CRIMINAL LAW

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CRIMINAL LAW

Doctrine, Application, and Practice

Third Edition

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For George Fletcher,
for rethinking criminal law

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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.

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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.

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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 inamorata or of a baseball game blaring forth on the car radio. Either he was coming or he was going.

The first inference would render the appellant guilty; the second would not. 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. . . .