GETTING EVIDENCE TO THE JURY
TO ENABLE THE JURY
TO DO JUSTICE

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GETTING EVIDENCE TO THE JURY
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1. THE PURPOSE OF THE JURY IS TO PREVENT OPPRESSION AND TO DO JUSTICE.
Sir John Hawles, Solicitor General of England, 1680:

> ***For the end of Juries is to preserve Men from oppression, which may happen as well by imposing or ruining them for that as a Crime, which indeed is none, or at least not such or so great as is pretended, as by charging them with the Commission of that which in truth was not committed.***

1. Juries bring their values and their common sense and their life experiences into the jury room and they will attempt to do justice, regardless of whether judge, prosecutor, or defense counsel likes it.

Every criminal trial should be viewed as a trial of the morality of the defendant's behavior versus the morality of the government's conduct, the law and the proposed punishment. These moral concerns are important considerations for juries, and it would be folly for defense counsel to pretend otherwise.

You may tip the scales of justice in favor of the defendant by morally bolstering the defendant or by attacking the government. Waging this moral battle within the confines of the rules of evidence and procedure requires creativity and occasionally a bit of courage. Sometimes, the rules themselves must be challenged.

Lysander Spooner, *An Essay on the Trial By Jury, Chapter X, Moral Considerations for Jurors (1852)*:

> *It is, for instance, manifestly absurd to say that jurors have no moral responsibility for the enforcement of an unjust law, when they consent to render a verdict of guilty for the transgression of it; which verdict they know, or have good reason to believe, will be used by the government as a justification for inflicting a penalty....*
>
> *It is absurd, also, to say that jurors have no moral responsibility for any cruel or unusual sentence that may be inflicted even upon a guilty man, when they consent to render a verdict which they have reason to believe will be used by the government as a justification for the infliction of such sentence.*
>
> *The consequence is, that jurors must have the whole case in their hands, and judge of law, evidence, and sentence, or they incur the moral responsibility of accomplices in any injustice which they have reason to believe will be done by the government on the authority of their verdict.*

Prosecutor: *Objection, your Honor. Defense counsel is trying to challenge the morality of the law. That question is irrelevant and inappropriate.*

Court: *Overruled. The defense is entitled to introduce appropriate evidence of the defendant's conduct and thoughts which challenge the moral underpinnings of the law.*

Sound far-fetched? The Supreme Court has recently stated that prosecutors are entitled to introduce evidence for the purpose of bolstering "moral underpinnings of the law." Why shouldn't defendants be able to respond in kind, by attacking those underpinnings?

The Supreme Court [in *dicta*] acknowledges that jurors' concern for the "moral underpinnings of the law" (*i.e.*, justice) is a proper consideration in determining the relevance of certain evidence:

> *A criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it. .*
>
> *When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.*
>
> *Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to discreet elements of a defendant's legal fault.*
>
> *Old Chief v. United States*, 519 U.S. 172 (1997).

2. Sentencing Information

> I. Jurors are morally concerned about the consequences of a verdict: "It [was] widely perceived by those who observed the operations of our trial courts in previous times, when juries had the additional responsibility of setting punishment, that often they seemed to find guilt of a crime not necessarily most strongly suggested by the evidence, but one the punishment for which suited their sense of justice for the case. . ."
> *Tennessee v. Cook*, 816 S.W.2d 322 (Tenn. 1991).
>
> [For many years after eliminating jury sentencing, Tennessee required by statute, Tenn. Code Ann. 40-35-201(b)(2) (Supp. 1994), that trial courts instruct juries on sentencing possibilities a defendant faced, including parole and release eligibility, when either party

requested a sentencing instruction. The sentencing instruction was frequently a defendant's best weapon for winning an acquittal or at least some leniency. On May 1, 1998, the Tennessee General Assembly repealed this law, and now the statute provides that the judge shall not instruct and the attorneys are expressly prohibited from even commenting on the punishment.]

A defendant's right to inform the jury about sentencing consequences is a right of constitutional magnitude because it enables the jury to perform its primary purpose, "to resist oppression by the government."
United States v. Datcher, 830 F.Supp. 411 (1993).

11. Jurors are also judges of the credibility of all witnesses. "In considering the testimony of any witness, you may take into account . . . the witness' interest in the outcome of the case and any bias or prejudice." Instruction 1.7, Credibility of Witnesses, Ninth Circuit Manual of Model Jury Instructions, Criminal (1997).

It is a common defense practice to place sentencing information before the jury through the cross-examination of a government witness getting relief from similar charges as those facing the defendant. The right to confront any witness as to their credibility is unquestioned. But cooperating witnesses (*snitches*) facing similar charges are not always available.

If the defendant testifies, to evaluate her credibility the jury has the right to know what sentence the defendant faces. ***If a family member of the defendant testifies***, the jury has a right to know what is at stake for that member if the defendant is convicted: loss of a spouse or parent for years, loss of financial support (including loss of federal benefits for federal prisoners while incarcerated), etc. Having the defendant or a family member or a business associate discuss some or all of the sentencing consequences can have the effect of eliminating the jury's speculation and defusing the issue of interest relating to credibility. Impeaching your own witness with questions about their interest in the outcome of the case is a way of being forthright with the jury. It can also impact the jury's considerations on the "moral underpinnings of the law."

If you don't provide sentencing information to the jury, they will speculate what it may be, perhaps to the defendant's detriment.

Defendants have long recognized that it is often better for them to introduce impeachment evidence, rather than leaving the prosecutor the chance to do so. *See United States v. Ohler*, 169 F.3d 1200, 1202 (9th Cir. 1999), *cert. granted* (It is a common defense strategy to "remove the sting" of impeachment of a testifying defendant with a prior conviction, by having the defendant introduce the prior conviction).

It is wise to reduce a jury's speculation as to impeachment evidence:

> [T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. . . . If [jurors'] expectations are not satisfied, triers of fact may penalize the party who disappoints them by drawing a negative inference against that party.

Old Chief v. United States, 519 U.S. 172, ___ (1997).

Denying the jury information relevant to their evaluation of the defendant's credibility, leaves the jury to their own speculations as to the defendant's interest in the outcome of the case. They may have guessed he faced 20 years in prison. They may have guessed he would get off lightly, even if convicted. A jury's speculation about possible consequences can cut for or against any testifying witness, including the defendant. A defendant who is upfront with his jury about what sentence he faces makes clear to the jury that he is not trying to hide the truth from them. The jury is entitled to that important information to assist them in evaluating a defendant's credibility.

Juries do consider sentencing possibilities for reasons other than impeachment, and that cannot [and should not] be stopped: "The potential or inevitable severity of sentences [when juries knew the penalties for serious offenses] was indirectly checked by juries' assertions of a mitigating power . . ." *Jones v. United States*, 119 S.Ct. 1215, 1225 (1999). Juries have been known to convict on more serious charges, rather than less serious charges, to make sure a defendant was adequately punished. *See United States v. Greer*, 620 F.2d 1383, 1384 (10th Cir. 1980) (this is rare, but correctable through review). Juries historically controlled outcomes through their determination of verdicts, not just facts, and *this history of jury power* had to be in the minds of the Framers when adopting the constitutional guarantee of the right to trial by jury. *Jones v. United States*, 199 S.Ct. 1215, 1226 (1999). Thus, this *jury power* to mitigate, based on sentencing considerations, is part of the definition of the Sixth Amendment right to trial by jury.

III. But compare:

"[T]he question of punishment should never be considered by the jury in any way in deciding the case." Instruction 10.2, Caution-Punishment, Eleventh Circuit Pattern Jury Instructions, Criminal (1998).

The Supreme Court has said that when a federal jury is not involved in sentencing, it should be admonished to deliberate without considering punishment. See *Shannon v. United States*, 512 U.S. 573 (1994). [P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion. *Id.*

The *Shannon* Court was in error, ignoring the credibility issue and contradicting the logic it subsequently employed in *Old Chief* and contradicting the historical purpose of the jury, as described by the Court in *Jones v. United States*, 119 S.Ct. 1215 (1999).

The *Jones* Court reviewed the history of the right to jury trial and observed that the power to mitigate harsh sentences was an essential aspect of the jury. the American jury has always had the unreviewable power to mitigate the harshness of the law, a power derived from English juries exercising their prerogative in the "form of flat-out acquittals in the face of guilt" as well as in the form of "verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the juror's part." *Jones v. United States*, 119 S.Ct. 1215, 1225 (1999). 526 US 227

As the *Jones* Court observed, British reaction against the American jury's power [to nullify harsh British law], in the form of diminishing trial by jury, was a major justification for revolution listed in the Declaration of Independence. *Id.*

The historical struggle for power over the ultimate outcome of criminal trials was resolved leaving the jury firmly in control -- which included preserving the jury's power and opportunity to engage in jury nullification. *Id.*, at 1226. "That this history had to be in the minds of the Framers [of the Sixth Amendment] is beyond cavil." *Id.*

3. Necessity, Justification, or Entrapment Evidence

See Old Chief. When the government suspects jurors might be questioning the morality of the law, courts frequently morally bolster the law by instruction, while more often than not they determine that defendants are not entitled to moral justification defenses such as necessity, justification, self-defense, entrapment, etc.

For example, the Ninth Circuit recommends an instruction concerning the use of undercover agents and informants: ". . . Law enforcement officials are not precluded from engaging in stealth and deception, such as the use of informants and undercover agents. . . . The government may utilize a broad range of schemes and ploys to ferret out criminal activity." Instruction 4.10.2, Ninth Circuit Manual of Model Jury Instructions, Criminal (1997).

Courts which deny moral defenses are intruding on the role of the jury.

4. Placing the law on trial.

Jurors everywhere are encouraged to employ their common sense in the jury room, and they are never required to violate their consciences in bringing back a verdict. Appeals to common sense and conscience should always be allowed. Although generally a defendant may not directly attack the law.

there are many ways to do so indirectly.

For instance, jurors *know* that certain actions cannot generally be unlawful. Like breathing, or eating. Or earning a living. Or selling an item of lawfully acquired property. When a law is at all complex, or difficult to understand, or to apply, you may not convince the court that it is unconstitutionally vague, or overbroad, but you may be able to convince the jury.

Juries should be told by defense counsel (if the court allows) that if they can't determine whether the law applies to the defendant's conduct, because the law itself is unclear to the jury, then the defendant should be acquitted. Reasonable doubt as to whether the law applies may well come from reasonable doubt as to what the law means, or as to what behavior the law reaches. The rule of lenity can be argued to juries in urging them to give the benefit of the doubt to the defendant.

To place the reach of the law in doubt in a proper case, government witnesses can be asked whether certain *obviously legal behavior* is prohibited by the statute. For instance, in a case where the defendant was criminally charged with dealing in used cars without a license, an investigator when asked ("You're not saying the defendant is a criminal because he sold his own car, are you?"), hotly denied that the law forbade a person from selling his own car, if he were "not in the business." Yet, read literally, the law could prohibit any person from selling even one personal vehicle without a dealer license. The jury instruction faithfully repeated the obviously overbroad (obvious to everyone but the judge and prosecutor) language of the statute. Defense counsel argued to the jury that it was not clear what behavior the statute prohibited, contrasting the language of the statute with the investigator's statement as to what was prohibited and what was not. It is for the jury to determine whether the statute prohibits the defendant's actions. If it's not clear to them, they should acquit. The jury could not comprehend the reach of the statute, which seemed to outlaw behavior which "could not be criminal" and brought back an acquittal.

WHO IS IN CONTROL? TRIAL BY JURY OR TRIAL BY THE GOVERNMENT

JUDGES TRUST THE GOVERNMENT:

A criminal process which was fair and equitable but used no juries is easy to imagine. J. White, *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968).

I can apprehend very little danger of the laws being wrested to purposes of injustice. United States v. Morris, 26 F.Cas. 1323 (C.C.D. Mass. 1851) [judge arguing against the jury judging the law in a case considering application of the Fugitive Slave Act to punish those who helped a runaway slave].

THE PEOPLE ARE NOT REQUIRED TO TRUST THE GOVERNMENT:

John Adams, *Notes on the Rights of Juries* (1771), in 1 *Legal Papers of John Adams* 229 (1965):

In the Administration of Justice too, the People have an important Share. Juries are taken by Lot or by Suffrage from the Mass of the People, and no Man can be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People.

As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as complete a Controul, as decisive a Negative, in every Judgment of a Court of Judicature.

Q: HOW CAN JURIES RESIST GOVERNMENT OPPRESSION WITHOUT JUDGING THE LAW OR THE MORALITY OF THE LAW?

Justice Story, *United States v. Battiste*, 24 F.Cas. 1042 (C.C.D. Mass. 1835):

It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.

Justice Story, Commentaries on the Constitution of the United States (5th Ed.):

This right [trial by jury] was designed to guard against a spirit of oppression and tyranny on the part of rulers.

Justice Cooley, [Story's] Commentaries on the Constitution of the United States (5th Ed.)[discussion on the recently enacted Fourteenth Amendment]:

The security of individual rights, it has often been observed, cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cobweb chains of paper constitutions'. . . A popular form of government . . . does not necessarily assure to the people an exemption from tyrannical legislation.

A: THEY CAN'T. JURIES MUST BE FREE TO EVALUATE THE MORAL UNDERPINNINGS OF THE LAW, AND ARE ENTITLED TO RECEIVE EVIDENCE AND ARGUMENT THAT IS RELEVANT TO THAT ISSUE.

OTHERWISE, THEY MAY BE UNWITTING ACCOMPLICES IN INJUSTICE.

Q: HOW CAN JURIES BE EXPECTED TO RESIST GOVERNMENT OPPRESSION AND TYRANNY IF INDEPENDENT-MINDED JURORS ARE REMOVED DURING VOIR DIRE?

A: THEY CAN'T BE.

[This excerpt is from a Tenth Circuit appellate brief arguing the trial court cannot remove a juror for cause simply because the juror is aware of the jury's unreviewable power to acquit.]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Case No. 98-1479

UNITED STATES OF AMERICA, Plaintiff-Appellee,
vs.
TORRENCE KEITH JAMES, Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
Honorable Richard Matsch, District Judge, Case No. 98-CR-168-M

APPELLANT'S REPLY BRIEF

II. The trial court erred when excusing a prospective trial juror based on the juror's knowledge of the jury's lawful power to acquit, for any reason or for no reason at all, and when misleading the jury as to its lawful power to acquit.

The trial court informed Mr. James' jury that the professor (Juror Altonin) was wrong, that the jury cannot disregard the law, that the jury must accept the law as it is, and that the jury can acquit [only] if the evidence fails to meet the burden of proof required.

The D.C. Circuit Court of Appeals found it "pragmatically useful" to structure instructions such that the jury must feel very strongly a calling of high conscience before undertaking a disregard of its instructions. *United States v. Dougherty*, 473 F.2d 1113, 1137 (D.C. Cir. 1972). That is exactly the type of reservation of the right of conscience expressed by Juror Altonin when he responded to the trial judge:

THE COURT: Okay, Well, I'll have to ask you the same question I asked our practicing attorney, whether you're willing to accept the law from me as I give it in instructions?

MR. ALTONIN: I don't know.

THE COURT: And why do you say that?

MR. ALTONIN: Something may come up that I'd feel very strongly about.

THE COURT: Like what?

MR. ALTONIN: I can't imagine now.

THE COURT: Well, you know it's your duty -

MR. ALTONIN: My inclination is to follow the judge's instructions.

[Vol. 3 at 37]. Mr. Altonin then went on to explain that the jury always has the ***power to acquit***,

notwithstanding the evidence. [Vol. 3 at 37]. The trial court then excused Mr. Altonin, and showing obvious irritation at Mr. Altonin, attempted to correct the "wrong impression" left by Mr. Altonin's statements, criticized the "misstatements" of law from Mr. Altonin, and advised the jury they could acquit *if* the government failed to prove its case.[1] [Vol. 3 at 38]. That implies that otherwise the jury could not acquit -- a clear misrepresentation of the law.

What the trial court said after excusing Juror Altonin and in response to his statement that the jury may acquit even in disregard of the law, can be presumed to have misled the jurors on their power to acquit. That goes beyond leaving the jurors to their own "cultural input" to discover the jury's prerogative to acquit for any reason, or for no reason at all.

That effectively redefines the burden of proof and shifts it to the defendant. **It is a misstatement of law to tell the jury that they must find reasonable doubt in order to acquit - or that certain conditions must be met for them to be able to acquit**. Such an instruction requires a defendant to "prove" reasonable doubt and removes the presumption of innocence. Such an instruction suggests that *guilt will be presumed* at the close of the government's case, *unless reasonable doubt has been established*. That is confusing and misleading and, in effect, is what the trial court told Mr. James' jury. The court's instruction implies the court is ordering the jury to bring back a guilty verdict, unless the jury can find reasonable doubt. Courts cannot direct verdicts [of guilt] and cannot intervene in deliberations.

The government does not understand the jury's power, arguing that the jury "must apply the law as instructed," citing to *Coleman v. Brown*, 802 F.2d 1227, 1232 (10th Cir. 1986), *cert. denied*, 482 U.S. 909 (1987). [Answer Brief at 17]. The government ignores that the American jury has always had the unreviewable power to mitigate the harshness of the law, a power derived from English juries exercising their prerogative in the "form of flat-out acquittals in the face of guilt" as well as in the form of "verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the juror's part." *Jones v. United States*, 119 S.Ct. 1215, 1225 (1999).

The trial court's actions, if allowed to stand, will contribute to further erosion of the right to jury trial. . . .

The power of jury mercy, jury leniency, or jury nullification, is the power to acquit despite the instructions, despite the law, and despite the evidence, an unreviewable jury power which defines the right to trial by jury. Juror Altonin expressed knowledge of that lawful power, not a willingness or intent or predisposition to find guilt despite inadequate proof. He limited his comments to the power of the jury to acquit. He was correct on the law, and for that was removed from the jury *sua sponte* by the trial court. Mr. James was deprived of his lawful jury, a jury guaranteed by the Sixth Amendment. For this structural and fundamental error, reversal is required. *See Chapman v. California*, 368 U.S. 18, 24 (1967).

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[1] Since the juror had already been excused, and since the trial court expressed strong irritation at Mr. Altonin, trial counsel for Mr. James may have been wise in not objecting and further irritating the trial court.