案·例·举·要 影印系列

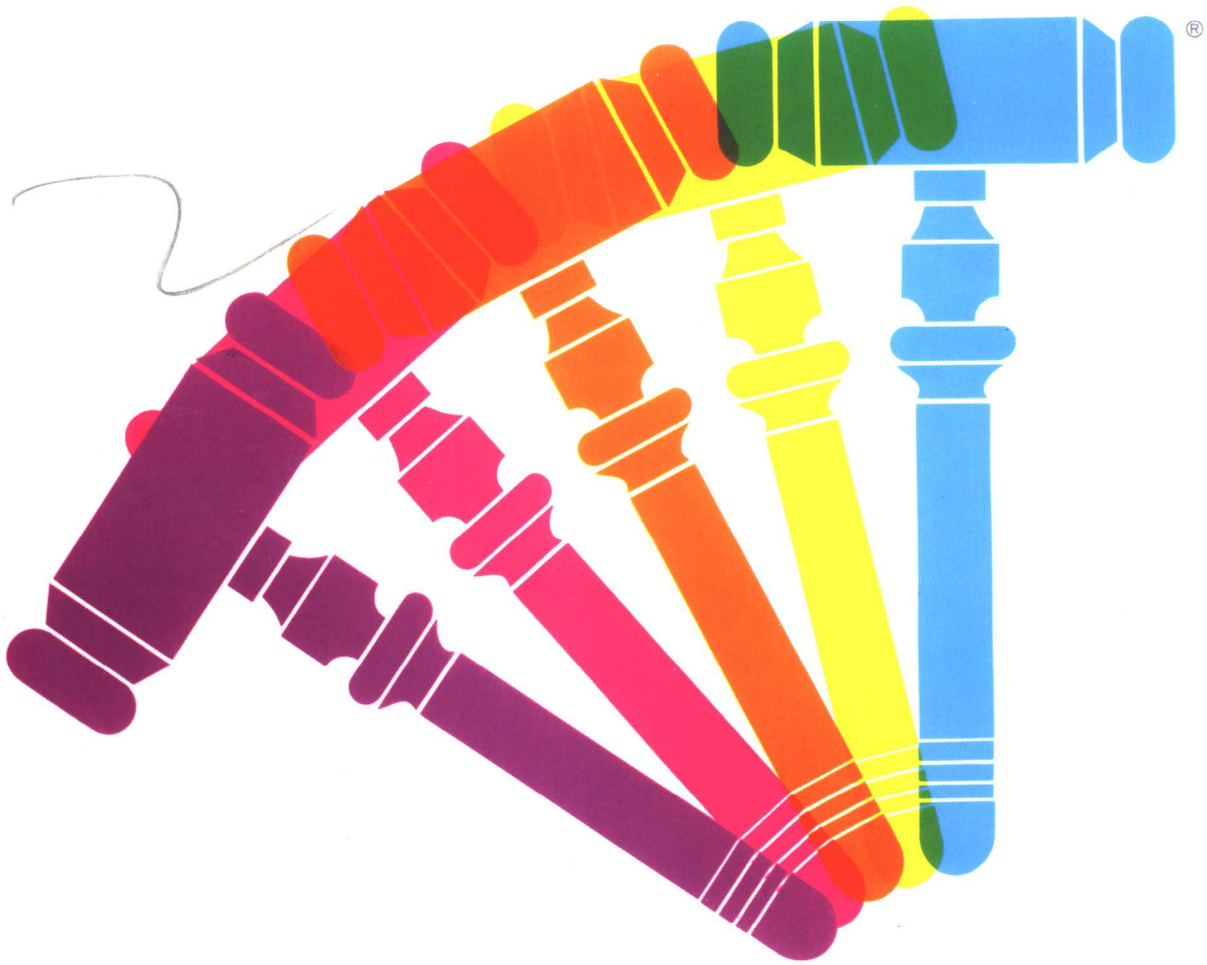
Casenote™ Legal Briefs

Keyed to Kadish and Schulhofer's Criminal Law and It's Processes

对应于卡季什和舒尔霍弗合著的案例教程《刑法与刑事诉讼法:案例与资料》

刑法

Criminal Law



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刑法

Criminal Law

Adaptable to courses utilizing Kaplan, Weisberg and Binder's casebook on Criminal Law

适用于使用卡普兰、韦斯伯格和宾德合著的案例教程《刑法：案例与资料》的课程

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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

FORMAT FOR THE CASENOTE LEGAL BRIEF

PARTY ID: Quick identification of the relationship between the parties.

NATURE OF CASE: This section identifies the form of action (e.g., breach of contract, negligence, battery), the type of proceeding (e.g., demurrer, appeal from trial court's jury instructions) or the relief sought (e.g., damages, injunction, criminal sanctions).

FACT SUMMARY: This is included to refresh the student's memory and can be used as a quick reminder of the facts.

CONCISE RULE OF LAW: Summarizes the general principle of law that the case illustrates. It may be used for instant recall of the court's holding and for classroom discussion or home review.

FACTS: This section contains all relevant facts of the case, including the contentions of the parties and the lower court holdings. It is written in a logical order to give the student a clear understanding of the case. The plaintiff and defendant are identified by their proper names throughout and are always labeled with a (P) or (D).

ISSUE: The issue is a concise question that brings out the essence of the opinion as it relates to the section of the casebook in which the case appears. Both substantive and procedural issues are included if relevant to the decision.

HOLDING AND DECISION: This section offers a clear and in-depth discussion of the rule of the case and the court's rationale. It is written in easy-to-understand language and answers the issue(s) presented by applying the law to the facts of the case. When relevant, it includes a thorough discussion of the exceptions to the case as listed by the court, any major cites to other cases on point, and the names of the judges who wrote the decisions.

CONCURRENCE / DISSENT: All concurrences and dissents are briefed whenever they are included by the casebook editor.

EDITOR'S ANALYSIS: This last paragraph gives the student a broad understanding of where the case "fits in" with other cases in the section of the book and with the entire course. It is a hornbook-style discussion indicating whether the case is a majority or minority opinion and comparing the principal case with other cases in the casebook. It may also provide analysis from restatements, uniform codes, and law review articles. The editor's analysis will prove to be invaluable to classroom discussion.

QUICKNOTES: Conveniently defines legal terms found in the case and summarizes the nature of any statutes, codes, or rules referred to in the text.

PALSGRAF v. LONG ISLAND R.R. CO.
Injured bystander (P) v. Railroad company (D)
N.Y. Ct. App., 248 N.Y. 339, 162 N.E. 99 (1928).

NATURE OF CASE: Appeal from judgment affirming verdict for plaintiff seeking damages for personal injury.

FACT SUMMARY: Helen Palsgraf (P) was injured on R.R.'s (D) train platform when R.R.'s (D) guard helped a passenger aboard a moving train, causing his package to fall on the tracks. The package contained fireworks which exploded, creating a shock that tipped a scale onto Palsgraf (P).

CONCISE RULE OF LAW: The risk reasonably to be perceived defines the duty to be obeyed.

FACTS: Helen Palsgraf (P) purchased a ticket to Rockaway Beach from R.R. (D) and was waiting on the train platform. As she waited, two men ran to catch a train that was pulling out from the platform. The first man jumped aboard, but the second man, who appeared as if he might fall, was helped aboard by the guard on the train who had kept the door open so they could jump aboard. A guard on the platform also helped by pushing him onto the train. The man was carrying a package wrapped in newspaper. In the process, the man dropped his package, which fell on the tracks. The package contained fireworks and exploded. The shock of the explosion was apparently of great enough strength to tip over some scales at the other end of the platform, which fell on Palsgraf (P) and injured her. A jury awarded her damages, and R.R. (D) appealed.

ISSUE: Does the risk reasonably to be perceived define the duty to be obeyed?

HOLDING AND DECISION: (Cardozo, C.J.) Yes. The risk reasonably to be perceived defines the duty to be obeyed. If there is no foreseeable hazard to the injured party as the result of a seemingly innocent act, the act does not become a tort because it happened to be a wrong as to another. If the wrong was not willful, the plaintiff must show that the act as to her had such great and apparent possibilities of danger as to entitle her to protection. Negligence in the abstract is not enough upon which to base liability. Negligence is a relative concept, evolving out of the common law doctrine of trespass on the case. To establish liability, the defendant must owe a legal duty of reasonable care to the injured party. A cause of action in tort will lie where harm, though unintended, could have been averted or avoided by observance of such a duty. The scope of the duty is limited by the range of danger that a reasonable person could foresee. In this case, there was nothing to suggest from the appearance of the parcel or otherwise that the parcel contained fireworks. The guard could not reasonably have had any warning of a threat to Palsgraf (P), and R.R. (D) therefore cannot be held liable. Judgment is reversed in favor of R.R. (D).

DISSENT: (Andrews, J.) The concept that there is no negligence unless R.R. (D) owes a legal duty to take care as to Palsgraf (P) herself is too narrow. Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. If the guard's action was negligent as to those nearby, it was also negligent as to those outside what might be termed the "danger zone." For Palsgraf (P) to recover, R.R.'s (D) negligence must have been the proximate cause of her injury, a question of fact for the jury.

EDITOR'S ANALYSIS: The majority defined the limit of the defendant's liability in terms of the danger that a reasonable person in defendant's situation would have perceived. The dissent argued that the limitation should not be placed on liability, but rather on damages. Judge Andrews suggested that only injuries that would not have happened but for R.R.'s (D) negligence should be compensable. Both the majority and dissent recognized the policy-driven need to limit liability for negligent acts, seeking, in the words of Judge Andrews, to define a framework "that will be practical and in keeping with the general understanding of mankind." The Restatement (Second) of Torts has accepted Judge Cardozo's view.

QUICKNOTES

FORESEEABILITY – The reasonable anticipation that damage is a likely result from certain acts or omissions.

NEGLIGENCE - Failure to exercise that degree of care which a person of ordinary prudence would exercise under similar circumstances.

PROXIMATE CAUSE – Something which in natural and continuous sequence, unbroken by any new intervening cause, produces an event, and without which the injury would not have occurred.

NOTE TO STUDENTS

Aspen Publishers is proud to offer *Casenote Legal Briefs*–continuing thirty years of publishing America's best-selling legal briefs.

Casenote Legal Briefs are designed to help you save time when briefing assigned cases. Organized under convenient headings, they show you how to abstract the basic facts and holdings from the text of the actual opinions handed down by the courts. Used as part of a rigorous study regime, they can help you spend more time analyzing and critiquing points of law than on copying out bits and pieces of judicial opinions into your notebook or outline.

Casenote Legal Briefs should never be used as a substitute for assigned casebook readings. They work best when read as a follow-up to reviewing the underlying opinions themselves. Students who try to avoid reading and digesting the judicial opinions in their casebooks or on-line sources will end up shortchanging themselves in the long run. The ability to absorb, critique, and restate the dynamic and complex elements of case law decisions is crucial to your success in law school and beyond. It cannot be developed vicariously.

Casenote Legal Briefs represent but one of the many offerings in Aspen's Study Aid Timeline, which includes:

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ABBREVIATIONS FOR BRIEFING

The following list of abbreviations will assist you in the process of briefing and provide an illustration of the technique of formulating functional personal abbreviations for commonly encountered words, phrases, and concepts.

acceptance ..... acp
affirmed ..... aff
answer ..... ans
assumption of risk ..... a/r
attorney ..... atty
beyond a reasonable doubt ..... b/r/d
bona fidepurchaser ..... BFP
breach ofcontract ..... br/k
cause ofaction ..... c/a
common law ..... c/l
Constitution ..... Con
constitutional ..... con
contract ..... K
contributorynegligence ..... c/n
cross x
cross-complaint ..... x/c
cross-examination ..... x/ex
cruel and unusual punishment ..... c/u/p
defendant ..... D
dismissed ..... dis
double jeopardy ..... d/j
due process ..... d/p
equal protection ..... e/p
equity ..... eq
evidence ..... ev
exclude ..... exc
exclusionary rule ..... exc/r
felony ..... f/m
freedom ofspeech ..... f/s
good faith ..... g/f
habeas corpus ..... h/c
hearsay ..... hr
husband ..... H
in loco parentis ..... ILP
injunction ..... inj
inter vivos ..... I/v
jointtenancy ..... j/t
judgment ..... judgt
jurisdiction ..... jur
last clear chance LCC
long-arm statute ..... LAS
majority view ..... maj
meeting ofminds ..... MOM
minority view ..... min
Miranda warnings ..... Mir/w
Miranda rule ..... Mir/r
negligence ..... neg
notice ..... mtc
nuisance ..... nus
obligation ..... ob
obscene ..... obs
offer ..... O
offeree ..... OE
offeror ..... OR
ordinance ..... ord
pain and suffering ..... p/s
parol evidence ..... p/e
plaintiff ..... P
prima facie ..... p/f
probable cause ..... p/c
proximatecause ..... px/c
real property ..... r/p
reasonable doubt ..... r/d
reasonable man ..... r/m
rebuttable presumption ..... rb/p
remanded ..... rem
res ipsa loquitur ..... RIL
respondent superior ..... r/s
Restatement ..... RS
reversed ..... rev
Rule Against Perpetuities ..... RAP
search and seizure ..... s/s
search warrant ..... s/w
self-defense ..... s/d
specific performance ..... s/p
statute of limitations ..... S/L
statute of frauds ..... S/F
statute ..... S
summary judgment ..... s/j
tenancy in common ..... t/c
tenancy at will ..... t/w
tenant ..... t
third party ..... TP
third party beneficiary ..... TPB
transferred intent ..... TI
unconscionable ..... uncon
unconstitutional ..... unconst
undue influence ..... u/e
UniformCommercial Code ..... UCC
unilateral ..... uni
vendee ..... VE
vendor ..... VR
versus v
void for vagueness ..... VFV
weight of the evidence ..... w/e
weight of authority ..... w/a
wife ..... W
with ..... w/
within ..... w/I
without prejudice ..... w/o/p
without ..... w/o
wrongfuldeath ..... wr/d

A GLOSSARY OF COMMON LATIN WORDS AND PHRASES ENCOUNTERED IN THE LAW

A FORTIORI: Because one fact exists or has been proven, therefore a second fact that is related to the first fact must also exist.

A PRIORI: From the cause to the effect. A term of logic used to denote that when one generally accepted truth is shown to be a cause, another particular effect must necessarily follow.

AB INITIO: From the beginning; a condition which has existed throughout, as in a marriage which was void ab initio.

ACTUS REUS: The wrongful act; in criminal law, such action sufficient to trigger criminal liability.

AD VALOREM: According to value; an ad valorem tax is imposed upon an item located within the taxing jurisdiction calculated by the value of such item.

AMICUS CURIAE: Friend of the court. Its most common usage takes the form of an amicus curiae brief, filed by a person who is not a party to an action but is nonetheless allowed to offer an argument supporting his legal interests.

ARGUENDO: In arguing. A statement, possibly hypothetical, made for the purpose of argument, is one made arguendo.

BILL QUIA TIMET: A bill to quiet title (establish ownership) to real property.

BONA FIDE: True, honest, or genuine. May refer to a person's legal position based on good faith or lacking notice of fraud (such as a bona fide purchaser for value) or to the authenticity of a particular document (such as a bona fide last will and testament).

CAUSA MORTIS: With approaching death in mind. A gift causa mortis is a gift given by a party who feels certain that death is imminent.

CAVEAT EMPTOR: Let the buyer beware. This maxim is reflected in the rule of law that a buyer purchases at his own risk because it is his responsibility to examine, judge, test, and otherwise inspect what he is buying.

CERTIORARI: A writ of review. Petitions for review of a case by the United States Supreme Court are most often done by means of a writ of certiorari.

CONTRA: On the other hand. Opposite. Contrary to.

CORAM NOBIS: Before us; writs of error directed to the court that originally rendered the judgment.

CORAM VOBIS: Before you; writs of error directed by an appellate court to a lower court to correct a factual error.

CORPUS DELICTI: The body of the crime; the requisite elements of a crime amounting to objective proof that a crime has been committed.

CUM TESTAMENTO ANNEXO, ADMINISTRATOR (ADMINISTRATOR C.T.A.): With will annexed; an administrator c.t.a. settles an estate pursuant to a will in which he is not appointed.

DE BONIS NON, ADMINISTRATOR (ADMINISTRATOR D.B.N.): Of goods not administered; an administrator d.b.n. settles a partially settled estate.

DE FACTO: In fact; in reality; actually. Existing in fact but not officially approved or engendered.

DE JURE: By right; lawful. Describes a condition that is legitimate "as a matter of law," in contrast to the term "de facto," which connotes something existing in fact but not legally sanctioned or authorized. For example, de facto segregation refers to segregation brought about by housing patterns, etc., whereas de jure segregation refers to segregation created by law.

DE MINIMUS: Of minimal importance; insignificant; a trifle; not worth bothering about.

DE NOVO: Anew; a second time; afresh. A trial de novo is a new trial held at the appellate level as if the case originated there and the trial at a lower level had not taken place.

DICTA: Generally used as an abbreviated form of obiter dicta, a term describing those portions of a judicial opinion incidental or not necessary to resolution of the specific question before the court. Such nonessential statements and remarks are not considered to be binding precedent.

DUCES TECUM: Refers to a particular type of writ or subpoena requesting a party or organization to produce certain documents in their possession.

EN BANC: Full bench. Where a court sits with all justices present rather than the usual quorum.

EX PARTE: For one side or one party only. An ex parte proceeding is one undertaken for the benefit of only one party, without notice to, or an appearance by, an adverse party.

EX POST FACTO: After the fact. An ex post facto law is a law that retroactively changes the consequences of a prior act.

EX REL.: Abbreviated form of the term ex relatione, meaning, upon relation or information. When the state brings an action in which it has no interest against an individual at the instigation of one who has a private interest in the matter.

FORUM NON CONVENIENS: Inconvenient forum. Although a court may have jurisdiction over the case, the action should be tried in a more conveniently located court, one to which parties and witnesses may more easily travel, for example.

GUARDIAN AD LITEM: A guardian of an infant as to litigation, appointed to represent the infant and pursue his/her rights.

HABEAS CORPUS: You have the body. The modern writ of habeas corpus is a writ directing that a person (body) being detained (such as a prisoner) be brought before the court so that the legality of his detention can be judicially ascertained.

IN CAMERA: In private, in chambers. When a hearing is held before a judge in his chambers or when all spectators are excluded from the courtroom.

IN FORMA PAUPERIS: In the manner of a pauper. A party who proceeds in forma pauperis because of his poverty is one who is allowed to bring suit without liability for costs.

INFRA: Below, under. A word referring the reader to a later part of a book. (The opposite of supra.)

IN LOCO PARENTIS: In the place of a parent.

IN PARI DELICTO: Equally wrong; a court of equity will not grant requested relief to an applicant who is in pari delicto, or as much at fault in the transactions giving rise to the controversy as is the opponent of the applicant.

IN PARI MATERIA: On like subject matter or upon the same matter. Statutes relating to the same person or things are said to be in pari materia. It is a general rule of statutory construction that such statutes should be construed together, i.e., looked at as if they together constituted one law.

IN PERSONAM: Against the person. Jurisdiction over the person of an individual.

IN RE: In the matter of. Used to designate a proceeding involving an estate or other property.

IN REM: A term that signifies an action against the res, or thing. An action in rem is basically one that is taken directly against property, as distinguished from an action in personam, i.e., against the person.

INTER ALIA: Among other things. Used to show that the whole of a statement, pleading, list, statute, etc., has not been set forth in its entirety.

INTER PARTES: Between the parties. May refer to contracts, conveyances or other transactions having legal significance.

INTER VIVOS: Between the living. An inter vivos gift is a gift made by a living grantor, as distinguished from bequests contained in a will, which pass upon the death of the testator.

IPSO FACTO: By the mere fact itself.

JUS: Law or the entire body of law.

LEX LOCI: The law of the place; the notion that the rights of parties to a legal proceeding are governed by the law of the place where those rights arose.

MALUM IN SE: Evil or wrong in and of itself; inherently wrong. This term describes an act that is wrong by its very nature, as opposed to one which would not be wrong but for the fact that there is a specific legal prohibition against it (malum prohibitum).

MALUM PROHIBITUM: Wrong because prohibited, but not inherently evil. Used to describe something that is wrong because it is expressly forbidden by law but that is not in and of itself evil, e.g., speeding.

MANDAMUS: We command. A writ directing an official to take a certain action.

MENS REA: A guilty mind; a criminal intent. A term used to signify the mental state that accompanies a crime or other prohibited act. Some crimes require only a general mens rea (general intent to do the prohibited act), but others, like assault with intent to murder, require the existence of a specific mens rea.

MODUS OPERANDI: Method of operating; generally refers to the manner or style of a criminal in committing crimes, admissible in appropriate cases as evidence of the identity of a defendant.

NEXUS: A connection to.

NISI PRIUS: A court of first impression. A nisi prius court is one where issues of fact are tried before a judge or jury.

N.O.V. (NON OBSTANTE VEREDICTO): Notwithstanding the verdict. A judgment n.o.v. is a judgment given in favor of one party despite the fact that a verdict was returned in favor of the other party, the justification being that the verdict either had no reasonable support in fact or was contrary to law.

NUNC PRO TUNC: Now for then. This phrase refers to actions that may be taken and will then have full retroactive effect.

PENDENTE LITE: Pending the suit; pending litigation underway.

PER CAPITA: By head; beneficiaries of an estate, if they take in equal shares, take per capita.

PER CURIAM: By the court; signifies an opinion ostensibly written "by the whole court" and with no identified author.

PER SE: By itself, in itself; inherently.

PER STIRPES: By representation. Used primarily in the law of wills to describe the method of distribution where a person, generally because of death, is unable to take that which is left to him by the will of another, and therefore his heirs divide such property between them rather than take under the will individually.

PRIMA FACIE: On its face, at first sight. A prima facie case is one that is sufficient on its face, meaning that the evidence supporting it is adequate to establish the case until contradicted or overcome by other evidence.

PRO TANTO: For so much; as far as it goes. Often used in eminent domain cases when a property owner receives partial payment for his land without prejudice to his right to bring suit for the full amount he claims his land to be worth.

QUANTUM MERUIT: As much as he deserves. Refers to recovery based on the doctrine of unjust enrichment in those cases in which a party has rendered valuable services or furnished materials that were accepted and enjoyed by another under circumstances that would reasonably notify the recipient that the rendering party expected to be paid. In essence, the law implies a contract to pay the reasonable value of the services or materials furnished.

QUASI: Almost like; as if; nearly. This term is essentially used to signify that one subject or thing is almost analogous to another but that material differences between them do exist. For example, a quasi-criminal proceeding is one that is not strictly criminal but shares enough of the same characteristics to require some of the same safeguards (e.g., procedural due process must be followed in a parol hearing).

QUID PRO QUO: Something for something. In contract law, the consideration, something of value, passed between the parties to render the contract binding.

RES GESTAE: Things done; in evidence law, this principle justifies the admission of a statement that would otherwise be hearsay when it is made so closely to the event in question as to be said to be a part of it, or with such spontaneity as not to have the possibility of falsehood.

RES IPSA LOQUITUR: The thing speaks for itself. This doctrine gives rise to a rebuttable presumption of negligence when the instrumentality causing the injury was within the exclusive control of the defendant, and the injury was one that does not normally occur unless a person has been negligent.

RES JUDICATA: A matter adjudged. Doctrine which provides that once a court of competent jurisdiction has rendered a final judgment or decree on the merits, that judgment or decree is conclusive upon the parties to the case and prevents them from engaging in any other litigation on the points and issues determined therein.

RESPONDEAT SUPERIOR: Let the master reply. This doctrine holds the master liable for the wrongful acts of his servant (or the principal for his agent) in those cases in which the servant (or agent) was acting within the scope of his authority at the time of the injury.

STARE DECISIS: To stand by or adhere to that which has been decided. The common law doctrine of stare decisis attempts to give security and certainty to the law by following the policy that once a principle of law as applicable to a certain set of facts has been set forth in a decision, it forms a precedent which will subsequently be followed, even though a different decision might be made were it the first time the question had arisen. Of course, stare decisis is not an inviolable principle and is departed from in instances where there is good cause (e.g., considerations of public policy led the Supreme Court to disregard prior decisions sanctioning segregation).

SUPRA: Above. A word referring a reader to an earlier part of a book.

ULTRA VIRES: Beyond the power. This phrase is most commonly used to refer to actions taken by a corporation that are beyond the power or legal authority of the corporation.

ADDENDUM OF FRENCH DERIVATIVES

IN PAIS: Not pursuant to legal proceedings.

CHATTEL: Tangible personal property.

CY PRES: Doctrine permitting courts to apply trust funds to purposes not expressed in the trust but necessary to carry out the settlor's intent.

PER AUTRE VIE: For another's life; in property law, an estate may be granted that will terminate upon the death of someone other than the grantee.

PROFIT A PRENDRE: A license to remove minerals or other produce from land.

VOIR DIRE: Process of questioning jurors as to their predispositions about the case or parties to a proceeding in order to identify those jurors displaying bias or prejudice.

CHAPTER 1
HOW GUILT IS ESTABLISHED

QUICK REFERENCE RULES OF LAW

1. **The Presentation of Evidence.** Unless the defendant has made his general character an issue in a criminal prosecution, evidence thereon is inadmissible (unless admissible for some other purpose). (People v. Zackowitz)

   [For more information on first-degree murder, see Casenote Law Outline on Criminal Law, Chapter 22, § II, Criminal Homicide: Common Law Principles and Definitions.]

2. **Allocating the Burden of Proof.** So long as the state proves every element of the charge beyond a reasonable doubt, the defendant may be required to prove an affirmative defense. (Patterson v. New York)

   [For more information on defenses, see Casenote Law Outline on Criminal Law, Chapter 7, § V, Extrinsic Defenses.]

3. **The Role of the Jury.** Because trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in federal court, could come within the Sixth Amendment's guarantee. (Duncan v. Louisiana)

4. **The Role of the Jury.** While the jury's prerogative to disregard the court's instructions even as to matters of law does exist and is approved of, the jury should not be formally informed of that power by the judge. (United States v. Dougherty)

5. **The Role of Counsel.** A defendant is not denied the right to counsel when his attorney prevents him from committing perjury. (Nix v. Whiteside)

PEOPLE v. ZACKOWITZ

State (P) v. Criminal defendant (D)

N.Y. Ct. of App., 254 N.Y. 192, 172 N.E. 466 (1930).

NATURE OF CASE: Appeal from first-degree murder conviction.

FACT SUMMARY: Zackowitz (D) claimed that evidence relating to his possession of other weapons at home should not have been admitted at his murder trial because its sole purpose was to give the impression he had a general criminal disposition.

CONCISE RULE OF LAW: Unless the defendant has made his general character an issue in a criminal prosecution, evidence thereon is inadmissible (unless admissible for some other purpose).

FACTS: After engaging in a verbal confrontation with Coppola, who made insulting remarks to his wife on a Brooklyn street, Zackowitz (D) returned home. There, his wife informed him that Coppola had specifically offered her two dollars to sleep with him. Zackowitz (D) then returned to the street where Coppola was repairing a car. A fight ensued, and Zackowitz (D) shot and killed Coppola with a .25-calibre pistol. Zackowitz (D) told the police he had obtained the pistol at home, before he went back to confront Coppola. At trial, however, he insisted that he had had the pistol on his person the entire evening. The People (P) were permitted to put into evidence the fact that Zackowitz (D) had a radio box, three pistols, and a teargas gun at his apartment. In appealing his first-degree murder conviction, Zackowitz (D) maintained this evidence was inadmissible because it was designed to show he had a general criminal disposition.

ISSUE: Unless a criminal defendant has put his general character at issue, is evidence thereon admissible at a criminal trial?

HOLDING AND DECISION: (Cardozo, C.J.) No. The character of a criminal defendant is never an issue in criminal prosecution unless the defendant makes it one, which Zackowitz (D) did not do. Nonetheless, the court permitted introduction of evidence designed to show that he was a man of evil life — a man of murderous heart, of criminal disposition, and therefore more likely to commit the crime charged. There could have been no other purpose because these other weapons Zackowitz (D) had at home had no connection with the crime with which he was charged. Thus, the evidence was not admissible. Judgment reversed; new trial ordered.

DISSENT: (Pound, J.) The evidence was presented to show Zackowitz (D) had an opportunity to select a weapon to carry out his threats, did so, then killed Coppola — not to show Zackowitz's (D) character.

EDITOR'S ANALYSIS: The exclusion of evidence as to the "bad character" of the defendant (including evidence of his other crimes) is relevant but is kept out because, as McCormick puts it, "in the setting of jury trial the danger of prejudice outweighs the probative value." Some courts have recognized that a judge trying a case is less likely to give undue weight to such evidence.

[For more information on first-degree murder, see Casenote Law Outline on Criminal Law, Chapter 22, § II, Criminal Homicide: Common Law Principles and Definitions.]

QUICKNOTES

CHARACTER EVIDENCE - Evidence of someone's moral standing in a community based on reputation.

FIRST DEGREE MURDER - The willful killing of another person with deliberation and premeditation; first-degree murder also encompasses those situations in which a person is killed within the perpetration of, or attempt to perpetrate, specified felonies.

RELEVANCE - The admissibility of evidence based on whether it has any tendency to prove or disprove a matter at issue to the case.

NOTES:

PATTERSON v. NEW YORK

Convicted murderer (D) v. State (P)

432 U.S. 197 (1977).

NATURE OF CASE: Appeal from a conviction of second-degree murder.

FACT SUMMARY: Patterson (D) alleged as an affirmative defense that he was emotionally disturbed at the time of the killing.

CONCISE RULE OF LAW: So long as the state proves every element of the charge beyond a reasonable doubt, the defendant may be required to prove an affirmative defense.

FACTS: Patterson (P), after separating from his wife, killed her new boyfriend. Patterson (P) was charged with second-degree murder. Patterson (P) raised a statutorily authorized affirmative defense that he had been emotionally disturbed at the time. If proved, this would have reduced the offense to manslaughter. The jury convicted Patterson (D) of second-degree murder and he appealed on the grounds that the state had failed to prove, beyond a reasonable doubt, that he was not emotionally disturbed at the time. The state (P) alleged that the burden of proving an affirmative defense was on Patterson (D). Since it had proved every element of its case beyond a reasonable doubt, the burden was on Patterson (D) to show, by a preponderance of the evidence, that mitigating circumstances warranted a lesser charge.

ISSUE: Where an affirmative defense does not include an element of the crime is the defendant required to bear the burden of proof?

HOLDING AND DECISION: (White, J.) Yes. Due process considerations only require the state to prove each element of the charge beyond a reasonable doubt. They do not require the state to prove the nonexistence of all affirmative defenses or mitigating factors. Here, emotional distress is not an element of the charge of second-degree murder. The state (P) proved every element of its case. It was up to Patterson (D) to prove that he was entitled to a lesser charge. Merely because a state makes a defense available does not require it to negate the existence of the defense. Affirmed.

DISSENT: (Powell, J.) The court is focusing on the wording of a statute which just as easily could have required a showing that no mitigating factors such as emotional distress be present. If this were the case, the burden would fall on the state to negate the existence of the defense. Constitutional protections should not be left to the whim and caprice of chance as to how a statute is drawn. Such a formalistic approach is indefensible.

EDITOR'S ANALYSIS: In *Mullaney v. Wilbur,* 421 U.S. 684 (1975), the Court held that Maine's murder law could not shift the burden to the defendant of showing that heat of passion or sudden provocation existed. This was included within the state's definition of mens rea. However, in *Rivera v. Delaware,* 429 U.S. 877 (1976), the Court held that the burden of proof was on the defendant to establish his affirmative defense of insanity. The rationale was substantially the same as herein.

[For more information on defenses, see Casenote Law Outline on Criminal Law, Chapter 7, § V, Extrinsic Defenses.]

QUICKNOTES

AFFIRMATIVE DEFENSE - A manner of defending oneself against a claim not by denying the truth of the charge but by the introduction of some evidence challenging the plaintiff's right to bring the claim.

DUE PROCESS - The constitutional mandate requiring the courts to protect and enforce individuals' rights and liberties consistent with prevailing principals of fairness and justice and prohibiting the federal and state governments from such activities that deprive its citizens of a life, liberty or property interest.

MANSLAUGHTER - The killing of another person without premeditation, deliberation or with the intent to kill or to commit a felony, which may be reasonably expected to result in death or serious bodily injury; manslaughter is characterized by reckless conduct or by some adequate provocation on the part of the actor, as determined by a subjective standard.

PREPONDERANCE OF THE EVIDENCE - A standard of proof requiring the trier of fact to determine whether the fact sought to be established is more probable than not.

REASONABLE DOUBT - Standard of proof necessary to convict a defendant, requiring the absence of evidence that would cause a reasonable person to hesitate in making an important decision in his personal affairs.

SECOND-DEGREE MURDER - The unlawful killing of another person, without premeditation, and characterized by either an intent to kill or by a reckless disregard for human life.

DUNCAN v. LOUISIANA

Convicted batterer (D) v. State (P)

391 U.S. 145 (1968).

NATURE OF CASE: Appeal from conviction for simple battery.

FACT SUMMARY: Duncan (D), a black youth, was convicted on disputed evidence, without a jury, of simple battery on a white youth.

CONCISE RULE OF LAW: Because trial by jury in criminal cases is fundamental to the American scheme of justice, the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which, were they to be tried in federal court, could come within the Sixth Amendment's guarantee.

FACTS: Upon disputed evidence, Duncan (D), a black youth, was convicted of simple battery upon a white youth. It was agreed that he at least touched the other boy on the elbow, but unclear whether he slapped him. Duncan's (D) request for a jury trial was denied. Under Louisiana law, a jury trial is guaranteed in cases where capital punishment or imprisonment at hard labor may be imposed. Simple battery is punishable as a misdemeanor with up to two years' imprisonment and a $300 fine. Duncan (D) appealed, claiming denial of a jury trial was a denial of due process in violation of the Sixth and Fourteenth Amendments.

ISSUE: Is the right to a jury trial so fundamental a principle of liberty and justice as to be guaranteed in state courts by the Fourteenth Amendment?

HOLDING AND DECISION: (White, J.) Yes. The test for determining whether rights found in the Fifth and Sixth Amendments should apply to the states by the Fourteenth Amendment is to determine whether that right is basic in our system of jurisprudence; a fundamental right essential to a fair trial. The right to a jury trial is such a right. The right to a jury trial has historically received protection in English and American law. It protects against unfounded criminal charges brought to eliminate enemies, judges too responsive to higher authority, and overzealous prosecutors. This does not mean that an accused cannot choose to waive a jury trial. Also, crimes carrying possible penalties up to six months do not require a jury trial if otherwise a petty offense. The possible penalty for a particular crime is of major importance in determining whether it is serious or not. The possible penalty may, in itself, if so severe, require a jury trial upon request. It was error to deny a jury trial here.

DISSENT: (Harlan, J., with whom Stewart, J., joins) When the criminally accused argues that his state conviction lacked due process of law, the question is actually whether he was denied an element of fundamental procedural fairness. A criminal trial can be fundamentally fair without a jury.

EDITOR'S ANALYSIS: Few justices have gone as far as Justices Black and Douglas in arguing that the Fourteenth Amendment was designed to extend the Bill of Rights to the states. Even so, the historical support for that view is strong, particularly in the statements of the senator who introduced the Amendment. The prevailing view, however, is that of selective incorporation. Only those rights found in the Bill of Rights deemed to be "fundamental," "basic," or "essential" have been held to apply to the states. Over the years, the vast majority of rights found in the first eight amendments have been extended by the Court to the states. Yet it is strange to think that for the good part of a century after adoption of the Fourteenth Amendment and 150 years after adoption of the Bill of Rights, rights guaranteed for trials in federal court were not usually guaranteed in the same type of case in state courts, unless the constitution of the state in question also guaranteed those rights.

QUICKNOTES

BATTERY - Unlawful contact with the body of another person.

DUE PROCESS - The constitutional mandate requiring the courts to protect and enforce individuals' rights and liberties consistent with prevailing principals of fairness and justice and prohibiting the federal and state governments from such activities that deprive its citizens of a life, liberty or property interest.

MISDEMEANOR - Any offense that does not constitute a felony, which is generally less severe and for which a lesser punishment is imposed.

RIGHT TO JURY TRIAL - The right guaranteed by the Sixth Amendment to the federal constitution that in all criminal prosecutions the accused has a right to a trial by an impartial jury of the state and district in which the crime was allegedly committed.

SELECTIVE INCORPORATION - Doctrine providing that the Bill of Rights is incorporated by the Due Process Clause only to the extent that the Supreme Court decides that the privileges and immunities therein are so essential to fundamental principals of due process to be preserved against both state and federal action.

UNITED STATES v. DOUGHERTY

Federal government (P) v. Criminal defendant (D)

473 F.2d 1113 (D.C. Cir. 1972).

NATURE OF CASE: Appeals from conviction for unlawful entry and malicious destruction of property.

FACT SUMMARY: Dougherty (D) contends that the trial judge erred in refusing to instruct the jury of its right to acquit without regard to the law and the evidence.

CONCISE RULE OF LAW: While the jury's prerogative to disregard the court's instructions even as to matters of law does exist and is approved of, the jury should not be formally informed of that power by the judge.

FACTS: Dougherty (D) and eight others broke into Dow Chemical Company offices and destroyed property as part of an attack on Dow's role in supporting U.S. military action in Vietnam. The trial judge refused to instruct the jury of its right to acquit Dougherty (D) without regard to the law and the evidence.

ISSUE: Should the jury be instructed of its power to nullify the law in a particular case?

HOLDING AND DECISION: (Leventhal, J.) No. An undoubted jury prerogative to disregard the law has evolved. It is derived from the jury's power to bring in a verdict of not guilty in a criminal case that is not reversible by the court. However, the fact that this power exists and is approved of as a necessary counter to hardened judges and arbitrary prosecutors does not mean that the jury must be informed by the judge of its power. The prerogative is reserved for the exceptional case and the judge's instruction acts as a generally effective constraint. To hold otherwise would unnecessarily burden the jury system, since the jury, that must be unanimous, would not merely have to come to a united determination of the facts, but also of the law. It would also burden the individual jurors. "For it is one thing for a juror to know that the law condemns, but he has a factual power of lenity. To tell him expressly of a nullification prerogative, however, is to inform him, in effect, that it is he who fashions the rule that condemns."

DISSENT: (Bazelon, C.J.) Nullification serves the important function of permitting the jury to bring to bear on the criminal process a sense of fairness and particularized justice. Pretending the jury does not have this power may allow it to avoid its responsibility. Further, the use of the nullification power provides important feedback on the standards of the criminal laws. For example, the reluctance of juries to hold defendants responsible for unmistakable violation of the prohibition laws told us much about the morality of those laws.

EDITOR'S ANALYSIS: The ability of the jury system to render a fair verdict for militant, radical, and minority defendants has been strongly questioned. Some of the criticism has been dissipated by the refusal of juries to convict in cases such as Huey Newton's, Bobby Seale's, and Angela Davis'. William Kunstler, defense attorney for many militants, commented, "For many, the inability of prosecutors in recent trials of radicals to convince any — or even most — of their respective panels that the defendants were guilty has been regarded as a stunning vindication of our legal system. For others, including myself, these results only indicate that just verdicts are, under certain conditions, attainable."

QUICKNOTES

ACQUITTAL - The discharge of an accused individual from suspicion of guilt for a particular crime and from further prosecution for that offense.

NOTES:

NIX v. WHITESIDE

Government (P) v. Convicted murderer (D)

475 U.S. 157 (1986).

NATURE OF CASE: Appeal of order granting habeas corpus.

FACT SUMMARY: Whiteside's (D) attorney refused to permit him to commit perjury when testifying in his defense.

CONCISE RULE OF LAW: A defendant is not denied the right to counsel when his attorney prevents him from committing perjury.

FACTS: Whiteside (D) stabbed an individual, killing him. He was charged with murder. He claimed he acted in self-defense. One week before the trial, Whiteside (D) told his attorney that he saw the decedent with a gun or something metallic. The defense attorney disbelieved him and urged him not to testify regarding this at trial. Whiteside (D) insisted that he would do so. The attorney threatened that he would inform the court that he believed Whiteside (D) not to be telling the truth. Whiteside (D) agreed not to mention the option and did not so testify. Convicted, he appealed, arguing he had been denied the right to counsel. The state appellate and supreme courts affirmed. The Eighth Circuit granted habeas corpus, however, holding that Whiteside (D) had been denied the right to counsel. The Supreme Court accepted review.

ISSUE: Is a defendant denied the right to counsel when his attorney prevents him from committing perjury?

HOLDING AND DECISION: (Burger, C.J.) No. A defendant is not denied the right to counsel when his attorney prevents him from committing perjury. For counsel to be denied, it must be shown that counsel was so inept as not to be functioning as counsel. An attorney's duty to his client goes only so far as to include legitimate, lawful conduct. It is universal among the jurisdictions, as well as in the Model Code of Professional Responsibility, that an attorney should not solicit or tolerate perjury. It is also, of course, incumbent upon a witness not to lie. In this case, therefore, the attorney's actions, at most, deprived Whiteside (D) of the ability to do that which he was not entitled to do. This being so, the conduct of the attorney was not deficient; in fact, it would have been a dereliction of duty for the attorney to have done otherwise. Therefore, in no way was Whiteside (D) denied effective counsel. Reversed.

CONCURRENCE: (Brennan, J.) The Court has no constitutional authority to establish conduct for lawyers practicing in state courts.

CONCURRENCE: (Blackmun, J.) To the extent the Court seems to adopt a set of rules of professional responsibility, it encroaches upon state authority.

CONCURRENCE: (Stevens, J.) A lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury — as well as judicial review of such apparent certainty — should be tempered by the realization that the most honest witness can later recall facts not at first remembered.

EDITOR'S ANALYSIS: Only five justices joined Chief Justice Burger's opinion, making it the opinion of a bare majority. The four justices declining to join, however, appeared to do so on the basis that the opinion could be read as adopting the Model Code of Professional Responsibility, something they considered improper. It would seem that all nine justices agreed with the rule of the case.

QUICKNOTES

HABEAS CORPUS - A proceeding in which a defendant brings a writ to compel a judicial determination of whether he is lawfully being held in custody.

PERJURY - The making of false statements under oath.

RIGHT TO COUNSEL - Right conferred by the Sixth Amendment that the accused shall be provided effective legal assistance in a criminal proceeding.

NOTES: