

CRIMINAL LAW  
Professor Hugh McClean  
Law 604-Section 329B

**First Class Assignment:** Please register for the TWEN course page as soon as possible. For first year day students, you should receive your Westlaw login during orientation.

- 1) Read Dressler (our text), pp. 1-13 (attached to this document). I have provided study questions (attached to this document) to guide your reading, as I will do for every reading assignment. I will not collect study questions, but I will use them to guide our class discussions. Please come to class prepared to engage in class discussion!
  
- 2) During our first class, we will have a discussion on the criminalization of “peeping,” which Webster’s defines as “to peer through or as if through a crevice.” **Come to class prepared to draft a “Peeping Tom” statute to make peeping into a room an illegal act.** In drafting your statute, consider the prohibited act(s), the required criminal intent (purposely, knowingly, recklessly, negligently), the prohibited conduct or result, the punishment, and any special rules or exceptions to prosecution under your peeping statute.

## CRIMINAL LAW COURSE INFORMATION AND SYLLABUS

### **Professor Hugh McClean**

hmclean@ubalt.edu  
Office: ALS 428  
410-837-4339

### **Administrative Assistant**

Rosalind Williams  
rdwilliams@ubalt.edu  
Office: ALS 412; x5705

### **Law Scholar**

Samantha Laulis  
Samantha.laulis@ubalt.edu  
443-928-2475

### **Class Meeting Times and Location**

Wednesday/Friday, 10:30—11:45 a.m. The course will be conducted in-person unless otherwise instructed. If there is a need to conduct virtual classes, instructions will be provided at that time.

**Office Hours:** Wednesday/Friday, 12:00 – 1:00 p.m.; Law Scholar review sessions TBA

I am happy to make appointments to meet at other times. Use the appointment link below my signature block, or [Click Here To Make An Appointment](#). Also, please drop by my office anytime – I am very often there and enjoy informal discussions!

### **Required Text**

- Joshua Dressler and Stephen Garvey, *CRIMINAL LAW: CASES AND MATERIALS (8th Ed., 2019)*, ISBN 9781642427820

The book is available at various locations, including here:

<https://www.westacademic.com/Dressler-Garveys-Cases-Materials-on-Criminal-Law-8th-9781642427851>.

or here:

[https://www.amazon.com/Cases-Materials-Criminal-Law-8th/dp/1642427829/ref=sr\\_1\\_1?dchild=1&keywords=ISBN+9781642427820&qid=1627401259&sr=8-1](https://www.amazon.com/Cases-Materials-Criminal-Law-8th/dp/1642427829/ref=sr_1_1?dchild=1&keywords=ISBN+9781642427820&qid=1627401259&sr=8-1)

Note that the West Academic website offers two add-ons to the text, including an e-book version of the text and access to a “Learning Library.” The Learning Library includes study aids, such as commercial outlines, that are very helpful but are not required for the course. The UB law library has all the study aids offered in the Learning Library—but the online version may be more convenient for you. The Learning Library can be purchased through West Academic for an additional \$35 using the above link.

### **Optional Texts (but very helpful)**

- Joshua Dressler, *UNDERSTANDING CRIMINAL LAW (8th Ed., 2018)*, ISBN 9781531007911. I highly recommend this study aid. It is designed to be used in conjunction with our casebook. Unfortunately, it is not included in the above-mentioned Learning Library.
- Joshua Dressler, *BLACK LETTER OUTLINE ON CRIMINAL LAW (2019)*. This helpful study aid outlines the black letter law and is available in the above referenced Learning Library.

### **COURSE DESCRIPTION (FROM COURSE CATALOGUE)**

Sources and interpretations of and constitutional limitations on substantive criminal law; criminal jurisdiction; criminal act and mental state requirements; burdens of proof; criminal capacity; justification and excuse (defense); accomplice liability; inchoate crimes; crimes against property; crimes against persons; crimes against habitation; punishment.

### **GOALS AND LEARNING OUTCOMES**

The goals of this course are to introduce students to (a) the general concepts and vocabulary of the criminal law; (b) the modes of criminal law argument practiced by prosecutors, defense attorneys, and judges; and (c) the debates that affect the criminal law's development and change. By the end of this course, student will be able to:

- Explain core criminal law concepts including legality, actus reus, mens rea, causality, defenses, solicitation, conspiracy, attempt, accomplice liability, and vicarious liability;
- Identify the elements of various crimes as set out in cases and statutes;
- Apply criminal law doctrine to factual scenarios in the mode of a prosecutor, defense attorney, judge, survivor, or other party to a crime; and
- Participate in criminal law debates in an informed manner, including role playing in the mode of legislators, executives, special interest groups, and the public.

**SYLLABUS**

Please find below the topics and reading assignments for the semester. For readings, please note that **DR** refers to “Dressler” (the course textbook). All other reading assignments are posted on TWEN, except for the Panopto mini-lectures. I will revise the syllabus from time to time during the semester to track the pace of our class discussions.

For each class, I have assigned study questions to guide your reading. **I will not collect your answers to the study questions**, but I will use the study questions to guide class discussions. **I have also assigned two assessments that count toward your participation grade.** These assessments will test your knowledge and ability to apply the material covered in previous lectures. There will be two graded assessments collectively worth 20% of your grade (see below).

I will use Panopto (video recording software) to record short “mini-lectures” to preview important topics covered in the reading. **Please watch the assigned Panopto recording prior to class.** These pre-recorded lectures are designed to focus your attention on key points, facilitate classroom discussion, and to serve as a reference for your midterm and final exam review.

	<b>Topics</b>	<b>Assignment</b>
<b>Week 1</b>		
8/25/21 (Wed) <i>Class 1</i>	Drafting Exercise; What is a crime?; Reasonable Doubt;	DR: Ch 1, pp. 1-13; Study Questions; Panopto: Overview of Course, Tips for Success, and Criminal Procedure
8/27/21 (Fri) <i>Class 2</i>	Presumption of Innocence; Jury Nullification	DR: Ch 1, pp. 13-29; Study Questions; MPC, <i>Table of Contents</i> , pp. 995-1000; “ <i>The American Model Penal Code</i> ,” on TWEN; Panopto: The Model Penal Code
<b>Week 2</b>		
9/1/21 (Wed) <i>Class 3</i>	Theories of Punishment	DR: Ch 2, pp. 31-42; 51-62; Study Questions; Watch Panopto Recording
9/3/21 (Fri) <i>Class 4</i>	Legality; Statutory Interpretation	<b>Judicial Sentencing Memo Due;</b> DR: Ch 3, pp. 91; 106-114; 121-127 Study Questions; Watch Panopto Recording
<b>Week 3</b>		
9/8/21 (Wed) <i>Class 5</i>	Actus Reus I ( <i>voluntary act;</i> <i>possession as an act</i> )	<b>**Assessment 1 (weeks 1 &amp; 2)**</b> DR: Ch 4, pp. 129-41; Study Questions; Watch Panopto Recording

9/10/21 (Fri) <i>Class 6</i>	Actus Reus II ( <i>omissions</i> )	DR: Ch 4, pp. 141-155; Study Questions; Watch Panopto Recording
<b>Week 4</b>		
9/15/21 (Wed) <i>Class 7</i>	Mens Rea I ( <i>specific &amp; general intent</i> )	Review Assessment 1 DR: Ch 5, pp. 157-168; Study Questions; Watch Panopto Recording
9/17/21 (Fri) <i>Class 8</i>	Mens Rea II ( <i>MPC; willful blindness</i> )	DR: Ch 5, pp. 169-178; Study Questions; Watch Panopto Recording
<b>Week 5</b>		
9/22/21 (Wed) <i>Class 9</i>	Mens Rea III ( <i>strict liability</i> )	DR: Ch 5, pp. 186-204; Study Questions; Watch Panopto Recording
9/24/21 (Fri) <i>Class 10</i>	Mens Rea IV ( <i>mistake</i> )	<b>**Assessment 2 (weeks 3-5)**</b> DR: Ch 5, pp. 205-221; Study Questions; Watch Panopto Recording
<b>Week 6</b>		
9/29/21 (Wed) <i>Class 11</i>	Causality I ( <i>actual cause</i> )	Review Assessment 2 DR: Ch 6, pp. 227-233 Study Questions; Watch Panopto Recording
10/1/21 (Fri) <i>Class 12</i>	Causality II ( <i>proximate cause; concurrence of elements</i> )	DR: Ch 6, pp. 233-250; Study Questions; Exercise: concurrence of the elements

<b>Week 7</b>		
10/6/21 (Wed) <i>Class 13</i>	<b>MIDTERM EXAMINATION</b>	<b>COVERS MATERIAL FROM CLASS 1-6</b>
10/8/21 (Fri) <i>Class 14</i>	Homicide I ( <i>intentional killings</i> )	DR: Ch 7, pp. 251-254; 270-282; Study Questions; Watch Panopto Recording
<b>Week 8</b>		
10/13/21 (We) <i>Class 15</i>	Homicide II ( <i>manslaughter “heat of passion”</i> )	DR: Ch 7, pp. 282-294; 300-306; Study Questions; Watch Panopto Recording
10/15/21 (Fri) <i>Class 16</i>	Homicide III ( <i>unintentional killings</i> )	Chauvin Materials; DR: Ch 7, pp. 313-329; Study Questions; Watch Panopto Recording
<b>Week 9</b>		
10/20/21 (We) <i>Class 17</i>	Homicide IV ( <i>felony murder</i> )	DR: Ch 7, pp. 329-332; 341-352; Study Questions;

10/22/21 (Fri) <i>Class 18</i>	Sexual Offenses I <i>(statistics, traditional approaches)</i>	<b>Mock Trial 1</b> DR: Ch 8, pp. 403-407; 410-413; 436-442; Watch Panopto Recording
<b>Week 10</b>		
10/27/21 (W) <i>Class 19</i>	Sexual Offenses II <i>(modern approaches)</i>	<b>Class Debate</b> DR: Ch 8, pp. 445-467
10/29/21 (Fri) <i>Class 20</i>	Defenses I <i>(categories of defenses; self-defense)</i>	DR: Ch 9, pp. 497-503; 513-527; Study Questions; Watch Panopto recording
<b>Week 11</b>		
11/3/21 (Wed) <i>Class 21</i>	Defenses II <i>(reasonable belief; battered-woman syndrome)</i>	<b>Mock Trial 2</b> DR: Ch 9, pp. 527-535; 549-558; Study Questions; Watch Panopto Recording
11/5/21 (Fri) <i>Class 22</i>	Defenses III <i>(excuse; duress; intoxication)</i>	DR: Ch 9, pp. 601-609; 625-628 Study Questions; Watch Panopto Recording
<b>Week 12</b>		
11/10/21 (We) <i>Class 23</i>	Defenses IV <i>(competency &amp; insanity)</i>	DR: Ch 9, pp. 633-645; 654-661 Study Questions; Watch Panopto Recording <b>Insanity Defense Flipgrid Assignment</b>
11/12/21 (Fri) <i>Class 24</i>	Inchoate Offenses I <i>(mens rea of attempt)</i>	DR: Ch 10, pp. 749-752; 757-766; Study Questions; Watch Panopto Recording
<b>Week 13</b>		
11/17/21 (We) <i>Class 25</i>	Inchoate Offenses II <i>(actus reus of attempt; defense of impossibility)</i>	DR: Ch 10, pp. 766-779; 788-802 Study Questions; Watch Panopto Recording
11/19/21 (Fri) <i>Class 26</i>	Inchoate Offenses III <i>(solicitation; conspiracy; Wharton's Rule defense)</i>	DR: Ch 10, pp. 817-830; 865-870 Study Questions; Watch Panopto Recording
<b>Week 14</b>		
11/24/21 (We) <i>Class 27</i>	<i>Take-Home Practice Exam (not graded)</i>	<b>**Peer Grade Practice Exam in class**</b> Complete Take-Home Practice Exam
11/26/21 (Fri)	THANKSGIVING BREAK—NO CLASS	
<b>Week 15</b>		
12/1/21 (Wed) <i>Class 28</i>	Liability for Others <i>(accomplice liability;</i>	<b>Mock Trial 3: Chauvin Case</b> DR: Ch 11, pp. 877-893; Study Questions; Watch Panopto Recording

**POLICIES**

- 1. Methods of Evaluation** – The final grade will be based on the following: Participation (two assessments collectively worth 20%); Midterm (30%); and Final (50%). This class is subject to UB’s mandatory 1L curve.
- 2. Attendance** – Regular class attendance is mandatory. You must be present for all classes, including virtual classes, which means you must be participating through virtual platforms, including TWEN, and completing all course assignments on time. You are strongly encouraged to keep your cameras on for all virtual classes. For virtual classes, if you choose not to turn on your camera and you are called on or otherwise asked to engage in class work and are in fact not present, you may be subject to discipline under the Honor Code for misrepresenting your attendance.

Students who have more than five absences (including virtual absences) will not be eligible to complete the course. Please note that under this policy, there are no “excused” or “unexcused” absences (with the exception for religious holidays). Attendance is established by signing the class attendance sheet. A student who is more than 5 minutes late may stay for class but may not sign the attendance sheet and be counted as present for that day.

All classes will be recorded. You may arrange to watch a recorded class in lieu of attending a live class by seeking prior permission from me. This should not be a regular occurrence.

- 3. Preparation** – This class relies on everyone arriving fully prepared to participate in the day’s discussion. At the most basic level, this means completing the assigned reading. I have deliberately given you relatively little reading per class (usually 10-15 pages). **This is because I expect you to read the cases at least twice.** Learning to read and understand cases and statutes is hard and takes work. Repetition is key. Often, you will still have lingering confusion even after reading a case two or three times. During Socratic questioning, I am happy to work with students who are struggling to understand. However, I have less patience for students who are unprepared.

American Bar Association Accreditation Standards establish guidelines for the amount of work students should expect to complete for each credit earned. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work for each credit earned in a class.

- 4. Professionalism** – Learning cannot effectively take place in an environment that is unprofessional or uncivil. To that end, I expect that you will observe basic professional courtesies such as arriving on time and turning off your cell phone. **Given our subject matter, it is my hope that we can have lively class debates where all students feel comfortable participating and expressing their opinions.** Expressions or actions that disparage a person's or race, ethnicity, nationality, culture, gender, gender identity / expression, religion, sexual orientation, age, disability, or marital, parental, or veteran status are contrary to the mission of this course and will not be tolerated. We need not agree on everything, but we do need to disagree professionally.

*Note: Please contact me or our law scholar if something related to our class debates or discussions makes you feel uncomfortable or otherwise interferes with your ability to learn. I will make every effort to address any issues raised.*

5. **Computers** – Research shows that students are more effective learners when they take notes by hand. Time and again studies show that students using laptops tend to “write everything” rather than critically listen, evaluate, and interpret the material. Nonetheless, I permit laptops for notetaking. **That said, laptops must not be used to browse the Internet, check email, Tweet, and etc.** I thus reserve the right to ban laptops if the temptations of the Internet cause disruptions or distractions.
6. **TWEN** – Please enroll in the TWEN site for this course, which is available through Westlaw. I will post handouts and study questions for each assignment the week prior to their due date. For example, on Friday I will post the study questions and handouts for classes scheduled for the following week. For technical issues, contact the Office of Technology Services (OTS), at [callcenter@ubalt.edu](mailto:callcenter@ubalt.edu), or (410) 837-6262. OTS provides overall technology support to the UB community.
7. **Class Cancellation** – If I must cancel a class, notices will be sent to students via email and posted on the classroom door. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.
8. **Academic Integrity** – Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at [http://law.ubalt.edu/academics/policiesandprocedures/honor\\_code/](http://law.ubalt.edu/academics/policiesandprocedures/honor_code/).
9. **Title IX Sexual Misconduct and Nondiscrimination Policy** – The University of Baltimore’s Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the university any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB’s nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.
10. **Disability Policy** – If you are a student with a documented disability who requires an accommodation for academic programs, exams, or access to the University’s facilities, please contact the Office of Academic Affairs, at [ublacadaff@ubalt.edu](mailto:ublacadaff@ubalt.edu) or (410) 837-4468.

**11. Course Evaluations** – It is a requirement of this course that students complete a course evaluation. The evaluation will be available later in the semester and is entirely anonymous. Faculty members will not have access to the feedback provided on course evaluations until after all grades are submitted.

**12. Mental Health / Student Assistance** – The Student Assistance Program (SAP) provides students with access to confidential, accessible support to manage life’s challenges. The SAP offers personal counseling and consultation on a variety of topics including family concerns, academic skills, finances, substance abuse, legal consultations, child care, and elder care. The SAP is available to all current UB students. If you have any questions, contact Clinical Case Manager Tony DuLaney at [rdulaney@ubalt.edu](mailto:rdulaney@ubalt.edu) or (410) 837-4755. To contact the SAP directly, call 1-800-327-2251. For more information visit [www.ubalt.edu/StudentAssistance](http://www.ubalt.edu/StudentAssistance).

Students are welcome to contact Dean Paul Manrique, Assistant Dean of Students at [pmanrique@ubalt.edu](mailto:pmanrique@ubalt.edu) or (410) 837-5283, or Ms. Keri Hickey, Director of Student Support at [khickey@ubalt.edu](mailto:khickey@ubalt.edu) or (410) 837-4414. Both are in the 7<sup>th</sup> floor Dean’s Suite and welcome students to walk in and are able to schedule virtual appointments.

**13. Academic Support** – For academic support, students should contact Professor Marta Baffy at [mbaffy@ubalt.edu](mailto:mbaffy@ubalt.edu) or (410) 837-6370. Professor Baffy is located on the 5<sup>th</sup> floor in Room 513.

**14. Bar Exam Support/Questions** – For questions about the bar exam, students should contact Professor Neal Kempler at [nkempler@ubalt.edu](mailto:nkempler@ubalt.edu) or (410) 837-4358. Professor Kempler is located on the 5<sup>th</sup> floor in Room 514.

**15. Writing Center** – Information about the UB Law Writing Center may be found here: [http://law.ubalt.edu/academics/academic-support/legal\\_writing\\_center/index.cfm](http://law.ubalt.edu/academics/academic-support/legal_writing_center/index.cfm). Dean Claudia Diamond will send announcements and updates to faculty and students when the writing center is open for business.

*Study Questions, Class 1, Aug 25—What is a crime; beyond a reasonable doubt*

*Learning Outcomes:*

1. Explain criminal law as a “method” or “process.”
2. Differentiate criminal law from civil law.
3. Define common law and explain its role in criminal law.
4. Explain the purpose of the Model Penal Code and explain its role in criminal law.
5. Define “beyond a reasonable doubt” and explain its role in criminal law.

What is a crime?

1. What does Professor Hart mean when he describes criminal law as a “process”? What is the role of government (legislature, executive, judiciary) in this process?
2. According to Professor Hart, how are crimes distinguished from civil wrongs?
3. See Note 2, pg. 3. What is common law? What role does common law play in modern criminal law jurisprudence?
4. See Notes 4 and 5, pgs. 4-5. What are the limits on legislative lawmaking, and what is the present-day role of the judiciary?
5. See Note 6, pg. 5. What is the Model Penal Code and what is its role in criminal law jurisprudence?
6. As described on pages 6-8, what are the *basic* (very basic) rights that are afforded to criminal defendants during the pre-trial and trial phases of a criminal case?

What is the meaning of the “beyond a reasonable doubt” standard?

7. *In re Winshop* discusses the “beyond a reasonable doubt standard.” How is it defined, and how have courts erred in defining it (hint: read the Notes after the cases)?
8. Read the jury instructions on pages 11-12. Which jury instruction would you argue for if you were the defendant in a criminal case?

# 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:<sup>13</sup>

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

---

<sup>13</sup> 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. Suppose the legislature in your state enacted a law prohibiting left-handed writing, punishable by one year imprisonment. Would Hart say this is a "crime"? What if the legislature passes a law, which it calls a "crime," to drive 66 miles per hour in a 65-miles-per-hour zone, also punishable by imprisonment. Is *this* a crime because the legislature so characterized it?

2. *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.

3. *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?

4. *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 punishments (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 risks violating principles of federalism and 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, the judiciary is usually responsible for ensuring that the rights of the minority are respected. Therefore, if courts defer too readily to legislatures, they risk abdicating their responsibility for enforcing the Constitution.

5. *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 ascertaining guilt in individual cases by interpreting criminal statutes. This role comes into play when a legislature has drafted a statute but its meaning is subject to reasonable dispute. In such circumstances courts have developed a number of “presumptions with which \* \* \* [to] approach debatable issues of interpretation.” Hart, *supra*, at 435. As you proceed through this casebook you will become familiar with some of these presumptions.

6. *Model Penal Code.* Until well into the twentieth century, most state “criminal codes” were little more than collections of statutes, enacted by legislators in piecemeal fashion over many decades, defining various crimes and their punishments.

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 if the legislature intended these gaps or if they were 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) 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. 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. Not all crimes are reported. In 2015, according to the National Crime Victimization Survey, only 47% of violent victimizations and 35% of property victimizations were reported to police. U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Victimization 2015 (Oct. 2016, NCJ 250180).

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) its authenticity. 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. Likewise, 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 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 probable cause exists 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 the evidence is sufficient, 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 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 "*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 *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 groups of people, 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”?<sup>4</sup> 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.<sup>a</sup> \* \* \* 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?

Is the standard of proof beyond a reasonable doubt too cautious? Should the law permit, if you will, “conviction without conviction”? One scholar recently suggested the law should have “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*

---

<sup>a</sup> 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.

*Without Conviction*, 96 Minn. L. Rev. 833, 836 (2012). For example, conviction beyond a reasonable doubt for murder would carry the most severe punishment (death or life imprisonment), conviction based on a somewhat lesser standard of guilt would carry a sentence 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 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. He distinguished 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.” Reasonable doubt, he said, is about “seven and a half, if you had to put it on a scale.” Do you believe a juror is in a “subjective state of near certitude” if she believes the chance a defendant is guilty is 75%?

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 United States 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). 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’s 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 instruction below do you find most helpful as a juror? As a separate thought experiment, which instruction would you prefer if you were the defendant’s attorney?

#### ***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. (*Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850), abrogated by *Commonwealth v. Russell*, 470 Mass. 464, 23 N.E.3d 867 (2015)).

### *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 Fed. Jud. Ctr., 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 reh'g, 5 F.3d 495 (11th Cir. 1993).)

5. *The truth and nothing but the truth?* What if a judge tells the members of a jury to be "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