

**SUPREME COURT OF THE UNITED
STATES**

Nos. 92-8894 AND 92-9049

CLARENCE VICTOR, PETITIONER
92-8894 v.

NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

ALFRED ARTHUR SANDOVAL, PETITIONER
92-9049 v.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
CALIFORNIA
[March 22, 1994]

JUSTICE KENNEDY, concurring.

It was commendable for Chief Justice Shaw to pen an instruction that survived more than a century, but, as the Court makes clear, what once might have made sense to jurors has long since become archaic. In fact, some of the phrases here in question confuse far more than they clarify.

Though the reference to "moral certainty" is not much better, California's use of "moral evidence" is the most troubling, and to me seems quite indefensible. The derivation of the phrase is explained in the Court's opinion, but even with this help the term is a puzzle. And for jurors who have not had the benefit of the Court's research, the words will do nothing but baffle.

I agree that use of "moral evidence" in the California formulation is not fatal to the instruction here. I cannot understand, however, why such an unruly term should

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be used at all when jurors are asked to perform a task that can be of great difficulty even when instructions are altogether clear. The inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk.

With this observation, I concur in full in the opinion of the Court.