CHAPTER 1

INTRODUCTION: SETTING THE STAGE

■ ■ ■

A. NATURE, SOURCES, AND LIMITS OF THE CRIMINAL LAW

HENRY M. HART, JR.—THE AIMS OF THE CRIMINAL LAW

23 Law and Contemporary Problems 401 (1958), 402–406.

* * * What do we mean by "crime" and "criminal"? Or, put more accurately, what should we understand to be "the method of the criminal law," the use of which is in question? This latter way of formulating the preliminary inquiry is more accurate, because it pictures the criminal law as a process, a way of doing something, which is what it is. * * *

What then are the characteristics of this method?

1. The method operates by means of a series of directions, or commands, formulated in general terms, telling people what they must or must not do. Mostly, the commands of the criminal law are "must-nots," or prohibitions, which can be satisfied by inaction. "Do not murder, rape, or rob." But some of them are "musts," or affirmative requirements, which can be satisfied only by taking a specifically, or relatively specifically, described kind of action. "Support your wife and children," and "File your income tax return."

2. The commands are taken as valid and binding upon all those who fall within their terms when the time comes for complying with them, whether or not they have been formulated in advance in a single authoritative set of words. They speak to members of the community, in other words, in the community's behalf, with all the power and prestige of the community behind them.

3. The commands are subject to one or more sanctions for disobedience which the community is prepared to enforce.

Thus far, it will be noticed, nothing has been said about the criminal law which is not true also of a large part of the noncriminal, or civil, law. The law of torts, the law of contracts, and almost every other branch of private law that can be mentioned operate, too, with general directions prohibiting or requiring described types of conduct, and the community's tribunals enforce these commands. What, then, is distinctive about the method of the criminal law?

Can crimes be distinguished from civil wrongs on the ground that they constitute injuries to society generally which society is interested in preventing? The difficulty is that society is interested also in the due fulfillment of contracts and the avoidance of traffic accidents and most of the other stuff of civil litigation. The civil law is framed and interpreted and enforced with a constant eye to these social interests. Does the distinction lie in the fact that proceedings to enforce the criminal law are instituted by public officials rather than private complainants? The difficulty is that public officers may also bring many kinds of "civil" enforcement actions—for an injunction, for the recovery of a "civil" penalty, or even for the detention of the defendant by public authority. Is the distinction, then, in the peculiar character of what is done to people who are adjudged to be criminals? The difficulty is that, with the possible exception of death, exactly the same kinds of unpleasant consequences, objectively considered, can be and are visited upon unsuccessful defendants in civil proceedings.

If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, the solution of the puzzle is simply that a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy. * * * [A] conviction for crime is a distinctive and serious matter—a something, and not a nothing. What is that something?

4. What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition. As Professor Gardner wrote not long ago, in a distinct but cognate connection:[13]

> The essence of punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a court-room; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.

If this is what a "criminal" penalty is, then we can say readily enough what a "crime" is. It is not simply anything which a legislature chooses to call a "crime." It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if

[13] Gardner, *Bailey v. Richardson and the Constitution of the United States,* 33 B.U.L.Rev. 176, 193 (1953). * * *

duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

5. The method of the criminal law, of course, involves something more than the threat (and, on due occasion, the expression) of community condemnation of antisocial conduct. It involves, in addition, the threat (and, on due occasion, the imposition) of unpleasant physical consequences, commonly called punishment. But if Professor Gardner is right, these added consequences take their character as punishment from the condemnation which precedes them and serves as the warrant for their infliction. Indeed, the condemnation plus the added consequences may well be considered, compendiously, as constituting the punishment. Otherwise, it would be necessary to think of a convicted criminal as going unpunished if the imposition or execution of his sentence is suspended.

In traditional thought and speech, the ideas of crime and punishment have been inseparable; the consequences of conviction for crime have been described as a matter of course as "punishment." The Constitution of the United States and its amendments, for example, use this word or its verb form in relation to criminal offenses no less than six times. Today, "treatment" has become a fashionable euphemism for the older, ugly word. * * * [T]o the extent that it dissociates the treatment of criminals from the social condemnation of their conduct which is implicit in their conviction, there is danger that it will confuse thought and do a disservice.

At least under existing law, there is a vital difference between the situation of a patient who has been committed to a mental hospital and the situation of an inmate of a state penitentiary. The core of the difference is precisely that the patient has not incurred the moral condemnation of his community, whereas the convict has.

NOTES AND QUESTIONS

1. Two scholars have defined a crime as "any social harm defined and made punishable by law." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 12 (3d ed. 1982). Is this definition helpful? Why, or why not? What do you think Professor Hart, supra, would say about this definition?

2. *The increasingly thin line between the "criminal" and "civil" methods of the law*. According to the preceding extract from Professor Hart's article, what is it that distinguishes a crime and the criminal process, on the one hand, from other legal directives and the civil process, on the other hand?

The criminal/civil divide has narrowed in the years since Hart's article was published. The civil law has taken on characteristics of the criminal law, and vice-versa. As you proceed with your studies, you should take note of those features of the law that seem to have blurred the criminal/civil distinction. Ask yourself whether there is good reason to preserve the distinct nature of criminal liability as it is described by Hart.

3. *Sources of American criminal law: the common law beginning*. The roots of American criminal law are found in English soil. The early colonists brought to this country, and in large part accepted as their own, the judge-made law, i.e., common law, of England. Over time, however, the American common law of crimes diverged in key respects from the English version.

Beginning in the late nineteenth century, many state legislatures asserted authority to enact criminal statutes. At first, they used their power to supplement the common law, but eventually they replaced it by legislation. Today, in every state and in the federal system, legislators, rather than judges, exercise primary responsibility for defining criminal conduct and for devising the rules of criminal responsibility.

4. *The legislature's role*. Professor Hart, supra, at 412, has explained the legislature's perspective in criminal lawmaking as follows:

> A legislature deals with crimes always in advance of their commission * * *. It deals with them not by condemnation and punishment, but only by threat of condemnation and punishment, *to be imposed always by other agencies*. It deals with them always by directions formulated in *general terms*. The primary parts of the directions have always to be interpreted and applied by the private persons—the potential offenders—to whom they are initially addressed. In the event of a breach or claim of breach, both the primary and the remedial parts must be interpreted and applied by various officials—police, prosecuting attorneys, trial judges and jurors, appellate judges, and probation, prison, and parole authorities—responsible for their enforcement. The attitudes, capacities, and practical conditions of work of these officials often put severe limits upon the ability of the legislature to accomplish what it sets out to accomplish.
>
> If the primary parts of a general direction are to work successfully in any particular instance, otherwise than by fortunate accident, four conditions have always to be satisfied: (1) the primary addressee who is supposed to conform his conduct to the direction must know (a) of its existence, and (b) of its content in relevant respects; (2) he must know about the circumstances of fact which make the abstract terms of the direction applicable in the particular instance; (3) he must be able to comply with it; and (4) he must be willing to do so.

Beyond the matter of efficacy, is it *fair* to convict a person if one or more of these conditions are not satisfied? Why, or why not?

5. *Limits on legislative lawmaking: the Constitution*. Legislators do not have unlimited lawmaking power. Their actions are subject to federal and state constitutional law. For example, the United States Constitution prohibits *ex post facto* legislation (Article 1, §§ 9 and 10) and cruel and unusual punishment (Eighth Amendment), and provides that persons may not be deprived of life, liberty or property without due process of law (Fifth

and Fourteenth Amendments). The study of the criminal law, therefore, necessarily includes consideration of these and other constitutional provisions.

Constitutional issues raise competing policy concerns. On the one hand, the doctrine of federalism teaches that each state has sovereign authority to promulgate and enforce its own criminal laws; and, pursuant to the doctrine of separation of powers, the legislative branch of government, rather than the judiciary, is now considered the appropriate lawmaking body. Therefore, when a *federal* court declares that a *state* statute is unconstitutional, it runs the risk of violating principles of federalism and of usurping legislative authority. On the other hand, President (later Chief Justice) William Howard Taft once pointed out that "[c]onstitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority." H.R.J.Res. 4, 62nd Cong., 1st Sess., 47 Cong.Rec. 4 (1911). Since legislative bodies typically represent the will of the majority, it is usually the responsibility of the judiciary to ensure that the rights of the minority are respected. Therefore, if courts defer too readily to legislatures, they run the risk of abdicating their responsibility for enforcing the Constitution.

6. *The present-day role of the judiciary*. Modern courts do not simply pass upon the constitutionality of legislation. They also play a vital role in the ascertainment of guilt in individual cases by interpreting criminal statutes. This role comes into play when a legislature has drafted a statute that is subject to reasonable dispute as to its meaning. In such circumstances there have developed a number of "presumptions with which courts approach debatable issues of interpretation." Hart, supra, at 435. As you proceed through this coursebook you will become familiar with some of these presumptions.

7. *Model Penal Code.* Until relatively recently, most state "criminal codes" were little more than collections of statutes, enacted by legislators in piecemeal fashion over many decades, defining various crimes and the punishments therefor.

These penal codes left much to be desired. First, not all common law crimes and defenses were codified, which meant that courts had to determine whether these gaps were intended or inadvertent. Second, many statutory systems were silent regarding essential penal doctrines, such as accomplice liability. Third, criminal codes typically included overlapping, even conflicting, penal statutes. Fourth, many codes applied internally inconsistent penological principles.

In order to bring coherence to the criminal law, the American Law Institute, an organization composed of eminent judges, lawyers, and law professors, set out in 1952 to develop a model code. A decade later, the Institute adopted and published the Model Penal Code and Commentaries thereto. Key portions of the Code (including some recent amendments, thereto) are set out in the appendix to this casebook.

The Model Penal Code has greatly influenced criminal law reform. Some states have adopted major portions of the Code. In other jurisdictions, courts look to it for guidance to fill holes in their own statutory systems. Perhaps most usefully, the Commentaries to the specific provisions of the Model Penal Code have shaped the reform debate in many state legislatures. For a fuller discussion of the status of the criminal law before the adoption of the Model Penal Code, see Sanford H. Kadish, *The Model Penal Code's Historical Antecedents,* 19 Rutgers L.J. 521 (1988). For a critical analysis of modern criminal codes, including an effort to rank them in terms of effectiveness, see Paul H. Robinson, Michael T. Cahill, & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. Rev. 1 (2000).

B. CRIMINAL LAW IN A PROCEDURAL CONTEXT: PRE-TRIAL

Criminal law casebooks use judicial opinions, mainly those of appellate courts, as the primary tool for exposing students to the general principles of the criminal law. This process can be misleading. It is easy to think that the commission of a crime inevitably results in a prosecution, culminating in a trial, conviction, and appeal of the conviction by the defendant. In fact, however, trials are the exception rather than the rule in the justice system. A great deal of the criminal process is barely visible in a criminal law course, although it is the focus of attention in courses relating to criminal procedure.

The criminal process begins, of course, when an alleged crime is reported to the police. According to the National Crime Victimization Survey (NCVS), an estimated 26.5 million persons, age 12 or older, were victims of violent or property crimes in the year 2012. Persons ages 12 through 24, and African-Americans and Native Americans, were victims of violent crimes at rates higher than older persons, and Hispanics and whites, respectively. However, only about 44 percent of violent victimizations and 34 percent of property crimes were reported to law enforcement agencies. U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Victimization 2012 (Oct. 2013, NCJ 243389).

The fact that a crime is reported does not ensure that an arrest will be made. The police might not investigate the report with vigor because they doubt (rightly or wrongly) the authenticity of the claim. Or, they may give the investigation low priority, because police departments have inadequate resources to investigate every reported offense. Unfortunately, as well, improper factors may affect criminal investigations. For example, the police may work hard to investigate a crime against a prominent individual, and yet do little to find the perpetrator of an offense against a homeless person. At times, some police departments have been accused of treating "black on black" crime—where the probable perpetrator and the victim are African-American—less

seriously than offenses involving white victims. And, until relatively recently, some police departments treated domestic violence as more of a "family matter" than a public offense.

Even if the police investigate a crime report thoroughly, insufficient evidence may exist to make an arrest. The United States Constitution prohibits the police from arresting a suspect unless they have probable cause to believe that the individual committed an offense. The concept of "probable cause" is a fluid one, not quantified in percentage terms, but which requires that there be a substantial chance that the suspect committed the offense under investigation.

If a suspect *is* arrested, the prosecutor must overcome various hurdles before a trial may be held. In many states, the arrestee is entitled to a preliminary hearing within two weeks after arrest, at which proceeding a judge must determine whether the arrest was justified. If the judge determines that there is probable cause to proceed with the prosecution, the prosecutor is permitted in some states to file an "information" in the trial court and to proceed to trial. An "information" is a document that sets out the formal charges against the accused and the basic facts relating to them.

In many states and in the federal system, however, the accused may not be brought to trial unless she is indicted by a grand jury. A grand jury consists of lay members of the community who consider evidence presented to them by a prosecutor, after which they deliberate privately, and determine whether adequate evidence exists to prosecute the accused. If there is sufficient evidence, the grand jury issues an "indictment," a document similar to an information.

Even if an indictment is issued or an information is filed, a trial might still not be held. First, the accused is entitled to make various pretrial motions which, if successful, sometimes require the dismissal of charges. For example, if evidence to be used by the Government was secured in violation of the Constitution, it may not be introduced at trial. On occasion, suppression of such evidence so weakens the prosecutor's case that charges must be dismissed.

Far more often, a defendant may plead guilty rather than proceed to trial. Nearly always, a guilty plea is the result of bargaining between the prosecutor and the defendant's lawyer. Typically, in exchange for a guilty plea, a prosecutor agrees to dismiss certain charges, reduce the severity of a charge, or agrees to recommend a more lenient sentence upon conviction. Guilty plea rates vary by jurisdiction, by offense, and by year, but the conviction rate obtained by guilty pleas typically nears or exceeds ninety percent.

Thus, in short, many crimes go unreported, many reported crimes do not result in arrest, and where arrests occur, the great majority of prosecutions are disposed of prior to trial, largely by guilty pleas.

C. CRIMINAL LAW IN A PROCEDURAL CONTEXT: TRIAL BY JURY

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The right to trial by jury applies to prosecutions of all non-petty offenses, i.e., any offense for which the maximum potential punishment exceeds incarceration of six months. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

In Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), the Supreme Court explained the history and rationale of the right to trial by jury this way:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. * * * Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

In the federal system and in most states, a jury in a criminal trial is composed of twelve persons, who must reach a unanimous verdict to acquit or to convict. However, juries as small as six in number are constitutionally permissible. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) (jury of six is allowed); Ballew v. Georgia, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) (jury of five is disallowed). Furthermore, state laws permitting non-unanimous verdicts by twelve-person juries are permissible, as long as the vote to convict constitutes a "substantial majority" of the jurors. Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (upholding a 9–3 guilty verdict).

The Sixth Amendment provides that "the accused shall enjoy the right to * * * an impartial jury * * *." A juror is not impartial if her state

of mind in reference to the issues or parties involved in the case would substantially impair her performance as a juror in accordance with the court's instructions on the law. In order to discover possible bias prior to trial, the judge and the attorneys examine prospective jurors ("venirepersons") regarding their attitudes and beliefs. The examination is called a "*voir dire*." If a venireperson's responses demonstrate partiality, the juror is excused "for cause."

The defense and the prosecutor are also entitled to exercise a limited number of "peremptory" challenges, i.e., challenges not based on cause. The primary purpose of peremptory challenges is to allow the parties to exclude persons from the jury whom they believe (often intuitively or as the result of such intangibles as "body language") are biased, but whose partiality was not adequately proven through the *voir dire*. Although the tradition of peremptory challenges is a venerable one, the Fourteenth Amendment Equal Protection Clause is violated if a prosecutor or defense lawyer exercises such a challenge solely on the basis of the venireperson's race or gender.

Because the purpose of the jury system is to defend against exercises of arbitrary power by the Government and to make available to defendants the common-sense judgment of the community, the accused is entitled to a jury drawn from a pool of persons constituting a fair cross-section of the community. This right is violated if large distinctive groups of persons, such as women or members of a racial or religious group, are systematically excluded from the jury pool for illegitimate reasons.

D. PROOF OF GUILT AT TRIAL

1. "PROOF BEYOND A REASONABLE DOUBT"

The Supreme Court ruled in In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that in order to provide "concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of our criminal law' "—the Due Process Clause of the United States Constitution requires the prosecutor to persuade the factfinder "beyond a reasonable doubt of every fact necessary to constitute the crime charged." The *Winship* Court justified the reasonable-doubt standard this way:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. * * *
>
> * * * The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

> Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. * * *
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

Justice Harlan, who concurred in *Winship,* conceded that the practical effect of the reasonable-doubt standard is to enhance the risk that factually guilty people will be set free. But, he explained:

> In a criminal case, * * * we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. * * * In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

NOTES AND QUESTIONS

1. Do you agree with Justice Harlan that it *is* better to let a guilty person go free than to convict an innocent individual? If so, why? What if the guilty person who is freed because of the presumption-of-innocence and reasonable-doubt requirements is a serial murderer or rapist? If you still believe that Harlan is correct, how far would you take this principle? Do you agree with Blackstone that "it is better that *ten* guilty persons escape, than that one innocent suffer"? 4 Blackstone, Commentaries on the Laws of England *352 (1765) (emphasis added). How about a hundred? See Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, 7 Soc. Phil. & Pol'y 226 (Spring 1990).

In this regard, consider the following defense of the heavy burden of proof imposed on the Government by the Constitution, expressed by a jury foreperson to his fellow jurors during deliberations in a New York criminal case:

> * * * I think that we all understand why [the burden of proof is so great]: to protect citizens from the * * * tremendous power of the state.
>
> We understand that power much better after the last four days [of deliberation]. We discovered that it is, fundamentally, an absolute power, and a frightening one. We discovered that a man in a chair and a robe [the judge] could tell us we couldn't go home, that

> we couldn't talk to our families * * *. He could send us to jail.[a] * * * We discovered that, in the end, there seemed to be no limit to the power of the state over us, once we fell into its hands.
>
> * * * Knowing what we know now, imagine that we had a chance to set up our own state * * *. What kind of protections would we try to offer to the citizens? I think * * * we would put the heaviest possible burden on the state before we would let it take away a person's liberty, and we would do that because we've learned the secret of government: that the state, any state, is, in the end, like a monster, more powerful than everything else. * * *
>
> Yesterday, in a moment I will never forget [two jurors] * * * reminded us of a transcendent idea: that true justice, final justice, absolute justice, belongs to God; human justice can only be cautious, not perfect. For this reason the burden is so heavy.

D. Graham Burnett, A Trial by Jury 163–164 (2001). Are you persuaded?

If there is already a distinction between "human justice" and "true justice," do you believe that the law should permit, if you will, "conviction without conviction"? One scholar recently suggested that there should be "different classes of convictions, * * * such as conviction on guilt beyond a reasonable doubt, conviction on guilt by clear and convincing evidence, or conviction by preponderance of the evidence"; the punishment that flows from these different levels of conviction would be "adjusted to the corresponding conviction category." Talia Fisher, *Conviction Without Conviction*, 96 Minn. L. Rev. 833, 836 (2012). Thus, for example, conviction beyond a reasonable doubt for murder would carry that jurisdiction's most severe punishment (death or life imprisonment), conviction based on a somewhat lesser standard of guilt would carry a sentence of less than life imprisonment, and conviction based on mere preponderance of the evidence "would entail only the lowest of possible sanction alternatives (such as a fine)." Id.

2. *Defining "beyond a reasonable doubt."* How onerous a burden is "proof beyond a reasonable doubt"? The Supreme Court has said that the standard requires that a juror's mind be in a "subjective state of near certitude" of guilt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Can "near certitude" be quantified? One Nevada trial judge tried to do so by distinguishing the burden required in a criminal case from those required to arrest a suspect (probable cause) and to obtain a civil judgment (preponderance of the evidence). He told jurors that on a scale of zero to ten, "the standard of probable cause [is] about one, and the burden of persuasion in civil trials [is] at just over five." As for reasonable doubt it is about "seven

---

[a] The judge ordered the jurors sequestered during deliberation, i.e., they were not permitted to go home, and were not permitted to talk to family members without permission and supervision. The jurors learned that if they violated the judge's orders, they could be held in contempt of court and jailed. In a couple of circumstances, the jurors felt that the judge acted officiously in dealing with jurors' requests.—Ed.

and a half, if you had to put it on a scale." Do you believe that if a juror feels that there is a 75% chance that the defendant is guilty that she is in a "subjective state of near certitude" of guilt?

The Nevada Supreme Court ruled that the judge's explanation was improper, without deciding whether the particular number—seven and a half—was too low. It stated, as have nearly all courts when confronted with the issue, that "[t]he concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." McCullough v. State, 99 Nev. 72, 657 P.2d 1157 (1983).

3. If "reasonable doubt" is not quantifiable, how *should* jurors be instructed on the concept? According to some observers, "the meaning of reasonable doubt is self-evident and * * * efforts to define it lead only to confusion or even dilution of the state's burden of proof." State v. Portillo, 182 Ariz. 592, 898 P.2d 970 (1995). According to the Supreme Court, "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). Furthermore, if a court *does* choose to define the concept, the Constitution does not require any particular form or words be used, as long as there is no reasonable likelihood that the definition, taken as a whole, would allow a conviction insufficient to meet the constitutional standard.

4. *A thought experiment*. Pretend you are on a jury in a criminal case. The judge will instruct you on the meaning of "reasonable doubt" in one of the following ways. Which one of the instructions below do you find most helpful as a juror? As a separate thought experiment, if you were the defendant's attorney, which instruction would you prefer?

The "Moral Certainty" Instruction

> [Reasonable doubt] is not merely possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (Based on Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850).)

The "Firmly Convinced" Instruction

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty. (State v. Portillo, 182 Ariz. 592, 898 P.2d 970 (1995) [based on Federal Judicial Center, Pattern Criminal Jury Instructions 17–18 (Instruction 21) (1987)].)

The "No Waver or Vacillation" Instruction

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers or vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable. (Standard Jury Instructions in Criminal Cases (97–1), 697 So.2d 84 (Fla.1997).)

The "No Real Doubt" Instruction

It is the Government that has the burden of proving a defendant guilty beyond a reasonable doubt. If it fails to do so, you must, under your oath, find the defendant not guilty.

But while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. The law does not require mathematical certainty, because that is generally impossible. What is required is that the Government's proof exclude any reasonable doubt concerning the defendant's guilt.

A reasonable doubt is just precisely what it says. It is a real doubt based upon reason and common sense after a careful and impartial consideration of all of the evidence in the case. Proof beyond a reasonable doubt, stated a little bit differently, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. (United States v. Daniels, 986 F.2d 451, opinion withdrawn and superseded in part on rehearing, 5 F.3d 495 (11th Cir.1993).)

5. *The truth and nothing but the truth?* What if a judge tells a jury that "you are guided solely by the evidence in the case and the crucial, hard-core question you must ask yourselves . . . is, where do you find the truth? The only triumph in any case, whether it be civil or criminal, is whether or not the truth has triumphed." United States v. Shamsideen, 511 F.3d 340 (2d

Cir. 2008). If you represented the defendant, would you have a legitimate basis for objecting to this instruction?

6. *A final thought*. Alexander Volokh, *n Guilty Men*, 146 U. Pa. L. Rev. 173, 211 (1997):

> The story is told of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed. The Chinese professor thought for a second and asked, "Better for whom?"

How would you answer the Chinese professor's question?

2. ENFORCING THE PRESUMPTION OF INNOCENCE

OWENS V. STATE

Court of Special Appeals of Maryland, 1992.
93 Md.App. 162, 611 A.2d 1043.

MOYLAN, JUDGE.

This appeal presents us with a small gem of a problem from the borderland of legal sufficiency. It is one of those few occasions when some frequently invoked but rarely appropriate language is actually pertinent. Ironically, in this case it was not invoked. The language is, "[A] conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence."

We have here a conviction based upon circumstantial evidence alone. The circumstance is that a suspect was found behind the wheel of an automobile parked on a private driveway at night with the lights on and with the motor running. Although there are many far-fetched and speculative hypotheses that might be conjured up (but which require no affirmative elimination), there are only two unstrained and likely inferences that could reasonably arise. One is that the vehicle and its driver had arrived at the driveway from somewhere else. The other is that the driver had gotten into and started up the vehicle and was about to depart for somewhere else.

The first hypothesis, combined with the added factor that the likely driver was intoxicated, is consistent with guilt. The second hypothesis, because the law intervened before the forbidden deed could be done, is consistent with innocence. With either inference equally likely, a fact finder could not fairly draw the guilty inference and reject the innocent with the requisite certainty beyond a reasonable doubt. We are called upon, therefore, to examine the circumstantial predicate more closely and to ascertain whether there were any attendant and ancillary

circumstances to render less likely, and therefore less reasonable, the hypothesis of innocence. Thereon hangs the decision.

The appellant, Christopher Columbus Owens, Jr., was convicted * * * by Judge D. William Simpson, sitting without a jury, of driving while intoxicated. Upon this appeal, he raises the single contention that Judge Simpson was clearly erroneous in finding him guilty because the evidence was not legally sufficient to support such finding.

The evidence, to be sure, was meager. The State's only witness was Trooper Samuel Cottman, who testified that at approximately 11 P.M. on March 17, 1991, he drove to the area of Sackertown Road in Crisfield in response to a complaint that had been called in about a suspicious vehicle. He spotted a truck matching the description of the "suspicious vehicle." It was parked in the driveway of a private residence.

The truck's engine was running and its lights were on. The appellant was asleep in the driver's seat, with an open can of Budweiser clasped between his legs. Two more empty beer cans were inside the vehicle. As Trooper Cottman awakened him, the appellant appeared confused and did not know where he was. He stumbled out of the vehicle. There was a strong odor of alcohol on his breath. His face was flushed and his eyes were red. When asked to recite the alphabet, the appellant "mumbled through the letters, didn't state any of the letters clearly and failed to say them in the correct order." His speech generally was "slurred and very unclear." * * * A check with the Motor Vehicles Administration revealed, moreover, that the appellant had an alcohol restriction on his license. The appellant declined to submit to a blood test for alcohol.

After the brief direct examination of Trooper Cottman (consuming but 3½ pages of transcript), defense counsel asked only two questions, establishing that the driveway was private property and that the vehicle was sitting on that private driveway. The appellant did not take the stand and no defense witnesses were called. The appellant's argument as to legal insufficiency is clever. He chooses to fight not over the fact of drunkenness but over the place of drunkenness. He points out that his conviction was under the Transportation Article, which is limited in its coverage to the driving of vehicles on "highways" and does not extend to driving on a "private road or driveway."

We agree with the appellant that he could not properly have been convicted for driving, no matter how intoxicated, back and forth along the short span of a private driveway. The theory of the State's case, however, rests upon the almost Newtonian principle that present stasis on the driveway implies earlier motion on the highway. The appellant was not convicted of drunken driving on the private driveway, but of drunken driving on the public highway before coming to rest on the private driveway.

It is a classic case of circumstantial evidence. From his presence behind the wheel of a vehicle on a private driveway with the lights on and the motor running, it can reasonably be inferred that such individual either 1) had just arrived by way of the public highway or 2) was just about to set forth upon the public highway. The binary nature of the probabilities—that a vehicular odyssey had just concluded or was just about to begin—is strengthened by the lack of evidence of any third reasonable explanation, such as the presence beside him of an inamorata or of a baseball game blaring forth on the car radio. Either he was coming or he was going.

The first inference would render the appellant guilty; the second would not. * * * For the State to prevail, there has to be some other factor to enhance the likelihood of the first inference and to diminish the likelihood of the second. We must look for a tiebreaker. * * *

In trying to resolve whether the appellant 1) had just been driving or 2) was just about to drive, it would have been helpful to know whether the driveway in which he was found was that of his own residence or that of some other residence. If he were parked in someone else's driveway with the motor still running, it would be more likely that he had just driven there a short time before. If parked in his own driveway at home, on the other hand, the relative strength of the inbound inference over the outbound inference would diminish.

The driveway where the arrest took place was on Sackertown Road. The charging document (which, of course, is not evidence) listed the appellant's address as 112 Cove Second Street. When the appellant was arrested, presumably his driver's license was taken from him. Since one of the charges against the appellant was that of driving in violation of an alcohol restriction on his license, it would have been routine procedure to have offered the license, showing the restriction, into evidence. In terms of our present legal sufficiency exercise, the license would fortuitously have shown the appellant's residence as well. Because of the summary nature of the trial, however, the license was never offered in evidence. For purposes of the present analysis, therefore, the appellant's home address is not in the case. We must continue to look for a tiebreaker elsewhere.

Three beer cans were in evidence. The presence of a partially consumed can of beer between the appellant's legs and two other empty cans in the back seat would give rise to a reasonable inference that the appellant's drinking spree was on the downslope rather than at an early stage. At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car. The appellant's state of unconsciousness, moreover, enforces that inference. One passes out on the steering wheel after one has been

drinking for some time, not as one only begins to drink. It is not a reasonable hypothesis that one would leave the house, get in the car, turn on the lights, turn on the motor, and then, before putting the car in gear and driving off, consume enough alcohol to pass out on the steering wheel. Whatever had been going on (driving and drinking) would seem more likely to have been at a terminal stage than at an incipient one.

Yet another factor would have sufficed, we conclude, to break the tie between whether the appellant had not yet left home or was already abroad upon the town. Without anything further as to its contents being revealed, it was nonetheless in evidence that the thing that had brought Trooper Cottman to the scene was a complaint about a suspicious vehicle. The inference is reasonable that the vehicle had been observed driving in some sort of erratic fashion. Had the appellant simply been sitting, with his motor idling, on the driveway of his own residence, it is not likely that someone from the immediate vicinity would have found suspicious the presence of a familiar neighbor in a familiar car sitting in his own driveway. The call to the police, even without more being shown, inferentially augurs more than that. It does not prove guilt in and of itself. It simply makes one of two alternative inferences less reasonable and its alternative inference thereby more reasonable.

The totality of the circumstances are, in the last analysis, inconsistent with a *reasonable* hypothesis of innocence. They do not, of course, foreclose the hypothesis but such has never been required. They do make the hypothesis more strained and less likely. By an inverse proportion, the diminishing force of one inference enhances the force of its alternative. It makes the drawing of the inference of guilt more than a mere flip of a coin between guilt and innocence. It makes it rational and therefore within the proper purview of the factfinder. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). We affirm.

NOTES AND QUESTIONS

1. The offense of DWI ["driving while intoxicated" or "driving while impaired"], which was the charge against Owens, does not require evidence regarding the driver's blood alcohol content (BAC). Instead, the offense is based on the arresting officer's opinion that the driver was intoxicated or otherwise impaired, in view of the driver's apparent lack of mental or physical capacity to operate the vehicle.

2. In *Owens,* the trial judge served as trier of fact, the role ordinarily reserved for a jury. If you had been a juror hearing this case, would you have voted to convict Owens? Look again at the jury instructions on burden of proof set out in the Note 4 "thought experiment" immediately preceding *Owens*. Based on any of these instructions (for example, focus on the "Firmly

Convinced" instruction), are you convinced of Owens's guilt beyond a reasonable doubt?

3. *The role of the trial judge in enforcing the presumption of innocence*. In a criminal trial, the prosecutor ordinarily makes an opening statement to the trier of fact, which is typically the jury, in which she outlines the evidence she plans to present at trial. The defense may also make an opening statement now, or may wait and give it when it presents its own case.

After opening statements, the prosecutor calls her witnesses. Upon completion of the State's case, the defense may make a motion for directed verdict of acquittal. In doing so, the defense asserts the presumption of innocence and claims thereby that the Government failed to overcome the presumption in its presentation of its case. The effect of such a motion, if granted, is the immediate termination of the trial in defendant's favor.

If the motion for directed verdict is denied, the defense presents its case, after which the prosecutor is permitted to introduce rebuttal testimony. At the conclusion, the defense may again move for a directed verdict of acquittal. If the motion is denied (or is not made), the parties make closing arguments to the jury, after which the judge (upon consultation with the parties) instructs the jury on the principles of law relevant to the case, including the constitutional presumption of innocence.

On what basis does a judge decide whether to grant a motion for directed verdict and, thereby, strip the jury of its factfinding role?[b] The following explanation is helpful:

> The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen *must* necessarily have such a doubt, the judge *must* require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind *might* fairly have a reasonable doubt or *might* fairly *not* have one, the case is for the jury, and the decision is for the jurors to make. * * * Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

[b] Because a defendant has a constitutional right to trial by jury, which includes the right to have the jury reach the requisite finding of guilt, a trial judge may not direct a verdict for conviction, no matter how overwhelming the evidence of guilt. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there *must* be such a doubt in a reasonable mind, he *must* grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he *must* let the jury decide the matter.

Curley v. United States, 160 F.2d 229 (D.C.Cir.1947) (emphasis added).

4. *The presumption of innocence on appeal*. At the conclusion of the opinion, the Court of Special Appeals stated that drawing an inference of guilt in this case involved "more than a flip of a coin between guilt and innocence," and that a finding of guilt was "rational and therefore within the proper purview of the factfinder." How can this be enough to meet the proof-beyond-a-reasonable-doubt standard? Why did the court apply this test? To understand why, one must keep in mind the distinction between the standard that the factfinder (typically, a jury) must apply and the standard an appellate court must follow after a conviction, if the defendant appeals on the ground that the evidence was insufficient to convict.

Keep in mind that an appellate court is not the factfinder in a criminal case. That is the jury's role. The jury is ordinarily in a better position than an appellate court to resolve conflicting factual claims because it sees all of the evidence and, more importantly, is able to evaluate the credibility of the witnesses. Consequently, many jurisdictions provide, in essence, that when jurors are confronted with a record of historical facts that could support conflicting inferences, an appellate court should assume that the jury resolved those factual conflicts in favor of the prosecution. The relevant inquiry, then, is whether, after viewing the evidence *in the light most favorable to the prosecution*, any rational trier of fact *could* have found the essential elements of the crime proven beyond a reasonable doubt. See *Jackson v. Virginia*, cited at the end of *Owens*. With that understanding, if you were an appellate court judge and applied this standard in *Owens*, would you have affirmed the conviction?

E. JURY NULLIFICATION

INTRODUCTORY COMMENT

Suppose that a prosecutor proves beyond a reasonable doubt every fact necessary to constitute the crime charged, but the jury—the community's representative—does not want to convict the defendant. Perhaps the jurors believe that the defendant's conduct should not

constitute a crime, although it does. Or, perhaps the jury feels that the police mistreated the defendant and it wants to acquit to send a message of its displeasure. Or, perhaps, the jurors simply feel compassion for the accused. In such circumstances, may the jury ignore the facts and the judge's instructions on the law and acquit the defendant? If it does so, this is called "jury nullification."

The Fifth Amendment Double Jeopardy Clause ("No person shall * * * be subject for the same offense to be twice put in jeopardy") bars the Government from reprosecuting a defendant after a jury acquittal. Therefore, ultimately, a jury has the raw power to acquit for any reason whatsoever. But, *should* juries nullify the law? And, since they have the power to do so, should they be informed of their power of nullification? These questions are considered in the next case.

STATE v. RAGLAND

Supreme Court of New Jersey, 1986.
105 N.J. 189, 519 A.2d 1361.

WILENTZ, C.J. * * *

[Defendant Ragland, a previously convicted felon, was prosecuted for various offenses, including armed robbery and possession of a weapon by a convicted felon. At the conclusion of the trial of the latter offense, the judge instructed the jury that if it found that the defendant was in possession of a weapon during the commission of the robbery, "you must find him guilty of the [possession] charge."

On appeal, the defendant argued that the judge's use of the word "must" in the instruction conflicted with the jury's nullification power, which he claimed was an essential attribute of his constitutional right to a jury trial. He also contended that the judge should have informed the jury regarding its power of nullification, as follows:

> "You are here as representatives of your community. Accordingly you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant, even if the State has proven its case, if you believe that justice requires such a result."]

The defendant would require a charge that states, in effect, that if the jury does not find a, b and c beyond a reasonable doubt, it must find defendant not guilty, but that if it does find a, b and c beyond a reasonable doubt, then it may find defendant guilty. In support of this change in present practice, defendant contends that the jury's power of nullification—the unquestioned power of the jury to acquit with finality no matter how overwhelming the proof of guilt—is an essential attribute of a defendant's right to trial by jury; that use of the word "must" conflicts with that attribute, for it incorrectly advises the jury that if it finds the

proof of guilt beyond a reasonable doubt it *must* convict, whereas the truth is that it need not do so, it may, in fact, acquit; that "must" convict, therefore, should never be used. * * *

While defendant's arguments suggest that the ultimate object is to assure that the jury is not impeded by this coercive language from performing its proper role, the effect of the change is somewhat different. Its only effect, its only tendency, is to make it more likely that juries will nullify the law, more likely, in other words, that no matter how overwhelming the proof of guilt, no matter how convinced the jury is beyond any reasonable doubt of defendant's guilt, despite the law, it will acquit. Even without an explicit charge on the power of nullification, the jury must understand from this contrasting language (*must* acquit but *may* convict) that it is quite properly free, and quite legally free (since it is the court who is telling it "may") to acquit even if it is convinced beyond a reasonable doubt of defendant's guilt. * * *

* * * We have been able to find but one federal case that supports the defendant's argument, *United States v. Hayward,* 420 F.2d 142 (D.C.Cir.1969). This seventeen-year-old case has not been followed in other federal courts on this proposition. * * *

We conclude that the power of the jury to acquit despite not only overwhelming proof of guilt but despite the jury's belief, beyond a reasonable doubt, in guilt, is not one of the precious attributes of the right to trial by jury. It is nothing more than a power. By virtue of the finality of a verdict of acquittal, the jury simply has the *power* to nullify the law by acquitting those believed by the jury to be guilty. We believe that the exercise of that power, while unavoidable, is undesirable and that judicial attempts to strengthen the power of nullification are not only contrary to settled practice in this state, but unwise both as a matter of governmental policy and as a matter of sound administration of criminal justice.

It is only relatively recently that some scholars have characterized this power as part of defendant's right to trial by jury and have defended it as sound policy. Like defendant, they take the position that the exercise of the power is essential to preserve the jury's role as the "conscience of the community."

There are various elements in this view of the jury as the "conscience of the community." Some laws are said to be unfair. Only the jury, it is thought, is capable of correcting that unfairness—through its nullification power. Other laws, necessarily general, have the capacity of doing injustice in specific applications. Again, only the jury can evaluate these specific applications and thereby prevent injustice through its nullification power. Cast aside is our basic belief that only our elected representatives may determine what is a crime and what is not, and only they may revise that law if it is found to be unfair or imprecise; only they and not twelve people whose names are picked at random from the box.

Finally, there is an almost mystical element to this contention about the "conscience of the community": before anyone is imprisoned, that person is entitled to *more* than a fair trial even when such a trial is pursuant to a fair law. He is entitled to the benefit of the wisdom and compassion of his peers, entitled to the right to have them conclude that he is guilty beyond any doubt, but that he shall be acquitted and go free because of some irrational, inarticulable instinct, some belief, some observation, some value, or some other notion of that jury.

If the argument is that jury nullification has proven to serve society well, that proof has been kept a deep secret. It is no answer to point to the occasions when laws that are deemed unjust have, in effect, been nullified by the jury. That proves only that the power may have done justice in those limited instances, without reflecting on whether, even in those instances, the cost of that justice exceeded its benefit, or whether in other instances it has done more harm, on balance, than the good. We know so little about this power that it is impossible to evaluate it in terms of results.

Since there is neither constitutional nor other legal authority mandating the proposed change in jury instructions, its ultimate justification must be that this new formulation of the proper charge is desirable; desirable that a jury should *not* be compelled to follow the law, for compulsion to follow the law is the natural tendency of the use of the word "must"; desirable that a jury should be left free to ignore the law, for that is the obvious tendency of telling the jury simply that it "may," or is "authorized" to, bring in a verdict of guilty, after saying it "must" find defendant not guilty. If indeed this is a desirable state of affairs, then the jury should be told of its power, so as to leave no doubt that the jury *knows* it is not compelled to bring back a guilty verdict despite its finding beyond a reasonable doubt that the defendant has committed the crime.
* * *

Other consequences should follow a conclusion that the nullification power is desirable. Counsel should be told that they may address that point in summation, that defense counsel should be allowed to argue to the jury that it should *not* apply the law given by the court, but rather should follow its own conscience, along with whatever argument counsel deems persuasive, and the prosecutor similarly should address these otherwise irrelevant issues, presumably including an encomium on law and order. If the court makes introductory remarks to give the jury some idea of its role (as is customary), it should add to the usual explanation—that the jury is the finder of the facts and the judge is the finder of the law—the qualification that ultimately, regardless of the facts and regardless of the law, the jury, and only the jury, will determine guilt or innocence. On voir dire, potential jurors, in addition to being asked whether they believe they will be able to obey the court's charge, should

also be asked if they believe they will be able to ignore the court's charge. If the nullification power is desirable, then, obviously, juries should include only those people who are capable of exercising it.[7]

If we are correct, that is, if such a change in the charge given to the jury is not compelled either by constitution, by statute, or by common law, then the question boils down to one of policy and the power of this Court. In deciding that question, it is essential to recognize precisely what we are talking about. There is no mystery about the power of nullification. It is the power to act against the law, against the Legislature and the Governor who made the law. In its immediate application, it transforms the jury, the body thought to provide the ultimate assurance of fairness, into the only element of the system that is permissibly arbitrary. * * * It is difficult to imagine a system more likely to lead to cynicism. * * *

The fundamental defect in jury nullification is obvious. It is a power that is absolutely inconsistent with the most important value of Western democracy, that we should live under a government of laws and not of men. * * *

Jury nullification is an unfortunate but unavoidable power. It should not be advertised, and, to the extent constitutionally permissible, it should be limited. Efforts to protect and expand it are inconsistent with the real values of our system of criminal justice. * * *

[The conviction was reversed, and a new trial ordered, on other grounds.]

NOTES AND QUESTIONS

1. Is jury nullification as bad as *Ragland* suggests? American courts were not always categorically opposed to jury nullification. Consider Supreme Court Chief Justice John Jay's charge to a special jury assembled by the high court in Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (emphasis added):

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy*. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand,

[7] Our review of recent jury instructions in criminal cases shows that the trial court invariably instructs the jury that it, and not the judge, is the final arbiter of the facts but that the judge determines the law, and that the jury is controlled by that law and *must* follow it. Defendant claims that this settled charge is also impermissible. * * *

> presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

And, at least one legislature, New Hampshire, recently enacted a statute providing that "[i]n all criminal proceedings, the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy." N.H. Rev. Stat. § 519.23–a (2013).

Consider as well these observations by Judge Thomas A. Wiseman, Jr., in United States v. Datcher, 830 F.Supp. 411 (M.D. Tenn. 1993):

> The drafters of the Constitution "clearly intended [the right of trial by jury] to protect the accused from oppression by the Government." Part of this protection is embodied in the concept of jury nullification: "In criminal cases, a jury is entitled to acquit the defendant because it has no sympathy for the government's position." "The Founding Fathers knew that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience." Although we may view ourselves as living in more civilized times, there is obviously no reason to believe the need for this protection has been eliminated. Judicial and prosecutorial excesses still occur, and Congress is not yet an infallible body incapable of making tyrannical laws.
>
> The power of a jury to nullify extends back to seventeenth century England. In *Bushell's Case*, Vaughn. 135, 124 Eng.Rep. 1006 (C.P. 1670), William Penn was acquitted of unlawful assembly notwithstanding damning facts * * *. The roots of jury nullification in this country reach back to 1735 and the prosecution of Peter Zenger for seditious libel. There the defendant admitted the facts charged but pleaded non-culpability, and the jury acquitted. "In the century following the Zenger case, it was generally recognized in American jurisprudence that the jury, agent of the sovereign people, had a right to acquit those whom it felt it unjust to call criminal." * * *
>
> This respect for nullification flows from the role of the jury as the "conscience of the community" in our criminal justice system. As Justice White wrote in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." This interposition serves the essential purpose of the jury trial, which is "to prevent oppression by the Government." * * *
>
> When measured by this standard, a defendant's right to inform the jury of that information essential "to prevent oppression by the Government" is clearly of constitutional magnitude. That is, if

community oversight of a criminal prosecution is the primary purpose of a jury trial, then to deny a jury information necessary to such oversight is to deny a defendant the full protection to be afforded by jury trial. Indeed, to deny a defendant the possibility of jury nullification would be to defeat the central purpose of the jury system.

Argument against allowing the jury to hear information that might lead to nullification evinces a fear that the jury might actually serve its primary purpose, that is, it evinces a fear that the community might in fact think a law unjust. The government, whose duty it is to seek justice and not merely conviction, should not shy away from having a jury know the full facts and law of a case. Argument equating jury nullification with anarchy misses the point that in our criminal justice system the law as stated by a judge is secondary to the justice as meted out by a jury of the defendant's peers. We have established the jury as the final arbiter of truth *and* justice in our criminal justice system; this court must grant the defendant's motion if the jury is to fulfill this duty.

On the other hand, see United States v. Luisi, 568 F.Supp.2d 106 (D. Mass. 2008):

History has not vindicated nullification. To be sure, there have been isolated instances of "benevolent" nullification that "some may regard as tolerable." Proponents of nullification often cite the acquittal of William Penn [and Peter Zenger] * * * But these examples, culled from bygone centuries, are exceptions to an otherwise abhorrent strain of lawlessness.

By and large, when juries have felt free to apply their own law the result was what Professor Randall Kennedy has described as a "sabotage of justice." "Consider, for example, the two hung juries in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old [African-American] Emmett Till." History is replete with such "shameful examples of how nullification has been used to sanction murder and lynching." * * *

Nullification frustrates the sole purpose of the jury. As this Court has instructed juries for some thirty years now, the word verdict comes from two Latin words meaning roughly "to speak the truth." Nullifiers, however, would render verdicts without regard to the truth. Once juries begin to deviate from this core function, our justice system has no more legitimacy than a Kangaroo court. * * * There are undoubtedly well-intentioned would-be nullifiers who believe that they are aiding the cause of justice. In fact, they are undermining the jury's core function. By adding fuel to the flames of

> anti-jury sentiment, nullification threatens to erode the jury system and along with it the rule of law and the independent judiciary.

2. Although jurors are almost never informed of the nullification power before they begin deliberating, what should a trial judge do if the jury asks the judge directly during deliberations whether it has the power to nullify? See People v. Dillon, 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697 (1983).

3. In their classic study of American jury behavior, Harry Kalven, Jr. and Hans Zeisel observed that "[i]n many ways the jury is the law's most interesting critic." Harry Kalven, Jr. & Hans Zeisel, The American Jury 219 (1966). Among the factors jurors consider in determining whether to acquit a defendant are: (1) the personal characteristics of the defendant; (2) the degree of harm caused by the defendant; (3) the jurors' belief that the victim was partially at fault for the offense; (4) their view of the morality or wisdom of the law that the defendant violated; (5) their belief that the defendant has been punished enough or that violation of the offense carries too harsh a penalty; and (6) their perception that the police or prosecutor acted improperly in bringing the case.

To the extent that the Kalven & Zeisel study might suggest that juries are more likely than judges to acquit defendants (whether on nullification or other grounds), this may be an outdated assumption. At least in federal courts, the average conviction rate of juries between 1946 and 2002 was 75%; judges convicted at roughly the same rate (73%). In the last decade of this period, however, judges have proven considerably more lenient: Juries have convicted 86% of the time, compared to 54% of the time by judges. Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 Wash. U. L.Q. 151, 164 (2005).

4. *Race-based jury nullification*. Consider Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 715 (1995), in which the author, a former federal prosecutor and now law professor, advocates race-based jury nullification. According to Butler, African-American jurors should *not* nullify the law in cases involving black defendants charged with violent crimes, such as murder, rape, and assault. However, in prosecutions of African-Americans for nonviolent offenses, such as theft,

> nullification is an option that the juror should consider, although there should be no presumption in favor of it. A jury might vote for acquittal, for example, when a poor woman steals from Tiffany's, but not when the same woman steals from her next-door neighbor. Finally, in * * * "victimless" crimes likes narcotics offenses, there should be a presumption in favor of nullification.

In an address published in *Race-Based Jury Nullification: Case-in-Chief*, 30 J. Marshall L. Rev. 911, 912–13, 918–21 (1997), Professor Butler defended his proposal this way:

I teach criminal law. My students learned that prison is for people who are the most dangerous and the most immoral in our society. Is there anyone here who really believes that over half of the most immoral and dangerous people in the United States are African-American when they constitute only 12 percent of the population? When I look at those statistics, I think that punishment, prison, and criminal law have become the way that we treat the problems of the poor, especially poor African-American people. I think that is immoral. I am confident that one day we, as a society, will understand that, but African-American people cannot afford to wait that long. * * *

Now, to prevent that kind of "just us" justice, I advocate a program of black self-help outside and inside the courtroom. Outside the courtroom self-help includes the kind of community-building efforts that many of us are already engaged in: mentoring, tutoring, after-school programs, providing legal and medical care to the poor, working with inmates, and taking better care of our families. * * * Inside the courtroom self-help includes the responsible use of prosecutorial discretion, especially by black prosecutors. It also includes selective jury nullification for victimless crimes. * * *

Now, I am a former prosecutor. Nullification is a partial cure that I come to reluctantly and for moral reasons. To me it is not enough to say that there is a power to nullify; there also has to be some moral basis for this power. In the [*Yale*] article I make several moral claims as to the power. I am going to quickly tell you about two.

One is this phenomenon of democratic domination. * * * The reason why I believe that African-American jurors have a moral claim to selective nullification is based on this idea that they do not effectively have a say; they do not have the say that they should in the making of the law. They are the victims of the tyranny of the majority. * * * Let me tell you how it works in the context of the criminal justice system. With every crime bill, the Black Political Caucus—the national one or the one in the state—will make the argument, "Hey, guys, instead of spending all this money building prisons, let's spend some money on rehabilitation, on job training, on education. Those are the root causes of crime." In the Black Political Caucus' belief, the white majority will just say no. * * *

The second most powerful way to stop crime is parental training, teaching some of these kids who are having babies how to be good parents. Studies show that such training prevents more crime than the deterrent effect of prison. Now, that does not shock a lot of you. It does not shock a lot of legislators either, but, unfortunately, the majority seems to prefer the punishment regime. * * *

> * * * "Democratic domination" is [the] name for it, and for me it is a moral reason as to why nullification is appropriate.
>
> The [other] moral claim African-Americans have to the power of jury nullification is what I call the symbolic role of black jurors. If you look at Supreme Court cases, they often have the occasion to discuss black jurors. They do so because of our country's sad history of excluding black people from juries. The Court said that is a bad thing because black jurors serve this symbolic function. Essentially they symbolize the fairness and the impartiality of the law. The Court says that excluding black jurors undermines public confidence in the criminal justice system. * * *
>
> * * * What about an African-American juror who * * * does not hold any confidence in the integrity of the system. So if she is aware of the implicit message that the Supreme Court says her presence sends, maybe she does not want to be the vehicle for that message. * * *
>
> The political protest part is to encourage an end to this madness of locking up African-Americans when white people do not get locked up for the identical crimes.

Professor Andrew D. Leipold replied to Butler's comments in *Race-Based Jury Nullification: Rebuttal (Part A)*, 30 J. Marshall L. Rev. 923, 923–26 (1997):

> Let me briefly outline a few of my concerns about Professor Butler's plan. * * *
>
> My * * * technical argument is that juries are incapable of making reasoned nullification decisions, because at trial they will not be given the information they need. At the heart of Professor Butler's plan is the notion that juries should engage in a cost-benefit analysis when deciding whether to convict. Jurors are supposed to look at the defendant and ask, "Even if this defendant committed the crime charged, what are the rewards of keeping this person out of jail, and what are the risks to the community of letting this person stay free?" The problem is that juries will never hear the evidence that would help them answer this question.
>
> Consider the problem in the context of a simple drug possession case. If we were sitting on a jury, what would we like to know about the defendant before we decided whether to nullify his conviction? We would probably want to know whether the defendant is contrite. We would want to know whether he had a criminal record, and if so, how serious were his prior crimes. We might want to know whether there was anyone else involved in the crime who is more blameworthy. We might wonder how the prosecution enforces this crime against others: are African-Americans disproportionately targeted or arrested for this type of crime? We might also want to know about the potential sentences the defendant would face if

convicted; under our cost-benefit analysis, we might be more willing to nullify if the defendant faced a stiff, mandatory sentence.

The problem is that almost none of this information is admissible at trial. * * *

My philosophical concerns begin with the idea of legitimizing and institutionalizing a cost-benefit analysis as a method of jury decision-making. * * * Once we have agreed that jurors can legitimately decide the outcome of cases by a cost-benefit analysis rather than by applying the law as written to the evidence presented, we have started down a dangerous road. Is there any doubt that many other groups will also be drawn to the cost-benefit analysis? * * *

Assume that a jury nullifies in the case of a young African-American defendant who has been charged with simple [drug] possession. Maybe this is a good result: maybe in that specific case, society is better off keeping another African-American kid out of jail, away from a very harsh sentence. But now assume that the next jury comes back and says, "Yes, we think this defendant battered his wife, but you know, she decided to stay in the marriage rather than get a divorce, it looks like she provoked him by spending too much time at her job, she was nagging him, *et cetera*, and we are not going to send this guy to jail." * * * We might be repelled by this reasoning, but we do not have any standing to complain about the process by which the outcome was reached. Those juries also engaged in a cost-benefit analysis, the same process approved of by the Butler plan. * * *

The final concern I have is at the broadest philosophical level. It is a comment that makes me very sad to have to raise at all: whether you go to jail or get set free should not depend on the color of your skin. Using race as the reason for acquitting or convicting is a bad idea, and no matter how strategic the reasoning and no matter how good our intentions, it is still wrong. It is wrong because it encourages the kind of stereotyping that had led to problems in the first place. It is wrong because we are telling people that they will never get equal justice in the courts and so you should take whatever you can get, however you can get it, and be satisfied with that. In short, the plan raises the flag of surrender in the fight for equal justice under the law.

Whose arguments do you find more persuasive?