly. The single most important factor that has led to the remarkable growth in the size of the prison population is the imposition of increasingly severe punishments for drug offenders. A few statistics tell the story. Since 1980, the incarceration rate for drug offenders has grown by over 1000 percent. Each year, more persons are jailed or imprisoned for drug offenses than were jailed or imprisoned for all crimes combined in any year from 1920 to 1970. More than a quarter of all new inmates are sentenced for "drug - only" offenses, without any other violent or criminal behavior. On any given day, more

than 430000 persons are incarcerated for drug offenses in the United States —— more than a third for the crime of simple possession. Minorities have borne the brunt of this trend. Although minorities are about as likely as whites to use illicit drugs, their rate of imprisonment is grossly disproportionate to their representation in the drug – using population.

Various strategies have been proposed to retard our excessive reliance on incarceration. Commentators have begun to explore imaginative modes of punishment that do not involve imprisonment. Many of their recommendations are welcome. But there is little reason to anticipate a reversal of this trend without revisions in the substantive criminal law itself. Citizens in a democratic state must debate whether the conduct for which persons are punished should remain subject to the criminal sanction. A thorough rewriting of my Philosophy of Criminal Law would have added a more detailed treatment of the topic of criminalization.

Douglas. N. Husak
Rutgers University
March 7, 2003

《刑法哲学》中文版第二版序

我的《刑法哲学》从第一次出版至今已经16年了。9年前，该书由谢望原教授等诸君翻译成中文并出版。我的著作在中国引起兴趣以及谢望原教授等诸君的精美翻译使我激动不已。谢望原教授邀请我为即将出版的第二版中文本《刑法哲学》写一个简短的序言，我当然欣然应允。

现在，从一位法哲学家的视角来看——就我自己的思维方式而言，刑法所发生的诸多变化并不令人奇怪。理论家们始终需要阐释那些我在1987年界定过的刑事责任的基本原则（《刑法哲学》首度出版时阐述过的刑事责任基本原则，译者注），这些原则涉及合法性、行为、意图、同时发生、危害、辩护以及证据方面的问题。实体刑法继续以新奇而有争议的方式适用着这些原则。对于刑法哲学根基的理解而言，这些迷人的发展强化了我所提出的那些基本原则的核心内容。

然而，在过去的16年中，英美刑法发生了诸多变化。最重要的变化就是刑事司法制度管辖领域与范围的巨大扩展。从总体上而言，美国制定了太多的刑法规范和适用了太多的刑事处罚。评论家们不愿意对某些犯罪的数量作出评估，而这个数字可能多达数十万。现存的人们只能描述现行刑法的一些只鳞片爪。而且这些数字

（无论精确的数字是什么）肯定会不断上升，因为刑法规范很容易制定却很少会被废除。任何一位研究当代刑法规范的学者，都可能被刑法无所不及的规范以及刑法规范认为可罚的行为数量众多所震惊。

用有关刑事处罚的数据来阐释问题将更有说服力。现在，大约有210万美国人被禁闭于各类监狱中，650万人（包括缓刑者和假释者）处于美国刑事司法制度的监督之下。这个数字在民主管理国家事务的历史上是史无前例的，它将动摇我们关于正义的理念。更重要的是，很少有人相信这种状况在不远的将来会得到改变。除了少数学究式人物外，现有政治选民不会赞同减缩刑法的适用范围和幅度。只有严重的经济衰退，才有可能使政治家们认真考虑我们必须减少国家刑事司法制度的管辖程度与范围。

对诸如此类问题的哲学回答，要求助于“犯罪化理论”（a theory of criminalization）——国家在制定使犯罪人受到刑事处罚的法律之前，一系列限制性条件必须得到满足，但令人悲观的是，现行刑法似乎完全没有可资遵循的犯罪化理论。按照威廉姆·史顿芝的观点，“刑法……不必遵守标准的理论，除了越遵守标准理论就越有利于刑法的制定和施行以外。”在美国，要创制一个新的罪名，某些条件仍然必须得到满足。不幸的是，这些必要的条件令人遗憾地不足以“证明”施以刑事制裁的合理性。请允许我简要地描述一下刑事法律必须通过的犯罪化检验标准吧。大多数法律是对自由的约

束（即限制或制约）。当这些法律的合宪性受到挑战时，法院就会将自由分为两个类型："基本的自由与非基本的自由。"那些约束基本自由的合宪性立法要受到"严格监督"，并且要运用法律规定的公民负有法律义务的"强制性国家利益"检验标准来加以评价。然而事实上，所有刑法都限制非基本自由，并运用那些极其少见的要求具有"合理根据"的检验标准来加以评价。根据这一检验标准，只有当法律实质上关涉合法政府的目的时，受到质疑的法律才可以制定和施行。合法政府的目的不需要是"事实上"的立法目的，只要其目的是"可以信赖的目的"即可。既然法律不能通过前述评价那些缺乏可以信赖的立法目的，那么法院就决不能仅仅因为非基本自由受到法律限制就认定一项法律具有违宪性。因此在今天，国家只需要具有某些可以信赖的合法目的，就可以制定载之于书籍的那些绝大多数刑法规范了。那些违反这些法律的人就要受到处罚，因为国家有合理根据这样做。

另一方面，国家有足够的理由处罚那些侵犯基本自由的人。例如，宪法有效地将旅行、祷告以及政治言论排除在犯罪化之外。然而，在范围狭小的基本自由之外，认为国家可以决定将任何行为犯罪化，那就多少有些夸张了。一个假设的案例也许有助于证实刑事领域国家权力的限度——国家权力潜藏着不公正性。设若，立法者因为有太多的人不健康和体重超重这一事实而感到惊恐，起初，立法者试图使消费者易于获得更合适的食

品而制定要求快餐供应者必须在食品包装上注明有关食物所含营养信息的立法。如果该法律的合宪性受到质疑，那么法院以违反了合理根据的检验标准为由而使立法者延缓立法则是合理的。然而，假如立法者逐渐认识到（正如本案例可能出现的情况一样），更详备的营养信息对于解决肥胖问题并无多少积极意义，那情况就不一样了。再假如，立法者禁止食用标明了不利于健康的食品，如违反此项规定就要追究刑事责任。假如香肠被列入了禁止消费的食品目录呢？合理根据的检验标准再一次被运用于该法的合宪性的评价。这个假设的罪案基本上是合理的，因为吃香肠的自由似乎并非基本自由的范畴。国家具有无可争议的保护公民健康的义务，人们至少可以确信，禁止食用香肠与国家保护公民健康的义务具有实体性关系。毋庸置疑，许多食品较之于香肠对人体更为有害。但是，刑法没有将某些行为犯罪化，或者过度地犯罪化这一事实，按照合理根据的检验标准，不能认为是一种合宪性障碍。换言之，刑法规范可以禁止一些不利于法律目的的行为事实，但刑法规范不需要禁止所有不利于法律目的的行为事实。

前述方法值得关注之处，就是该方法完全不重视刑事立法与非刑事立法之间的区别。对于非刑事立法来说，使非基本自由受到合理根据检测标准的评价乃是问题的一个方面。但以同一标准来评价刑事立法就完全是另一回事了。刑法具有自己的特殊性——它显然不同于其他部门法。正是根据刑法不同于其他部门法的设想，

立法者才围绕刑事处罚设定了特别程序给予保护。那么刑法的特殊性究竟何在？我认为，刑法与其他法律的不同之处在于它使涉案人员服从于国家处罚。在强制措施缺乏有关合理性证明之时，所有的处罚都是对权利的侵犯。当代宪法没有提供足够的犯罪化理论根据，因为它没有提供足够的为什么要践踏那些宝贵的合理性证明的权利。

在没有应受尊重的犯罪化理论的情况下，刑法规范已经迅速膨胀。导致监狱在押罪犯人数量显著增加的一个最重要因素，就是对毒品犯罪人适用了不断增加严厉程度的刑罚。下列数字说明了此问题：自从1980年以来，毒品犯罪人的在押罪犯人已经增长了1000%以上。现在，每年因为毒品犯罪而被禁闭或监禁的罪犯人，比从1920年到1970年这50年间任何一年所有犯罪的总禁闭或监禁人数还要多。所有新的在押罪犯人中的1/4以上，没有实施其他违法犯罪行为而仅因为毒品犯罪而被判处剥夺自由刑。现在，美国有43万人因为毒品犯罪而被监禁，其中1/3的人仅因为持有毒品而被监禁。少数民族是因毒品犯罪而受处罚的首当其冲者。虽然少数民族可能像白人一样使用违禁药物，但对少数民族涉及滥用违禁药物者所适用监禁刑的比例与他们滥用违禁药物的人数相比显然是太多了点。

为了防止过多地依赖监禁刑，人们提出了许多改进措施。学者们已经开始探讨行之有效的非监禁处罚措施模式。他们所推荐的许多非监禁处罚措施受到了欢迎。