

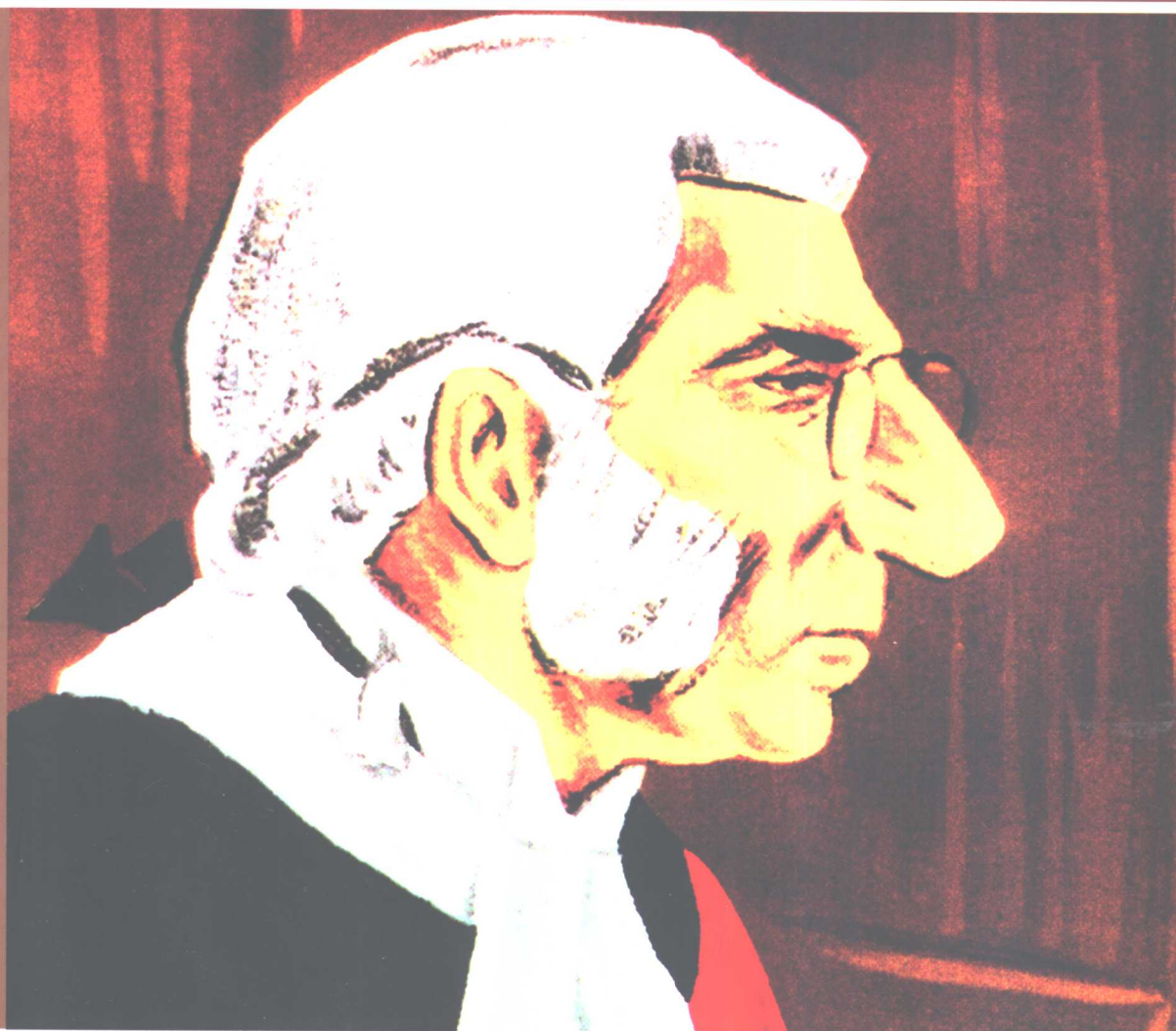
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伊曼纽尔法律精要影印系列 law outlines

# 刑法

[美] 史蒂文·L·伊曼纽尔/著  
(Steven L. Emanuel)

Criminal Law



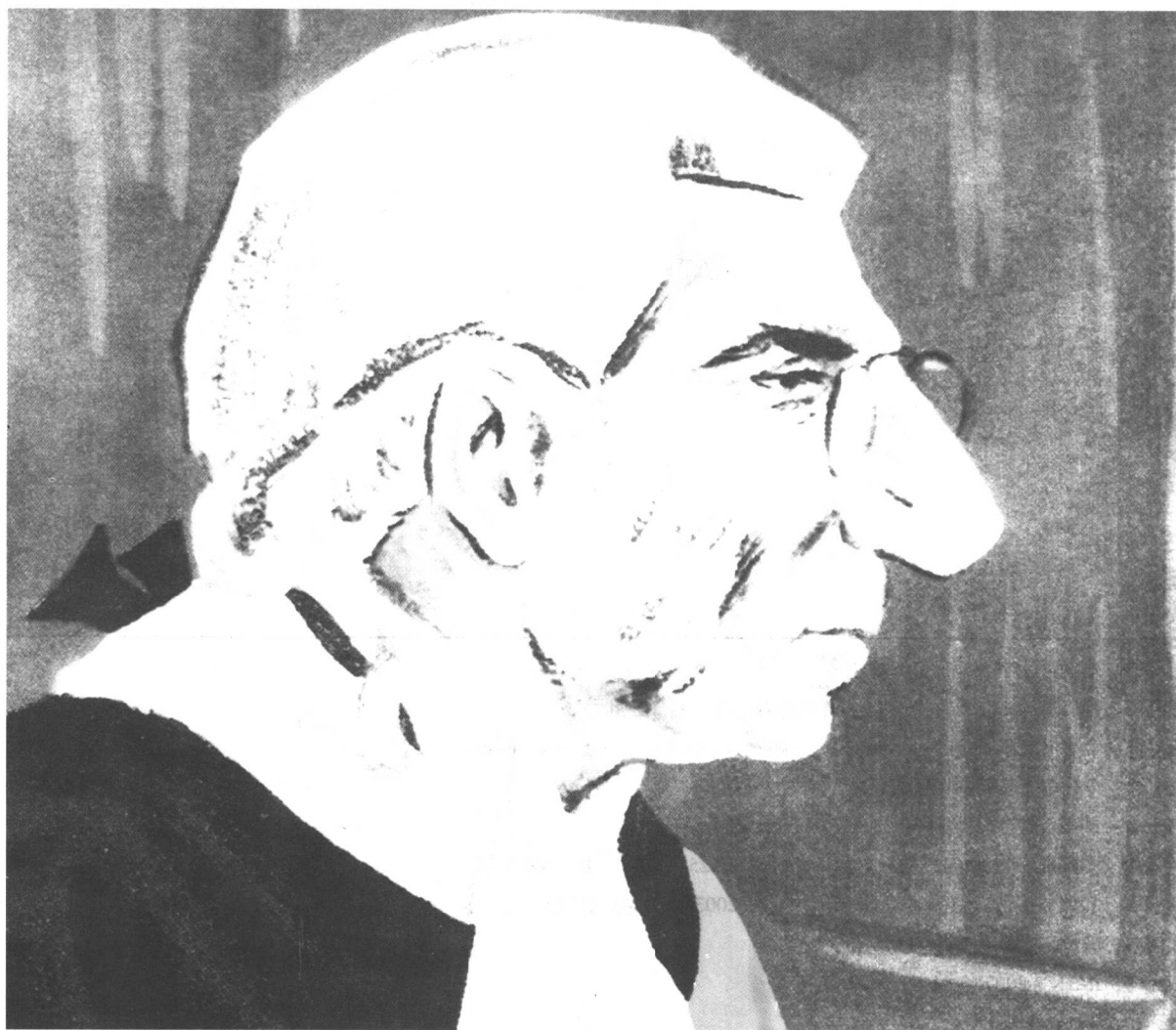
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## 刑法

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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。

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## **About Aspen Law & Business Legal Education Division**

Aspen Law & Business is proud to welcome Emanuel Publishing Corporation's highly successful study aids to its list of law school publications. As part of the Aspen family, Steve and Lazar Emanuel will continue their work on these popular titles, widely purchased by students for more than a quarter century. With the addition of the Emanuel title, Aspen now offers the most comprehensive selection of outstanding publications for the discerning law student.

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# **Dedication**

**For Meredith Rachel**

## Preface

Thank you for buying this book.

We think three special features we've added to this edition will help you a lot. These are:

- **Exam Tips** — We've compiled these by reviewing dozens of actual past essay and multiple-choice questions, and 100s of multiple-choice questions, asked in past law-school and bar exams. We focus on the issues that are most likely to pop up on real exams, and on the tricks and traps that professors have tried to spring on unsuspecting students throughout the years. 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 throughout the book, either at the end of a roman-numeraled section or at the end of a whole chapter. Each "pod" of Quiz Yourself questions can easily be located by using the Table of Contents.
- **Casebook Correlation Chart** — This chart, located near the front of the book, works like this: if you have a topic that you're reading about in a particular place in your casebook, the Chart tells you where in the outline that topic is discussed.

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:<sup>1</sup>

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 question. When you do these questions: (1) record your short "answer" in the book after 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. [At about the same time, do the Multistate-style multiple-choice questions at the back of the book.]
5. 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 step (4), so that you use the *Tips* to help you spot the issues in the short-answer questions. You'll probably want to follow up from many of the *Tips* to the main outline's discussion of the topic.

[Continued]

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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 in this Preface, I've chosen to focus on how I think you can use this outline.



6. 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.
- 7 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).

Good luck. Write to me with any comments, corrections or suggestions. Or, better still, you can reach me via E-mail at: [semanuel@pobox.com](mailto:semanuel@pobox.com)

If you'd like any other publication of Aspen Law & Business, you can find it at your bookstore or at [www.aspenpublishers.com](http://www.aspenpublishers.com)

Steve Emanuel

## Abbreviations Used in Text

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

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

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

K&S — Kadish and Schulhofer, *Criminal Law and its Processes* (Little Brown, 6th Ed., 1995)

LaFave — Wayne LaFave, *Modern Criminal Law, Cases, Comments and Questions* (West Publishing, 2nd Ed., 1988)

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

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.]

# CASEBOOK CORRELATION CHART

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

Any updates to this chart can be found at our web site — <http://www.emanuel.com>

<b>Emanuel's Criminal Law Outline (by chapter and section heading)</b>	<b>Kadish &amp; Schulhofer Criminal Law and Its Processes (6th Ed. 1995)</b>	<b>Boyce &amp; Perkins Criminal Law and Procedure: Cases and Materials (8th Ed. 1999)</b>	<b>Johnson Criminal Law (5th Ed. 1995)</b>	<b>Dressler Cases and Materials on Criminal Law (2nd Ed. 1999)</b>	<b>Kaplan, &amp; Weisberg Criminal Law: Cases and Materials (3rd Ed. 1996)</b>	<b>LaFare Modern Criminal Law (2nd Ed. 1988)</b>
<b>CHAPTER 1 ACTUS REUS AND MENS REA</b>						
<b>I. Actus Reus</b>	171-79, 181-203	416-40, 371-9 805-47	49-62	111-30, 662-80	121-47, 372-81	187-225
<b>II. Mens Rea</b>	204-82, 683-719	475-6, 480-6, 564-693	1-49, 62-81, 637-38	131-93, 923-43	195-302, 997-1032	96-186, 762-93
<b>III. Concurrence</b>	179-81	693-699	62	NC	NC	96
<b>CHAPTER 2 CAUSATION</b>						
<b>II. Cause In Fact</b>	NC	511-512	NC	196-200, 209-11	320-33	315-19
<b>III. Proximate Cause Generally</b>	547-60	512	NC	200-01	333-41	315-16
<b>IV. Proximate Cause — Unintended Victims</b>	560-61	673-683	NC	138-40, 207	NC	108
<b>V. Proximate Cause — Unintended Manner of Harm</b>	561-81	510-563	243-73	201-09	341-72	319-34
<b>CHAPTER 3 RESPONSIBILITY</b>						
<b>I. The Insanity Defense</b>	929-94	736-774	274-352	589-641	713-62	354-408
<b>II. Diminished Responsibility</b>	999-1010	740	339-52	641-55	303-07, 772-74	408-18
<b>III. Automatism</b>	173-79, 994-99	770-771	52-54	114-17	138-47, 765-72	187-203
<b>IV. Intoxication</b>	913-29, 1011-29	774-801	9-14, 66, 74-76, 322-33, 347-52	574-89, 662-80	147-52, 307-15, 762-65	419-54
<b>V. Infancy</b>	NC	703-736	NC	655-62	NC	455-59
<b>CHAPTER 4 JUSTIFICATION AND EXCUSE</b>						
<b>II. Duress</b>	896-913	801-4, 847-52, 859, 903	353-70	553-74	693-712	514-26
<b>III. Necessity</b>	860-80	847-60	356-60, 364, 370-79	526-48	661-93	527-33
<b>IV. Self-Defense</b>	801-46	930-75	379-406, 417-25	453-506	604-43	462-81
<b>V. Defense of Others</b>	836-37	975-87	407-17, 423-25	506-10	NC	481-84

## CASEBOOK CORRELATION CHART (continued)

<b>Emanuel's Criminal Law Outline (by chapter and section heading)</b>	<b>Kadish &amp; Schulhofer Criminal Law and Its Processes (6th Ed. 1995)</b>	<b>Boyce &amp; Perkins Criminal Law and Procedure: Cases and Materials (8th Ed. 1999)</b>	<b>Johnson Criminal Law (5th Ed. 1995)</b>	<b>Dressler Cases and Materials on Criminal Law (2nd Ed. 1999)</b>	<b>Kaplan, &amp; Weisberg Criminal Law: Cases and Materials (3rd Ed. 1996)</b>	<b>LaFare Modern Criminal Law (2nd Ed. 1988)</b>
<b>CHAPTER 4 JUSTIFICAT. AND EXCUSE (Cont.)</b>						
<b>VI. Defense of Property</b>	846-51	987-1004	426-30	510-17	655-61	484-91
<b>VII. Law Enforcement (Arrest; Prevention of Escape and Crime)</b>	851-60	898-902, 917-30	430-37	517-26	643-55	491-509
<b>VIII. Maintaining Authority</b>	NC	906-16	NC	NC	NC	509-14
<b>IX. Consent</b>	329-32	860-79	437-40	NC	1033-35	533-39
<b>X. Entrapment</b>	673-4, 1046-7	1004-24	440-59	875	NC	NC
<b>CHAPTER 5 ATTEMPT</b>						
<b>II. Mental State</b>	585-93	405-06	581-86	704-13	786-94	540-49
<b>III. The Act — Attempt vs. "Mere Preparation"</b>	593-617	380-92	555-81	713-39	794-810	549-63
<b>IV. Impossibility</b>	623-40	392-405	586-97	739-52	822-48	563-75
<b>V. Renunciation</b>	599-600	412-14	560-64, 573-74	752-5	810-15	575-81
<b>VI. Attempt-Like Crimes</b>	308-14, 601-10	363-4, 407-9	83-91, 555-59	96-101, 697, 758-9	178-89, 799-802	583-95
<b>VII. Mechanics of Trial; Punishment</b>	581-85	416	576	698, 703-4	784-86	581-83
<b>CHAPTER 6 CONSPIRACY</b>						
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<b>III. Mens Rea</b>	753-64	451-9	597-603, 643-49	778-94	939-49	610-32
<b>IV. The Conspiratorial Objective</b>	294-98, 729-31, 733-43, 751-53	441-2, 459-64	577, 655-59	765-71	949-61	632-46
<b>V. Scope: Multiple Parties</b>	764-74, 781-99	467-73	616-21, 659-78	807-12, 824-43	971-95	650-60, 683-96
<b>VI. Duration of Conspiracy</b>	720-5, 727-29	460-1, 474	611-15	822-24	937-39	661-70
<b>VII. Plurality</b>	774-80	444-51, 464-7	603-07	815-21	961-68	670-82
<b>VIII. Punishment</b>	731-33	474-5	574-76	767	920-31	676-77

## CASEBOOK CORRELATION CHART (continued)

<b>Emmanuel's Criminal Law Outline (by chapter and section heading)</b>	<b>Kadish &amp; Schulhofer Criminal Law and Its Processes (6th Ed. 1995)</b>	<b>Boyce &amp; Perkins Criminal Law and Procedure: Cases and Materials (8th Ed. 1999)</b>	<b>Johnson Criminal Law (5th Ed. 1995)</b>	<b>Dressler Cases and Materials on Criminal Law (2nd Ed. 1999)</b>	<b>Kaplan, &amp; Weisberg Criminal Law: Cases and Materials (3rd Ed. 1996)</b>	<b>LaFare Modern Criminal Law (2nd Ed. 1988)</b>
<b>CHAPTER 7 ACCOMPLICE LIABILITY AND SOLICITATION</b>						
<b>I. Parties to Crime</b>	641-44	487-90	638-39	844-6	860-62	704-06
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<b>VII. Assault, Battery and Mayhem</b>	603-04	155-74, 192-3	584-86, 576-77	755-9	NC	101, 590-93
<b>VIII. Rape</b>	315-84	182-90	NC	353-434	1099-1155	165-75, 534
<b>IX. Kidnapping</b>	NC	174-5, 191-2	NC	NC	NC	NC

## CASEBOOK CORRELATION CHART (continued)

<b>Emanuel's Criminal Law Outline (by chapter and section heading)</b>	<b>Kadish &amp; Schulhofer Criminal Law and Its Processes (6th Ed. 1995)</b>	<b>Boyce &amp; Perkins Criminal Law and Procedure: Cases and Materials (8th Ed. 1999)</b>	<b>Johnson Criminal Law (5th Ed. 1995)</b>	<b>Dressler Cases and Materials on Criminal Law (2nd Ed. 1999)</b>	<b>Kaplan, &amp; Weisberg Criminal Law: Cases and Materials (3rd Ed. 1996)</b>	<b>LaFare Modern Criminal Law (2nd Ed. 1988)</b>
<b>CHAPTER 9 THEFT CRIMES</b>						
<b>II. Larceny</b>	1041-49, 1090- 1118, 1123-25	233-303	679-98	945-68, 981-2	1037-53	NC
<b>III. Embezzlement</b>	1049-64, 1118-22	309-14	698-702, 710-18	968-72	1045-47	NC
<b>IV. False Pretenses</b>	1064-79	314-32, 350-2	728-32, 738-57	972-84	1057-75	NC
<b>V. Consolidation of Theft Crimes</b>	1088-90	332-48	700	944	1054-57	NC
<b>VI. Receiving Stolen Property</b>	623-25	348-9	702-09	NC	822-35	NC
<b>VII. Burglary</b>	213, 602-03	195-228	13	NC	1095-98	109-12, 593-95
<b>VIII. Robbery</b>	1048-49	304-9	718-21	950	1093-95	NC
<b>IX. Blackmail and Extortion</b>	1048-49, 1079- 88	352-7	721-38	NC	1075-93	NC

## 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

## *ACTUS REUS AND MENS REA*

### I. GENERAL

- A. **Four elements:** All crimes have several basic common elements: (1) a **voluntary act** ("*actus reus*"); (2) a **culpable intent** ("*mens rea*"); (3) "**concurrence**" between the *mens rea* and the *actus reus*; and (4) **causation** of harm. [1]

### II. *ACTUS REUS*

- A. **Significance of concept:** The defendant must have committed a **voluntary act**, or "*actus reus*." Look for an *actus reus* problem anytime you have one of the following situations: (1) D has not committed physical acts, but has "guilty" **thoughts, words**, states of **possession** or **status**; (2) D does an **involuntary act**; and (3) D has an **omission**, or failure to act. [1]
- B. **Thoughts, words, possession and status:** *Mere thoughts* are never punishable as crimes. (*Example:* D writes in his diary, "I intend to kill V." This statement alone is not enough to constitute any crime, even attempted murder.) [1]

1. **Possession as criminal act:** However, mere **possession** of an object may sometimes constitute the necessary criminal act. (*Example:* Possession of narcotics frequently constitutes a crime in itself.) [1-2]

- a. **Knowledge:** When mere possession is made a crime, the act of "possession" is almost always construed so as to include only **conscious** possession. (*Example:* If the prosecution fails to prove that D knew he had narcotics on his person, there can be no conviction.) [1]

- C. **Act must be voluntary:** An act cannot satisfy the *actus reus* requirement unless it is **voluntary**. [3-5]

1. **Reflex or convulsion:** An act consisting of a **reflex** or **convulsion** does not give rise to criminal liability. [3]

**Example:** D, while walking down the street, is stricken by epileptic convulsions. His arm jerks back, and he strikes X in the face. The striking of X is not a voluntary act, so D cannot be held criminally liable. But if D had known beforehand that he was subject to such seizures, and unreasonably put himself in a position where he was likely to harm others — for instance, by driving a car — this initial act might subject him to criminal liability.

2. **Unconsciousness:** An act performed during a state of “*unconsciousness*” does not meet the *actus reus* requirement. But D will be found to have acted “unconsciously” only in rare situations. [3-4]

**Example:** If D can show that at the time of the crime he was on “automatic pilot,” and was completely unconscious of what he was doing, his act will be involuntary. (But the mere fact that D has *amnesia* concerning the period of the crime will *not* be a defense.)

3. **Hypnosis:** Courts are split about whether acts performed under *hypnosis* are sufficiently “involuntary” that they do not give rise to liability. The Model Penal Code (MPC) treats conduct under hypnosis as being involuntary. [4]
4. **Self-induced state:** In all cases involving allegedly involuntary acts, D’s *earlier voluntary act* may deprive D of the “involuntary” defense. [4]

**Example:** D, a member of a cult run by Leader, lets himself be hypnotized. Before undergoing hypnosis, D knows that Leader often gives his members orders under hypnosis to commit crimes. D can probably be held criminally liable for any crimes committed while under hypnosis, because he knowingly put himself in a position where this might result.

- D. **Omissions:** The *actus reus* requirement means that in most situations, there is no criminal liability for an *omission* to act (as distinguished from an affirmative act). [5-9]

**Example:** D sees V, a stranger, drowning in front of him. D could easily rescue V. D will normally not be criminally liable for failing to attempt to rescue V, because there is no general liability for omissions as distinguished from affirmative acts.

1. **Existence of legal duty:** But there are some “special situations” where courts deem D to have a *special legal duty to act*. Where this occurs, D’s omission may be punished under a statute that speaks in terms of positive acts. [6-8]
  - a. **Special relationship:** Where D and V have a *special relationship* — most notably a *close blood relationship* — D will be criminally liable for a failure to act. (*Example:* Parent fails to give food or water to Child, and Child dies. Even if there is no general statute dealing with child abuse, Parent can be held liable for murder or manslaughter, because the close relationship is construed to impose on Parent an affirmative duty to furnish necessities and thereby prevent death.) [6]
    - i. **Permitting child abuse:** Some courts have applied this theory to hold one parent liable for child abuse for *failing to intervene* to stop affirmative abuse by the other parent.
  - b. **Contract:** Similarly, a legal duty may arise out of a *contract*. (*Example:* Lifeguard is hired by City to guard a beach. Lifeguard intentionally fails to save Victim from drowning, even though he could easily do so. Lifeguard will probably be criminally liable despite the fact that his conduct was an omission rather than an act; his contract with City imposed a duty to take affirmative action.) [7]
  - c. **D caused danger:** If the *danger was caused* (even innocently) by *D himself*, D generally has an affirmative duty to then save V. [7]

**Example:** D digs a hole in the sidewalk in front of his house, acting legally under a building permit. D sees V about to step into the hole, but says nothing. V falls in and dies. D can be held criminally liable for manslaughter, because he created the condi-



tion — even though he did so innocently — and thus had an affirmative duty to protect those he knew to be in danger.

- d. **Undertaking:** Finally, D may come under a duty to render assistance if he *undertakes* to give assistance. This is especially true where D leaves V *worse off* than he was before, or effectively dissuades other rescuers who believe that D is taking care of the problem. [8]

**Example:** V is drowning, while D and three others are on shore. D says, “I’ll swim out to save V.” The others agree, and leave, thinking that D is taking care of the situation. Now, D will be criminally liable if he does not make reasonable efforts to save V.

### III. MENS REA

- A. **Meaning:** The term “*mens rea*” symbolizes the requirement that there be a “*culpable state of mind*.” [11]

1. **Not necessarily state of mind:** Most crimes require a true “*mens rea*,” that is, a state of mind that is truly guilty. But other crimes are defined to require merely “negligence” or “recklessness,” which is not really a state of mind at all. Nonetheless, the term “*mens rea*” is sometimes used for these crimes as well: thus one can say that “for manslaughter, the *mens rea* is recklessness.” There are also a few crimes defined so as to require no *mens rea* at all, the so called “strict liability” crimes. [11]

- B. **General vs. specific intent:** Court traditionally classify the *mens rea* requirements of various crimes into three groups: (1) crimes requiring merely “*general intent*”; (2) crimes requiring “*specific intent*”; and (3) crimes requiring merely *recklessness* or *negligence*. (Strict liability crimes form a fourth category, as to which there is no culpable mental state required at all.) [12-13]

1. “**General intent**”: A crime requiring merely “*general intent*” is a crime for which it must merely be shown that D *desired to commit the act which served as the actus reus*. [12]
2. “**Specific intent**”: Where a crime requires “*specific intent*” or “special intent,” this means that D, in addition to desiring to bring about the *actus reus*, must have desired to do *something further*. [13-13]

**Example of general intent crime:** Battery is usually a “general intent” crime. The *actus reus* is a physical injury to or offensive touching of another. So long as D intends to touch another in an offensive way, he has the “general intent” that is all that is needed for battery. (Thus if D touches V with a knife, intending merely to graze his skin and frighten him, this will be all the (general) intent needed for battery, since D intended the touching, and no other intent (such as the intent to cause injury) is required.)

**Example of specific intent crime:** For common-law burglary, on the other hand, it must be shown that D not only intended to break and enter the dwelling of another, but that he also intended to commit a felony once inside the dwelling. This latter intent is a “specific intent” — it is an intent other than the one associated with the *actus reus* (the breaking and entering).

3. **Significance:** The general/specific intent distinction usually matters in two situations: (1) where D is *intoxicated*; and (2) where D makes a *mistake* of law or fact. [13]
  - a. **Intoxication:** *Intoxication* rarely negates a crime of general intent, but may sometimes negate the specific intent for a particular crime. (Example: D breaks and enters, but is too drunk to have any intent to commit larceny or any other felony inside; D probably is not guilty of burglary.) [13]