right to a jury trial to prosecutions for crimes for which the maximum potential punishment exceeds incarceration of six months.

2. **Jury Nullification**

Jury nullification occurs when the jury decides that the prosecution has proven its case beyond a reasonable doubt, but for reasons of conscience it disregards the facts and/or the law and acquits the defendant. Jurors have the *power* to nullify, but not the *right* to do so. Therefore, a defendant is not entitled to have the jury instructed that it may nullify the law.

II. "TOOLS" OF THE CRIMINAL LAW

A. **Theories of Punishment**

1. **Different Theories**

   Two broad theories of punishment exist: *utilitarianism* and *retribution*.

2. **Principles of Utilitarianism**

   a. **Augmenting Happiness**

      Utilitarianism holds that the general object of all laws is to augment the total happiness of the community by excluding, as much as possible, everything that subtracts from that happiness, *i.e.*, everything that causes "mischief" (pain).

   b. **Role of Punishment**

      Both crime and punishment are evils because they both result in pain to individuals and to society as a whole. Therefore, the pain of punishment is undesirable unless its infliction is likely to prevent a greater amount of pain in the form of future crime.

   c. **Forms of Utilitarianism**

      i. **General Deterrence**

         A person is punished in order to send a message to others (the general society or, at least, persons who might be contemplating criminal conduct) that crime does not pay.
ii. Specific Deterrence

D is punished in order to deter D from future criminal activity. This is done in either of two ways: by *incapacitation* (incarceration of D prevents her from committing additional crimes in the general community for the duration of her sentence); and/or by *intimidation* (D's punishment serves as a painful reminder, so that upon release D will be deterred from future criminal conduct).

iii. Rehabilitation

Advocates of this form of utilitarianism believe that the criminal law can prevent future crime by reforming an individual, by providing her with employment skills, psychological aid, etc., so that she will not want or need to commit offenses in the future.

3. Principles of Retribution

a. Just Deserts

Punishment of a wrongdoer is justified as a deserved response to wrongdoing. Retributivists punish *because* of the wrongdoing—the criminal gets his just deserts—regardless of whether such punishment will deter future crime.

b. Rationale

Wrongdoing creates a moral disequilibrium in society. The wrongdoer obtains the benefits of the law (namely, that other people have respected *his* rights), but he does not accept the law's burdens (respecting others' rights). Proportional punishment of the wrongdoer—"paying his debt"—brings him back into moral equilibrium. Another justification is that both crime and punishment are forms of communication: one who commits a crime sends an implicit message to the victim that the wrongdoer's rights are more important than others' rights; punishment is a symbolic way of showing the criminal—and reaffirming for victims—that this message was wrong. Punishment proportional to the offense defeats the offender: it brings him down to his proper place in relation to others.
B. Proportionality of Punishment

1. General Principle
   A general principle of criminal law is that punishment should be proportional to the offense committed.

2. Utilitarian Meaning
   Punishment is proportional if it involves the infliction of no more pain than necessary to fulfill the law's deterrent goal of reducing a greater amount of crime.

3. Retributive Meaning
   Punishment should be proportional to the harm caused on the present occasion, taking into consideration the actor's degree of culpability for causing the harm.

4. Constitutional Law
   The Eighth Amendment Cruel and Unusual Punishment Clause prohibits grossly disproportional punishment.
   a. Death Penalty Cases
      The Supreme Court has held that death is grossly disproportional punishment for the crime of rape, because the latter offense does not involve the taking of human life.
   b. Imprisonment Cases
      According to the Supreme Court's most recent pronouncement, there is only a very "narrow proportionality principle" outside the context of the death penalty. The legislature (not the judiciary) has primary authority in setting punishments. No non-capital incarcerative punishment will be declared unconstitutional unless there are objective grounds—not simply a judge's own subjective views of the propriety of the punishment—for determining that the punishment is grossly disproportionate to the crime.

C. Legality

1. Requirement of Previously Defined Conduct
   a. General Principle
      The so-called "principle of legality" is that there can be no crime without (pre-existent) law, no punishment without (pre-existent) law.
b. Constitutional Law

The principle of legality not only is a common law doctrine, but has deep constitutional roots. Legislatures are prohibited by the Ex Post Facto Clause of the United States Constitution from enacting laws that would punish conduct that was lawful at the time of its commission, or that increases the punishment for an act committed before the law took effect. In turn, courts are prohibited from enlarging the scope of criminal statutes by the Due Process Clause.

2. Fair Notice

A corollary of the legality principle is that a person may not be punished for an offense unless the statute is sufficiently clear that a person of ordinary intelligence can understand its meaning. This is a fundamental common law concept, with constitutional roots as well in the Due Process Clause.

3. Nondiscriminatory Enforcement

Another corollary of the legality principle is that a criminal statute should not be so broadly worded that it is susceptible to discriminatory enforcement by law enforcement officers, thereby unduly expanding government power.

D. Burden of Proof

1. Burden of Production

This burden relates to the question of which party—the defendant or the government—has the obligation to first introduce evidence on a given issue. The party with this obligation, who fails to satisfy this burden, loses on the issue. In general, the government has the burden of production regarding elements of a crime; the defendant carries the burden as to affirmative defenses.

2. Burden of Persuasion

Once the burden of production has been satisfied, the next question becomes: who has the burden of persuading the factfinder on the particular issue? The party with the burden of production need not have the burden of persuasion.
a. Degree of Burden

i. Elements of a Crime

The Due Process Clause of the Constitution requires that the government carry the burden of persuasion, beyond a reasonable doubt, as to “every fact necessary to constitute the crime charged.” The Court has limited the word “fact”—and, thus, the prosecutor’s constitutional obligation to carry the burden of production beyond a reasonable doubt—to elements of an offense, and not to defenses and mitigating factors.

ii. Defenses to Crimes

A legislature is free to place the burden of persuasion regarding a criminal law defense on either party—the defendant or government—and to set the burden very high (proof beyond a reasonable doubt), somewhat high (clear and convincing evidence) or low (proof by preponderance of the evidence).

■ PART TWO: ACTUS REUS

I. ACTUS REUS: OVERVIEW

A. Definition

The “actus reus” of an offense is the physical, or external, component of a crime what society does not want to occur.

B. Two Elements

The actus reus of a crime consists of two components, both of which must be proved by the prosecutor beyond a reasonable doubt.

1. Voluntary Act or Legal Omission

Generally speaking, there can be no crime in the absence of conduct. But, only a certain type of conduct qualifies, namely, conduct that includes a