

On Limiting the Scope of Application of Abstract Dangerous Offenses through Counterproof

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Abstract: Against the backdrop of modern risk society, the expansion of abstract dangerous offenses in China's criminal legislation exhibits an excessive tendency. This paper advocates establishing a principle permitting rebuttal of the dangers inherent in abstract dangerous offenses while strictly limiting their scope of application. By allowing defendants to demonstrate that their actions could not have caused any legal harm under specific circumstances, a balance can be achieved between the "formal rationality" presumed by legislation and the "substantive rationality" of case-specific justice. Concurrently, the supplementary status of abstract dangerous offenses should be recognized, with their application explicitly requiring compliance with the principles of proportionality and legal interest protection. This restrictive approach upholds the fundamental role of criminal law as both a safeguard of legal systems and a guardian of individual freedoms.

Keywords: Abstract Danger Offense; Admissibility of Counter-evidence; Proportionality Principle; Legal Interest Protection; Presumption of Danger

1. Introduction: Concerns of Expansion and the Necessity of Restriction

With the advancement of modern technology and increasing social complexity, China's criminal legislation has demonstrated a clear preventive orientation, particularly marked by the expansion of abstract dangerous offenses. From dangerous driving offenses to environmental pollution crimes, from food safety violations to cybercrime, legislators have significantly advanced the legal defense threshold through legislative provisions, aiming to achieve early social risk control and proactive crime prevention. However, while this expansion trend enhances social governance efficiency, it also raises profound legal concerns:

When criminal penalties are based solely on legislators' presumption of danger without allowing judicial verification of actual risk existence, could this lead to "punishment of thought" or "prohibition of conduct"? Might it improperly restrict citizens' legitimate behavioral space under the guise of risk prevention? [1]

The central thesis of this paper posits that defendants should be permitted to present counter-evidence regarding abstract danger elements, provided that a clearly defined scope for such rebuttal is established. This position neither fully validates the value of abstract danger offenses in modern criminal law nor advocates their unconditional expansion, but seeks to achieve a rational equilibrium between the practical demands of risk society and fundamental principles of the rule of law. The introduction of counter-evidence mechanisms effectively curbs potential risks of "excessive criminalization" and "judicial mechanization" associated with abstract danger offenses, while strict limitations on their application scope uphold the principles of criminal law's restraint and last-resort nature.

2. Review of the Current Status of Abstract Dangerous Offense Expansion: Coexistence of Necessity and Peril

Against the backdrop of the modern risk society, the legislative expansion of abstract dangerous offenses has become a prominent trend in China's criminal law system, a development that bears the dual attributes of practical necessity and inherent legal peril. Its emergence and expansion are an inevitable response to the increasingly complex and diversified social risks, effectively making up for the deficiencies of the traditional actual harm offense model in risk prevention and control, and playing a positive role in safeguarding major legal interests and maintaining social order. However, the overly extensive expansion trend of abstract dangerous offenses in legislative practice has also triggered

a series of legal and practical problems, not only easily leading to the expansion of criminal law's adjustment scope and the improper restriction of citizens' legitimate behavioral freedom, but also bringing challenges to the judicial application of criminal law, such as mechanical adjudication and the loss of substantive justice, forming a sharp tension between risk response and the protection of individual rights.

2.1 Manifestation of Legislative Expansion of Abstract Dangerous Offenses in China

Since the establishment of the crime of dangerous driving under the Criminal Law Amendment (VIII), abstract dangerous offenses in China's criminal law have entered a period of rapid expansion. This expansion exhibits three distinct characteristics. First, broadened scope: The concept has expanded from traditional public safety domains (e.g., dangerous driving and endangering public safety) to economic order (e.g., issuing fraudulent VAT special invoices), [2] environmental resources (e.g., environmental pollution), food safety (e.g., producing and selling toxic or harmful food), and even cyberspace (e.g., illegal use of information networks). [3] Second, typified behaviors: Legislators tend to directly categorize certain risk-prone behaviors as crimes rather than focusing on whether such actions actually create specific hazards in particular contexts. For instance, drunk driving constitutes a crime regardless of time, location, or road conditions. Third, simplified proof requirements: The design of abstract dangerous offense elements significantly reduces prosecutorial burden. Prosecutors only need to prove that the perpetrator engaged in legally prohibited acts (such as driving under the influence) without requiring evidence of immediate or imminent danger.

2.2 The Duality of Expansion: Risk Response and Constraints on Freedom

The expansion of abstract dangerous offenses carries practical justification. In an era of increasingly complex and systemic social risks, the traditional actual harm offense model in criminal law has proven inadequate in response. Through preemptive intervention and widespread deterrence, abstract dangerous offenses effectively prevent irreversible damage to legal interests once incidents occur. [4] This approach has demonstrated positive effects in

critical areas such as food safety, environmental pollution, and public security by reinforcing behavioral norms and increasing the cost of violations. However, this expansion also entails significant risks. The inherent danger of abstract dangerous offenses primarily stems from legislators' general social experience: any behavior meeting their constitutive criteria should be deemed to have created the intended risks, regardless of actual occurrence. Furthermore, the "prohibition of rebuttal theory" surrounding abstract dangerous offenses has become the dominant perspective in academic and practical circles. Even when defendants can prove their actions posed no danger, they cannot overturn legislators' preconceived assumptions to secure acquittal. The determination of whether an act poses a risk to legal interests primarily rests with legislators. When legislators are unable to make such judgments, judicial personnel should evaluate cases through judicial discretion. Some scholars argue that permitting rebuttal arguments against abstract risks might undermine the legislative authority prior to judicial review and lead to logical inconsistencies within the legal system. The author contends that judicial practice should not mechanically adhere to legislation, as legislative content and language are not always precise. To achieve substantive justice, judges should be empowered to interpret the true intent of laws during adjudication. Both judicial and legislative bodies must jointly assume responsibility for safeguarding legal interests. [5]

3. Legitimate Basis for Allowing Counter-evidence

Allowing rebuttal arguments against abstract dangerous offenses addresses legislative deficiencies in legal constructs without undermining legislative authority. Strict application of laws governing abstract dangerous offenses may lead to criminalizing non-hazardous behaviors in specific cases—a practice that would be unacceptable to the public and violate substantive justice principles. Permitting rebuttal arguments will curb the expansion of abstract dangerous offenses while providing stronger protection for citizens' interests.

3.1 Requirements of the Principle of Statutory Nature of Criminal Offenses and

Penalties

The principle of legality in criminal law not only requires the formal criterion that "no crime shall be committed without explicit legal provisions", but also encompasses the substantive dimension of penal legislation's appropriateness. Penal statutes must adhere to both the principle of clarity and the principle of appropriateness. While abstract danger offenses that legislatively presume risks satisfy clarity requirements, outright prohibition of rebuttal evidence may lead to penalties being imposed in cases lacking substantial danger—a violation of the principle's substantive justice. Allowing rebuttal evidence precisely serves to reconcile formal legality with substantive rationality in individual cases.

3.2 Principle of Legal Interest Protection

The establishment of abstract danger offenses fundamentally stems from the urgent need to protect significant legal interests, yet their criminal liability must ultimately be grounded in actual threats to these interests. If a specific act has been proven entirely incapable of infringing upon relevant legal interests in concrete circumstances, the basis for punishment ceases to exist. Take the crime of issuing fraudulent VAT special invoices as an example: the criminal penalty aims to prevent risks of state tax or property loss. Any act of "falsification" would automatically constitute this offense. However, if the perpetrator issues such invoices merely to maintain bookkeeping aesthetics without causing actual financial loss, should this still be criminalized? Such conduct would not fundamentally infringe upon public legal interests. The introduction of rebuttal mechanisms serves to anchor the punishment of abstract danger offenses back to the substantive foundation of legal interest protection, preventing their transformation into mere tools for restricting specific behaviors. [6]

3.3 Adherence to Responsibility Theory

The responsibility doctrine requires that criminal punishment must be premised on the possibility of culpability. In abstract dangerous offenses, the basis for culpability lies in the perpetrator's commission of acts with typical dangerous characteristics. However, if the perpetrator can demonstrate that under exceptionally rare circumstances, their actions posed no risk whatsoever, the foundation for

holding them accountable becomes fundamentally undermined. Imposing punishment in such cases would amount to penalizing a "non-harmful act", thereby violating the core principles of the responsibility doctrine. [7]

3.4 Application of the Proportionality Principle

The constitutional principle of proportionality requires that state intervention in citizens' rights must be appropriate, necessary, and proportionate. In criminal law, this principle manifests as the restraint of criminal legislation and its role as a last resort. Prohibiting counter-evidence in abstract danger offenses may lead to blanket sentencing—imposing penalties even when no actual danger exists—thereby violating both the principle of appropriateness and the narrow sense of proportionality. Allowing counter-evidence provides a viable pathway for applying the proportionality principle in specific criminal cases.

4. Specific Construction of Admissible Counter-evidence

Allowing rebuttal is not merely a slogan but requires concrete and feasible institutional design. Its core lies in: while adhering to the legislative "general presumption" of danger, permitting the overturning of this presumption through "specific rebuttal" in extreme exceptional circumstances.

4.1 Object and Criteria of Counter-Evidence

The object of rebuttal: The object of rebuttal is the "abstract danger" presumed by legislation. The defendant does not need to prove that the act did not cause "specific danger", but rather that the act could not possibly generate any risk of legal interest infringement under specific circumstances, i.e., the possibility of danger is absolutely excluded. Proof Standards: The burden of proof for rebuttal evidence shall be stringent, though it may be marginally lower than that of the prosecution. The defendant must present "clear and convincing" evidence to demonstrate that the risk of legal interest infringement under the specific circumstances was absolutely nonexistent. Judicial authorities may also be required to challenge such rebuttal evidence—a standard distinct from the preponderance of evidence in civil proceedings

or the prosecution's "reasonable doubt" standard in criminal cases, constituting an intermediate threshold.

4.2 Typical Counter-evidence Scenarios

Scenario of absolute spatial isolation: When the act occurs in a private space completely isolated from public areas, where no third party can enter. For example, driving a vehicle while intoxicated and making short-distance movements in a fully enclosed garage with no connection to external roads. [8]

Absolute non-harmful scenario of the object: When the target of the act itself cannot be harmed. For example, discharging pollutants into a car that has been confirmed to be completely scrapped and incapable of any use, without causing any impact on the environment or other legal interests.

Absolute time safety scenario: When the timing of an action renders the occurrence of danger absolutely impossible. For example, performing a typically hazardous behavior at a late-night construction site where all personnel have been confirmed evacuated and no entry is feasible.

It should be noted that "significantly minor circumstances" does not equate to "absolute absence of danger". The former may still entail slight risks but pose limited social harm, while the latter entails the complete elimination of any danger possibility. The former can be exempted from criminal liability through the proviso in Article 13 of the Criminal Law, whereas the latter is exempted by overturning the presumption of danger itself. Although these two legal principles differ fundamentally, they can coexist without contradiction.

4.3 Procedure Mechanism Design

Timing of presentation: The counter-evidence claim should be explicitly raised by the defense during the litigation process, accompanied by corresponding evidence or leads. Burden of Proof Allocation: The burden of proving the basic constitutive elements remains with the prosecution. The defense bears the "burden of presentation" to raise counter-evidence claims and provide supporting evidence, with the evidentiary standards as previously stated.

Judicial Review Obligation: Judges are obligated to examine counter-evidence claims and must not refrain from assessing substantive risks merely because the actions meet formal requirements. Upon the defense raising

reasonable doubt, the judge shall proactively review all case evidence to determine whether the presumption of danger has been overturned.

5. Substantive Limitations on the Scope of Application of Abstract Dangerous Offenses

Allowing rebuttal constitutes judicial-level case-specific remedies, whereas imposing substantive limitations on the scope of abstract dangerous offenses represents fundamental constraints at the legislative and interpretative levels.

5.1 Guiding Principles of Restrictions: Specification of the Proportionality Principle

Principle of Appropriateness: The establishment of abstract danger offense should only be considered when the model can effectively achieve the purpose of protecting significant legal interests. For risks that can be effectively regulated through administrative supervision, civil compensation, or other legal means, abstract danger offense should not be readily invoked. Principle of Necessity: Abstract danger offenses should be considered as "last resort measures". If the requirement to prove specific dangers or actual harmful consequences in the crime composition can also adequately protect legal interests, the latter approach should be prioritized to maximize the safeguarding of civil liberties. The narrow proportionality principle: The importance of the legal interest protected by the establishment of abstract dangerous offenses must be proportional to the intensity of restrictions on civil liberties. The more severe the punishment, the stronger the requirement for an empirical association between the act and the danger.

5.2 Specific Limitation Criteria for Scope of Application

The significance and aggregative nature of legal interests: Abstract danger offenses are generally applied only to protect exceptionally significant or aggregative legal interests, such as life, health, major public safety, and core national interests. For general violations of order or property-related legal interests, abstract dangerous offenses should be established with caution. Typicality of hazardous experience and high probability: The presumed danger in legislation must be grounded in solid social experience. There must be a statistically significant probability association between the

behavior and hazardous consequences, rather than subjective assumptions or policy choices by legislators. Identifiability and Avoidability of Behavior: Prohibited behaviors must have clear external identification criteria, enabling ordinary citizens to clearly understand which actions are forbidden and to avoid violations through reasonable care. [3] The orientation towards leniency in sentencing: The penalty configuration for abstract dangerous offenses should generally be milder than that for corresponding actual harm offenses and specific dangerous offenses. Where feasible, lighter punishments such as criminal detention and fines may be considered, while reserving space for probation to reflect their primary function as "preventive" rather than "punitive".

5.3 Synergistic Restriction of Legislation and Judiciary

Legislative clarification: Future legislation should strive to avoid establishing purely abstract danger offenses. When necessary, criteria such as "sufficient to cause danger" or "likely to induce danger" may be adopted to provide room for substantive judicial assessment, or require the conduct to possess objective suitability for triggering infringement.

The Prudence in Judicial Interpretation: When formulating relevant judicial interpretations, the highest judicial authority should avoid improperly expanding the scope of application of abstract dangerous offenses. For acts with ambiguous boundaries, restrictive interpretations favorable to defendants should be adopted.

Judicial proactive review: Judges should courageously apply the proviso of Article 13 of the Criminal Law, the legal principle permitting counter-evidence, and substantive interpretation methods to exclude behaviors that formally meet the constitutive requirements but substantially lack punishable danger from the scope of criminal liability. [9-11]

6. Conclusion: Finding a Balance between Safety and Freedom

The advent of risk society has posed challenges to traditional criminal law theories. Abstract dangerous offenses, as one of the tools for addressing systemic risks, possess practical rationality in their existence. However, the modernization of criminal law is not merely about upgrading tools but also about upholding

core values. A mature rule-of-law society neither sacrifices freedom indefinitely under the guise of safety nor neglects risk prevention due to excessive emphasis on liberty. Allowing rebuttal evidence and restricting application serve as dual pillars for rational regulation of abstract dangerous offenses. Allowing rebuttal evidence establishes a defense threshold in judicial cases to prevent legislative presumptions from causing manifest injustice under extreme circumstances; restricting application sets legislative and policy boundaries to prevent criminal law defenses from overstepping and encroaching upon fundamental civil liberties.

In the practice of criminal justice, the dual regulation mechanism of counter-evidence admissibility and application scope limitation is not a simple mechanical combination, but a mutually complementary and organic integration. Legislative level's strict definition of the applicable scope of abstract dangerous offenses lays a fundamental foundation for preventing the random expansion of criminal law, while judicial level's counter-evidence mechanism makes up for the deficiency of legislative generalization and realizes the precise application of criminal law in individual cases. This model conforms to the development trend of modern criminal law towards "precision governance", and also reflects the core connotation of the unity of form rationality and substantive rationality in the rule of law. In the future, with the continuous evolution of social risks, the regulation of abstract dangerous offenses still needs to be dynamically adjusted based on social reality, adhering to the bottom line of legal interest protection and proportionality principle, so as to make criminal law better play its role in safeguarding social order and protecting individual freedoms in the risk society.

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