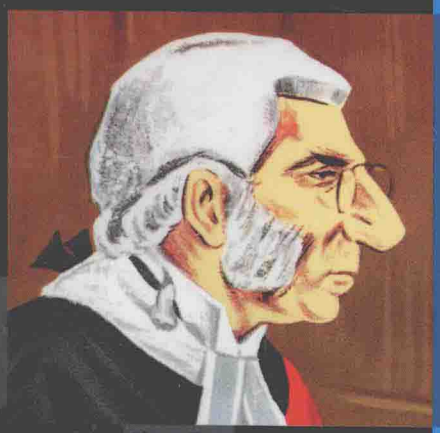

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Criminal Law

Eighth Edition

Steven L. Emanuel

Wolters Kluwer

CRIMINAL LAW

EIGHTH EDITION

STEVEN L. EMANUEL

Founder & Editor-in-Chief, *Emanuel Law Outlines* and
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Dedication

For Meredith Rachel

Abbreviations Used in Text

B&P — Boyce and Perkins, *Cases and Materials on Criminal Law and Procedure* (Foundation Press, 8th Ed., 1999)

D&G — Dressler and Garvey, *Cases and Materials on Criminal Law* (West, 6th Ed., 2012)

Dressler Csbk — Joshua Dressler, *Cases and Materials on Criminal Law* (Thomson / West, 5th Ed., 2009)

Dressler Hnbk — Joshua Dressler, *Understanding Criminal Law* (LexisNexis, 2006)

Fletcher — George Fletcher, *Rethinking Criminal Law* (Little Brown, 1978)

Johnson — Phillip Johnson, *Criminal Law, Cases, Materials and Text* (West Pubishing, 5th Ed., 1995)

KS&S — Kadish, Schulhofer & Steiker, *Criminal Law and its Processes* (Aspen, 8th Ed., 2007)

KSS&B — Kadish, Schulhofer, Steiker & Barkow, *Criminal Law and Its Processes* (Wolters Kluwer, 9th Ed., 2012)

L — Wayne LaFave, *Criminal Law* (West Publishing, Hornbook Series, 3d Ed., 2000)

LaFave — Wayne LaFave, *Modern Criminal Law, Cases, Comments and Questions* (West Publishing, 4th Ed., 2006)

M.P.C. — *Model Penal Code*, Proposed Official Draft (1962) and Tentative Drafts 1-13 (1953-1962) (American Law Institute) [Note: The Model Penal Code has not changed since 1962. However, the Official Commentaries to Parts I and II were revised in 1985 and 1980 respectively. All references in this outline to the Commentaries are to the revised Commentaries where applicable.]

P&B — Perkins & Boyce, *Criminal Law* (textbook) (Foundation Press, 3d Ed., 1982)

Preface

Thank you for buying this book.

We think the special features that are part of this edition will help you a lot. These include:

- ***Capsule Summary*** — We've boiled the black-letter law of Criminal Law down to 108 pages. We've designed this Capsule Summary to be read in the last week or so (maybe even the last night) before your exam. If you want to know more about a topic, cross-references in the Capsule point you to the pages in the main text that cover the topic more thoroughly.
- ***Casebook Correlation Chart*** — This chart shows you, for the five leading Criminal Law casebooks, where in the *Emanuel* any topic from your casebook is covered.
- ***Exam Tips*** — We've compiled these by reviewing dozens of actual past essay questions, and 100s of multiple-choice questions, asked in past law-school and bar exams. The *Exam Tips* are at the end of each chapter.
- ***Quiz Yourself*** questions — We've adapted these short-answer questions from the *Law in a Flash* flash-card deck on Criminal Law. (We've re-written most answers, to better mesh with the outline's approach.) You'll find these distributed within each chapter, usually at the end of a roman-numeraled section. Each "pod" of Quiz Yourself questions can easily be located by using the Table of Contents.

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:[1]

1. During the semester, use the book in preparing each night for the next day's class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* at the front of the outline to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you've just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you all or part of two days.
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. When you do these questions: (1) record your short "answer" in the book after

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1. The suggestions below relate only to this book. I don't talk here about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn't mean I don't think these other steps are important — it's just that on this one page I've chosen to focus on how I think you can use this outline.

the question, but also: (2) try to write out a "mini essay" on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. Some time in the week before your exam, do the 26 *Multiple-Choice* questions near the back of the book. Unlike the *Quiz Yourself* questions, these are not marked by chapter or subject matter, so they'll be a better test of whether you can recognize the issues being tested.

6. A couple of days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with steps (4) and/or (5), so that you use the *Tips* to help you spot the issues in the questions. You'll also probably want to follow up from many of the *Tips* to the main outline's discussion of the topic.

7. Some time during the week or so before the exam, do some or all of the full-scale essay exams at the back of the book. Write out a full essay answer under exam-like conditions (e.g., closed-book if your exam will be closed book). If you can, exchange papers with a classmate and critique each other's answer.

8. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your writing juices flowing; and (2) re-read the various *Exam Tips* sections (you should be able to do this in 1-2 hours).

My deepest thanks go to my colleagues at Wolters Kluwer, Barbara Lasoff and Barbara Roth, who have helped greatly to assure the reliability and readability of this and my other books.

Good luck in your Criminal Law course. If you'd like any other Wolters Kluwer publication, you can find it at your bookstore or at **www.wklegaledu.com**. If you'd like to contact me, you can email me at **semanuel@westnet.com**.

Steve Emanuel

Larchmont NY

March 2015

CASEBOOK CORRELATION CHART

(**Note:** general sections of the outline are omitted from this chart. **NC** = not directly covered by this casebook.)

Emanuel's Criminal Law Outline *(by chapter and section heading)*	Kadish, Schulhoffer, Steiker & Barkow **Criminal Law and Its Processes** (9th Ed. 2012)	Dripps, Boyce & Perkins **Criminal Law and Procedure: Cases and Materials** (12th Ed. 2013)	LaFave **Modern Criminal Law: Cases, Comments & Questions** (5th Ed. 2011)	Dressler & Garvey **Cases and Materials on Criminal Law** (6th Ed. 2012)	Kaplan, Weisberg & Binder **Criminal Law: Cases and Materials** (7th Ed. 2012)
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CASEBOOK CORRELATION CHART (continued)

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CASEBOOK CORRELATION CHART (continued)

Emanuel's Criminal Law Outline *(by chapter and section heading)*	Kadish, Schulhoffer, Steiker & Barkow **Criminal Law and Its Processes** (9th Ed. 2012)	Dripps, Boyce & Perkins **Criminal Law and Procedure: Cases and Materials** (12th Ed. 2013)	LaFave **Modern Criminal Law: Cases, Comments & Questions** (5th Ed. 2011)	Dressler & Garvey **Cases and Materials on Criminal Law** (6th Ed. 2012)	Kaplan, Weisberg & Binder **Criminal Law: Cases and Materials** (7th Ed. 2012)
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X. Corporate Criminal Liability	777-816	576-584	875-909	874-892	794-804

CASEBOOK CORRELATION CHART (continued)

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CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed. The order of topics is occasionally somewhat different from that in the main outline.

CHAPTER 1

SOME BASIC ISSUES IN CRIMINAL LAW

I. A BRIEF INTRODUCTION TO CRIMINAL LAW

A. Felonies vs. misdemeanors: Modern criminal statutes typically divide crimes into two broad categories: ***felonies*** and ***misdemeanors***. [1] A good general rule, at least for state as opposed to federal crimes, is that:

- ❑ a ***felony*** is a ***serious*** crime that is punishable by ***at least one year in a state prison***; and
- ❑ a ***misdemeanor*** is a ***lesser*** crime for which the maximum penalty is either: (a) incarceration for less than a year, typically in a city or county jail rather than in a state prison; or (b) a fine or (c) both.

B. Theories of punishment: There are two main philosophies about what the purpose of criminal law should be, often labeled ***"utilitarianism"*** and ***"retributivism."*** [2]

1. Utilitarianism: The basic concept of ***utilitarianism*** is that society should try to ***maximize the net happiness of people*** – "the greatest good for the greatest number." Utilitarians cite the following as the narrow objectives that a system of criminal law and punishment should try to achieve:

- ❑ Most importantly, the utilitarians stress ***"general deterrence."*** That is, if D commits a crime, we should punish D mainly in order to convince the ***general community*** to avoid criminal conduct in the future.
- ❑ Next, the utilitarians seek ***"specific deterrence"*** (sometimes called "***individual*** deterrence"). That is, if D commits a crime, we should punish D to deter her from committing additional crimes in the future.
- ❑ Lastly, the utilitarians stress ***"rehabilitation."*** That is, the criminal justice system should try to prevent D from committing further crimes not by causing him to fear the pain of further punishment in the future but by educating him or otherwise ***"reforming"*** him.

2. Retributivism: ***Retributivists***, on the other hand, believe that the principal – maybe even the sole — purpose of the criminal law should be to ***punish the morally culpable***.

a. Deterrence not principal focus: Retributivists, because of their focus on moral blameworthiness, do ***not*** regard either general or specific ***deterrence*** as being very

important objectives to be served by the criminal law.

i. **Rehabilitation:** For similar reasons, retributivists do not think the criminal law should be spending much effort towards ***rehabilitation*** of offenders.

C. **Types of punishment:** There are three main ***types*** of punishments in criminal law: (1) ***imprisonment***; (2) the ***death penalty***; and (3) the imposition of ***monetary fines***. With respect to (1) and (3), the states and federal governments have ***wide latitude*** to choose how long a prison sentence, and how great a fine, to impose for any particular crime. [3]

1. **"Shaming" punishments:** Courts occasionally impose a fourth type of punishment, by trying to publicly "***shame***" the defendant, usually by requiring him to make some sort of ***public apology or confession*** as a condition of his probation.

a. **Courts split:** Appellate courts have been ***split*** about whether and when to reverse shaming punishments. By and large, as long as the punishment is ***reasonably proportional*** to the offense and not likely to inflict major permanent psychological damage, appellate courts seem mostly to ***uphold*** them.

Example: After D is convicted of mail theft, the judge requires him to wear a sign outside a post office saying "I stole mail; this is my punishment." *Held*, on appeal, the judge was attempting to rehabilitate D, not humiliate him, so the punishment is lawful under federal sentencing procedures. [*U.S. v. Gementera* (2004)] [3]

CAPSULE SUMMARY

II. CONSTITUTIONAL LIMITS ON PUNISHMENT

A. **The U.S. Constitution generally:** The ***U.S. Constitution*** imposes important limits on punishments that may be imposed by federal and state legislatures. [4]

1. **Bill of Rights:** The Bill of Rights (the first 10 amendments to the Constitution) imposes several limits on the criminal process. By its terms, the Bill of Rights applies only to the federal government, not the states (but see below for how the Bill of Rights affects the states). Some of the more important Bill of Rights guarantees that limit what conduct may be criminalized, or limit how that conduct can be prosecuted, are these:

- ❑ The ***First*** Amendment orders Congress to "make no law ... abridging the ***freedom of speech.***" This provision limits, for instance, Congress' right to criminalize expressive conduct (e.g., flag burning).
- ❑ The ***Fourth*** Amendment bars the government from making ***"unreasonable searches and seizures."*** Evidence gathered by the police in violation of this amendment must generally be excluded from the defendant's criminal trial.
- ❑ The ***Fifth*** Amendment bars the government from trying a person twice for the same charge (the ***"Double Jeopardy"*** clause).
- ❑ The ***Fifth*** Amendment also bars the government from depriving a person of "life, liberty, or property, without ***due process of law."*** This Due Process clause guarantees criminal defendants a certain amount of procedural fairness. For instance, if Congress were to pass a criminal statute that was unreasonably vague, so that reasonable people could not tell what conduct was forbidden and what was not, a prosecution under that statute would likely violate the Due Process clause.

- ❑ The ***Eighth*** Amendment prohibits Congress from imposing ***"cruel and unusual punishments."*** For instance, the death penalty for any crime other than murder has effectively been found to be cruel and unusual under the Eighth Amendment.

2. **Extension of Bill of Rights to the states:** The Bill of Rights applies by its terms only to the federal government, but the ***Fourteenth Amendment***, enacted after the Civil War, imposes limits on what ***state*** governments can do. One clause of the Fourteenth Amendment prohibits states from depriving any person of "life, liberty, or property, without due process of law[.]" In the criminal law context, the effect of this Fourteenth Amendment Due Process clause is to ***make nearly all of the Bill of Rights guarantees applicable to the states.*** [4]

   Example: If a state were to impose the death penalty for petty theft, this would violate the Eighth Amendment ban on cruel and unusual punishments, as made applicable to the states via the Fourteenth Amendment's Due Process clause.

B. The "legality" principle: One important limit on the criminal law that has Constitutional underpinnings is the principle of ***"legality."*** Under this principle, a person may not be punished unless his conduct was ***defined as criminal before he acted.*** So the legality principle is essentially a rule against ***"retroactive punishment."*** [4-7]

1. **Constitutional underpinnings:** The legality principle is not expressly stated anywhere in the Constitution. But several clauses of the Constitution are inspired by the legality principle, i.e., by the idea that retroactive punishment is unfair: [5]

   - ❑ Art. I, § 9, prohibits Congress from passing any ***" bill of attainder,"*** and Art. I, § 10 prohibits the states from doing so. A bill of attainder is legislation that ***singles out for punishment*** a particular ***individual or easily-identified group.***

   - ❑ Art. I, § 9, also prohibits Congress from passing any ***"ex post facto"*** law, and Art. I, § 10, prohibits the states from doing so. An *ex post facto* law is a law that either ***makes conduct criminal*** that was ***not criminal at the time committed***, increases the ***degree of criminality*** of conduct beyond what it was at the time it was committed, or increases the ***maximum permissible punishment*** for conduct beyond what it was at the time of commission. [*Calder v. Bull* (1798)]

   - ❑ The Due Process clauses of the Fifth and Fourteenth Amendments prohibit most legislatures and courts from behaving in a way that would criminalize conduct without giving ordinary people ***fair warning*** of what is being prohibited. As we'll see immediately below, a statute that is unduly vague, or that gives the police undue discretion in when to make an arrest, is likely to be found to violate due process.

2. **The problem of vagueness:** The legality principle means that criminal laws that are ***unreasonably vague*** may not be enforced. Typically, the Constitutional ground for declining to enforce an unreasonably vague criminal statute is that enforcement would violate the ***due process*** rights of the person charged. [5]

   a. **Rationale:** There are actually two distinct but related reasons why unreasonably vague statutes are held to violate the due process rights of persons charged under them:

      - ❑ First, if a statute is unreasonably vague, it does not provide ***fair warning*** of what is prohibited. [*Grayned v. City of Rockford* (1972)]

      - ❑ Second, an unreasonably vague statute gives ***too much discretion to law enforcement***

personnel, raising danger of "***arbitrary and discriminatory enforcement***." (*City of Chicago v. Morales* discussed immediately *infra*). The Supreme Court has therefore held that a criminal statute must "establish ***minimal guidelines*** to govern law enforcement" (*Kolender v. Lawson* (1983)).

b. Loitering laws: Laws against ***"loitering"*** or ***" vagrancy"*** pose these twin dangers of lack-of-fair-warning and selective-enforcement especially vividly. [5]

Example: Chicago, to combat gang violence, enacts an ordinance that says that if a police officer reasonably believes that at least one of two or more people in a public place is a "criminal gang member," and the people are "loitering" (defined as "remaining in any one place with no apparent purpose"), the officer can and must order them to "disperse" from "the area." A person who disobeys the order can be punished by imprisonment. (It doesn't matter whether the person turns out to be a gang member or not.)

Held, the ordinance is unconstitutionally vague. A majority of the Court believes that it fails to ***"establish minimal guidelines to govern law enforcement."*** For instance, the ordinance is not limited to people whom the police suspect of being gang members (as long as one member of the group is reasonably suspected of being such), nor to persons whom the police suspect of having a *harmful* purpose (since it applies to anyone whose purpose is not apparent to the observing officer). Also, a plurality of the Court believes that the ordinance fails to give fair notice of what conduct is forbidden, because of the vagueness of the concept of "no apparent purpose." [*City of Chicago v. Morales* (1999)] [5]

C. The principle of proportionality: As a general principle, theories of punishment agree that the punishment for a given crime should be roughly ***proportional*** to that crime's seriousness. This is the principle of ***"proportionality."*** [7]

1. The Eighth Amendment: The ***Eighth Amendment*** to the U.S. Constitution prohibits the federal government from imposing ***"cruel and unusual punishment"*** on those convicted of crimes. The Amendment is indirectly applicable to the states as well, by operation of the Fourteenth Amendment's Due Process clause.

a. Effect on proportionality principle: The extent to which the Eighth Amendment imposes the proportionality principle on federal and state governments is unclear — Supreme Court precedents are somewhat inconsistent, especially as to punishments other than death.

b. Our treatment: To match the Supreme Court's treatment of the subject, we divide our discussion of the Eighth Amendment's limits on criminal punishments into three categories: (1) the death penalty (Par. D below); (2) life without parole (Par. E); and (3) all prison sentences short of life without parole (Par F).

D. Capital punishment (the death penalty): In the case of ***capital punishment***, the proportionality principle as reflected in the Eighth Amendment imposes ***real limits*** on the circumstances in which government may impose that penalty. Because this penalty is so severe and irrevocable, the Court has held that it is "reserved for a ***narrow category*** of crimes and offenders," including only the ***worst offenders***. *Roper v. Simmons* (2005). In brief, the Court has held that the death penalty may be imposed in ***"ordinary" murder*** cases, but ***not*** in any of the following situations:

[1] cases ***not involving homicide***;

[2] ***homicide*** cases where the defendant is ***mentally retarded***; and

[3] ***homicide*** cases where the ***defendant was a juvenile*** at the time of the killing.

1. **"Ordinary" murder cases:** In "ordinary" murder cases — that is, cases involving ***non-mentally-retarded*** defendants who were ***adults*** at the time of the killing — the death penalty does not necessary violate the Eighth Amendment, though it may do so if certain procedures are used. (For instance, the Amendment will be violated if the jury is given ***unbridled discretion*** about whether to impose death or, conversely, death is made mandatory in some class of cases.) Capital punishment in this "ordinary murder" situation is discussed further *infra*, p. C-83.

2. **Non-homicide cases against victims who are individuals:** Where the crime is against an individual and ***does not lead to death***, the Court has held that capital punishment ***violates the Eighth Amendment***. So ***rape***, even of a child, ***may not be punished by death***. See *Kennedy v. Louisiana* (2008). [8]

   a. **Crimes against state:** On the other hand, there is so far no Eighth Amendment problem with imposing death for serious crimes that are not committed against an *individual* but are instead directed against the ***state***, such as ***treason, espionage*** and ***terroris***m, even though no death resulted. *Id.*

3. **Execution of the mentally retarded in murder cases:** Even if the defendant *has* committed murder, the Court has held that if he is ***mentally retarded***, executing him ***violates the Eighth Amendment***. ***Atkins v. Virginia*** (2002). [8]

   a. **Test for "mentally retarded":** Furthermore, a 2014 case shows that the states are ***not*** free to ***define*** "mental retardation" in what the Supreme Court considers an unduly narrow way. In ***Hall v. Florida*** (2014), Florida took the position that no defendant who scored ***higher than 70*** on an IQ test would be deemed to be mentally retarded. But the Supreme Court, by a 5-4 vote, held that this bright-line rule was ***too inflexible*** to meet the requirements of the Eighth Amendment. [8]

      i. **The new rule:** Under *Hall,* even a defendant with an IQ tested consistently above 70 must be given the opportunity to show that he has ***such large deficits in "adaptive functioning"*** that his practical intellectual capacity is comparable to that of many people with sub-70 IQ scores. So, for instance, the defendant must be permitted to show that before adulthood, he acquired various ***life skills*** at a much slower-than-usual rate, leaving him with major intellectual deficits, and thus entitling him to be spared the death penalty.

4. **Execution of juveniles:** Just as the Court has held that the mentally retarded (even if they commit murder) may not be executed, so the Court has held, by 5-4, that the Eighth Amendment prevents the execution of persons who were ***juveniles*** at the time they committed murder. ***Roper v. Simmons*** (2005). [9]

   a. **Rationale:** The *Roper* majority said that juveniles are "categorically ***less culpable*** than the average criminal," because of their ***lack of maturity***, their lesser ***sense of responsibility,*** their greater vulnerability to ***peer pressure,*** and their more-***transitory*** character traits.

E. Life Without Parole ("LWOP"): The Supreme Court has similarly held that the punishment of ***"life without parole"*** (***"LWOP"***) is constitutionally suspect, at least where it is imposed on persons who were ***juveniles*** at the time of the crime.