
CRIMINAL LAW

Editorial Advisors

Rachel E. Barkow

Segal Family Professor of Regulatory Law and Policy
Faculty Director, Center on the Administration of Criminal Law
New York University School of Law

Erwin Chemerinsky

Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law Emeritus
The University of Michigan Law School

Tracey L. Meares

Walton Hale Hamilton Professor of Law
Director, The Justice Collaboratory
Yale Law School

Richard K. Neumann, Jr.

Alexander Bickel Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Stanley Morrison Professor of Law
Faculty Co-Director, Stanford Criminal Justice Center
Stanford Law School



ASPEN CASEBOOK SERIES

CRIMINAL LAW

DOCTRINE, APPLICATION, AND PRACTICE

Third Edition

JENS DAVID OHLIN

*Allan R. Tessler Dean and Professor of Law
Cornell Law School*

 Wolters Kluwer

Copyright © 2022 CCH Incorporated. All Rights Reserved.

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.WKLegaledu.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3512-0

Library of Congress Cataloging-in-Publication Data

Names: Ohlin, Jens David, author.

Title: Criminal law : doctrine, application, and practice / Jens David Ohlin.

Description: Third edition. | New York : Wolters Kluwer, 2022. | Series: Aspen casebook series | Includes bibliographical references and index. | Summary: "Criminal Law casebook designed to respond to the changing nature of law teaching by offering a shorter, flexible, and more doctrinal approach"—Provided by publisher.

Identifiers: LCCN 2021023929 | ISBN 9781543835120 (hardcover) | ISBN 9781543835137 (ebook)

Subjects: LCSH: Criminal law—United States. | LCGFT: Casebooks (Law)

Classification: LCC KF9219 .O35 2021 | DDC 345.73—dc23

LC record available at <https://lcn.loc.gov/2021023929>

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

**For George Fletcher,
for rethinking criminal law**

SUMMARY OF CONTENTS

<i>Table of Contents</i>	xiii
<i>Preface</i>	xxxi
<i>Acknowledgments</i>	xxxiii

PART I

1

CHAPTER 1	
Introduction to the Criminal Process	3
CHAPTER 2	
Punishment	25
CHAPTER 3	
The Death Penalty	59
CHAPTER 4	
Fundamental Principles of Criminal Law	93
CHAPTER 5	
Act Requirement	123
CHAPTER 6	
Mental States	147
CHAPTER 7	
Mistakes	191
CHAPTER 8	
Causation	217

PART II

241

CHAPTER 9

Intentional Murder

243

CHAPTER 10

Voluntary Manslaughter

263

CHAPTER 11

Reckless Killings

289

CHAPTER 12

Felony Murder

319

CHAPTER 13

Negligent Homicide

347

CHAPTER 14

Rape

363

CHAPTER 15

Other Offenses Against the Person

409

CHAPTER 16

Theft & Property Offenses

431

PART III

459

CHAPTER 17

Offenses Against the Administration of Justice

461

CHAPTER 18

Attempt

493

CHAPTER 19

Inchoate Conspiracy

529

CHAPTER 20

Solicitation

559

PART IV

577

CHAPTER 21

Accomplices

579

CHAPTER 22	
Conspiracy Liability	625
CHAPTER 23	
Corporate Crime	651
 PART V	
	685
<hr/>	
CHAPTER 24	
Self-Defense	687
CHAPTER 25	
Defensive Force by Police Officers	739
CHAPTER 26	
Necessity	765
CHAPTER 27	
Duress	797
CHAPTER 28	
Intoxication	831
CHAPTER 29	
Insanity	861
 <i>Appendix: Model Penal Code</i>	909
<i>Table of Cases</i>	969
<i>Index</i>	975

TABLE OF CONTENTS

<i>Preface</i>	xxxi
<i>Acknowledgments</i>	xxxiii

PART I

1

CHAPTER 1

3

	3
1. Criminal Complaint and Investigation	3
2. Arrest	4
3. Indictment and Preliminary Hearings	5
4. Trial	5
5. Sentencing	6
6. Appeal	7
	7
1. The Presumption of Innocence	7
<i>Owens v. State</i>	8
Notes & Questions on the Presumption of Innocence	11
2. Jury Nullification	12
<i>State v. Ragland</i>	12
Notes & Questions on Jury Nullification	18
	20
Material elements of the offense	21
Canons of interpretation	22

CHAPTER 2	25
1. Deterrence, Incapacitation, and Rehabilitation	25
2. Retributivism or “Just Deserts”	26
3. Expressivism	27
1. Deterrence	27
<i>United States v. Brewer</i>	27
Notes & Questions on Deterrence	31
2. Retributivism	35
<i>United States v. Madoff</i>	35
Notes & Questions on Retributivism	39
3. Shaming Penalties	41
<i>United States v. Gementera</i>	41
Notes & Questions on Shaming Penalties	49
Appealing to emotion	50
The guilt paradox	51
Victim impact statements	51
Sentencing guidelines	52
Consistency in punishment	53
International crimes	54
Consecutive versus concurrent sentences	54
Mass incarceration	55
The case for abolition	56
CHAPTER 3	59
1. Who Can Be Executed	59
2. Which Crimes Apply	60
3. Racial Disparities	60
4. Methods of Execution	60
1. Mental Disability	61
<i>Atkins v. Virginia</i>	61
2. The Juvenile Death Penalty	65
<i>Roper v. Simmons</i>	66
Notes & Questions on <i>Atkins</i> and <i>Roper</i>	70
3. Capital Punishment for Rape	71
<i>Kennedy v. Louisiana</i>	71
Notes & Questions on Offense Restrictions	77

4. Racial Disparities	78
<i>McCleskey v. Kemp</i>	79
5. Methods of Execution	83
<i>Glossip v. Gross</i>	84
Notes & Questions on Execution Methods	88
	90
Bargaining in the shadow of death	90
Return to guided discretion	91
Strategy in bifurcated trials	91
Ariel Castro case redux	92
CHAPTER 4	
	93
	93
1. The Written Statute Requirement	94
2. Retroactivity	94
3. Interpreting Statutes and the Common Law	94
4. Vagueness	95
5. The Rule of Lenity	95
	96
1. The Written Statute Requirement	96
<i>Street v. State</i>	96
Notes & Questions on Written Statutes	99
2. Retroactivity	100
<i>Rogers v. Tennessee</i>	100
Notes & Questions on Retroactivity	105
3. Statutory Construction and the Common Law	106
<i>Lewis v. Superior Court</i>	107
Notes & Questions on Statutory Construction	111
4. Vagueness	111
<i>City of Chicago v. Morales</i>	112
Notes & Questions on Vagueness	116
5. The Rule of Lenity	118
<i>Bell v. United States</i>	118
Notes & Questions on Lenity	120
	121
Disorderly conduct	121
Endangering the welfare of a child	122
CHAPTER 5	
	123
	123
1. Voluntary Acts	123

2. Omissions	124
3. Bystanders	125
	126
1. Voluntary Acts	126
<i>State v. Utter</i>	126
Notes & Questions on Voluntariness	128
2. Omissions	132
<i>Commonwealth v. Pestinikas</i>	132
Notes & Questions on Omissions	135
3. Bystanders	138
<i>State v. Davis</i>	138
Notes & Questions on Bystander Liability	141
	143
The omission strategy	143
Sleepwalking redux	144
CHAPTER 6	
	147
	147
1. Malice	148
2. Acting Purposely	149
3. Acting Knowingly	150
4. Recklessness and Negligence	151
5. Strict Liability Offenses	152
	152
1. Malice	152
<i>Young v. State</i>	152
Notes & Questions on Malice	156
2. Acting Purposely	156
<i>United States v. Bailey</i>	156
Notes & Questions on Purpose and Intent	161
3. Knowledge and the Problem of “Willful Blindness”	162
<i>Rehaif v. United States</i>	163
<i>United States v. Jewell</i>	166
Notes & Questions on Willful Blindness	171
4. Recklessness Versus Negligence	172
<i>State v. Olsen</i>	173
Notes & Questions on Recklessness and Negligence	175
5. Strict Liability	177
<i>Staples v. United States</i>	177
Questions on Strict Liability	184
	186
Prosecutorial strategy	187
Strategic charging	187

Mental states as sorting mechanisms	188
Mental states in foreign jurisdictions	189
CHAPTER 7	
	191
	191
1. Mistakes of Fact	191
2. Mistakes of Law	192
	193
1. Mistakes of Fact	193
<i>People v. Navarro</i>	193
<i>State v. Sexton</i>	195
Notes & Questions on Mistakes of Fact	200
2. Mistakes of Law	202
<i>People v. Weiss</i>	203
<i>People v. Marrero</i>	207
Notes & Questions on Mistakes of Law	211
	213
The dangers of relying on mistake arguments	214
Charging a jury on mistakes	214
Reasonableness redux	215
CHAPTER 8	
	217
	217
1. Cause in Fact	217
2. Proximate Cause	218
	219
1. Cause in Fact	219
<i>Oxendine v. State</i>	219
<i>People v. Jennings</i>	223
Notes & Questions on But-For Causation	227
2. Proximate Cause	229
<i>State v. Smith</i>	229
Notes & Questions on Proximate Cause	234
	238
Establishing causation at trial	238
Arguing proximate cause to a jury	240
The Model Penal Code approach	240

PART II

241

CHAPTER 9

243

	243
1. Express Malice Murder	243
2. First-Degree or Aggravated Murder	244
3. Defining Premeditation and Deliberation	245
4. Prior Calculation and Design	245
	246
1. Express Malice Murder	246
<i>Taylor v. State</i>	246
Notes & Questions on Malice	247
2. Premeditation	248
<i>State v. Guthrie</i>	248
Notes & Questions on Premeditation and Deliberation	252
3. Prior Calculation and Design	255
<i>State v. Walker</i>	255
Notes & Questions on Prior Calculation & Design	259
	259
Proving premeditation	260
Hierarchy of blameworthiness	261

CHAPTER 10

263

	263
1. Provocation	263
2. Extreme Emotional Disturbance	264
	265
1. Provocation	265
<i>Girouard v. State</i>	265
<i>State v. Castagna</i>	270
Notes & Questions on Provocation	274
2. Extreme Emotional Disturbance	277
<i>State v. White</i>	277
Notes & Questions on Extreme Emotional Disturbance	284
	286
Provocation as partial justification	286
Provocation as partial excuse	286
Arguing provocation to the jury	287

Domestic violence and adultery	287
Abolishing provocation	288
CHAPTER 11	
	289
	289
1. Involuntary Manslaughter	289
2. Implied Malice and Extreme Indifference Murder	290
3. Misdemeanor Manslaughter Rule	291
	291
1. Involuntary Manslaughter	291
<i>People v. Kolzow</i>	291
Notes & Questions on Involuntary Manslaughter	295
2. Implied Malice and Extreme Indifference Murder	297
<i>People v. Knoller</i>	297
<i>People v. Snyder</i>	303
Notes on Implied Malice and Depraved Indifference	307
3. Misdemeanor Manslaughter Rule	308
<i>State v. Biechele</i>	309
Notes & Questions on Misdemeanor Manslaughter	314
	315
Murder and mens rea	316
Murder and sentencing	316
Compromise verdicts	316
New York courts respond	317
CHAPTER 12	
	319
	319
1. Independent Felony or “Merger” Limitation	320
2. Inherently Dangerous Felony Limitation	321
3. In Furtherance of the Felony Limitation	321
	322
1. Independent Felony or “Merger” Limitation	322
<i>Rose v. State</i>	322
Notes & Questions on the Merger Limitation	326
2. Inherently Dangerous Felony Limitation	327
<i>State v. Stewart</i>	327
Notes & Questions on Inherent Dangerousness	330
3. In Furtherance of the Felony Limitation	332
<i>People v. Hernandez</i>	333

<i>State v. Sophophone</i>	337
Notes & Questions on “In Furtherance”	340
	343
The Model Penal Code approach	343
Felony murder in the United States	344
Normative foundation	345
 CHAPTER 13	
	347
	347
1. Ordinary Negligence	347
2. Gross Negligence	348
	348
1. Ordinary Negligence	348
<i>People v. Traughber</i>	349
Notes & Questions on Ordinary Negligence	353
2. Gross Negligence	354
<i>State v. Small</i>	354
Notes & Questions on Gross Negligence	357
	359
Model Penal Code approach	360
The in-between standard	360
Subjective or objective	361
Criminal prosecutions for medical negligence	361
 CHAPTER 14	
	363
	363
1. Force	364
2. Threats of Force	365
3. Consent	365
4. Rape by Fraud	366
5. Statutory Rape and Lack of Capacity	366
	367
1. Force	367
<i>State v. Jones</i>	367
Notes & Questions on Force	374
2. Threats of Force	376
<i>Rusk v. State, 43 Md. App. 476 (1979)</i>	376
<i>Rusk v. State, 289 Md. 230 (1981)</i>	381
Notes & Questions on Threats of Force	382
3. Consent	383
<i>Commonwealth v. Lopez</i>	383

<i>People v. Newton</i>	388
Notes & Questions on Consent	390
4. Rape by Fraud	392
<i>Boro v. Superior Court</i>	393
Notes & Questions on Fraud	395
5. Statutory Rape and Legal Barriers to Consent	398
<i>State v. Hirschfelder</i>	398
Notes & Questions on Barriers to Consent	400
	403
Affirmative consent	404
Campus judicial codes	405
The Model Penal Code responds	406
Prosecutorial strategy	406
CHAPTER 15	
	409
	409
1. Physical Battery	410
2. Assault	411
3. Kidnapping	411
	412
1. Physical Battery	412
<i>People v. Peck</i>	413
Notes & Questions on Physical Battery	414
2. Assault	416
<i>State v. Birthmark</i>	416
<i>State v. Boodoosingh</i>	419
Notes & Questions on Assault	420
3. Kidnapping	422
<i>Goolsby v. State</i>	422
Notes & Questions on Kidnapping	426
	427
Anti-stalking statutes	427
Reasonable apprehension and vagueness	428
Custodial interference	429
CHAPTER 16	
	431
	431
1. Unlawful Taking	433
2. Fraud, Extortion, Blackmail, and Embezzlement	433

3. Property	434
4. Intent to Deprive	435
5. Robbery	435
6. Burglary and Arson	436
	437
1. Unlawful Taking	437
<i>State v. Carswell</i>	437
Notes & Questions on Takings	440
2. Fraud, Extortion, Blackmail, and Embezzlement	441
<i>United States v. Villalobos</i>	441
Notes & Questions on Fraud and Extortion	445
3. Property	447
<i>Penley v. Commonwealth</i>	447
Notes & Questions on Property	449
4. Intent to Deprive Permanently	450
<i>Marsh v. Commonwealth</i>	450
Notes & Questions on Intent to Deprive	454
	455
Securities fraud	456
Insider trading	457
 PART III	
	459
<hr/>	
CHAPTER 17	
	461
	461
1. Obstruction of Justice	461
2. Perjury	462
3. Bribery and Corruption	463
4. Contempt of Court	464
	465
1. Obstruction of Justice	465
<i>United States v. Aguilar</i>	465
Notes & Questions on Obstruction of Justice	469
2. Perjury	471
<i>State v. Danielson</i>	471
Notes & Questions on Perjury	474
3. Bribery	475
<i>Skilling v. United States</i>	476
Notes & Questions on Bribery	481

4. Contempt of Court	482
<i>In re Jefferson</i>	482
Notes & Questions on Contempt of Court	486
	486
Presidential obstruction of justice	487
Obstruction of Congress	489
 CHAPTER 18	
	493
	493
1. Specific Intent or Purpose	493
2. Distinguishing Attempts from Mere Preparation	494
3. Impossibility	495
4. Abandonment	496
5. Merger	496
	497
1. Specific Intent or Purpose	497
<i>People v. Gentry</i>	497
Notes & Questions on Specific Intent or Purpose	501
2. Distinguishing Attempts from Mere Preparation	504
<i>People v. Rizzo</i>	504
Notes & Questions on Dangerous Proximity	506
<i>State v. Reeves</i>	507
Notes & Questions on Substantial Step	513
3. Impossibility	515
<i>People v. Dlugash</i>	515
<i>State v. Smith</i>	518
Notes & Questions on Impossibility	520
4. Abandonment	522
<i>Ross v. Mississippi</i>	522
Notes & Questions on Abandonment	524
	526
Punishing attempts: why and how much	527
Assault and battery	528
 CHAPTER 19	
	529
	529
1. Agreement to Commit Unlawful Act	529
2. Specific Intent or Purpose	530
3. The Overt Act Requirement	530
4. Renunciation	531
5. Merger	532

	532
1. Agreement to Commit Unlawful Act	532
<i>State v. Pacheco</i>	532
Notes & Questions on Conspiratorial Agreements	537
2. Specific Intent or Purpose	539
<i>United States v. Valle</i>	539
Notes & Questions on Specific Intent or Purpose	543
3. Overt Act in Furtherance of the Conspiracy	544
<i>United States v. Shabani</i>	544
<i>United States v. Abu Ghayth</i>	546
Notes & Questions on Overt Acts	548
4. Renunciation	550
<i>Commonwealth v. Nee</i>	550
Notes & Questions on Renunciation	554
	554
Common law origins	554
Conspiracy and international law	555
Distinguishing inchoate conspiracy from attempt	556
 CHAPTER 20	
	559
	559
1. Distinguishing Solicitation from Conspiracy	560
2. Distinguishing Solicitation from Attempts	560
3. Merger and Renunciation	561
	561
1. Distinguishing Solicitation from Conspiracy	561
<i>People v. Breton</i>	562
Notes & Questions on Solicitation Versus Conspiracy	565
2. Distinguishing Solicitation from Attempts	568
<i>People v. Superior Court (Decker)</i>	568
Notes & Questions on Solicitation Versus Attempts	574
	575
Undercover agents and defense arguments	575
The inherent dangerousness of solicitations	575
 PART IV	
	577
<hr/>	
 CHAPTER 21	
	579
	579
1. Assistance or Support	580

2. Purpose Versus Knowledge	580
3. Natural and Probable Consequences Doctrine	581
4. Innocent Instrumentality Rule	582
5. Defenses	582
	583
1. Assisting the Principal Perpetrator	583
<i>State v. V.T.</i>	584
Notes & Questions on the Act Requirement	587
2. Purpose Versus Knowledge	590
<i>Rosemond v. United States</i>	590
Notes & Questions on Purpose Versus Knowledge	594
3. The Natural and Probable Consequences Doctrine	598
<i>Waddington v. Sarausad</i>	598
<i>People v. Prettyman</i>	602
Notes & Questions on Natural and Probable Consequences	605
4. Innocent Instrumentality Rule	608
<i>Bailey v. Commonwealth</i>	608
Notes & Questions on Innocent Instrumentalities	612
5. Defenses	613
<i>Standefor v. United States</i>	613
Notes & Questions on Defenses	617
	620
Constitutional constraints on punishing accomplices	620
Victims as accomplices	621
Purpose versus knowledge in human rights	622
 CHAPTER 22	
	625
	625
1. <i>Pinkerton</i> Liability	625
2. Scope of the Conspiracy	626
3. Withdrawing from a Conspiracy	626
	627
1. <i>Pinkerton</i> Liability	627
<i>United States v. Alvarez</i>	627
Notes & Questions on <i>Pinkerton</i> Liability	632
2. Scope of the Conspiracy	635
<i>People v. Bruno</i>	636
<i>Kotteakos v. United States</i>	637
Notes & Questions on Conspiratorial Scope	642
3. Withdrawal	644
<i>United States v. Schweih</i>	645
Notes & Questions on Withdrawal	647

	648
Conspiracy as procedure and substance	648
Joint Criminal Enterprise	649
CHAPTER 23	
	651
	651
1. Prosecuting Corporations	651
2. Punishing Corporations	652
3. Prosecuting Corporate Officers	653
	653
1. Prosecuting Corporations	653
<i>State v. Far West Water & Sewer Inc.</i>	653
Notes & Questions on Corporate Liability	657
2. Punishing Corporations	660
<i>Principles of Federal Prosecution of Business Organizations</i>	660
Notes & Questions on Corporate Punishment	674
3. Prosecuting Corporate Officers	676
<i>United States v. Park</i>	676
Notes & Questions on Responsible Officers	680
	681
State prosecutions	681
Deferred prosecution agreements	681
Waiving attorney-client privilege	683
PART V	
	685
CHAPTER 24	
	687
	687
1. Imminent Threat	687
2. Necessity and the Duty to Retreat	688
3. Reasonable Belief	689
4. Imperfect Self-Defense	690
	690
1. Imminence	690
<i>State v. Norman</i>	691
Notes & Questions on Imminence	703
2. Necessity and the Duty to Retreat	704
<i>United States v. Peterson</i>	704
<i>People v. Riddle</i>	709

Notes & Questions on Duty to Retreat	714
3. Reasonable Belief	716
<i>People v. Goetz</i>	717
Notes & Questions on Reasonable Beliefs	724
4. Imperfect Self-Defense	726
<i>People v. Elmore</i>	726
Notes & Questions on Imperfect Self-Defense	730
	733
Stand Your Ground laws	733
Procedural immunity	735
Battered Nation Syndrome	736
Imminence in targeted killing	736
 CHAPTER 25	
	739
	739
1. Constitutional Limits	740
2. Civil Rights Violations	741
3. State Statutes Governing Police Use of Force	742
	743
1. Constitutional Limits	743
<i>Scott v. Harris</i>	743
Notes & Questions on Immediate Danger	748
2. Civil Rights Violations	750
<i>Report Regarding the Criminal Investigation into the Shooting</i>	
<i>Death of Michael Brown by Ferguson, Missouri Police Officer</i>	
<i>Darren Wilson</i>	750
Notes & Questions on Objective Reasonableness	759
	761
Abandoning pursuit	761
Body cameras	762
 CHAPTER 26	
	765
	765
1. Utilitarian Balancing and “Choice of Evils”	765
2. Defense to Murder	767
3. Necessity and Prison Breaks	767
4. Necessity and Civil Disobedience	768
	768
1. Utilitarian Balancing and “Choice of Evils”	768
<i>United States v. Ridner</i>	768

Notes & Questions on Utilitarian Balancing	772
2. Defense to Murder	773
<i>The Queen v. Dudley & Stephens</i>	773
Notes & Questions on Necessity and Murder	778
3. Necessity and Prison Breaks	778
<i>United States v. Bailey</i>	779
Notes & Questions on Prison Breaks	784
4. Necessity and Civil Disobedience	785
<i>United States v. Schoon</i>	785
Notes & Questions on Civil Disobedience	790
	791
Torture and terrorism	791
Torture and human dignity	792
Hijacked airliners and human dignity	794
CHAPTER 27	
	797
	797
1. Threats That Vitate Autonomy	797
2. The Severity of the Threat	798
3. Defense to Murder	799
4. Recklessness in Creating the Threat	799
	800
1. Threats That Vitate Autonomy	800
<i>Dixon v. United States</i>	800
<i>United States v. Contento-Pachon</i>	803
Notes & Questions on Duress and Autonomy	806
2. The Severity of the Threat	807
<i>Commonwealth v. DeMarco</i>	808
Notes & Questions on Reasonable Firmness	814
3. Defense to Murder	816
<i>People v. Anderson</i>	816
Notes & Questions on Duress and Murder	824
	826
Duress and atrocity	826
CHAPTER 28	
	831
	831
1. Negating Mens Rea	831
2. Eliminating the Defense of Voluntary Intoxication	833
3. Involuntary Intoxication	833

	834
1. Negating Mens Rea	834
<i>State v. Brown</i>	835
Notes & Questions on Negating Mens Rea	841
2. Eliminating the Intoxication Defense	843
<i>Montana v. Egelhoff</i>	843
Notes & Questions on Eliminating the Defense	848
3. Involuntary Intoxication	850
<i>People v. Garcia</i>	850
Notes & Questions on Involuntary Intoxication	856
	858
Grand schemers	858
The “separate offense” solution	859
Strategic charging and trial decisions	859
 CHAPTER 29	
	861
	861
1. The Cognitive Test	861
2. The Irresistible Impulse Test	862
3. The Model Penal Code Substantial Capacity Test	862
4. The Definition of Wrongfulness	863
5. Diminished Capacity	863
	864
1. The Cognitive Test	864
<i>Sanders v. State</i>	864
Notes & Questions on the Cognitive Test	871
2. Irresistible Impulse Test	871
<i>Pollard v. United States</i>	871
Notes & Questions on Irresistible Impulses	877
3. The Model Penal Code Substantial Capacity Test	879
<i>United States v. Freeman</i>	880
Notes & Questions on Substantial Capacity	884
4. The Definition of Wrongfulness	885
<i>State v. Crenshaw</i>	886
Notes & Questions on Wrongfulness	891
5. Diminished Capacity	892
<i>Clark v. Arizona</i>	893
Notes & Questions on Diminished Capacity	902
	904
Separate insanity phase	904
Guilty but mentally ill (GBMI) plea	905

Too crazy to plead insanity	906
The medical model to criminal insanity	906
<i>Appendix: Model Penal Code</i>	909
<i>Table of Cases</i>	969
<i>Index</i>	975

PREFACE

I wrote this casebook not just to use as teaching materials for my own class, but also to provide professors and students everywhere with a set of crisp and flexible materials for the study of criminal law. The book is divided into 29 chapters, followed by an appendix with selections from the Model Penal Code. I deliberately wrote a larger number of shorter chapters so that each chapter would correspond to a single topic. The goal of the book is to help students learn the criminal law and to stimulate a wider discussion of it among students and scholars alike.

Each chapter is divided into three major sections. The A Section focuses on a doctrinal overview of the subject, presented without using secondary materials such as law review excerpts. The goal of this section is to give the reader a bird's-eye view of the chapter's topic. I find this is helpful so that readers have a sense of the outer scope of the topic before they delve into more particular investigations of each doctrine. In short, students need some context before they learn the particulars. Then, the B Section (labeled "Application") focuses on applying the doctrine to new and complex fact patterns. Readers are presented with appellate opinions, followed by notes and questions, which will help develop and hone an essential skill: applying the law to novel facts. Consequently, cases are selected with an eye toward this pedagogical goal. Instead of reprinting cases that merely announce the law, the chapter focuses on cases that present complicated and contested applications of the law. Many of the cases are new—from the past 15 years—though I have also kept many of the older canonical cases that are rightly regarded as classics of criminal law teaching. Finally, each chapter concludes with a brief section labeled "Practice & Policy" that asks students to consider some of the deeper implications, both practical and theoretical, of the material they have learned in each chapter.

Please note that I have followed several conventions while selecting and editing the cases in the book. First, internal citations within the cases are omitted without indication, in order to make the cases more readable. Second, deletions within cases are marked by ellipses (. . .) rather than asterisks (* * *). Third, the ellipses at the beginning or end of a paragraph may indicate that

sentences were deleted from the paragraph or that entire paragraphs were deleted. In other words, the reader should not assume that ellipses at the end of a paragraph indicate that the deleted material was solely contained within that original paragraph. Finally, parallel citations were removed without indication.

The third edition includes several notable additions:

1. I have added a chapter on “Offenses Against the Administration of Justice,” which covers obstruction of justice, perjury, bribery and corruption, and contempt of court. The chapter ends, in the Practice & Policy section, with a brief discussion of these crimes in a political context, including obstruction of justice and contempt of Congress by executive branch officials.
2. The chapter on “Theft & Property Offenses” has been updated to include robbery and arson. As these topics are tested on the bar exam, some professors may wish to add these pages to their syllabuses.
3. The chapters on premeditation and felony murder have both been completely overhauled to take into account recent developments, especially the repeal of felony murder in California.
4. The chapter on “Defensive Force by Police Officers” includes a new introduction referencing the nation-wide protests over police brutality and linking the reform proposals from those social movements with the particular doctrines that govern the use of force by law enforcement.
5. The chapter on “Punishment” now includes a discussion of mass incarceration and the prison abolition movement.

The third edition, like the second, also includes integrated prompts directing students to watch and analyze the fact patterns in a series of original courtroom videos at <https://www.casebookconnect.com/> that were written and produced to accompany *Criminal Law: Doctrine, Application, and Practice*. The videos are also available on the Wolters Kluwer product page for this casebook. For students accessing the digital casebook through Casebook Connect, the videos are comprised of four major vignettes, each one broken into four short segments of about three or four minutes in length. The idea behind the videos is to give students an extra opportunity to understand the implications of the legal rules that they are studying, and also another opportunity to *apply* the law to a hypothetical example—this time rendered in vivid detail on the screen. My assumption is that students will review the videos at home while they read the chapter. On occasion, though, professors may wish to replay the video during class to stimulate a discussion regarding the topic presented in the video. Learn more about the videos at <https://www.wklegaledu.com/Ohlin-CriminalLaw3>.

Please feel free to send comments and suggestions for the fourth edition; your feedback is both welcome and essential for future revisions.

Jens David Ohlin
Cornell Law School
Ithaca, New York
July 2021

ACKNOWLEDGMENTS

Many people were instrumental in bringing this casebook to fruition.

I first discussed the idea of doing this casebook with Deborah Van Patten and Carol McGeehan. Nicole Pinard, John Devins, Kathy Langone, Troy Froebe, Sarah Hains, and Joe Stern were instrumental in helping me through the writing and editing process every step of the way, while Michelle Humphrey assisted with permissions. Susanne Walker did a great job marketing the first edition. I also wish to thank Joe Terry.

Several colleagues at Cornell Law School, including Steve Shiffrin, offered advice about writing a casebook. In particular, Kevin Clermont spent countless hours with me discussing law school teaching pedagogy in general as well as the structure and content of my proposed casebook. He graciously provided a detailed editing of my first draft chapter.

I am indebted to several criminal law colleagues who read and provided feedback on early drafts of the entire manuscript, including Sherry Colb, Geoffrey Corn, Rob Sloane, Sasha Greenawalt, Tom McDonnell, and Wadie Said. Also, several anonymous reviewers for Wolters Kluwer provided suggestions that made their way into the final version of this casebook. Rachel Lerman provided valuable research assistance.

The revisions for the second and third editions were, in many ways, a collaborative exercise. Several adopters sent back feedback that included rich ideas for new material or changes. However, three adopters in particular—Clifford Rosky, Geoff Corn, and Ken Simons—deserve special mention for sending me detailed suggestions for editorial changes both large and small. I am eternally grateful for their time and effort and for their commitment to this casebook.

Most importantly, Nancy Ohlin encouraged me to embark on this ambitious project in the first place. She suggested some of the news items that eventually became problem cases in the casebook. She also spent many hours listening to me, ultimately helping me to distinguish between my best and worst ideas. This book never would have become a reality without her hard work and dedication to my career.

I would also like to thank the following copyright holders for granting permission to reproduce these materials in the text:

American Law Institute. Model Penal Code © 1985 by The American Law Institute. Reproduced with permission. All rights reserved.

Anders Behring Breivik, photograph. Copyright © 2012 by ODD ANDERSEN/AFP via Getty Images.

Andreas Lubitz, photograph. Copyright © 2015 by Fototeam Mueller/Reuters Pictures.

Andrew Fastow, photograph. Copyright © 2006 by Dave Einsel/Getty Images.

Ariel Castro, photograph. Copyright © 2013 by Angelo Merendino/Getty Images.

Arthur Miller, Chief of Police for South Pasadena, CA, photograph. Copyright © 2014 by Mark Ralston/AFP via Getty Images.

Bernhard Goetz, photograph. Copyright © 1995 by Clarence Davis/New York Daily News Archive via Getty Images.

Bernie Madoff, photograph. Copyright © 2009 by Bloomberg/Getty Images.

Biljana Plavsic, photograph. Copyright © 1998 by Ulrich Baumgarten/Getty Images.

Chris Turgeon and Blaine Applin, photograph. Copyright © 2001 by Paul Joseph Brown for the Seattle Post-Intelligencer via Museum of History and Industry.

Colin Ferguson, photograph. Copyright © 1995 by Bill Turnbull/NY Daily News Archive via Getty Images.

Curtis Wehmeyer, photograph. Courtesy of Minnesota Department of Corrections.

Daniel M. Biechele, photograph. Copyright © 2006 by POOL/Getty Images.

Darren Wilson, photograph. Copyright © 2014 by St. Louis County Prosecutor's Office via Getty Images.

David Sweat, photograph. Copyright © 2015 by AP Images (file photo).

Drazen Erdemovic enters the War Crimes Tribunal in the Hague, photograph. Copyright © 1998 by Jasper Juinen/Reuters Pictures.

Drazen Erdemovic puts on headphones, photograph. Copyright © 1996 by Jasper Juinen/Reuters Pictures.

George Zimmerman, photograph. Copyright © 2013 by Joe Burbank/Getty Images.

Greg Doda, photograph. Copyright © 2006 by Bradley J. Boner/Jackson Hole Daily.

Henry Rayhons, photograph. Copyright © 2014 by Daniel Acker/Bloomberg via Getty Images.

James Holmes, photograph. Copyright © 2012 by RJ Sangosti-Pool/Getty Images.

James Holmes's notebook, photograph. Copyright © 2015 by Colorado Judicial Department via AP Photos.

Jay McLaughlin, photograph. Copyright © 2006 by Bob Breidenbach-Pool/Getty Images.

John Hinckley, photograph. Courtesy of FBI Field Office, Washington.

Justin Ross Harris, photograph. Copyright © 2014 by AP Photo/Marietta Daily Journal/Kelly J. Huff.

Kathy Rowe, photograph. Copyright © 2015 by David Brooks/U-T San Diego/ZUMA Press.

Kenneth Parks, photograph. Copyright © 1988 by Frank Lennon/Toronto Star/Getty Images.

Lindbergh baby with nurse, photograph. Copyright © 1931 by AP Images.

Michael Brelo, photograph. Copyright © 2015 by AP Photo/Tony Dejak.

O.J. Simpson, photograph. AP Photo/Vince Bucci. Copyright © 1995.

Oleg Davie, photograph. Copyright © 2014 by Aaron Showalter/New York Daily News/Daily News, L.P.

Paul Formella, photograph. Copyright © 2007 by Jennie Post/The Dartmouth.

Raffi Kodikian, photograph. Copyright © 2000 by AP Photo/Eric Gay.

Reagan assassination attempt, photograph. Copyright ©1981 by AP Photos/Ron Edmonds.

Richmond High School, photograph. Copyright © 2009 by Justin Sullivan/Getty Images.

Ross Ulbricht, photograph. Copyright © 2015 by Spencer Platt/Getty Images.

Sabbar Kashur, photograph. Copyright © 2010 by Reuters/Ammar Awad.

Sandy Hook Elementary School, photograph. Copyright © 2012 by AP Photo/Jason DeCrow.

Scott Roeder, photograph. Copyright © 2009 by Mike Hutmacher/Wichita Eagle/Tribune News Service via Getty Images.

Shannon Conley, photograph. Copyright © 2014 by 7NEWS/KMGH/Scripps Media, Inc. All rights reserved.

Trayvon Martin rally in Los Angeles, photograph. Copyright © 2013 by Frederic J. Brown/AFP/Getty Images.

Wolfgang Daschner, Frankfurt Police Department Vice President, and Magnus Gäfgen, photographs. Copyright © 2014 by Boris Roessler/EPA via Shutterstock.

CRIMINAL LAW

PART I

BASIC ELEMENTS OF CRIMINALITY

CHAPTER 1

INTRODUCTION TO THE CRIMINAL PROCESS

Although this is a casebook in the substantive criminal law, not criminal *procedure*, it is nonetheless important to situate the substance of American criminal law within the system that it operates. Indeed, in debating about the criminal law, scholars and practitioners appeal to how the offense will be prosecuted and adjudicated in reality—surely a relevant consideration for anyone who cares about justice. Given this, the student of the criminal law needs at least a basic tour through the criminal justice system, and an introduction to the major stages of the process: the criminal complaint and its investigation, arrest, indictment or preliminary hearings, trial, sentencing, and appeal. Consequently, this introductory chapter, which provides such a tour, departs slightly from the structure used in the rest of the book. Section A examines the phases of the criminal justice system, with particular emphasis on the different evidentiary burdens that apply during each phase. Then, Section B considers the bedrock principle of the presumption of innocence and applies it in a concrete case. Section B then continues its examination of the fact-finding process with a concrete controversy: juries who refuse to convict even if they think a defendant is guilty. Section C provides an introduction in how to read, understand, and ultimately carve a penal statute into its component parts—an essential skill to acquire before proceeding to the rest of the material in this casebook.

The criminal process usually begins with a criminal complaint sworn by a victim in a case. There are exceptions to this general practice: If the police

encounter evidence of law breaking they will investigate and pursue the case in anticipation that a victim will be found who will complain about the conduct. Also, if the police encounter evidence of criminal conduct directed at the public at large—or if they personally witness the crime—they will issue a citation on their own volition. But for major crimes, a case usually begins with a complaining victim for mostly pragmatic reasons: It is difficult to successfully prosecute an offender unless there is a witness to testify about the offending conduct.

The investigation will be conducted by the relevant police agency with jurisdiction over the crime. This is not limited to the municipal police and the FBI. There are a host of other agencies with criminal jurisdiction apart from your local city police and the federal government. This includes county sheriffs, state police, and numerous federal and state agencies with statutory grants of jurisdiction over particular crimes or territory: state agencies that patrol state parks; agencies that prosecute environmental or safety offenses; federal agencies like the Bureau of Alcohol, Tobacco, and Firearms; and hundreds of obscure agencies that rarely get public attention (e.g., the Library of Congress used to have its own police force until Congress merged it with the U.S. Capitol Police). Finally, universities and colleges in most states have their own public safety officers entitled to exercise the same duties as police officers. An “investigation” can be as swift or as protracted as the circumstances require.

If the police believe that there is sufficient evidence that a particular individual committed a crime, they can either arrest the suspect or, if the crime is serious and the jurisdiction requires it, ask a judge to issue an arrest warrant. In every jurisdiction, if the police go to the suspect’s home to arrest him or her, the Fourth Amendment requires an arrest warrant unless there are exigent circumstances. Outside the home, a police officer might perform an arrest on his or her own authority if he or she personally witnesses the crime or if the officer reasonably believes, based on an investigation, that the suspect committed the crime. As for the arresting officer’s evidentiary burden, the standard is usually that there exists “probable cause” to believe that the suspect committed the crime—a standard that is much less demanding than the level of certainty required to convict someone at trial (proof beyond a reasonable doubt) or to find liability in a civil case (a preponderance of the evidence).

The police may question the suspect either before or after the arrest (or both). However, once the suspect is in police custody, the police must issue *Miranda* warnings and advise the suspect of his rights, including the right, during an interrogation, to counsel at public expense and the right to remain silent. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Failure to advise a detained suspect of his rights could later trigger the exclusionary rule at trial. In some larger jurisdictions, such as New York City, professional investigators

working directly for the district attorney will continue to work on the case pending the trial.

After being processed, arrested suspects will be brought before a judge for arraignment. Bail will either be granted or denied depending on various factors, including the severity of the offense and the risk that the defendant might flee the jurisdiction. If bail is granted, the suspect may either post cash (if he has enough) or apply for a bail bond. The defendant secures the bail bond by giving a percentage of the money and collateral to a bail bondsman. If the defendant flees the jurisdiction or otherwise refuses to appear for trial, the bail is forfeited. To recoup his loss, the bail bondsman will then attempt to locate the suspect and forcibly bring him to the court, or seize the collateral pledged by the defendant or his family. In many cases, the lightly regulated bail bondsman industry has provoked substantial concern because these private actors act as bounty hunters.

After arrest, the local district attorney is usually not permitted to proceed directly to a trial. In the case of felonies, many jurisdictions require the successful completion of either a preliminary hearing or a grand jury indictment before a judge will schedule a trial. These two pre-trial mechanisms are radically different. Preliminary hearings are usually public, adversarial proceedings between a prosecutor and a defense attorney; the prosecutor has the burden to demonstrate to the judge that there is a sufficient factual basis to justify the charge and proceed to trial. In contrast, grand jury proceedings are non-adversarial and involve only a prosecutor presenting his or her side of the case to a grand jury in a closed-door and confidential proceeding. The prosecutor has the burden to present admissible evidence that provides reasonable cause to believe that the defendant committed the crime. A grand jury must indict the individual on a specific charge, which the prosecutor must then prove beyond a reasonable doubt at trial. In both mechanisms, if the prosecutor loses, the defendant is released. On the other hand, if the prosecutor wins and a trial is ordered, both sides then begin work to prepare for trial.

Before trial, prosecutors are required to meet the demands of discovery: turn over all relevant and probative evidence to defense counsel. This process eliminates the danger of unfair surprise and gives the defendant the opportunity to prepare for trial and select an appropriate defense strategy. Also, the defense attorney and prosecutor may make informal predictions about their chance of success at trial and then negotiate a plea bargain in order to reduce the risk of losing. Usually a plea bargain involves the defendant pleading guilty

to a lesser charge and coming to some agreement about the length (or range) of the penalty. The deal is then presented to the judge for ratification and endorsement. Although judges are entitled to reject plea offers if they wish, in most cases they welcome them as a way to reduce their caseloads. In the absence of plea-bargaining, the criminal justice system in its current form would collapse.

After the judge dispenses with any pre-trial motions regarding inadmissible evidence or discovery disputes, the trial begins with *voir dire*, the selection of the jury. (Some jurisdictions dispense with juries but only in cases of minor infractions.) Each side may strike potential jurors with a limited number of peremptory challenges and an unlimited number of challenges for cause when there is evidence that a juror cannot be impartial.

The trial commences with the prosecutor's presentation of evidence and witnesses, who can be cross-examined by the defense attorney. The prosecutor bears the initial burden to establish a *prima facie* case, i.e., evidence that is legally sufficient to demonstrate that the defendant's behavior satisfied each element of the criminal offense, unless that evidence is disproved or rebutted by the defense. In theory then, a defendant could be acquitted without his lawyer presenting a shred of evidence, if the prosecutor fails to meet his *prima facie* burden. At the conclusion of the prosecution's case-in-chief, the judge can grant a dismissal if he or she determines that it would be unreasonable for any jury to convict (because of the paucity of evidence). Otherwise, the defense presents its case and argues for an acquittal, followed by closing arguments. If the defendant has selected a bench trial, the judge deliberates and then hands down a decision. In the case of a jury trial, the judge must "charge" the jury with a set of instructions that explain the law to lay individuals who do not have prior legal training. Jurors then retire to deliberate in secret. Not all jurisdictions require unanimous jury verdicts. Ultimately, the jury must decide whether the prosecution submitted enough admissible evidence to establish beyond a reasonable doubt that the defendant committed the crime. It is possible that the prosecution might submit enough evidence to meet its *prima facie* burden but not enough evidence to satisfy its ultimate burden of persuasion, especially in light of countervailing evidence presented by the defense. Those cases should result in acquittals by the jury.

If found guilty, a defendant will be subject to the criminal penalties defined by statute. In most cases the sentencing determination is bifurcated into a separate proceeding that allows the judge or jury to consider aggravating and mitigating circumstances that would not be relevant during the guilt phase of the trial. So,

for example, defense counsel might call witnesses who could testify regarding the defendant's positive character or the factors beyond his control—such as early childhood abuse—that influenced his life trajectory. For some crimes, the statute will fix mandatory minimum and maximum penalties so as to constrain the discretion of the court in imposing its sentence. In some jurisdictions, a non-binding set of sentencing guidelines will provide a framework for the court to use in calculating an appropriate prison sentence or fine.

After sentencing, defendants are permitted to appeal their conviction unless they have knowingly waived their right to appeal as part of a plea bargain. Generally speaking, the prosecutor cannot appeal an acquittal because the constitutional protection of double jeopardy attaches to the acquittal. The grounds of appeal by the defense are limited to questions of law, as opposed to the jury's assessment of the facts. That being said, matters of fact become reviewable as a question of law if an appellate court determines that no reasonable jury could find the defendant guilty under the evidence admitted in the case. “[T]his inquiry does not require a court to ‘ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.’ Instead, the relevant question is whether, after viewing the evidence *in the light most favorable to the prosecution*, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (emphasis added). Successful appeals also involve procedural irregularities at trial, mistakes regarding evidence that should have been excluded but was wrongfully submitted to the jury, or judges' mistakes in describing the law when charging the jury before its deliberations. An appellate court can uphold a conviction in spite of these mistakes if its judges believe they constituted “harmless error” that could not have affected the outcome of the case. If a defendant wins on appeal, the government usually has the option of retrying the case unless the appeals court orders a dismissal “with prejudice.”

In the absence of proof of guilt, the defendant is presumed innocent. In many ways, this is an abstract principle. The rubber meets the road in the context of the prosecution's burden to establish the defendant's guilt beyond a reasonable doubt. What does it mean for this burden to fall on the prosecution side rather than on the defense side?

Court of Special Appeals of Maryland
93 Md. App. 162 (1992)

MOYLAN, Judge.

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

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

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

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

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

The truck’s engine was running and its lights were on. The appellant was asleep in the driver’s seat, with an open can of Budweiser clasped

between his legs. Two more empty beer cans were inside the vehicle. As Trooper Cottman awakened him, the appellant appeared confused and did not know where he was. He stumbled out of the vehicle. There was a strong odor of alcohol on his breath. His face was flushed and his eyes were red. When asked to recite the alphabet, the appellant “mumbled through the letters, didn’t state any of the letters clearly and failed to say them in the correct order.” His speech generally was “slurred and very unclear.” When taken into custody, the appellant was “very argumentative . . . and uncooperative.” A check with the Motor Vehicles Administration revealed, moreover, that the appellant had an alcohol restriction on his license. The appellant declined to submit to a blood test for alcohol.

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

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

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

The first inference would render the appellant guilty; the second would not. Mere presence behind the wheel with the lights on and the motor running could give rise to either inference, the guilty one and the innocent one. For the State to prevail, there has to be some other factor to enhance the likelihood of the first inference and to diminish the likelihood of the second. We must look for a tiebreaker.

The State had several opportunities to break the game wide open but failed to capitalize on either of them. As Trooper Cottman woke the appellant, he asked him what he was doing there. The appellant responded that he had just driven the occupant of the residence home. Without explanation, the appellant's objection to the answer was sustained. For purposes of the present analysis, therefore, it is not in the case. We must look for a tiebreaker elsewhere.

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

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

Three beer cans were in evidence. The presence of a partially consumed can of beer between the appellant's legs and two other empty cans in the back seat would give rise to a reasonable inference that the appellant's drinking spree was on the downslope rather than at an early stage. At least a partial venue of the spree, moreover, would reasonably appear to have been the automobile. One does not typically drink in the house and then carry the empties out to the car. Some significant drinking, it may be inferred, had taken place while the appellant was in the car. The appellant's state of unconsciousness, moreover, enforces that inference. One passes out on the steering wheel after one has been drinking for some time, not as one only begins to drink. It is not a reasonable hypothesis that one would leave the house, get in the car, turn on the lights, turn on the motor, and then, before putting the car in gear and driving off, consume enough alcohol to pass out on the steering wheel. Whatever had been going on (driving and drinking) would seem more likely to have been at a terminal stage than at an incipient one.

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

The totality of the circumstances are, in the last analysis, inconsistent with a reasonable hypothesis of innocence. They do not, of course, foreclose the hypothesis but such has never been required. They do make the hypothesis more strained and less likely. By an inverse proportion, the diminishing force of one inference enhances the force of its alternative. It makes the drawing of the inference of guilt more than a mere flip of a coin between guilt and innocence. It makes it rational and therefore within the proper purview of the factfinder. We affirm.

The phrase “burden of proof” is often uttered, but it is an imprecise term. The burden of proof is composed of two more specific categories: “burden of production” and “burden of persuasion.” In a criminal proceeding, the burden of production is one side’s obligation to introduce sufficient evidence to make an issue a triable issue of fact for the fact finder (usually the jury) to resolve. The burden of persuasion is one side’s obligation to introduce enough evidence to satisfy the fact finder according to the relevant standard of proof. In criminal cases, the standard of proof is proof beyond a reasonable doubt.

It is also important to distinguish how these burdens apply to the overall case versus a particular legal issue within a case. In criminal law cases, the prosecution retains the overall burden to persuade the fact finder of guilt beyond a reasonable doubt. For affirmative defenses, however, the defense bears an initial burden of production and must introduce sufficient facts regarding the defense to make it a triable issue of fact requiring resolution. Once the defense meets that initial burden of production, some states will shift the burden of

persuasion to the prosecution to disprove the defense beyond a reasonable doubt to the jury. In some circumstances, however, a state might allocate the burden of persuasion on the affirmative defense to the defense side. In that case, the defense might need to demonstrate the affirmative defense by a preponderance of the evidence. For example, Ohio law allocates to the defendant the burden of proving self-defense by a preponderance of the evidence, a scheme that was upheld by the Supreme Court in *Moran v. Ohio*, 469 U.S. 948, 949 (1984). However, the Ohio scheme is rare; most states allocate to the prosecution the burden of disproving self-defense, since it is so closely connected to the state's overall burden of persuasion to demonstrate that the defendant committed the crime.

As noted earlier, in reviewing the trial court's verdict to determine whether the evidence was legally sufficient to support the verdict, the appellate court must view the evidence "in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). How did the appellate court in *Owens* honor this requirement? Identify the relevant facts and how the interpretation of those facts might change depending on whether they are viewed in the light most favorable to the defense or in the light most favorable to the prosecution.

The following case involves two principles that come head-to-head when the jury goes into deliberations. On the one hand, the jury is supposed to follow and apply the law as described by the judge. On the other hand, the jury can do what it wants and can always refuse to return a guilty verdict, even in cases where evidence of guilt is sufficient to meet the legal standard of proof beyond a reasonable doubt. This is often referred to as jury nullification. Does the fact that the jury possesses this raw power entail that defense lawyers should be permitted to ask juries to nullify? In the following case, the New Jersey court grapples with this question.

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

WILENTZ, C.J.

. . . Defendant, Gregory Ragland, was convicted by a jury of conspiracy to commit armed robbery, unlawful possession of a weapon, and unlawful possession of a weapon without a permit. Another charge against him, possession of a weapon by a convicted felon, was severed on defense counsel's motion in order to avoid the inevitable prejudice in the trial of the other charges that would be caused by introducing defendant's prior felony

conviction, an essential element in the severed charge. . . . Included in the trial court's instructions on the severed charge was the following:

If you find that the defendant, Gregory Ragland, was previously convicted for the crime of robbery and that he was in possession of a sawed-off shotgun, as you have indicated . . . then you must find him guilty as charged by this Court. . . . If, on the other hand, you have any reasonable doubt concerning any essential element of this crime, then you will find him not guilty.

Defendant appealed. . . .

II

It is conceded that the "must" charge is widely used in New Jersey and has been as long as anyone can remember. Defendant refers to the instructions as "commonly used in this jurisdiction" and acknowledges that the "must" charge is found in our model jury charges—frequently, we might add. Defendant calls it "our current system of instructing jurors." We agree. While our review, for this purpose, of jury charges in criminal matters recently before us, as well as our recollection, indicates a great variety in the language used to instruct a jury concerning its responsibilities, the "must find him guilty" format is there in abundance. And so are many other formulations.

The defendant would require a charge that states, in effect, that if the jury does not find a, b and c beyond a reasonable doubt, it must find defendant not guilty, but that if it does find a, b and c beyond a reasonable doubt, then it may find defendant guilty. In support of this change in present practice, defendant contends that the jury's power of nullification—the unquestioned power of the jury to acquit with finality no matter how overwhelming the proof of guilt—is an essential attribute of a defendant's right to trial by jury; that use of the word "must" conflicts with that attribute, for it incorrectly advises the jury that if it finds the proof of guilt beyond a reasonable doubt it *must* convict, whereas the truth is that it need not do so, it may, in fact, acquit; that "must" convict, therefore, should never be used. While noting that the word "should" "is better than 'must,'" defendant would also prohibit the use of that word in connection with the guilty charge since when the court says it "should" convict, the jury will believe that the court means it "must."

While defendant's arguments suggest that the ultimate object is to assure that the jury is not impeded by this coercive language from performing its proper role, the effect of the change is somewhat different. Its only effect, its only tendency, is to make it more likely that juries will nullify the law, more likely, in other words, that no matter how overwhelming the proof of guilt, no matter how convinced the jury is beyond any reasonable doubt of defendant's guilt, despite the law, it will acquit. Even without

an explicit charge on the power of nullification, the jury must understand from this contrasting language (*must* acquit but *may* convict) that it is quite properly free, and quite legally free (since it is the court who is telling it “may”) to acquit even if it is convinced beyond a reasonable doubt of defendant’s guilt. Whether the contrast is as clear as “must” and “may,” or is expressed in some other way (e.g., “you are authorized to find the defendant guilty,” “a guilty verdict would be considered valid or proper,” “you have the responsibility to return a guilty verdict,” “the State is entitled to the return of a guilty verdict”—all contrasting with “you must acquit”), the message, intended by the charge and so understood by the jury, is that you have the power to nullify and it is permissible for you to do so.

This change in our settled practice, this attempt to modify our present instructions to the jury in order to allow for the uninhibited, robust, exercise of its nullification power, is not commanded by the United States Constitution, the New Jersey Constitution, any statute, or by the common law. The implication of defendant’s argument is that the use of the word “must” in this connection violates both his federal and state constitutional rights, since the protected right—nullification—is described in terms of an essential attribute of defendant’s right to trial by jury. . . .

III

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

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

There are various elements in this view of the jury as the “conscience of the community.” Some laws are said to be unfair. Only the jury, it is thought, is capable of correcting that unfairness—through its nullification power. Other laws, necessarily general, have the capacity of doing injustice in specific applications. Again, only the jury can evaluate these specific applications and thereby prevent injustice through its nullification power. Cast aside is our basic belief that only our elected representatives may

determine what is a crime and what is not, and only they may revise that law if it is found to be unfair or imprecise; only they and not twelve people whose names are picked at random from the box.

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

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

There is no mystery about the power of nullification. It is the power to act against the law, against the Legislature and the Governor who made the law. In its immediate application, it transforms the jury, the body thought to provide the ultimate assurance of fairness, into the only element of the system that is permissibly arbitrary. And in its immediate application, it would confuse any conscientious citizen serving on a jury by advising that person, after the meticulous definition of the elements of the crime, the careful description of the burden of proof, and the importance of the conscientious discharge of that person’s duties, that, after all is said and done, he can do whatever he pleases. Spectators, formerly amazed at verdicts that clearly violated the law (namely, verdicts that suggested that the jury had nullified the law), will be comforted to know that there is nothing to be amazed about, that juries are not required to follow the law, that they are advised that one of their important functions is *not* to follow the law, and that this advice is given by the ultimate symbol of lawfulness, the judge. It is difficult to imagine a system more likely to lead to cynicism.

There is another point of view that accepts the existence of the power as a fact, regardless of its desirability, and concludes that if we cannot eliminate it, we should at least make its application equal by making sure every jury knows of it. There is a surface appeal to the equality advocated. If one believes, however, that the exercise of the power is essentially arbitrary, the position that every jury should be advised of this power is seen as leading not to more equality but to more arbitrary results. That is not the sole reason for opposing such a position, however. What may be more important

than minimizing these arbitrary results is the question of society's determination to make the jury system work as rationally as possible. The cynicism and disbelief that are encouraged by such instructions to a jury, including, especially, the instruction that tells the jury it need not listen to instructions, are more to be avoided than even the arbitrariness likely to affect the jury's final determination.

The fundamental defect in jury nullification is obvious. It is a power that is absolutely inconsistent with the most important value of Western democracy, that we should live under a government of laws and not of men. There are many manifestations of the concept of a "government of laws," and one of the most important is its operation in the administration of criminal justice. It is there that the sovereign is visibly restrained, it is there that we can see most clearly the application of this hard-earned rule, the rule that no one, to the extent man is capable of achieving this goal, no one, shall be found to have violated society's commands unless that command is first announced and then only after a group of free people, hearing all of the evidence, determine that the accused has violated the command. With jury nullification, these free people are told, either explicitly or implicitly, that *they* are the law, that what the sovereign has pronounced ahead of time either may or may not be followed, and that if they want to, they may convict every poor man and acquit every rich man; convict the political opponent but free the crony; put the long-haired in jail but the crew-cut on the street; imprison the black and free the white; or, even more arbitrarily, just do what they please whenever they please.

One of the biggest problems in the administration of criminal justice is the inequality of its enforcement, an inequality that starts with the inability to find all of its violators (it is sometimes estimated that only one out of ten violators is apprehended) and then apply the law equally to those who are caught. The extent to which the inequality at that point varies depends upon prosecutorial discretion, the differences in the abilities of counsel, and the varying strength and wisdom of judges. But at every stage of the proceeding, from the work of the police and the prosecutor's office, to the actions of a grand jury and the work of the judiciary at trial, all elements strive, at least consciously, for one goal, and that is the equal application of the law to all accused, so that all who are guilty are found guilty and all who are innocent are acquitted. Absolutely nowhere in the system is there some notion that someone should have the power, arbitrarily, to pick and choose who shall live and who shall die. But that is precisely what jury nullification is: the power to undo everything that is precious in our system of criminal justice, the power to act arbitrarily to convict one and acquit another where there is absolutely no apparent difference between the two. It is a power, unfortunately, that is there, that this Court cannot terminate,

but a power that should be restricted as much as possible. The defendant would enshrine that power, in effect pronounce it one of the precious rights of a defendant, and thereby weaken our system of criminal justice and our dedication to fairness in prosecuting criminals.

The underlying fault of nullification is its total arbitrariness. No one knows what causes it or whether what causes it in one instance causes it in another. No one knows what factors are at play. No one tells a jury what the standards are that should be considered in exercising jury nullification, and no jury advises what standards it applied, or that it applied any. The very nature of the power is that it is absolute, unguided, not to be explained. There is no quality that it lacks if the goal is arbitrariness; it is totally and perfectly arbitrary.

Its existence in our system of criminal justice is almost ludicrous. There is no system more carefully designed to assure not simply that the innocent go free, but that at every step of the way the proceedings are directed toward a rational result. The lengths to which we go to exclude irrelevant evidence, the expenditures made to protect defendants from juror prejudice, the energy, study, and work devoted to a particular prosecution, all of these are prodigious. Having gone through that process, admired by us both for its thoroughness and its goals, astonishing to others for its devotion to fairness and reason, it is incomprehensible that at the very end we should tell those who are to make the judgment that they may do so without regard to anything that went before and without guidance as to why they should disregard what went on before, and without the obligation of explaining why they so disregarded everything. Were anyone to suggest that the police had the right, for no reason whatsoever, to arrest one person but let another escape—intentionally—or that a prosecutor, for no reason whatsoever, and without the need to explain, could prosecute one person but intentionally not prosecute another, or that a grand jury could do the same, where there is no perceptible difference in the two cases, we would either demand the indictment of that policeman and that prosecutor or would immediately pronounce such a suggestion as so lacking in any understanding of the purposes of our criminal justice system as to be not worthy of response. But that is precisely the power that is proposed here to be given to a jury. And were the Legislature to pass a law making a particular course of conduct criminal, and, at the end of that statute, provide that regardless of the proof of criminality the jury shall have the power to acquit, that law would be stricken as unconstitutional.

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