CHAPTER 1

INTRODUCTION: SETTING THE STAGE

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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

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[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. 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.
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> 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. * * *
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> * * * 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. * * *
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> 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.
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> 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.
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> * * * 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. * * *
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> 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*

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[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.

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" is 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