ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672
10294 HOUSE JUDICIARY 139

HB

430

Representative Eric Croft

HB 430

Sponsor Statement

Youth Courts in Alaska have matured from pilot programs that experimented with new and innovative ways of rehabilitating juvenile offenders, into stable programs that aim to rehabilitate minors more effectively than the traditional youth justice system. Youth Courts also provide the secondary benefit of giving young people leadership experience and training. The funding sources that many Youth Court Programs rely on have not matured with the Youth Court concept leaving these beneficial programs reliant on finding supplemental funding from one-time sources every year.

To meet this need, HB 430 establishes a $10 surcharge on misdemeanors, non-traffic violations, and other infractions and a Juvenile Justice Grant Fund to distribute the revenues from the surcharge to Youth Courts and other youth justice programs. These grants require a 100% match to insure that Youth Court Programs will continue to raise funding from local and private sources.

HB430 would provide a secure and stable source of funding for one of the most innovative and successful criminal justice programs in the state. I ask for your support of this bill

January-May: State Capitol • Juneau, AK 99801-1182 • (907) 465-4998 • Fax (907) 465-4419
June-December: 716 W. 4h Avenue • Anchorage, AK 99501• (907) 269-0216 • Fax (907) 269-0218
Representative_Eric_Croft@legis.state.ak.us

Representative Eric Croft

Subject: **Sectional Summary of House Bill 430, related to a Surcharge on Fines for Misdemeanors and Authorizing Disposition of Receipts to Create a Juvenile Justice Grant Fund for the Operation of Youth Courts (Work Order No. 22-LS132\F)**

This bill would create a juvenile justice grant fund from surcharges on fines, to be used as a funding source for the operation of youth courts.

Section 1. Amends AS 12.25.195(c) by adding another surcharge requirement to AS 12.55.039 and 12.55.041.

Section 2. Amends AS 12.25.200(b) to state that citations must indicate the amount of each surcharge applicable to the offense.

Section 3. Amends AS 12.55 by adding a new section to say that defendants found guilty of misdemeanors, non-traffic violations, or infractions shall be assessed a surcharge of $10.

Section 4. Amends AS 28.05.151(c) to reflect the allowance of multiple surcharges.

Section 5. Amends AS 29.25.074(a) to reflect the allowance of multiple surcharges.

Section 6. Amends AS 44.47 by adding a new section creating within the Department of Community and Economic Development a juvenile justice grant fund, to be used by the department for grants to non-profits to defray the costs of operation of youth courts.

Section 7. Establishes that Section 8 of this act will be repealed on June 30, 2003, or the date when the Alaska Court System has the electronic capability to separately track and account for money collected under the terms of Section 3 of this act.

Section 8. Amends the uncodified law of the State of Alaska by adding a new section directing the Alaska Court System to deposit to the general fund money collected under the terms of Section 3 of this act, and to provide reports.

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FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 430
() Publish Date. 2/15/02

Revision Date/Time (Note if correction):
Dept. Affected:
Title: Surcharge on Fines/Juv. Justice
BRU: Alaska Court System
Component: Trial Courts
Sponsor: Representative Croft
Requester: House Judiciary
Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 430.

Prepared by: Douglas Wooliver
Division: Alaska Court System
Phone 463-4750
Date/Time 3/28/02 8:23 AM

Approved by: Stephanie Cole
Agency: Alaska Court System
Date 3/28/02

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 430
( ) Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services
Title: IMPOSING SURCHARGES ON CRIMINAL PENALTIES AND CREATING A JUVENILE JUSTICE GRANT FUND
BRU: Juvenile Justice
Component: Probation Services
Sponsor: CROFT
Requestor: HOUSE (JUD)
Component Number: 2134

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims	300.0	300.0	300.0	300.0	300.0	300.0
Miscellaneous						
TOTAL OPERATING	300.0	300.0	300.0	300.0	300.0	300.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	300.0	300.0	300.0	300.0	300.0	300.0
1037 GF/Mental Health						
Other (Specify Type--do not abbreviate)						
TOTAL	300.0	300.0	300.0	300.0	300.0	300.0

Estimate of any current year (FY2002) cost:

Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Based on estimates from the Alaska Court system and Anchorage Youth Court, the department believes a $10 surcharge to misdemeanor and other offenses as specified would generate between $300,000 and $500,000 in revenue. If the legislature were to allocate the lower amount, $300,000, the department believes this would result in up to 12 grant awards to youth courts.

The department proposes to amend the bill so that the Juvenile Justice Grant Fund would be administered by the Division of Juvenile Justice grants unit to maximize coordination of funding for youth court programs. The grants unit would administer this new grant program with existing resources and it is expected that at this allocation level, there would be a zero fiscal impact to the

Prepared by: Susan M. Taylor, Administrative Manager IV
Phone 465-1385
Division Juvenile Justice
Date/Time 03/04/2002
Approved by: Elmer A. Lindstrom, Deputy Commissioner
Date 03/06/2002
Agency Department of Health & Social Services

For distribution information, call the Governor's Legislative Office

(Rev 2/7/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 430
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title "An Act imposing a surcharge... and creating a juvenile justice grant fund..."
BRU Legal and Advocacy Services
Component Public Defender Agency
Sponsor Representative Croft
Requester (H) JUD
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
See attached.

Prepared by: Barbara Brink, Director
Phone (907) 334-4416
Division Public Defender Agency
Date/Time 4/1/02 4:26 PM
Approved by: Jim Duncan, Commissioner
Date 4/1/2002
Agency Department of Administration

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

BILL NO. HB 430

ANALYSIS CONTINUATION

This legislation provides for a mandatory surcharge of $10.00 to be paid by every person convicted of any misdemeanor, infraction, or violation, except a vehicle or traffic offense under AS 28, a regulation under AS 28, or a municipal ordinance under AS 28.01.010. This would be in addition to other applicable surcharges already levied under existing statutes.

If a person fails to pay the surcharge, the court can punish him or her through contempt of court proceedings.

This bill will have some impact on the Public Defender Agency. Because contempt of court proceedings can result in imprisonment, a person can be appointed an attorney if it appears that he or she will end up in jail. Even though this surcharge is modest compared to others, the Public Defender Agency believes that some people who are convicted of these offenses will have difficulty paying this surcharge because of other financial demands. Fines, restitution payments to victims, attorneys fees under Criminal Rule 39, other existing surcharges including police training surcharges, fees for substance abuse, anger management, and other required programs often take up all the available case indigent offenders and violators have.

Depending on how rigorously this surcharge is enforced, the legislation could have a financial impact on the Public Defender Agency. However, this impact is not possible to predict, therefore, an indeterminate fiscal note is submitted.

P.O. Box 210189
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Phone: (907)278-1165
Toll Free (Alaska Only) 1-877-278-1165
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www.alaskayouthcourt.org

March 16, 2002

The Honorable Eric Croft
House of Representatives
Alaska State Capitol Room 400
Juneau, Alaska 99807-1182

Dear Mr. Croft:

The United Youth Courts of Alaska (UYCA) was incorporated in October 1998 as a non-profit corporation and is a resource to Alaskan Communities. The UYCA serves as a centralized location to obtain training, technical assistance, and informational materials on how to start and maintain a youth court. In addition to providing year round technical assistance to Alaskan communities, the UYCA coordinates, schedules, and facilitates teleconference meetings, arranges and coordinates annual state youth court conferences, and offers a youth scholarship program for state and national training opportunities.

There is a statewide need for addressing juvenile crime and delinquency, it has devastating and lasting effects in every community. According to data provided by the Alaska Division of Juvenile Justice Office, in Fiscal Year 2001 there were approximately 7,000 delinquency reports, of those, 11% were referred to Youth Courts, Community Courts or Elder Courts.

Studies indicate, that early intervention can effectively prevent more serious violations from occurring in the future. As reported by the Coalition for Juvenile Justice, "prevention saves lives and money—for each child prevented from beginning a life of crime, taxpayers save as much as $2 million". There is an urgent need for the legislation to provide support to these innovative prevention and early intervention programs across Alaska. There are 15 established youth courts, 8 emerging youth courts and at least 7 communities interested in developing a youth court program. Youth Courts throughout Alaska are growing rapidly and require additional funding sources in order ensure sustainability to continue efforts across the state.

As a stakeholder in the sustainability of youth courts statewide, UYCA supports HB 430 in locating a reliable funding source for emerging and established youth courts and other informal dispositions in which youth actively assist in adjudicating their peers.

Please contact me toll free at 1-877-278-1165 if you have any questions. Additionally, I would like to be informed when public testimony is to take place.

Sincerely,

LeAnn Chaney

LeAnn Chaney
United Youth Courts of Alaska

Approved

Date: 3/5/02

Submitted by: Assemblymembers Tremaine, Shamberg, Taylor, Tesche, Traini, Van Etten, and Sullivan
Prepared by: Department of Assembly
For reading: March 5, 2002

ANCHORAGE, ALASKA
AR NO. 2002-76

A RESOLUTION OF THE ANCHORAGE MUNICIPAL ASSEMBLY SUPPORTING HOUSE BILL NO. 430, "AN ACT IMPOSING A SURCHARGE ON FINES IMPOSED FOR MISDEMEANORS, INFRACTIONS, AND VIOLATIONS AND AUTHORIZING DISPOSITION OF ESTIMATED RECEIPTS FROM THAT SURCHARGE; AND CREATING THE JUVENILE JUSTICE GRANT FUND IN ORDER TO PROVIDE FINANCIAL ASSISTANCE FOR THE OPERATION OF YOUTH COURTS."

WHEREAS, the average court costs in a traditional State court are about $3,000 per case, and each offender residing in McLaughlin Youth Center costs the State approximately $41,000 per year; and

WHEREAS, each case that is diverted to the Anchorage Youth Court (AYC) costs approximately $650, a number made possible through the utilization of about 30,000 student volunteer hours per year; and

WHEREAS, AYC provides swift, appropriate, and meaningful consequences within two weeks of referral for crimes committed by juveniles; and

WHEREAS, about 9,879 hours of community work service are served and about $10,720 of restitution is paid on a yearly basis by offenders who come through the AYC; and

WHEREAS, the most common charges that AYC accepts are shoplifting, theft, and property crimes - crimes that cost owners and consumers money; and

WHEREAS, the sentences given for these crimes include restitution, public service, essays, and rehabilitative classes; and

WHEREAS, the AYC accepts approximately 400 cases per year, and maintains a remarkably low recidivism rate of about 10%.

NOW, THEREFORE, the Anchorage Assembly resolves:

Section 1: That this body supports and urges passage of House Bill 430 which creates a juvenile justice grant fund in order to provide financial assistance for the operation of youth courts.

Section 2: That copies of this resolution be forwarded to the Governor and the Alaska State Legislature immediately upon passage and approval.

PASSED AND APPROVED by the Anchorage Assembly this _____day of _____, 2002.

_____
Chair

ATTEST:

_____
Municipal Clerk

EGJ/2002/RESOLUTIONS/AR22

HB 460

HOUSE COMMITTEE REPORT

(7)
Date Referred to Committee: April 18, 2002 **FURTHER REFERRALS: Finance**

Date of Committee Action: 4.22.02

The JUDICIARY Committee considered: **HB 460**

HOUSE BILL NO. 460 **ANTITRUST CIVIL COURT ACTIONS**

"An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

Recommends it be replaced with _____CS_____(_____) [ ] Same Title [ ] New Title
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev. for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *For Chief Clerk's Office Use Only				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW			✓	

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
Con Bunde	Berkowitz			✓	
for Colbert	Colbert			✓	
Kelly Kashdan	Kashdan			✓	
Jeannette James	JAMES			✓	
				✓	
Chair: Norman Rokeberg	ROKEBERG	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 460
() Publish Date:

Revision Date/Time (Note if correction): 4/19/02 3:16 PM
Dept. Affected: Law
Title "An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending . . ."
BRU Civil Division
Component Fair Business Practices
Sponsor Representative Croft
Requester House Judiciary Committee
Component No. 2206

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	******	******	******	******	******	******

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 460 updates Alaska antitrust statutes consistent with a recent United States Supreme Court precedent to allow the attorney general to bring a cause of action on behalf of both direct and indirect purchasers. Current Alaska statutes allow a cause of action only for purchasers who buy directly from the person or manufacturer that violated antitrust statutes. Because these type of actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law. The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages. Federal law does not have this requirement, encouraging plaintiffs to resolve issues important to Alaska businesses and consumers in federal court, rather than state court.

These are actions the attorney general pursues under current law, and increasing the number of purchasers represented in those actions is not anticipated to increast costs for the Department of Law. Revenues associated with passage of this bill will depend on the number and complexity of actions brought by the attorney general in any given year and are too speculative to quantify.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/19/02 3:16 PM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 4/19/2002
Agency Department of Law

(Revised 9/2001 OMB)

STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907)465-3600
FAX: (907)465-2075

April 18, 2002

The Honorable Norman Rokeberg, Chair
House Judiciary Committee
Alaska State Legislature
Juneau, Alaska 99801

RE: HB 460 – "An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date"

Dear Representative Rokeberg:

I write today to request that you schedule HB 460 – "An Act relating to actions for monopolies and restraint of trade, including proof of damages . . ." for a hearing at the earliest possible time. As you know, from the Labor and Commerce Committee hearing yesterday, this legislation, which is often referred to as an "Illinois Brick Repealer," updates the Alaska antitrust statutes to provide a statutory basis for the attorney general to bring parens patriae actions for violations of antitrust statutes on behalf of state businesses, residents, and governmental entities as indirect purchasers.

Currently, the State of Alaska, through the attorney general, does not have authority to bring an action on behalf of consumers for "indirect damages." Indirect damages are damages that a consumer may suffer because of an antitrust violation that occurred "upstream" from the consumer transaction. Alaska has been involved in several multi-state antitrust actions in the last several years. The claims Alaska has been able to assert in these cases, however, have been limited to claims on behalf of state agencies that have been directly harmed by the alleged illegal conduct; we have not been able to act to benefit individual Alaskans. For example, Alaska lost out on several hundred thousand dollars in consumer relief in the recent "Vitamins" case, which involved allegations of illegal contracts between vitamin manufacturers.

Passage of HB 460 would give the attorney general authority to bring an action in superior court both in the name of the state and on behalf of consumers and non-state

governmental entities (which includes municipalities) for the recovery of both direct and indirect damages. It is a good piece of legislation that will benefit Alaskans and I encourage you to schedule it for a hearing and action.

I have enclosed a sectional analysis prepared by the Department of Law, as well as Representative Croft's sponsor statement. If you have questions, please feel to contact either me or Ed Sniffen in our consumer protection/antitrust section, at 269-5100.

Thanks for your attention.

Sincerely,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Chrystal Stillings Smith
Legislative Liaison

Enclosures

Cc: Representative Eric Croft
Mike Abbott, Legislative Director, Office of the Governor
Ed Sniffen, Assistant Attorney General, Department of Law
Deborah Behr, Legislation and Regulations Attorney, Department of Law

Representative Eric Croft

HB 460
Sponsor Statement

In 1977, the US Supreme Court issued a ruling in a seminal antitrust case called *Illinois Brick Co. v. Illinois.* The case held that federal antitrust laws do not allow "indirect purchasers" to recover damages from "upstream" antitrust violators. The Court further held, however, that states are free to formulate their own public policy on the issue of anti trust lawsuits brought on behalf of indirect purchasers. Since the *Illinois Brick* decision, over 30 states have passed laws that allow recovery of damages by indirect purchasers under various state antitrust statutes. HB 460 would update Alaska antitrust statutes to allow the Attorney General to bring actions on behalf of indirect purchasers.

An indirect purchaser is a person who does not buy the suspect product directly from the wrongdoer. For example, suppose two drug manufacturers conspire to keep prescription drug prices high. A consumer who buys the drug from a pharmacy is an "indirect purchaser" because the pharmacy has not violated the antitrust laws. Currently, only direct purchasers, such as the distributor who bought directly from the drug manufacturer, have the option to bring suit for antitrust violations like price-fixing. Since these entities rarely pass on the overcharges they recover, indirect consumers don't really benefit from the suit.

HB 460 also removes the requirement of proof of willfulness for treble damages, and provides for statistical methods of proof consistent with federal law. This allows the Attorney General to bring antitrust suits on behalf of Alaska's indirect purchasers, under Alaska law in an Alaskan court, rather than federal court.

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June-December: 716 W. 4h Avenue • Anchorage, AK 99501• (907) 269-0216 • Fax (907) 269-0218
Representative_Eric_Croft@legis.state.ak.us

SECTIONAL ANALYSIS – HB 460

"An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

Section 1. AS 45.50.576 is amended as follows:

Sec. 45.50.576. Suits by persons injured; treble damages.

This section is being modified to remove the requirement that a defendant be found to have acted "willfully" before treble damages can be awarded. Removing this requirement will make this section consistent with other state and Federal antitrust acts. *See* 15 U.S.C. § 15a.

Subsection (b) is modified to remove duplicative language and make the section consistent with the new section added below.

Section 2. As 45.50 is amended to add a new section as follows:

Sec. 45.50.577. Enforcement by attorney general.

This new section will accomplish several things. Currently, the State of Alaska, through the attorney general, is without authority to bring an action on behalf of consumers for "indirect damages." Indirect damages are damages that a consumer may suffer because of an antitrust violation that occurred "upstream" from the consumer transaction. For example, when a consumer purchases drugs from a pharmacy, the price may be artificially high because of an illegal deal made between two competing manufacturers. The price increase that results from this illegal agreement is passed down to the wholesaler, then to the distributor, then to the retailer, who finally passes the increase to the consumer.

The entity "directly" harmed in the above scenario is the wholesaler who bought the drugs directly from the manufacturer. Thus, under current antitrust law, the only person who can bring an antitrust action against the manufacturers is the wholesaler, or other persons who bought directly from the manufacturer (some state agencies make these direct purchases). This rule of law was enunciated in a U.S. Supreme Court decision called *Illinois Brick Co. v. Illinois.* That case left

open, however, the opportunity for individual states to enact their own laws that would allow the recovery of these "indirect" damages under state-specific antitrust statutes. In response to this case, several states have enacted such laws, called "*Illinois Brick* repealer" statutes because they repeal the effect of the *Illinois Brick* decision.

Alaska has been involved in several multi-state antitrust actions in the last several years. Ever since the tobacco litigation, states' attorneys general have cooperated with each other to bring these actions against antitrust violators for various kinds of illegal antitrust conduct. The claims Alaska has been able to assert in these cases, however, are limited to claims on behalf of state agencies that have been directly harmed by the alleged illegal conduct. We have limited and questionable authority to make claims on behalf of consumers for their "indirect purchases" of drugs and other products. For example, Alaska lost out on several hundred thousand dollars in consumer relief recently in the "Vitamins" case. That case involved allegations of illegal contracts between vitamin manufacturers. Alaska was initially excluded from the settlement because we did not have an "*Illinois Brick* repealer." We eventually received about $100,000, while other states that had such a statute received about $1 million.

This section provides that the attorney general can bring an action in superior court in the name of the state, and on behalf of consumers and nonstate governmental entities (which includes municipalities) for the recovery of **both** direct and indirect damages.

Subsections (a) through (c) accomplish the above.

Subsections (d) and (e) allow the recovery of costs, full reasonable attorney's fees, and treble damages if the state is the prevailing party.

Subsections (f) and (g) require publication of the proposed action and an opportunity for a person or nonstate governmental entity to elect to be excluded from the action. Any judgment issued in the action precludes claims by anyone who does not elect to be excluded.

Subsection (h) provides that any action brought under this section cannot be dismissed without approval of the court.

Subsection (i) provides that any recovery under this section must be distributed in accordance with court instructions, and requires that everyone on

whose behalf the action was brought be given an opportunity to recover the participant's appropriate portion of the proceeds.

Subsection (j) provides that the attorney general can recover aggregate damages using accepted sampling methods approved by the court.

Section 3. AS 45.50.50 is amended by adding a new section as follows:

Sec. 45.50.579. Actions for indirect injury.

This section allows only the attorney general to bring actions for indirect injuries. This is also consistent with other state statutes that have enacted these "*Illinois Brick* repealers."

Section 4. AS 45.50.596 is amended as follows:

Sec. 45.50.586. Judgment in favor of the state as evidence in another matter.

This section is being modified to conform with the above changes.

Section 5.

AS 45.50.596 is amended by adding a new paragraph (4) that adds a definition of "nonstate governmental entity."

Sections 6 through 9:

These sections are procedural and address: (1) modification of the Court Rules to recognize the state's authority to receive full reasonable attorney's fees; (2) the effective date; and (3) the requirement that a two-thirds majority is required for passage of AS 45.50.577 (dealing with amendment of the Court Rules) to take effect.

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: HB 460
(H) Publish Date: 4/18/02

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to actions for monopolies and restraint of trade, including proof of damages; amending . . ."
BRU Civil Division
Component Fair Business Practices
Sponsor Representative Croft
Requester House Labor and Commerce Committee
Component No. 2206

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	******	******	******	******	******	******
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	******	******	******	******	******	******

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	******	******	******	******	******	******

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 460 updates Alaska antitrust statutes consistent with a recent United States Supreme Court precedent to allow the attorney general to bring a cause of action on behalf of both direct and indirect purchasers. Current Alaska statutes allow a cause of action only for purchasers who buy directly from the person or manufacturer that violated antitrust statutes. Because these type of actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law. The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages. Federal law does not have this requirement, encouraging plaintiffs to resolve issues important to Alaska businesses and consumers in federal court, rather than state court.

Costs and revenues associated with passage of this bill will depend on the number and complexity of actions brought by the attorney general in any given year. Both are too speculative to quantify at this time.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 4/11/02 3:57 PM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 4/11/2002
Agency Department of Law

(Revised 9/2001 OMB)

PROPOSED *ILLINOIS BRICK* REPEALER TO
ALASKA ANTITRUST STATUTE

OVERVIEW

In a case called *Illinois Brick*, the U.S. Supreme Court said that under federal antitrust law, only direct purchasers could bring suits to recover for damages resulting from an antitrust conspiracy. The much-criticized *Illinois Brick* decision left indirect purchasers—typically consumers such as gasoline purchasers or contact lens purchasers—without any remedy for antitrust damages since these consumers don't typically purchase products directly from the manufacturer, but instead by from a wholesaler, **retailer,** etc. To remedy this situation, several states decided as a matter of state law to enact legislation called "*Illinois Brick* repealer statutes" so that under state antitrust laws, consumers would have a remedy for antitrust overcharges. California led the way with an *Illinois Brick* repealer statute in a case known as the *ARC America* case. **In this case, the** U.S. Supreme Court heard a challenge brought by manufacturers in a nationwide price-fixing conspiracy involving cement products to the authority of the attorneys general of Alabama, Arizona, California and Minnesota who brought suits **under their new Illinois Brick repealer statutes** on behalf of their states' indirect purchasing consumers. The U.S. Supreme Court, in a landmark decision, held that states **are free to formulate their own public policy on this issue and the Supremacy Clause does not preclude states from granting indirect purchasers an antitrust remedy that federal law does not allow.**

In the wake of the *Illinois Brick* and *ARC America* cases, many states have updated their antitrust laws by enacting *Illinois Brick* repealer statutes. Alaska's antitrust laws were enacted in 1975, and have not been updated to provide a right of action for indirect purchasers. The legislation proposed would update Alaska law to allow Alaska indirect purchasers protection from antitrust violations through representation by the Alaska Attorney General's Office in a *parens patrie* action. Indirect purchasers could be the state, municipalities, small and large businesses, and individual consumers that all made indirect purchases of goods and services, etc., that were inflated in price as a result of an antitrust conspiracy. An *Illinois Brick* repealer statute is especially important in Alaska because of the volume of goods and services that are consumed by Alaskans from outside the state that are purchased indirectly from wholesalers and suppliers. Without this legislation, there will be no clear remedy under the state's antitrust statute for indirect purchasers.

FACTORS SUPPORTING ALASKA *ILLINOIS BRICK* REPEALER

- No Remedy Without the proposed legislation, indirect purchasers that are typically consumers, small businesses, municipalities and the state will have no clear economic remedy under the Alaska Antitrust Statute for price-fixing conspiracies. Instead, indirect purchasers will have to rely on direct purchasers to bring suit and stop the price fixing. Since direct purchasers rarely pass on the overcharges they recovery, indirect purchasers are usually not economically made whole for the damages from the conspiracy.
- No Clogged Courts Since only the attorney general in a *parens patrie* action will be able to bring suit on behalf of the indirect purchasers, there is no risk with this legislation of multiple lawsuits.
- Alaska Courts Deciding Alaska Cases The proposed legislation removes the barrier to allowing suits on behalf of indirect purchasers in Alaska courts by removing the requirement of proof of willfulness for treble damages, and providing for statistical methods of proof consistent with federal law. Rather than forcing plaintiffs into federal court, antitrust issues important to Alaskans can be decided under Alaska law in an Alaska court, rather than federal court.
- Participation in Multistate Cases The attorney general often participates in Multistate antitrust cases with other states' attorneys general on behalf of consumers. In these cases, Alaska law is applied. This legislation will make clear that under the Alaska Antitrust Statute, the attorney general can participate fully and recover potentially millions of dollars for Alaska indirect purchasers.

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ALASKA PUBLIC RADIO NETWORK

26Grant Hitchcock APRN/PKG 3/26/02

TWO AID AGENCIES RECEIVED GRANTS TODAY AS PART OF A SETTLEMENT AGAINST SIX VITAMIN MANUFACTURERS ACCUSED OF PRICE FIXING. THE 4.4 MILLION DOLLAR SETTLEMENT IS BEING DISTRIBUTED AMONG SEVEN STATES. KIDS' KITCHEN AND FOOD BANK OF ALASKA BENEFIT FROM THE SETTLEMENT, BUT AT THE SAME TIME THE SETTLEMENT HIGHLIGHTS A PROBLEM WITH ALASKA LAW. ALASKA COULD HAVE RECEIVED MUCH MORE OF THE SETTLEMENT MONEY. APRN'S BONNIE-SUE HITCHCOCK HAS THE STORY:

The 4.4 million dollar settlement against six vitamin companies is the outcome of a lawsuit filed by seven states -- Alaska, Connecticut, Kentucky, Ohio, Oklahoma, South Carolina and Utah. The lawsuit alleges that vitamin manufacturers engaged in a ten year conspiracy to fix the price and allocate the markets for vitamins and vitamin sales in the US. Alaska's share in the settlement was $95, 956 dollars. Ed Sniffen, Assistant Attorney General for the state of Alaska's Fair Businesses practices section, says that Alaska could have received as much as a million dollars more, if it had an "indirect purchasers statute" in place:

(Indirect purchasers :36) Some of the other states have laws that enable them to sue for indirect purchasers which are purchasers who don't actually buy from the "bad" people. In this case the vitamin manufacturers. When you go out and buy the food that has these vitamins in them, then you become and indirect purchaser because you bought from a retailer who bought from a supplier who bought from a distributor who probably then bought from a manufacturer. And the US Supreme court has said that if you are one of those indirect purchasers then you can't recover under our anti-trust laws for these kinds of damages unless your state has enacted a law that allows you to do that"

Defendants in the trial argued that Alaska could not settle for indirect purchasers without having the statutes on the books. But Sniffen says the State could settle for agencies that made direct purchases:

(Sniffen 2 :17) We had some state agencies that purchased foods with these vitamins in them and we got a certain amount of money for those direct purchases but in order to get money for those indirect purchasers we had to argue very strongly that our statues could be interpreted to allow this".

HB 460 is an indirect purchasers statute that was introduced by Democrat Eric Croft. The bill has only undergone first reading and is still waiting for a co-signer in the legislature. Sniffen says the bill, if passed, would act as insurance for Alaska in the future when these kinds of cases arise:

(sniffen 3 :10) We're trying to get that bill through, it's really a win-win situation for everyone, in these types of big cases it would enable us to recover more money for folks in Alaska.

Food Bank of Alaska and the Kids' Kitchen couldn't agree more. Those agencies were chosen to receive part of the settlement in the form of grants by the State Attorney General's office, because they qualified under the court-ordered settlement agreement and because they distribute food to needy Alaskans. Susanna Morgan accepted the $22,000 grant on behalf of the Food Bank of Alaska, an agency which has been distributing food to soup kitchens, daycares and other agencies in Alaska since 1979 :

(morgan :25) Food Bank of Alaska distributed our 30 millionth pound of food last year. We're up to 33 million pounds of food. ...This money will distribute 50,000 pounds of nutritious food to hungry Alaskans.

Kids Kitchen serves food to low income children and has served over 350,000 meals since 1996. Elgin Jones accepted the 10,000 dollar grant on behalf of Kids' kitchen:

(Jones :17) What this 10,000 dollars will do for the summer.....and we can do a lot with this for the kids.

The checks were presented to Morgan and Jones by Lieutenant Governor Fran Ulmer. Ulmer says that statistics show 1 in 5 children and 1 in 10 adults in Alaska are at risk of going to bed hungry every day

Ulmer : 17 So it is really an extraordinary day when we can take money from two lawsuits from 6 companies that engaged in a ten year practice of illegal behavior, and take that money and provide it to two organizations that really do their best to help Alaskans.

According to the attorney general's office, the rest of the money will be deposited into the general fund for distribution to govt. entities that made indirect purchases of vitamin products. It will also be used to cover costs for consumer protection and antitrust investigations.

Proposed Consumer Protection/Antitrust Legislation

Purpose: To amend Alaska antitrust laws to specifically authorize the state to seek restitution for indirect purchasers as a result of illegal acts of remote suppliers

Background: In the course of investigating potential antitrust claims, the Department of Law has determined that Alaska law could be improved by clearly authorizing the state to seek restitution for indirect purchasers (for instance, retail consumers of prescription drugs and other products, governmental entities, government-funded service providers, and state businesses) as a result of harm caused by illegal acts of remote suppliers. Under current Alaska antitrust statutes, indirect purchasers are without any remedy for antitrust injuries.

A simple change to Alaska statutes that would specifically authorize a right of action by the state on behalf of indirect purchasers would remove any ambiguity about the state's authority to proceed in its own cases and to participate in multistate cases brought against suppliers of drugs, contact lenses, and other products. This is knows as an *Illinois Brick* repealer statute, after a case in which the U.S. Supreme Court said that under federal antitrust law only direct purchasers could bring suits to recover for damages resulting from an antitrust conspiracy. Many states have enacted such repealer provisions.

See attached for additional information on the draft legislation.

HB

463

ALASKA STATE HOUSE OF REPRESENTATIVES

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REPRESENTATIVE JOHN COGHILL

HB 463 Role of a Jury
Sponsor Statement

House Bill 463 places in statute clear language that was set in place by our founding fathers and reinforced by our courts through the years. It provides for juries to determine if a defendant is guilty according to the law and if that law was unjustly applied to the defendant. The bill also gives the defendant the right to inform the jury that they can vote on the verdict according to conscience.

Jury nullification goes back to the Magna Carta, which King John reluctantly granted in 1215 for fear of the people dethroning him. In 1679 William Penn was acquitted of preaching Quakerism to an unlawful assembly. The four jurors who voted to acquit were imprisoned and starved until they paid fines. Edward Bushell, a juror in the case, refused to pay the fine and took his case to the Court of Common Pleas. Since the Magna Carta jurors were routinely fined and even jailed for making decisions contrary to the want of government. In the Court of Common Pleas ruling in the Bushell case, Chief Justice Vaughan ruled that jurors could not be punished for their verdicts.

The government interference with juries of peers for 570 years were fresh in the minds of our founding fathers when they wrote Article VII of the Constitution. Alexander Hamilton felt juries would reduce the "temptations, which the judges might have to surmount." *Federalist No. 83.* Thomas Jefferson said, "I consider trail by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

Through America's history the courts have ruled for jury nullification. Supreme Court Justice John Jay ruled in a Georgia civil forfeiture case that the jury has "a right ... to determine the law as well as the fact in controversy." *Georgia v. Brails ford,* 3 U.S. 1 (1794). As recent as 1986, the Georgia Supreme Court in ruled that a "Jury in criminal cases possesses de facto power of 'nullification.' to acquit defendant regardless of strength of evidence against him. *Cargill v. State*, 255 Ga. 616, 340 SE.2d 891 (1986).

HB 463 reasserts the nullification of juries in a time when juries have felt judges have restricted their deliberations and strict interpretation of the law. This legislation has resulted in part by just such a jury in Fairbanks last year.

Representative_John_Coghill@LEGIS.state.ak.us

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 463
() Publish Date: 2/19/2002

Revision Date/Time (Note if correction'. Corrected 4-01-02 2:45
Dept. Affected:
Title Informed Jury
BRU Alaska Court System
Component Trial Courts
Sponsor Representative Coghill
Requester House Judiciary
Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	***	***	***	***	***	***
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	***	***	***	***	***	***

Estimate of any current year (FY2002) cost: ***
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 463 requires that juries be informed that they may acquit a defendant or convict him or her of a lesser included offense if the jury believes that it would be unfair to apply the law to the defendant. The court system believes that the right to such an instruction will increase the number of jury triais because a defendant who might otherwise plead guilty may instead choose to argue to a jury that even though he or she violated the law, the law is unfair.

Although we anticipate an increase in jury trails as a result of this bill, the extent of that increase is too speculative to support a fiscal note. However, if the increase proves to be significant the court system may return to the legislature for additional funding.

Prepared by: Douglas Wooliver
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Division Alaska Court System
Date/Time 4/4/02 10:02 AM
Approved by: Doug Wooliver for Stephanie Cole
Date 4/4/2002
Agency Alaska Court System

(Revised 9/2001 OMB)

FISCAL NOTE

STATE OF ALASKA
2002 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 463
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Law
Title "An Act relating to juries; . . ."
BRU Criminal Division
Component All
Sponsor Representative Coghill
Requester House Judiciary Committee
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*********	*********	*********	*********	*********	*********
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*********	*********	*********	*********	*********	*********

Estimate of any current year (FY2002) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

HB 463 would give juries the right to find a defendant not guilty, or guilty of a lesser included offense, if the jury believes the law to be unjust, even though the jury determines that the defendant is guilty of breaking that law.

While we have no reliable way to quantify what the cost would be, allowing jury nullification of the law would have a significant fiscal impact on the Department of Law. We would anticipate many more resource intensive jury trials to occur. Defendants, who now will settle their cases prior to trial because the facts of the case are not in their favor, will be encouraged to put their case before a jury and argue that the law itself is unfair. We would expect many more re-trials resulting from juries being unable to reach a unanimous verdict. One juror who believes Alaska's drug laws are unjust and refuses to apply the law in a case would hang that jury, requiring a new trial. The same result would occur in a domestic violence prosecution if only one person believes the spouse deserved to be hit. The reach of child abuse laws, fish and game laws, and criminal child support laws are other examples where an individual's personal philosophy can lead to questioning the fairness of a law in a given circumstance.

Prepared by: Joan M. Kasson
Phone (907) 465-5370
Division Attorney General's Office
Date/Time 3/29/02 8:56 AM
Approved by: Kathryn Daughhetee for Bruce M. Botelho, Attorney General
Date 3/29/2002
Agency Department of Law

CIVIL RULES OF PROCEDURE
Part VII. Evidence and Conduct of Trial

Rule 48. Order of Trial Proceedings - Management of Juries.

(a) Conduct of Trial. Conduct of a jury trial shall be governed by Rule 46 and this rule.

(b) Instructions - Argument - Retirement of Jury. When argument of counsel is concluded or waived, the court shall then charge the jury. Such charge shall be reduced to writing and read to the jury. The jury must take the written charge with it to the jury room.

(c) View of Premises by Jury. When the court deems proper, it may order a proper officer to conduct the jury in a body to view the property which is the subject of the litigation or the place where a material fact occurred and to show such property or place to it. While the jury is making its inspection no one shall speak to it on any subject connected with the trial. The court may order the person applying for a jury view to pay the expenses connected therewith.

(d) Separation of Jury - Admonition - Manner of Keeping Jury Before Submission of Case. If any juror is permitted to separate from the jury during the trial the juror must be admonished by the court that it is the juror's duty not to converse with any person, including another juror, on any subject connected with the trial, nor to form or express any opinion thereon until the case is finally submitted to the jury. If any juror is permitted to separate from the jury after the case is submitted the juror must be admonished by the court that it is the juror's duty not to converse with any person on any subject connected with the trial, and that the juror is to discuss the case only with other jurors in the jury room.

(e) Juror Unable to Continue. If, prior to the time the jury retires to consider its verdict, a juror is unable or disqualified to perform the juror's duty, the court may order the juror to be discharged. If an alternate juror has not been impanelled as provided in the rules, the trial may proceed with the other jurors with the consent of the parties, or another juror may be sworn and the trial may begin anew; or the jury may be discharged and a new jury then or afterwards formed.

(f) Jury - Deliberation - Communications. After hearing the charge the jury shall retire for deliberation. It shall be and remain under the charge of an officer until it agrees upon its verdict or is discharged by the court. Unless otherwise ordered by the court, the officer having charge of the jury must keep the jury together, separate from other persons; and the officer must not suffer any communication to be made to it, nor make any except to ask it if it has agreed upon its verdict, and the officer must not, before the verdict is rendered, communicate to any person the state of its deliberations or the verdict agreed upon. Such officer shall be sworn to act according to the provisions of this section.

(g) Items Which May Be Taken Into the Jury Room. Upon retiring for deliberation the jury shall take with it any exhibits, except depositions, that have been introduced into evidence which the court deems proper.

(h) Discharge of Jury Before Verdict. Except as may be provided in these rules or as the interest of justice may require, the jury shall not be discharged after the cause is submitted to them until they have agreed upon a verdict and given it in open court, except:

(1) By the consent of all parties entered in the record.

(2) At the expiration of such period as the court deems proper if it appears that there is no probability of an agreement being arrived at among the jurors necessary to return a verdict.

(i) Retrial in the Event of Discharge Without Verdict. In all cases where the jury is discharged without having given a verdict, or is prevented from giving a verdict by reason of accident or other cause during the progress of the trial, or after the cause is submitted to it, the action may be again tried immediately, or at a future time, as the court directs.

(j) Adjournment During Absence of Jury. While the jury is absent the court may adjourn from time to time, in respect to other business, but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged.

Rule 51. Instructions to Jury.

Rules text

(a) Requested Instructions - Objections. At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court give the jury specific instructions. The court shall inform counsel of the final form of jury instructions prior to their arguments to the jury. Following the close of the evidence, before or after the arguments of counsel, the court shall instruct the jury. Additionally, the court may give the jury such instructions as it deems necessary at any stage of the trial. No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity must be given to make the objection out of the hearing of the jury, by excusing the jury or hearing objections in chambers.

(b) Instructions to Be Given. The court shall instruct the jury that they are the exclusive judges of all questions of fact and of the effect and value of evidence presented in the action. The court shall instruct the jury on all matters of law which it considers necessary for their information in giving their verdict. On all proper occasions they shall also be instructed:

(1) That they are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number, or against a presumption or other evidence satisfying their minds.

(2) That a witness wilfully false in one part of the witness' testimony may be distrusted in other parts.

(3) That the oral admissions of a party ought to be viewed with caution.

(4) That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one party to produce and of the other party to contradict; and if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of one party to produce, that the evidence offered should be viewed with distrust.

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FULLY INFORMED JURY ASSOCIATION

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Phone: (406) 793-5550
Web: www.fija.org

February 22, 2002

The Honorable John Coghill
House Judiciary Committee
Room 102
State Capitol Building
Juneau, AK

Dear Representative Coghill:

The Fully Informed Jury Association is a national, non-profit, 501 (c)3 educational organization dedicated to informing citizens of their responsibilities when they serve in a jury trial. FIJA's goal is to promote respect for the law and criminal justice system by informing people of their important role as trial jurors.

The founding fathers established the right to trial by jury of one's peers and mentioned it in the constitution several times because they knew it was fundamental to a self-governing people. The framers wisdom of placing the power to judge the application of the law and to use conscience when bringing in a verdict has been proven time and time again. It is no less important today than when jurors refused to find defendants guilty of breaches of the Fugitive Slave Act.

Although FIJA doesn't endorse proposed legislation, we recognize that HB 463 acknowledges a jury's rights, powers, and duties in bringing in a general verdict. This will pay immeasurable dividends for the State of Alaska. More of its citizens will come away from their experiences in court satisfied that the system actually delivers justice. It also will be an important tool for legislators to recognize trends in public opinion.

Finally, as 12-year veteran of the Oklahoma House Of Representatives, I understand the importance of your role and the decisions you must make. If I can be of any further assistance to you or your colleges, please feel free to contact me.

Sincerely,

Charles Key

Charles Key

Subject: Current Constitutional Authority For Jury Nullification
Date: Wed, 13 Feb 2002 20:28:00 +0000
From: "Frank W. Turney" <fturney@mosquitonet.com>
Organization: JuryRights.com
To: Shane_Longbine@legis.state.ak.us

CURRENT CONSTITUTIONAL AUTHORITY FOR JURY NULLIFICATION

The Constitutions of Maryland (Art. XXIII, entire), Indiana (Art. I, sec. 19), Oregon (Art. I, sec. 16), and Georgia (Art. I sec. 1, para. 11, subsec. A), currently have provisions guaranteeing the right of jurors to "judge the law"; that is, to nullify the law.

For example, the Georgia Constitution says: "In criminal case, the defendant shall have a public and speedy trial...and the jury shall be the judges of the law and the facts."

Although these provisions have not been strong enough to withstand decades of hostile judicial interpretation, and have relatively little current impact, they do remain "on the books". Attorneys in Georgia and Indiana reportedly are able to request nullification instructions from the judge to the jury and generally receive them, and are sometimes able to argue the law.

Twenty-three states currently include jury nullification provisions in their Constitutions under their sections on freedom of speech, specifically with respect to libel and sedition cases:

Alabama (Art.I, Sec. 12); Colorado (Art.II, sec. 10); Connecticut (Art. First, sec. 7); Delaware (Art. I, sec. 5); Georgia (Art. I, sec. II, Para. 1); Kentucky (Bill of Rights, sec. 9); Louisiana (Art. XIV, sec. 9); Maine (Art. I, sec. 4); Mississippi (Art. 3, sec. 13); Missouri (Art. 1, sec. 8); Montana (Art. II, sec. 7); New Jersey (Art. I, sec. 6); New York (Art. I, sec. 8); North Dakota (Art. I, sec. 4); Oregon (Art. I, sec. 16); Pennsylvania (Art. I, sec. 7); South Carolina (Art. II, sec. 21); South Dakota (Art. VI, sec. 5); Tennessee (Art. I, sec. 19); Texas (Art. I, sec. 8); Utah (Art. I, sec. 15); Wisconsin (Art. I, sec. 3); Wyoming (Art. I, sec. 20).

Of these, Texas, Delaware, Kentucky, North Dakota and Tennessee say that the jury is the judge of the law in libel and sedition cases, "as in all other cases."

Source: Alan W. Scheflin, "Jury Nullification: the Right to Say No", Southern California Law Review, 45, p. 204 (1972).
[List has been updated to 1994.]□

601 College Road
Fairbanks, AK 99701
May 18, 2001

Mr. Paul Canarsky
529 Fifth Avenue, Suite 1
Fairbanks, AK 99701

Dear Mr. Canarsky:

I was one of the jurors that rendered the verdict of guilty in the State of Alaska vs. [redacted] yesterday. This letter is to explain the basis for our decision, and to hopefully mitigate the potential long-term effects of the verdict on the life of [redacted]. I speak for all jurors, including the jurors that are available to sign this letter, that we are firm in the conviction that we made the legally correct decision. However, we are all sympathetic to [redacted] future.

The clear grounds for conviction were jury rules 14 and 15. We were asked to evaluate whether [redacted] committed this act "knowingly" and "recklessly". Your defense centered on the assumption that this was unintentional, which very well may be. However, even if an accident, the event clearly fell under the definitions presented in the jury instructions. Following rules 14 and 15, as well as the instruction to evaluate the case based on the evidence only and not the potential consequences of the verdict, led us reluctantly to the inescapable verdict of guilty.

While [redacted] was found guilty of indecent exposure in the second degree, there is nothing in the conviction that states that the conduct was intentional. The prosecution tried to present this as a deliberate act. If we were required to judge whether the act was intentional or not, we do not believe that the state would have met that burden of proof. Our verdict did not reflect a judgment as to whether or not this incident was an accident. In one form or another, this incident occurred, which is not disputed, and it falls under rules 14 and 15 regardless of whether or not the action was intentional.

The main purpose of this letter is to state that we do not believe that [redacted] is an inherently bad person. It is plausible that this was an accident. We sincerely regret the implications that this conviction may have on the future of [redacted] career. It is evident that he is a highly valuable member of the community and I do not believe that this one instance should be used to remove him from the medical field. I believe I speak for us all when I say that [redacted] contention that your client needs to find another line of work was extremely callous. The community needs more selfless people like [redacted] even if they make the occasional careless mistake. Nothing in his past or in the evidence presented suggested, beyond a reasonable doubt, that he is intentionally deviant. I personally would trust him to provide [redacted] to my loved ones or me if the need ever arose.

As a juror in this trial, I have more knowledge of the facts of the case beyond what the conviction may suggest to a potential employer or licenser to [redacted]. I offer to discuss the case with anyone performing a background check on [redacted] or any current or future employer. I will explain the nature of this incident, and the reasons for conviction. I would prefer to be contacted at work, and I ask that parties crucial to [redacted] career, which includes [redacted] and the [redacted], only contact me. It does not include you or [redacted]. My offer to help stands indefinitely. My work telephone number is (907) 452-1241. [redacted] is free to present a copy of this letter to anyone he wishes to.

The law can be a brutally blunt instrument sometimes. We were legally and morally bound to return the verdict that we did, but I feel morally obligated to explain to you the basis for that verdict. I feel morally bound to relay that we all feel sympathy for [redacted] and sincerely hope that this can get this behind him as soon as possible. We wish him the best.

Sincerely,

Peter A. Jacobsen

Peter A. Jacobsen

Tracie A Hall - Foreman

Lone Star FIJA

QUOTES

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"It is not only his [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."

John Adams

Second U.S. President

"I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution."

Thomas Jefferson

Author of the Declaration of Independence and third U. S. President

"The jury has the right to judge both the law as well as the fact in controversy."

John Jay

Joint-author of the Federalist Papers and first U. S. Supreme Court Chief Justice

"The friends and adversaries of the plan of the [Constitutional]

convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."

Alexander Hamilton

Joint-author of the Federalist Papers

"If it [jury power] is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails."

Ben Franklin

Delegate to the Constitutional Convention

"Must a citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience, then? ... It is not desirable to cultivate a respect for the law, so much as for the right."

Henry David Thoreau

Author, Civil Disobedience

"Cowardice asks the question: is it safe? Expediency asks the question: is it politic? Vanity asks the question: is it popular? But conscience asks the question: is it right? And there comes a time when one must take a position that is neither safe, nor politic, nor popular--but one must take it because it is right. One has a moral responsibility to disobey unjust laws--and unjust law is a code that is out of harmony with the moral law."

Martin Luther King, Jr.

Civil Rights Leader

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SUPREME COURT of the UNITED STATES.

[3 U.S. 1]

February Term, 1794.

ON the meeting of the Court, a commission was read, dated the 28th of January, 1794, appointing *William Bradford*, Esquire, Attorney-General of the United States.[1]

The STATE of GEORGIA, *versus* BRAILSFORD, *et al.*

This cause was now tried, by a special jury, upon an amicable issue, to ascertain , whether the debt due from *Spalding*, and the right of action to recover it, belonged to the State of *Georgia*, or to the original creditors, under all the circumstances, which are set forth in the pleadings and arguments on the equity side of the Court? See 2 vol. *Dall. Rep.* 403, 415.

For the plaintiff, *Ingersoll* and *Dallas*, proposed two objects for enquiry: – 1. Was the debt due from Spalding, at any time the property of the State? – 2. Has the title of the State ceased, or been removed, and the right of action re-vested in the defendants?

1. On the *first* point, they contended, that *Georgia* as a sovereign State, had power to transfer the debt in question from the original creditor, an alien enemy, to herself, notwithstanding some of the debtors were citizens of another State; that by her confiscation law she had declared the intention to make the transfer; and that without an inquest of office, her intention had been carried into effect in due form, and according to [3 U.S. 1,2] law, as well in relation to her own citizens, as to the parties who were citizens of *South Carolina*. – In support of these several propositions the following authorities were cited: 1 *H.Bl.* 149. *Vatt B.* 3. *c.* 77. *Lee on Capt. Bynk. B.* 1. *c.* 7. *Vatt. B.* 3. *c.* 18. *s.* 295. *Jenk.* 121. *Sir T. Park.* 121. *Plow.* 243, 324. 1 *H. Bl.* 413. 2 *Bl. Com.* 405, 409. 2 *Wood.* 130. 4 *B.. Com.* 386. 1 *Hal. P. C.* 413. 3 *Inst.* 55. 1 *Hawk.* 68. 3 *Bl. Com.* 259. 3 *T. Rep.* 731, 2, 3, 4. 1 *Woodes.* 146. *Cor. Car.* 460. 16 *Vin. Abr.* 85. 6. 3 *Bl. Com.* 260. *Park.* 267. 1 *P. Wm.* 307. 1 *Dail. Rep.* 393. *Hind. Ch.* 129. 1 *Vern.* 58.

2. On the *second* point, it was urged, that although the word, "sequestration" was used in the *Georgia* law, yet, that the law directed the debt to be collected, *in the same manner as debts confiscated*, and to be put into the treasury, for the use of the state, until it should be otherwise appropriated; and that the state had never made any other appropriation; but, on the first opportunity, claimed it as a forfeiture. The election, therefore, to consider it as a confiscation, was reserved by the state to herself; and her subsequent conduct makes the reservation absolute. The exception of debts in the *South-Carolina* law cannot govern the case as to *Powell & Hopton*; for that law is only referred to for the *manner and form*, not for the subjects of confiscation. It only remains, therefore, to enquire, whether, independent of *Georgia*, the operation and existence of her law can be, and and has been, defeated and annulled. The *peace* merely does not effect the right of the state; for, the condition of things at the conclusion of the war is legitimate; and all things not mentioned in the treaty, are to remain as at the conclusion of it. The *treaty* of 1783 does not affect the right of the state; for, though it provides, generally, in the 4th article, that creditors, on either side, shall meet with no lawful impediment, in recovering their debts, this ought to be understood merely as a provision that the war, abstractedly considered, shall make no difference in the remedy, for the recovery of *subsisting* debts; that the remedy shall not be perplexed by instalment laws, pine-barren laws, bull laws, paper money laws, &c; but it does not decide, what are subsisting debts, which can only, indeed, be decided on the general principle of the law of nations. Laws of sequestration and confiscation, are not, however, the object of the 4th article of the treaty of peace; but of a subsequent article, in which Congress only promise (all, indeed, that they could do) to recommend to the states, revision and restitution. Debts discharged by law, where they originated, are every where discharged. Such is not only the doctrine of *Georgia*, but of the *British* Statesmen and Judges wherever the question has arisen. The *Federal Constitution* does not affect the right of the state; for, though [3 U.S. 3] it gives effect to the treaty of peace, it furnishes no rule for construing the meaning of the parties to that instrument. In relation to these arguments, the following authorities were cited: – *State papers, Jefferson*

to Hammond, Hinde Ch. 127. 1 *Br. Ch.* 376. 3 *Bac. Abr.* 310. *Caermarthen's Memorial, American Museum, May* 1787. 1 *Hen. Bl.* 123, 135. 3 *T. Rep.* 732. 1 *H. Bl.* 149. 2 *Br. Ch.* 11. 1 *H. Bl.* 146.

For the defendants, *Bradford* (the attorney-general) *E. Tilghman* and *Lewis* made the following points:–1st That the debts due to *Powell & Hopton*, had not been confiscated by the law of *South-Carolina*, and, therefore, were not confiscated by the words of reference in the law of *Georgia*; nor had *Georgia* a right to confiscate the property of the citizens of other states. 2d. That even if the law of *Georgia* had confiscated *Brailford's* interest in the debt, the right to recover the two thirds belonging to *Powell & Hopton* was unimpaired. 3d. That the debt, as it respects *Brailsford* himself, is *not confiscated*, but *sequestered*; and that the sequestration had not been enforced by any inquest of office, seizure, or other act tantamount to an office or seizure. 4th. That the Peace alone, without any positive compact, restored the right of action to the original creditors. 5th. That without recourse to the general principle of the law of nations, the treaty expressly revives the right of action, by removing all legal impediments to the recovery of bona-fide debts, and the treaty is the supreme law of the land, by virtue of the Federal Constitution. In support of these propositions the following authorities were cited: – 3 *Bac.* 203. 2 *Co.* 67. 1 *P. Wm.* 307. *Curs. Canc.* 89. 1. *Dom. Civ. L. 138, 147. Magna Carta. Sir T. Park.* 267. 3 *T. Rep.* 734. *Vatt. b.* 4. *c.* 1. *s.* 8. *ib. c.* 2. *s.* 20. 22. *Burn. Ec. L.* 157. *Carth. 148. Grot. b.* 3. *c.* 20 *s.* 16. *p.* 700. 1 *Dall. Rep.* 233. 1 *H. Bl.* 123. 136. 2 *Bro ch.* 11. 1 *Bl. c.* 409. 240. *Sir T. Raym. Saunf.* 45. *Plowd.* 259. 3 *Inst.* 55. 1 *Hawk.* 68. *State papers Bynk. b.* 1. *C.* 7. 1 *Ver.* 58. *Circular Letter of Congress.*

The argument having continued for four days, the *Chief Justice* delivered the following charge on the 7th of February.

Jay, *Chief Justice*. This cause has been regarded as of great importance; and doubtless is is so. It has accordingly been treated by the Counsel with great learning, diligence and ability; and on your part it has been heard with particular attention. It is, therefore, unnecessary for me to follow the investigation over the extensive field into which it has been carried: you are now, if ever you can be, completely possessed of the merits of the cause. [3 U.S. 3,4]

The facts comprehended in the case, are agreed; the only point that remains, is to settle what is the law of the land arising from those facts; and on that point, it is proper, that the opinion of the court should be given. It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous: We entertain no diversity of sentiment; and we have experienced no difficulty in uniting in the charge, which it is my province to deliver.

We are then, Gentlemen, of opinion, that the debts due to *Hopton & Powell* (who were citizens of *South-Carolina*) were not confiscated by the statute of *South-Carolina*; the same being therein expressly excepted: That those debts were not confiscated by the statute of *Georgia*, for that statute enacts, with respect to *Powell & Hopton*, precisely the like, and no other, degree and extent of confiscation and forfeiture, with that of *South-Carolina*. Wherefore it cannot now be necessary to decide, how far one state may of right legislate relative to the personal rights of citizens of another state, not residing within their jurisdiction.

We are also of opinion, that the debts due to *Brailsford*, a *British* subject, residing in *Great Britain*, were by the statute of *Georgia* subjected, not to confiscation, but only to sequestration; and, therefore, that his right to recover them, revived at the peace, both by the law of nations and the treaty of peace.

The question of forfeiture in the case of joint obligees, being at present immaterial, need not now be decided.

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumbable, that the court are the best judges of the law. But still both objects are lawfully, within your power of decision.

Some stress has been laid on a consideration of the different situations of the parties to the cause; The State of *Georgia*, sues three private persons. But what is it to justice, how many, or how few; how high, or how low; how rich, or how poor; the contending parties may chance to be? Justice is indiscriminately due to all, without regard to numbers, wealth, or rank. Because to the State of *Georgia*, composed of many [3 U.S. 4,5] thousands of people, the litigated sum cannot be of great moment, you will not for this reason be justified, in deciding against her claim; if the money belongs to her, she ought to have it; but on the other hand, no consideration of the circumstances, or of the comparative insignificance of the defendant's, can be a ground to deny them the advantage of a favourable verdict, if in justice they are entitled to it.

Go then, Gentlemen, from the bar without any impressions of favor or prejudice for the one party or the other; weigh well the merits of the case, and do on this, as you ought to do on every occasion, equal and impartial justice.

The jury having been absent some time, returned to the bar, and proposed the following questions to the court.

1. Did the act of the State of *Georgia*, completely vest the debts of *Brailsford, Powell, & Hopton*, in the State, at the time of passing the same?

2. If so, did the treaty of peace, or any other matter, revive the right of the defendants to the debt in controversy?

In answer to these questions, the CHIEF JUSTICE stated, that it was intended in the general charge of the court, to comprise their sentiments upon the points now suggested; but as the jury entertained a doubt, the enquiry was perfectly right. On the 1st question, he said it was the unanimous opinion of the judges, that the act of the State of *Georgia* did not vest the debts of *Brailsford, Powell & Hopton*, in the State at the time of passing it. On the 2nd question he said, that no sequestration divests the property in the thing sequestered; and, consequently, *Brailsford*, at the peace, and indeed, throughout the war, was the real owner of the debt. That it is true, the State of *Georgia* interposed with her legislative authority to prevent *Brailsford's* recovering the debt while the war continued, but, that the mere restoration of peace, as well as the very terms of the treaty, revived the right of action to recover the debt, the property of which had never in fact or law been taken from the defendants: and that if it were otherwise, the sequestration would certainly remain a lawful impediment to the recovering of a bona fide debt, due to a *British* creditor, in direct opposition to the 4th article of the treaty.

After this explanation, the jury, without going again from the bar, returned a *Verdict for the defendants*.

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1. Mr. Bradford was appointed in the room of Edmund Randolph, Esq. who had accepted the office of Secretary of State.

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Federalist No. 81

FEDERALIST PAPERS

Federalist No. 81

The Judiciary Continued, and the Distribution of the Judicial Authority
From McLEAN'S Edition, New York.

Author: **Alexander Hamilton**

To the People of the State of New York:

LET US now return to the partition of the judiciary authority between different courts, and their relations to each other, ``The judicial power of the United States is" (by the plan of the convention) ``to be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish." [1]

That there ought to be one court of supreme and final jurisdiction, is a proposition which is not likely to be contested. The reasons for it have been assigned in another place, and are too obvious to need repetition. The only question that seems to have been raised concerning it, is, whether it ought to be a distinct body or a branch of the legislature. The same contradiction is observable in regard to this matter which has been remarked in several other cases. The very men who object to the Senate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at least, the propriety of vesting the ultimate decision of all causes, in the whole or in a part of the legislative body.

The arguments, or rather suggestions, upon which this charge is founded, are to this effect: ``The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the SPIRIT of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this

respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a PART of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and of equity.

These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be commended.

It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an

inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

Having now examined, and, I trust, removed the objections to the distinct and independent organization of the Supreme Court, I proceed to consider the propriety of the power of constituting inferior courts, [2] and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or AUTHORIZE, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much ``to constitute tribunals,'' as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention. I should consider every thing calculated to give, in practice, an UNRESTRAINED COURSE to appeals, as a source of public and private inconvenience.

I am not sure, but that it will be found highly expedient and useful, to divide the United States into four or five or half a dozen districts; and to institute a federal court in each district, in lieu of one in every State. The judges of these courts, with the aid of the State judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted; and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the Union. The Supreme Court is to be invested with original jurisdiction, only ``in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party.'' Public ministers of

every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal. Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Let us resume the train of our observations. We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, ``with such EXCEPTIONS and under such REGULATIONS as the Congress shall make."

The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by **jury**, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term ``appellate," which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one **jury** to another, is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word ``appellate," therefore, will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular State. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a **jury**, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a **jury**, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second **jury**, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the re-examination of a fact once ascertained by a **jury**, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a

superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it. [3] This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common-law courts of this State ascertain disputed facts by a **jury**, yet they unquestionably have jurisdiction of both fact and law; and accordingly when the former is agreed in the pleadings, they have no recourse to a **jury**, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, ``appellate jurisdiction, both as to law and fact,'' do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court (it may have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, others in the course of the CIVIL LAW. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases which shall have been originally tried by a **jury**, because in the courts of some of the States ALL CAUSES are tried in this mode [4] ; and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and FACT, and that this jurisdiction shall be subject to such EXCEPTIONS and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate, puts it out of all doubt that the supposed ABOLITION of the trial by **jury**, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, both subject to any EXCEPTIONS and REGULATIONS which may be thought advisable; that this appellate jurisdiction does, in no case, ABOLISH the trial by **jury**; and that an ordinary degree of prudence and integrity in the national councils will insure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences which have been predicted from that source.

PUBLIUS.

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1. Article 3, sec. I.

2. This power has been absurdly represented as intended to abolish all the county courts in the several States, which are commonly called inferior courts. But the expressions of the Constitution are, to constitute ``tribunals INFERIOR TO THE SUPREME COURT''; and the evident design of the provision is to enable the institution of local courts, subordinate to the Supreme, either in States or larger districts. It is ridiculous to imagine that county courts were in contemplation.

3. This word is composed of JUS and DICTIO, juris dictio or a speaking and pronouncing of the law.

4. I hold that the States will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

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History of Jury Nullification

WHY DID OUR FOUNDING FATHERS EXPECT CITIZEN JURIES TO JUDGE OUR LAWS AS WELL AS THE GUILT OF THE INDIVIDUAL ?

Because: "If a juror accepts as the law that which the judge states then that juror has accepted the exercise of absolute authority of a government employee and has surrendered a power and right that once was the citizen's safeguard of liberty." (1788) (2 Elliots Debates, 94, Bancroft, History of the Constitution, 267)

"Jury nullification of law", as it is sometimes called, is a traditional American right defended by the Founding Fathers. Those Patriots intended the jury serve as one of the tests a law must pass before it assumes enough popular authority to be enforced. Thus the Constitution provides five separate tribunals with veto power -- representatives, senate, executive, judges and jury -- that each enactment of law must pass before it gains the authority to punish those who choose to violate it. Thomas Jefferson said, "I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

The power of the jury to judge the justice of the law and to hold laws invalid by a finding of "not guilty" for any law a juror felt was unjust or oppressive dates back to the Magna Carta, in 1215. At the time King John could pass any laws any time he pleased. Judges and executive officers, appointed and removed at his whim, were no more than servants of the king. The oppression became so great that the nation rose against the ruler and the barons of England compelled their king to pledge that no freeman would be punished for a violation of any laws without the consent of his peers.

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The Magna Carta was a gift reluctantly bestowed upon his subjects by the Its sole means of enforcement, the jury, often met with hostility from the Crown. By 1664 English juries were routinely fined for acquitting a defendant. Such was the case in the 1670 political trial of William Penn for preaching Quakerism to an unlawful assembly. Four of the twelve jurors voted to acquit and continued to acquit even after being imprisoned and starved for four days. The jurors were fined and imprisoned until they paid the fines. One juror, Edward Bushell, refused to pay the fine and brought his case before the Court of Common Pleas. Chief Justice Vaughan held that jurors could not be punished for their verdicts. Bushell's Case (1670) was one of the most important developments in the common law history of the jury.

Jurors exercised their power of nullification in 18th century England in trials of defendants charged with sedition and in mitigating death penalty cases. In the American Colonies jurors refused to enforce forfeitures under the English Navigation Acts. The Colonial jurors' veto power prompted England to extend the jurisdiction of the non-jury admiralty courts in America beyond their ancient limits of sea-going vessels. Depriving "the defendant of the right to be tried by a jury which was almost certain not to convict him [became] ... the most effective, and therefore most disliked" of all the methods used to enforce the acts of trade. (Holdsworth, A History of English Law (1938) XI, 110)

John Hancock, "the wealthy Massachusetts patriot and smuggler who as President of the Continental Congress affixed the familiar bold signature which adorns the parchment Declaration of Independence" (United States Court of Appeals, 1980, 618 F.2d 453), was prosecuted through this admiralty jurisdiction in 1768 for a fine of 9,000 pounds -- triple the value of the goods aboard his sloop "Liberty" which had been previously forfeited. John Adams eloquently argued the case, chastising Parliament for depriving Americans of their right to trial by jury. Adams later said of the juror, "it is not only his right, but his duty... to find the verdict according to his own best understanding, judgment, and conscience,

though in direct opposition to the direction of the court." (Yale Law Journal, 1964:173.)

Earlier in America jury nullification had decided the celebrated seditious libel trial of John Peter Zenger (Zenger's Case, 1735). His newspaper had criticized the royal governor of New York. The law made it a crime to publish any statement, true or false, criticizing public officials, laws or government. The jury was only to decide if the material in question had been published; the judge was to decide if the material was in violation of the statute. The defense asked the jury to make use of their own consciences and although the judge ruled that the truth was no defense, the jury acquitted Zenger. The jury's nullification in this case is praised in history textbooks as a hallmark of freedom of the press in the United States.

At the time of the American revolution, the jury was considered the judge of both law and fact. In a case involving the civil forfeiture of private property by the state of Georgia, first Supreme Court Chief Justice John Jay, instructed jurors that the jury has "a right ... to determine the law as well as the fact in controversy." (Georgia vs. Brailsford, 1794:4.)

Until the middle of the 1800s federal and state judges often instructed juries they had the right to disregard the court's view of the law. (Barkan, Steven, Jury Nullification in Political Trials, citing 52 Harvard Law Review, 582-616) Then northern jurors refused to convict abolitionists who had violated the 1850 Fugitive Slave Law. In response judges began questioning jurors to find out if they were prejudiced against the government, dismissing any who were. In 1852 Lysander Spooner, a Massachusetts lawyer and champion of individual liberties, complained, "that courts have repeatedly questioned jurors to ascertain whether they were prejudiced against the government ... [The reason] was, that 'the Fugitive Slave Law, so called', was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people." Modern treatments of abolitionism praise these jury nullification verdicts for helping the anti-slavery cause -- rather than condemn them for undermining the rule of law and the uniformity of justice.

In 1895, the Supreme Court, under pressure from large corporations, ruled in a bitter split decision that courts no longer had to inform juries they could veto an unjust law. The giant corporations had lost numerous trials pressed against labor leaders trying to organize unions. Striking was against the law at that time. "Juries also ruled against corporations in damage suits and other cases, prompting influential members of the American Bar Association to fear that jurors were becoming too hostile to *their clients* and too sympathetic to the poor. As the American Law Review wrote in 1892, jurors had 'developed agrarian tendencies of an alarming character'." (Barkan, 1983, emphasis added.)

Despite the courts' refusal to inform jurors of their historical veto power, jury nullification in liquor law trials was a major contributing factor in ending alcohol prohibition. (Today in Kentucky jurors often refuse to convict under the marijuana prohibition laws.)

Fewer incidences of jury veto actions occurred as time increased after the courts began concealing jurors' rights from American citizens and falsely instructing them that they may consider only the facts as admitted by the court. Researchers in 1966 found that jury nullification occurred only 8.8 percent of the time between 1954 and 1958, and suggested that "one reason why the jury exercises its very real power [to nullify] so sparingly is because it is officially told it has none." (California's charge to the jury in criminal cases is typical: "It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you ... You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me.") Today no officer of the court is allowed to tell the jury of their veto power.

Counsels for Vietnam war protest defendants tried to introduce moral and political arguments on the war to gain jury sympathy. Most often the jury was given instructions such as "You must apply the law that I lay down." (Conspiracy trial of Benjamin Spock et al., 1969.) Jurors receiving such instructions usually convicted while feeling the pang of conscience expressed by the typical responses from Spock trial jurors: "I had great difficulty sleeping that night ... I detest the Vietnam war ... But it was so clearly put by the judge." And "I'm convinced the Vietnam war is no good. But we've got a Constitution to uphold ... Technically speaking, they were guilty according to the judge's charge." But in the

few anti-Vietnam war trials where juries were allowed to hear of their power they acquitted.

Jury acquittals in the colonial, abolitionist and post-Civil War eras helped advance political activist causes and restrained government efforts at social control. Steven Barkan suggests that the refusal of judges during the Vietnam war to inform juries of their power to disregard the law frustrated the anti-war goals. As Lysander Spooner pointed out regarding the questioning of jurors to eliminate those who would bring in a verdict according to conscience (a practice effectively accomplished today through the jurors' oaths) "The only principal upon which these questions are asked, is this -- that no man shall be allowed to serve as juror unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be.... A jury like that is palpably nothing but a mere tool of oppression in the hands of the government."

Authoritarians may argue that the Constitution without jury veto power provides the necessary protection of liberties. But legislatures will always confirm the constitutionality of their own acts. And the oaths sworn to uphold the Constitution by judges and public servants have historically been only as good as the power to enforce such oaths. Nor are free elections adequate to prevent tyranny without jury veto power, because elections come only periodically and give no guarantee of repealing the damage done. Additionally, the second body of legislators are likely to be as bad as the first since they are exposed to the same temptations and use the same tactics to gain office.

Further, the jury's veto power protects minorities from "the body of the people, operating by the majority against the minority." (James Madison, June 8, 1789.) Twelve men taken randomly from the population will represent both friends and opponents of the party in power. With fully informed juries the government can exercise no powers over the people without the consent of the people. Trial by jury is trial by the people. When juries are not allowed to judge law it becomes trial by the government "In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of government; for there are no oppressions which the government may not authorize by law." (Spooner, 1852) (Excerpted from "Jury Power" by L.& J. Osburn)

"FIJA" means Fully Informed Jury Amendment, Act, or Association.

As law, FIJA. would require that judges resume the practice of informing jurors of their inherent right to bring in a verdict according to conscience and their judgment as to whether the low itself is unjust or unfairly applied in any trial by jury where government is one of the parties. FIJA would also provide that defendants' motives be admissible as evidence.

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A History of Jury Nullification

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From Magna Carta to Edward Bushell

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Those whose interests lie in maintaining government control of social behavior may argue that the Constitution provides the necessary protection of liberties. But legislative bodies will always confirm the constitutionality of their own acts. And the oaths sworn to uphold the Constitution by judges and public servants have historically been only as good as the power to enforce such oaths. Nor are free elections adequate to prevent tyranny without jury veto power, because elections come only periodically and give no guarantee of repealing the damage done. Additionally, the second body of legislators are likely to be as bad as the first since they are exposed to the same temptations and use the same tactics to gain office.

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For more information on the Fully Informed Jury Association contact:

FIJA, P.O. Box 59, Helmville, MT 59843

Tel: (406) 793-5550. Web site: http://www.fija.org

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ED FORCHION "Jury Nullification Trial"

An Essay on The
Trial By Jury
By
Lysander Spooner

1852

Abridged
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THE RIGHT OF JURIES TO JUDGE OF THE JUSTICE OF LAWS

Section I

For more than six hundred years-that is, since Magna Carta, in 1215--there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; *but that it is also their light, and their primary and paramount duty, to judge the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such law.*

Unless such be the right and duty of jurors, it is plain that, instead of juries being a "palladium of liberty"-a barrier against the tyranny and oppression of the government-they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed.

But for their right to judge the law, *and the justice of the law,* juries would be no protection to an accused person, *even as to matters Of fact;* for, if the government can dictate to a jury any law whatever, in a criminal case, it can certainly dictate to them the laws of evidence. That is, it can dictate what evidence is admissible, and what inadmissible, *and also what force or weight is to be given to the evidence admitted.* And if the government can thus dictate to a jury the laws of evidence, it can not only make it necessary for them to convict on a partial exhibition of the evidence rightfully pertaining to the case, but it can even require them to convict on any evidence whatever that it pleases to offer them.

That the rights and duties of jurors must necessarily be such as are here claimed for them, will be evident

when it is considered what the trial by jury is, and what is its object.

"The trial by jury," then, is a "trial by the country"-that is, by the people- as distinguished from a trial by the government.

It was anciently called "trial *per pais*"-that is, "trial by the country." And now, in every criminal trial, the jury are told that the accused "has, for trial, put himself upon the *country; which country* you (the jury) are."

The object of this trial "by the country," or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or "the country," judge and determine their own liberties against the government; instead of the government's judging of and determining its own powers over the people.

If the government may decide who may, and who may not, be jurors, it will of course select only its partisans, and those friendly to its measures. It may not only prescribe who may, and who may not, be eligible to be drawn as jurors; but is may also question each person drawn as a juror, as to his sentiments in regard to the particular law involved in each trial, before suffering him to be sworn on the panel; and exclude him if he be found unfavorable to the maintenance of such a law.

So, also, if the government may dictate to the jury *what laws they are to enforce,* it is no longer a "trial by the country," but a trial by the government; because the jury then try the accused, not by any standard of their own-not by their own judgments of their rightful liberties-but by a standard dictated to them by the government. And the standard, thus dictated by the government, becomes the measure of the people's liberties. If the government dictate the standard of trial, it of course dictates the results of the trial. And such a trial is no trial by the country, but only a trial by the government; and in it the government determines what are its own powers over the people, instead of the people's determining what are their own liberties against the government. In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of the government; for there are no oppressions which the government may not authorize by law.

The jury are also to judge whether the laws are rightly expounded to them by the court. Unless they judge on this point, they do nothing to protect their liberties against the oppressions that are capable of being practiced under cover of a corrupt exposition of the laws. If the judiciary can authoritatively dictate to a jury any exposition of the law, they can dictate to them the law itself, and such laws as they please; because laws are, in practice, one thing or another, according as they are expounded.

They must also judge whether there really be any such law, (be it good or bad,) as the accused is charged with having transgressed. Unless they judge on this point, the people are liable to have their liberties taken from them by brute force, without any law at all.

The jury must also judge of the laws of evidence. If the government can dictate to the jury the laws of evidence, it can not only shut out any evidence it pleases, tending to vindicate the accused, but it can require that any evidence whatever, that it pleases to offer, be held as conclusive proof of any offense whatever which the government chooses to allege.

It is manifest, therefore, that the jury must judge of and try the whole case, and every part and parcel of the case, free of any dictation or authority on the part of the government. They must judge of the existence of the law; of the true exposition of the law; *of the justice of the law;* and of the admissibility of and weight of all the evidence offered; otherwise the government will have everything its own way; the jury will be mere puppets in the hands of the government; and the trial will be, in reality, a trial by the government,

and not a "trial by the country." By such trials the government will determine its own powers over the people, instead of the people's determining their own liberties against the government; and it will be an entire delusion to talk, as for centuries we have done, of the trial by the jury, as a "palladium of liberty," or as any protection to the people against the oppression and tyranny of the government.

The question, then, between trial by jury, as thus described, and trial by the government, is simply a question between liberty and despotism. The authority to judge what are the powers of the government, and what are the liberties of the people, must necessarily be vested in one or the other of the parties themselves-the government, or the people; because there is no third party to whom it can be entrusted. If the authority be vested in the government, the government is absolute, and the people have no liberties except such as the government sees fit to indulge them with. If, on the other hand, that authority be vested in the people, then the people have all liberties, (as against the government,) except such as substantially the whole people (through a jury) choose to disclaim; and the government can exercise no power except such as substantially the whole people (through a jury) consent that it may exercise.

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* To show that this supposition is not an extravagant one, it may be mentioned that courts have repeatedly questioned jurors to ascertain whether they were prejudiced *against the government*-that is, whether they were in favor of, or opposed to, such laws of the government as were to be put in issue in the then pending trial. This was done (in 1851) in the United States District Court of- the District of Massachusetts, by Peleg Sprague, the United Slates district judge, in impaneling three several juries for the trials of Scott, Hayden, and Morris, charged with having aided in the rescue of fugitive slave from the custody of the United States deputy Marshall. This judge caused the following question to be propounded to all the jurors separately; and those who answered unfavorably for- the purposes of government, were excluded from the panel. "Do you hold any opinions upon the subject of the Fugitive Slave Law, so called, which will induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment, *and contesting the offense,* are proved against him, and the court direct you that the law is constitutional!"

The reason of this question was, that "the Fugitive Slave Law, so called," was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people.

A similar was soon afterwards propounded to the persons drawn as jurors in the United States *District* Court for the District of Massachusetts, by Benjamin R. Curtis, one of the Justices of the Supreme Court of the United States, in impaneling a jury for the trial of the aforesaid Morris on the charge before mentioned; and those who did not answer the question favorably for the government were again excluded from the panel.

It has also been an habitual practice with the Supreme Court of Massachusetts, in impaneling juries for the trial of capital offenses, to inquire of the persons drawn as jurors whether they had any conscientious scruples against finding verdicts of guilty in such cases; that is, whether they had any conscientious scruples against sustaining the law prescribing death as the punishment of the crime to be tried; and to exclude from the panel all who answered in the affirmative.

The only principle upon which these questions arc asked, is this-that no man shall be allowed to serve as juror, unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be.

What is such a jury good for, as a protection against the tyranny of the government! A jury like that is palpably nothing but a mere tool of oppression in the hands of the government. A trial by such a jury is really a trial by the government itself-and not a trial by the country-because it is a trial only by men

specially selected by the government for their readiness to enforce its own tyrannical measures.

If that ⊦e the true principle of the trial by jury, the trial is utterly worthless as a security to liberty. The Czar might, with perfect safety to his authority, introduce the trial by jury into Russia, if he could but be permitted(i to select his jurors from those whomever ready to maintain his laws, without regard to their injustice.

The example is sufficient to show that the very pith of the trial by jury, as a safeguard to liberty, consists in the jurors being taken indiscriminately from the whole people, and in their- right to hold invalid all laws which they think unjust.

Section 2

The force and justice of the preceding argument cannot be evaded by saying that the government is chosen by the people; that, in theory, it represents the people; that it is designed to do the will of the people; that its members are all sworn to observe the fundamental or constitutional law instituted by the people; that its acts are therefore entitled to be considered the acts of the people; and that to allow a jury, representing the people, to invalidate the acts of government, would therefore be arraying the people against themselves.

There are two answers to such an argument.

One answer is, that, in a representative government, there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws.

Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive, jury, and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals, than there is in making the representatives, or ~t ~e senate, or the executive, or the judges, one of them. There is no more absurdity in giving a jury the veto upon the laws, than there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves, when a jury puts its veto upon a statute, which the other tribunals have sanctioned, than they are when the same veto is exercised by the representatives, the senate, the executive, or the judges.

But another answer to the argument that the people are arrayed against themselves, when a jury hold an enactment of the government invalid, is, that the government, and all the departments of government, *are merely the servants and agents of the people;* not interested with arbitrary or absolute authority to bind the people, but required to submit all their enactments to the judgment of a tribunal more fairly representing the whole people, before they carry them into execution, by punishing any individual for transgressing them. If the government were not thus required to submit their enactments to the judgment of "the country," before executing them upon individuals-if, in other words, the people had reserved to themselves no veto upon the acts of government, the government, instead of being a mere servant and agent of the people, would be an absolute despot over the people. It would have all power in its own hands; because the power *to punish* carries all other powers with it. A power that can, of itself, and by its own authority, punish disobedience, can compel obedience and submission, and is above all responsibility for the character of its laws. In short, it is a despotism.

And it is of no consequence to inquire how a government came by this power to punish, whether by prescription, by inheritance, by usurpation, or by delegation of the people? *If it have now but got it,* the government is absolute.

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* - The executive has a qualified veto upon the passage of laws, in most of our governments, and an absolute veto, in all of them, upon the execution of any laws which he deems unconstitutional; because his oath to support the constitution (as he understands it) forbids him to execute any law that he deems unconstitutional.

It is plain, therefore, that if the people have invested the government with power to make laws that absolutely bind the people, and to punish the people for transgressing those laws, the people have surrendered their liberties unreservedly into the hands of the government.

It is of no avail to say, in answer to this view of the case, that in surrendering their liberties into the hands of government, the people took an oath from the government, that it would exercise its power within certain constitutional limits; for when did oaths ever restrain a government that was otherwise unrestrained? Or when did a government fail to determine that all its acts were within the constitutional and authorized limits of its power, **if it were permitted to determine that question for itself.**

Neither is it of any avail to say, that, if the government abuse its power, and enact unjust and oppressive laws, the government may be changed by the influence of discussion, and the exercise of the right of suffrage (voting). Discussion can do nothing to prevent the enactment, or procure the repeal, of unjust laws, unless it be understood that the discussion is to be followed by resistance. Tyrants care nothing for discussions that are to end only in discussion. Discussions, which do not interfere with the enforcement of their laws, are but idle wind to them. Suffrage is equally powerless and unreliable. It can be exercised only periodically; and the tyranny must at least be borne until the time for suffrage comes. Besides, when the suffrage is exercised, it gives no guaranty for the repeal of existing laws that are oppressive, and no security against the enactments of new ones that are equally so. The second body of legislators are liable and likely to be just as tyrannical as the first. If it be said that the second body may be chosen for their integrity, the answer is, that the first were chosen for that very reason, **and yet proved tyrants.** The second will be exposed to the same temptations as the first, and will be just as likely to prove tyrannical. Who ever heard that succeeding legislatures were, on the whole, more honest than those that preceded them? What is there in the nature of men or things to make them so? If it ~1. be said that the first body were chosen from motives of injustice, that fact proves that there is a portion of society who desire to establish injustice; and if they were powerful or artful enough to procure the election of their instruments to compose the first legislature, they will be likely to be powerful or artful enough to procure the election of the same or similar instruments to compose the second. The right of suffrage, therefore, and even a change of legislators, guarantees no change of legislation-certainly no change for the better. Even if a change for the better actually comes, it comes too late, because it comes only after more or less injustice has been irreparably done.

But, at best, the right of suffrage can be exercised only periodically; and between the periods the legislators are wholly irresponsible. No despot was ever more entirely irresponsible than are republican legislators during the period for which they are chosen. They can never be removed from their office, nor called to account while in their office, nor punished after they leave office, be their tyranny what it may. Moreover, the judicial and executive departments of the government are equally irresponsible *to the people,* and are only responsible, (by impeachment, and dependence for their salaries), to these irresponsible legislators. **This dependence of the judiciary and executive upon the legislature is a guaranty that they will always sanction and execute its laws, whether just or unjust.** Thus the legislators hold the whole power of the government in their hands, and are at the same time utterly

irresponsible for the manner in which they use it.

If, now, this government, (the three branches thus really united in one), can determine the validity of, and enforce, its own laws, it is, for the time being, entirely absolute, and wholly irresponsible to the people.

But this is not all. These legislators, and this government, so irresponsible while in power, can perpetuate their power at pleasure, if they can determine what legislation is authoritative upon the people, and can enforce obedience to it; for they can not only declare their power perpetual, but they can enforce submission to all legislation that is necessary to secure its perpetuity. They can, for example, prohibit all discussion of the rightfulness of their authority; forbid the use of suffrage; prevent the election of any successors; disarm, plunder, imprison, and even kill all who refuse submission. If, therefore, the government (all departments united) be absolute for a day-that is, if it can, for a day, enforce obedience to its own laws-it can, in that day, secure its power for all time-like the queen, who wished to reign but for a day, but in that day caused the king, her husband, to be slain, and usurped his throne.

Nor will it avail to say that such acts would be unconstitutional, and that unconstitutional acts may be lawfully resisted; for everything a government pleases to do will, of course, be determined to be constitutional, if the government itself be permitted to determine the question of the constitutionality of its own acts. **Those who are capable of tyranny, are capable of perjury to sustain it.**

The conclusion, therefore, is, that any government, that can, *for a day,* enforce its own laws, without appealing to the people, (or to a tribunal fairly representing the people,) for their consent, is, in theory, an absolute government, irresponsible to the people, and can perpetuate its power at pleasure.

The trial by jury is based upon a recognition of this principle, and therefore forbids the government to execute any of its laws, by punishing violators, in any case whatever, without first getting the consent of "the country," or the people, through a jury. In this way, the people at all times, hold their liberties in their own hands, and never surrender them, even for a moment, into the hands of government.

The trial by jury, then, gives to any and every individual the liberty, at any time, to disregard or resist any law whatever of the government, if he be willing to submit to the decision of a jury, the questions, whether the law be intrinsically just and obligatory? and whether his conduct, in disregarding or resisting it, were right in itself? And any law, which does not, in such trial, obtain the unanimous sanction of twelve men, taken at random from the people, and judging according to the standard of justice in their own minds, free from all dictation and authority of the government, may be transgressed and resisted with impunity, by whomsoever pleases to transgress or resist it.*

And if there be so much as a reasonable *doubt* of the justice of the laws, the benefit of that doubt must be given to the defendant, and not to the government. So that the government must keep its laws *clearly* within the limits of justice, if it would ask a jury to enforce them.

The trial by jury authorizes all this, or it is a sham and a hoax, utterly worthless for protecting the people against oppression. If it do not authorize an individual to resist the first and least act of injustice or tyranny, on the part of the government, it does not authorize him to resist the last and the greatest. If it do not authorize individuals to nip tyranny in the bud, it does not authorize them to cut it down when its branches are filled with the ripe fruits of plunder and oppression.

Those who deny the right of a jury to protect an individual in resisting an unjust law of the government, deny him all *legal* defence whatsoever against oppression. The right of revolution, which tyrants, in mockery, accord to mankind, is no *legal right under a* government; it is only a *natural* right to overturn a government. **The government itself never acknowledges this right.** And the right is practically

established only when and because the government no longer exists to call it in question. The right, therefore, can be exercised with immunity, only when it is exercised victoriously. All *unsuccessful* attempts at revolution, however justifiable in themselves, are punished as treason, if the government be permitted to judge of the treason. **The government itself never admits the injustice of its laws,** as a legal defence for those who have attempted a revolution, and failed. The right of revolution, therefore, is a right of no practical value, except for those who are stronger than the government. So long, therefore, as the oppressions of a government are kept within such limits as simply not to exasperate against it a power greater than its own, the right of revolution cannot be appealed to, and is therefore inapplicable to the case. This affords a wide field for tyranny; and if a jury cannot here intervene, the oppressed are utterly defenseless.

It is manifest that the only security against the tyranny of the government lies in forcible resistance to the execution of the injustice; because the injustice will certainly be executed, *unless it be forcibly resisted.* And if it be but suffered to be executed, it must then be borne; for the government never makes compensation for its own wrongs.

Since, then, this forcible resistance to the injustice of the government is the only possible means of preserving liberty, it is indispensable to all *legal* liberty that this *resistance* should be *legalized.* It is perfectly self-evident that where there is no *legal* right to resist the oppression of the government, there can be no *legal* liberty. And here it is all-important to notice, that, *practically speaking,* there can be no *legal* right to resist the oppressions of the government, unless there be some legal tribunal, other than the government, and wholly independent of, and *above,* the government, to judge between the government and those who resist its oppressions; in other words, to judge what laws of the government are to be obeyed, and what may be resisted and held for naught. The only tribunal known to our laws, for this purpose, is a jury. If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, *legally speaking,* are slaves. Like many other slaves they may have sufficient courage and strength to keep their masters somewhat in check; but they are nevertheless *known to the law* only as slaves.

That this right of resistance was recognized as a **common** law **right,** when the ancient and genuine trial by jury was in force, is not only proved by the nature of the trial itself, but is acknowledged by history.*

* - *Hallam* says "The relation established between a lord and his vassal by the feudal tenure, far from containing principles of any servile and implicit obedience, permitted the compact to be dissolved in case of its violation by either party. This extended as much to the sovereign as to inferior lords. + + *If a* vassal was aggrieved, and if justice was denied him, he sent a defiance, that is, a renunciation of fealty to the king, and was entitled to enforce redress at the point of his sword. It then became a contest of strength as between two independent potentates, and was, terminated by treaty, advantageous or otherwise, according to the fortune of war. + + There remained the original principle, that allegiance depended conditionally upon good treatment, and that an appeal might *be lawfully* made to arms against an oppressive government. Nor was this, we may be sure, left for extreme necessity, or thought to require a long-enduring forbearance. In modern times, a king, compelled by his subjects' sword is to abandon any pretension, would be supposed to have ceased to reign; and the express recognition of such a right is that of insurrection has been justly deemed inconsistent with the majority of law. But ruder ages had ruder sentiments. Force was necessary to repel force; and men accustomed to see the king's authority defied by a private riot, were not much shocked when it was resisted in defence of public freedom."
-- *3 Middle Ages,* 240-3

This right of resistance is recognized by the constitution of the United States, as a strictly legal and constitutional right. It is so recognized, first by the provision that "the trial of all crimes, except in cases of impeachment, shall be by jury"-that is, by the country-and not by the government; secondly, by the provision that "the right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them-as mush as a constitutional security for the right to buy and keep food would have implied the right to eat it. The constitution, therefore, takes it for granted that the people will judge of the conduct of the government, and that, as they

have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it. And it is a sufficient and *legal* defence for a person accused of using arms against the government, if he can show, to the satisfaction of a jury, *or even any one of a jury,* that the law he resisted was an unjust one.

In the American State constitutions also, this right of resistance to the oppressions of the government is recognized, in various ways, as a natural, legal, and constitutional right. In the first place, it is so recognized by provisions establishing the trial by jury; thus requiring that accused persons shall be tried by "the country," instead of the government. In the second place, it is recognized by many of them, as, for example, those of Massachusetts, Maine, Vermont, Connecticut, Pennsylvania, Ohio, Indiana, Michigan, Kentucky, Tennessee, Arkansas, Mississippi, Alabama, and Florida, by provisions, in their bills of rights, declaring that men have a natural, inherent, and inalienable right of *"defending* their lives and liberties." This, of course, means that they have a right to defend them against any injustice *on the pail of government,* and not merely on the part of private individuals; because the object of all bills of rights is to assert the rights of individuals and the people, *as against the government,* and not as against private persons. It would be a matter of ridiculous supererogation to assert, in a constitution of government, the natural right of men to defend their lives and liberties against private trespassers.

Many of these bills of rights also assert the natural right of all men to protect their property-that is, to protect it *against the government.* It would be unnecessary and silly indeed to assert, in a constitution of government, the natural right of individuals to protect their property against thieves and robbers.

The constitutions of New Hampshire and Tennessee also declare that "The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."

The legal effect of these constitutional recognitions of the right of individuals to defend their property, liberties, and lives, against the government, is to legalize resistance to all injustice and oppression, of every name and nature whatsoever, on the part of the government.

But for this right of resistance, on the part of the people, all governments would become tyrannical to a degree of which few people are aware. Constitutions are utterly worthless to restrain the tyranny of governments, unless it be understood that the people will, by force, compel the government to keep within the constitutional limits. **Practically speaking, no government knows any limits to its power, except the endurance of the people.** But that the people are stronger than the government, and will resist in extreme cases, our governments would be little or nothing else than organized systems of plunder and oppression. All, or nearly all, the advantage there is in fixing any constitutional limits to the power of a government, is simply to give notice to the government of the point at which it will meet with resistance. If the people are then as good as their word, they may keep the government within the bounds they have set for it; otherwise it will disregard them-as is proved by the example of all our American governments, in which the constitutions have all become obsolete, at the moment of their adoption, for nearly or quite all purposes except the appointment of officers, who at once become practically absolute, except so far as they are restrained by the fear of popular resistance.

The bounds set to the power of the government, by the trial by jury, as will hereafter be shown, are these-that the government shall never touch the property, person, or natural or civil rights of an individual, against his consent, (except for the purpose of bringing them before a jury for trial,) unless in pursuance and *execution* of a judgment, or decree, rendered by a jury in each individual case, upon such evidence, and such law, as are satisfactory to their own understandings and consciences, irrespective of all legislation of the government.

MORAL CONSIDERATIONS FOR JURORS

(from Chapter 10 of the First Edition)

The trial by jury must, if possible, be construed to be such that a man can rightfully sit in a jury, and unite with his fellows in giving judgment. But no man can rightfully do this, unless he hold in his own hand alone a veto upon any judgment or sentence whatever to be rendered by the jury against a defendant, which veto he must be permitted to use according to his own discretion and conscience, and not bound to use according to the dictation of either legislatures or judges. The prevalent idea, that a juror may, at the mere dictation of a legislature or a judge, and without the concurrence of his own conscience or understanding, declare a man *"guilty,"* and thus in effect license the government to punish him; and that the legislature or the judge, and not himself, has in that case all the moral responsibility for the correctness of the principles on which the judgment was rendered, is one of the many gross impostures by which it could hardly have been supposed that any sane man could ever have been deluded, but which governments have nevertheless succeeded in inducing the people at large to receive and act upon.

As a moral proposition, it is perfectly self-evident that, unless juries have all the legal rights that have been claimed for them in the preceding chapters,--that is, the rights of judging what the law is, whether the law be a just one, what evidence is admissible, what weight the evidence is entitled to, whether an act were done with a criminal intent, and the right also to *limit* the sentence, free from all dictation from any quarter,--they have no *moral* right to sit in the trial at all, and cannot do so without making themselves accomplices in any injustice that they may have reason to believe may result from their verdict. It is absurd to say that they have no moral responsibility for the use that may be made of their verdict by the government, when they have reason to suppose it will be used for purposes of injustice.

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 a punishment inflicted upon a man *against law,* when, at the dictation of a judge as to what the law is, they have consented to render a verdict against their own opinions of the law.

It is absurd, too, to say that jurors have no moral responsibility for the conviction and punishment of an innocent man, when they consent to render a verdict against him on the strength of evidence, or laws of evidence, dictated to them by the court, if any new evidence or laws of evidence have been excluded, which *they* (the jurors) think ought to have been admitted in his defence.

It is absurd to say that jurors have no moral responsibility for rendering a verdict of *"guilty"* against a man, for an act which he did not know to be a crime, and in the commission of which, therefore he could have had no criminal intent, in obedience to the instructions of courts that "ignorance of the law (that is, of crime) excuses no one."

It is absurd, aiso, to say that jurors have no moral responsibility for any cruel and unusual sentence that **maybe** 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.

The same principles apply to civil cases as criminal. If a jury **consent,** at the dictation of the court, as to either law or evidence, to render a verdict, on the strength of which they have reason to believe that a man's property will be taken from him and given to another, against their own notions of justice, they make themselves morally responsible for the wrong.

Every man, therefore, ought to refuse to sit in a jury, and to take the oath of a juror, unless the form of the oath be such as to allow him to use his own judgment, on every part of the case, free of all dictation whatsoever, and to hold in his own hand a veto upon any verdict that can be rendered against a defendant, and any sentence that can be inflicted upon him, even if he be guilty.

Of course, no man can rightfully take an oath as a juror, to try a case "according to law," (if by law be meant anything other than his own ideas of justice,) nor "according to the law and the evidence, *as they shall be given to him."* Nor can he rightfully take an oath even to try a case *"according to the evidence,"* because in all cases he may have good reason to believe that a party has been unable to produce all the evidence legitimately entitled to be received. The only oath which it would seem that a man can rightfully take as a juror, in either a civil or criminal case, is, that he "will try the case *according to his conscience."* Of course, the form may admit of variation, but this should be the substance. Such, we have seen, were the ancient common law oaths.

Commentary

In his book, *No Treason* Spooner maintained that the U.S. Constitution literally bound no one (in *a legal sense)* to perform, including the very men who drafted and signed it! Yet, in 1991, we are beset with thousands upon thousands of "laws"-local, state & Federal-which, undoubtedly, only a few have read, much less comprehended, including many judges (who are supposedly intended to uphold them). This being the case, justice is often ignored or denied in today's tribunals and courts. As Patrick Henry exclaimed, "*What right have they* (the framers of the U.S. Constitution) *to say 'We, The People'?!"* binding each succeeding generation with pains of punishment for violation of statutes where there was no universal popular consent. What "check" do we have on bad legislation?

Enter the Jury

Historically, under the Common Law (originating in the Holy Bible), juries have been bodies of conscience, confirming either the correctness or corruption of Man's laws. As Spooner noted:

But it is in the administration of justice, or of law, that the freedom or subjection of a people is tested. If this administration be in Accordance with the arbitrary will of the legislator-that is, if his will, as it appears in his statutes, be the highest rule of decision known to judicial tribunals,--the government is a despotism, and the people are slaves. If, on the other band, the rule of decision be those principles of natural equity and justice, which constitute, or at least are embodied in, the general conscience of mankind, the people are free in just so far as that conscience is enlightened.

Today the mass of society appears not only unenlightened, but incapable of judging right from wrong, or at least this is what opponents of jury powers notification will tell you (their vested interests usually lie in upholding the legislative elite). Spooner rightly stated that one motive for legitimate government was "protection of the weak against the strong," and America's jural society provided this avenue for the weak and, yes, the unenlightened. In the very first jury trial before the U.S. supreme Court in 1794 ("supreme" is not capitalized in the U.S. Constitution, though the term "Behavior" is), the judges said, "*it is presumed,*

that the juries are the best judges of facts; it is, on the other hand, presumed that the courts are the best judges of law. But still, **both objects are within your power of decision. You have a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. "** (Georgia vs. Brailsford, et al, 3 Dall. 1, emphasis ours)

Indeed, these popular powers existed long before, and are independent of, the U.S. Constitution:

Under constitutional scheme, grand jury is not and should not be captive to any of the three branches of government; the grand jury, is a pre-constitutional institution given constitutional stature by the Fifth Amendment but not relegated by the Constitution to a position within any of the three branches of government, as the federal grand jury is a constitutional fixture in its own right (U.S.C.A. Const. Amend. 5; U.S. vs. Chanen, 549 F.2d 1306, certiorari denied 98 s. Ct. 72, 434 U.S. 825, 54 L.Ed.2d 83) ... (There is a difference between a common law grand jury, and a "federal grand jury," which applies only to "federal citizens"-residents of Washington, D.C. and its enclaves).

Grand jury is (an) investigative body acting independently of either prosecutor or judge whose mission is to bring to trial those who may be guilty and clear the innocent. (Marston's Inc. vs. Strand, 560 P.2d 778, 114 Ariz. 260).

It must be clearly understood that, in America, court decisions (though they be called case law) are NOT law at all, but merely decisions "of a court" applicable only to the case at hand. They may be good decisions, and they may be bad, but in a legitimate government, they are unanimous concensus of a properly empanelled jury which has acted independently of a judge or prosecutor, according to the dictates of conscience If the consciences of any particular jurors are seared, keep in mind that the same applies to government employees, whose job it is to uphold the liberties of the common man, not his own interests.

CURRENT CONSTITUTIONAL AUTHORITY FOR JURY NULLIFICATION

The Constitutions of Maryland (Art. XXIII, entire), Indiana (Art. I, sec. 19), Oregon (Art. I, sec. 16), and Georgia (Art. I sec. 1, para. 11, subsec. A), currently have provisions guaranteeing the right of jurors to "judge the law"; that is, to nullify the law.

Although these provisions have not been strong enough to withstand decades of hostile judicial interpretation, and have relatively little current impact, they do remain "on the books".

Twenty-three states currently include jury nullification provisions in their Constitutions under their sections on freedom of speech, specifically with respect to libel and sedition cases:

Alabama (Art.I, Sec. 12); Colorado (Art.II, sec. 10); Connecticut (Art. First, sec. 7); Delaware (Art. I, sec. 5); Georgia (Art. I, sec. II, Para 1); Kentucky (Bill of Rights, sec. 9); Louisiana (Art. XIV, sec. 9); Maine (Art. I, sec. 4); Mississippi (Art. 3, sec. 13); Missouri (Art. 1, sec. 8); Montana (Art II, sec. 7); New Jersey (Art. I, sec. 6); New York (Art. I, sec. 8); North Dakota (Art. I, sec. 9); Oregon (Art. I, sec. 16); Pennsylvania (Art. I, sec. 7); South Carolina (Art. II, sec. 21); South Dakota (Art. VI, sec. 5); Tennessee (Art. I, sec. 19); Texas (Art. I, sec. 8); Utah (Art. I, sec. 15); Wisconsin (Art. I, sec. 3); Wyoming (Art. I, sec. 20).

Source: Alan W. Scheflin, "Jury Nullification: the Right to Say No", Southern California Law Review, 45, p. 204 (1972). [List has been updated to 1993.]

Educating jurors and prospective jurors is the only way to make certain that justice is done. Fully informed juries is appealing to anyone with a concern for the importance of the Constitution, to anyone who believes that justice should be tempered with mercy, to anyone worried about the increasing interference of the various arms of Big Government, to anyone who thinks that state-mandated sentences for various crimes fail to take into consideration the human element and the differences of fact in individual cases.

It is not only (the juror's) right but his duty...to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."
John Adams, 1771

We take a lots of rights and privileges for granted in this country, among them the right to a trial by jury, though this right exists only in Britain and its former colonies. Juries of one's peers are the final check on a government's power when it has an interest in convicting. **Trial by jury is under attack in America in several ways: in what they are allowed to judge, what they're allowed to hear and how they're allowed to rule. Trial by jury replaced trials of water and fire as a means of establishing guilt or innocence.** ***It is a basic right in English-speaking lands.***

"Unsatisfactory verdicts" will be a thing of the past when jurors are fully informed. In 1670 an "unsatisfactory verdict" was delivered by the jurors acquittal of William Penn in that the king's law against preaching quaker doctrine was nullified. When William Penn beat the rap for his sermon justice prevailed as jurors said "He may be guilty, but he's guilty of breaking a lousy law--and we're not going to convict him." Three Hundred and Twenty Years later, jurors cry after delivering their verdict because they followed the judge's instructions but violated their own good sense and conscience. The judge instructed them to follow the law as he saw fit to give it to them, like-it-or-not. **Today's "unsatisfactory verdicts" are delivered in contravention of everyone's natural rights, common law rights, and constitutional rights.** ***...(It is the juries) primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws.***
Lysander Spooner, 1852

SELECTED QUOTES

John Adams, who became the second U.S. President, in 1771 said of the juror: "It is not only his right, but his duty...to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." Quoted in Yale Law Journal **74** (1964):173.

Alexander Hamilton (1804): Jurors should acquit even against the judge's instruction "...if exercising their judgment with discretion and honesty they have a clear conviction that the charge of the court is wrong." Quoted in Joseph Sax, Yale Law Review **57** (June 1968): 481-494.

John Jay, first Chief Justice, U.S. Supreme Court, in Georgia v. Brailsford, 1794:4 said: "The jury has a right to judge both the law as well as the fact in controversy."

Samuel Chase, Supreme Court Justice and signer of the Declaration of Independence, 1804: "The jury has the right to determine both the law and the facts."

Thomas Jefferson, in a letter to Thomas Paine, 1789: "I consider trial by jury as the only anchor ever

yet imagined by man, by which a government can be held to the principles of its constitution."

Theophilus Parsons, "...a leading supporter of the Constitution of the United States in the convention of 1788 by which Massachusetts ratified the Constitution, appointed by President Adams in 1801 Attorney General of the United States, but declining that office, and becoming Chief Justice of Massachusetts in 1806" said:

"The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation." 2 Elliot's Debates, 94; 2 Bancroft's History of the Constitution, p. 267. Quoted in Sparf and Hansen v. U.S., 156 U.S. 51 (1895), Dissenting Opinion: Gray, Shiras, JJ., 144.

"If a juror accepts as the law that which the judge states then that juror has accepted the exercise of absolute authority of a government employee and has surrendered a power and right that once was the citizen's safeguard of liberty, For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." 2 Elliot's Debates, 94, Bancroft, History of the Constitution, 267, 1788.

"Unless the jury can exercise its community conscience role, our judicial system will have become so inflexible that the effect may well be a progressive radicalization of protest into channels that will threaten the very continuance of the system itself. To put it another way, the jury is...the safety valve that must exist if this society is to be able to accommodate its own internal stresses and strains...[I]f the community is to sit in the jury box, its decision cannot be legally limited to a conscience-less application of fact to law." **William Kunstler**, quoted in Franklin M. Nugent, Jury Power: Secret Weapon Against Bad Law, revised from Youth Connection, 1988.

"Every jury in the land is tampered with and falsely instructed by the judge when it is told it must take (or accept) as the law that which has been given to them, or that they must bring in a certain verdict, or that they can decide only the facts of the case." **Lord Denman**, C.J. O'Connel v. R. (1884).

"For more than six hundred years that is, since Magna Carta, in 1215, there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws."
Lysander Spooner, An Essay on the Trial by Jury, 1852, p. 11.

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." Article XXIII, **Constitution of Maryland**

"Because of this constitutional mandate, this instruction is given to criminal jurors in **Maryland**:

'Members of the Jury, this is a criminal case and under the Constitution and the laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept or reject it. And

you may apply the law as you apprehend it to be in the case. '" Alan Scheflin and Jon Van Dyke, Jury Nullification: The Contours of a Controversy, Law and Contemporary Problems, **43**, 83. (1980)

"If the jury feels the law is unjust, we recognize the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by a judge, and contrary to the evidence...If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision." **United States v. Moylan**, 4th Circuit Court of Appeals, 1969, 417 F.2d at 1006.

The jury has an "unreviewable and irreversible power...to acquit in disregard of the instructions on the law given by the trial judge...The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge; for example, acquittals under the fugitive slave law. **U.S. v. Dougherty**, D.C. Circuit Court of Appeals, 1972, 473 F.2d at 1130 and 1132. (Nevertheless, the majority opinion held that jurors need not be told this. Dissenting Chief Judge Bazelon thought that they ought to be so told.)

"The arguments for opposing the nullification instruction are, in our view, deficient because they fail to weigh the political advantages gained by not lying to the jury...What impact will this deception have on jurors who felt coerced into their verdict by the judge's instructions and who learn, after trail, that they could have voted their consciences and acquitted? Such a juror is less apt to respect the legal system." **Alan Scheflin and Jon Van Dyke,** "Jury Nullification: the Contours of a Controversy," Law and Contemporary Problems, **43**, No.4,105- 106.

"In a representative government...there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws. Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive...jury, and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it...there is no more absurdity in giving a jury a veto upon the laws than there is in giving a veto to each of these other tribunals."
Lysander Spooner, An Essay on the Trial by Jury, 1852.

"In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts." Article 1, section 19 of the **Indiana Constitution**. Upheld, Holliday v. State 257 N.E. 579 (1970).

"It is useful to distinguish between the jury's **right** to decide questions of law and its **power** to do so. The jury's **power** to decide the law in returning a general verdict is indisputable. The debate of the nineteenth century revolved around the question of whether the jury had a legal and moral **right** to decide questions of law." Note (anon.), The Changing Role of the Jury in the Nineteenth Century, **Yale Law Journal**, 74,170 (1964).

"...[T]he right of the jury to decide questions of law was widely recognized in the colonies. In 1771, **John Adams** stated unequivocally that a juror should ignore a judge's instruction on the law if it violates fundamental principles:

'It is not only...[the juror's] right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.'

There is much evidence of the general acceptance of this principle in the period immediately after the

Constitution was adopted." Note (anon.), The Changing Role of the Jury in the Nineteenth Century, **Yale Law Journal 74**, 173 (1964).

"During the first third of the nineteenth century,...judges frequently charged juries that they were the judges of law as well as the fact and were not bound by the judge's instructions. A charge that the jury had the right to consider the law had a corollary at the level of trial procedure: counsel had the right to argue the law, its interpretation and its validity to the jury." Note (anon.), The Changing Role of the Jury in the Nineteenth Century, **Yale Law Journal 74**, 174,(1964).

Alexander Hamilton, acting as defense counsel in a seditious libel case, said: "That in criminal cases, nevertheless, the court are the constitutional advisors of the jury in matter of law; who may compromise their conscience by lightly or rashly disregarding that advice, but may still more compromise their consciences by following it, if exercising their judgments with discretion and honesty they have a clear conviction that the charge of the court is wrong." 7 Hamilton's Works (ed. 1886), 336-373.

New York Supreme Court **Justice Kent** (1803): "The true criterion of a legal power is its capacity to produce a definitive effect, liable neither to censure nor review. And the verdict of not guilty in a criminal case, is, in every respect, absolutely final. The jury are not liable to punishment, nor the verdict to control. No attaint lies, nor can a new trial be awarded. The exercise of this power in the jury has been sanctioned, and upheld in constant activity, from the earliest ages." 3 Johns Cas., 366-368. Quoted in Sparf and Hansen v. U.S., 156 U.S.51, 148-149. (1894) (Gray, Shiras, JJ, dissenting).

"Within six years after the Constitution was established, the right of the jury, upon the general issue, to determine the law as well as the fact in controversy, was unhesitatingly and unqualifiedly affirmed by this court, in the first of the very few trials by jury ever had at its bar, under the original jurisdiction conferred upon it by the Constitution.

"The report shows that, in a case in which there was no controversy about the facts, the court, while stating to the jury its unanimous opinion upon the law of the case, and reminding them of 'the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide,' expressly informed them that 'by the same law, which recognizes this reasonable distribution of jurisdiction', the jury 'have nevertheless a right to take upon themselves to judge of both, and to determine the law as well as the fact in controversy.'" **Supreme Court**, Sparf and Hansen v. U.S., 156 U.S. 51, 154-155 (1894), from the **dissent by Gray and Shiras.**

"It is universally conceded that a verdict of acquittal, although rendered against the instructions of the judge, is final, and cannot be set aside; and consequently that the jury have the legal power to decide for themselves the law involved in the general issue of guilty or not guilty." From the dissent by **Gray and Shiras**, Supreme Court, Sparf and Hansen v. U.S., 156 U.S. 51, 172 (1894).

"...[I]t is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules; and that those judges who are...occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

"The jury having the undoubted and uncontrollable power to determine for themselves the law as well as the fact by a general verdict of acquittal, a denial by the court of their right to exercise this power will be apt to excite in them a spirit of jealousy and contradiction... '

"...[A] person accused of crime has a twofold protection, in the court and the jury, against being unlawfully convicted. If the evidence appears to the court to be insufficient in law to warrant a conviction,

the court may direct an acquittal...But the court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers." From the dissent by **Gray and Shiras**, Supreme Court, Sparf and Hansen v. U.S., 156 U.S. 51, 174 (1894).

"But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy." From the dissent by **Gray and Shiras**, Supreme Court, Sparf and Hansen v. U.S., 156 U.S. 51, 176 (1894).

"The jury has the power to bring a verdict in the teeth of both the law and facts." **Oliver Wendell Holmes**, U.S. Supreme Court Justice, Horning v. District of Columbia, 138 (1920).

"If juries were restricted to finding facts, cases with no disputed factual issues would be withheld from the jury. But such cases are presented to the jury. By its general verdict of innocence, the jury may free a person without its verdict being subject to challenge. The judge cannot ask jurors to explain their verdict, nor may the judge punish the jurors for it. Although judges now generally tell jurors they must obey the judge's instructions on the law, the jurors may not be compelled to do so. If the jury convicts, however, the defendant is entitled to a broad range of procedural protections to ensure that the jury was fair and honest.

"When a jury acquits a defendant even though he or she clearly appears to be guilty, the acquittal conveys significant information about community attitudes and provides a guideline for future prosecutorial discretion in the enforcement of the laws. Because of the high acquittal rate in prohibition cases during the 1920s and early 1930s, prohibition laws could not be enforced. The repeal of these laws is traceable to the refusal of juries to convict those accused of alcohol traffic." **Alan Scheflin and Jon Van Dyke**, Jury Nullification: The Contours of a Controversy, Law and Contemporary Problems **43**, No.4, 71 (1980).

"Jury acquittals in the colonial, abolitionist, and post-bellum eras of the United States helped advance insurgent aims and hamper government efforts at social control. Widespread jury acquittals or hung juries during the Vietnam War might have had the same effect. But the refusal of judges in trials of antiwar protesters to inform juries of their power to disregard the law helped ensure convictions, which in turn frustrated antiwar goals and protected the government from the many repercussions that acquittals or hung juries would have brought." **Steven E. Barkan**, Jury Nullification in Political Trials, Social Problems, **31**, No. 1, 38, October, 1983.

"...[T]he institution of trial by jurye specially in criminal cases has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty to say nothing of his life only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury...preserves both these fundamental elements and a trial by a judge preserves neither..." **Judge Learned Hand**, U.S. ex rel McCann v. Adams, 126 F.2d 774, 775-76 (2nd Circuit, 1942).

"It's easy for the public to ignore an unjust law, if the law operates behind closed doors and out of sight. But when jurors have to use a law to send a man to prison, they are forced to think long and hard about the justice of the law. And when the public reads newspaper accounts of criminal trials and convictions, they

too may think about whether the convictions are just. As a result, jurors and spectators alike may bring to public debate more informed interest in improving the criminal law. Any law which makes many people uncomfortable is likely to attract the attention of the legislature. The laws on narcotics and abortion come to mind and there must be others. The public adversary trial thus provides an important mechanism for keeping the substantive criminal law in tune with contemporary community values." D.C. Circuit Court **Judge D. Bazelon**, "The Adversary Process Who Needs It?" 12th Annual James Madison Lecture, New York University School of Law (April, 1971), reprinted in 117 Cong. Rec. 5852, 5855 (daily ed. April 29, 1971).

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FULLY INFORMED JURY ASSOCIATION

February 21, 2002

The Honorable Norman Rokeberg
House Judiciary Committee
Room 118
State Capitol Building
Juneau, AK

Dear Representative Rokeberg:

The Fully Informed Jury Association is a national, non-profit, 501 (c)3 educational organization dedicated to informing citizens of their responsibilities when they serve in a jury trial. FIJA's goal is to promote respect for the law and criminal justice system by informing people of their important role as trial jurors.

The founding fathers established the right to trial by jury of one's peers and mentioned it in the constitution several times because they knew it was fundamental to a self-governing people. The framers wisdom of placing the power to judge the application of the law and to use conscience when bringing in a verdict has been proven time and time again. It is no less important today than when jurors refused to find defendants guilty of breaches of the Fugitive Slave Act.

Although FIJA doesn't endorse proposed legislation, we recognize that HB 463 acknowledges a jury's rights, powers, and duties in bringing in a general verdict. This will pay immeasurable dividends for the State of Alaska. More of its citizens will come away from their experiences in court satisfied that the system actually delivers justice. It also will be an important tool for legislators to recognize trends in public opinion.

Finally, as 12-year veteran of the Oklahoma House Of Representatives, I understand the importance of your role and the decisions you must make. If I can be of any further assistance to you or your colleges, please feel free to contact me.

Sincerely,

Charles Key

Charles Key

Supreme Court of California

The PEOPLE, Plaintiff and Respondent,
v.
Arasheik Wesley WILLIAMS, Defendant and Appellant.

No. S066106.

May 7, 2001.

Defendant was convicted in the Superior Court, Santa Clara County, No. 178305, Paul R. Teilh, J., of the misdemeanor offense of unlawful sexual intercourse with a minor, and he appealed. The Court of Appeal affirmed, and defendant appealed. The Supreme Court, George, C.J., held that: (1) excusing a juror who refused to follow the law regarding charge did not violate defendant's right to a jury trial, and (2) ample evidence established juror's inability to perform his duties as a demonstrable reality.

Affirmed.

Kennard, J., filed a concurring opinion.

Werdegar, J., filed a concurring opinion.

West Headnotes

[1] Criminal Law ⚿1152(2)
110k1152(2)

Supreme Court reviews for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve; if there is any substantial evidence supporting the trial court's ruling, the Court will uphold it. West's Ann.Cal.Penal Code § 1089.

[2] Jury ⚿97(1)
230k97(1)

Juror who refuses to follow the court's instructions is unable to perform his duty. West's Ann.Cal.Penal Code § 1089.

[3] Jury ⚿149
230k149

Trial court did not violate defendant's right to a jury trial by excusing a juror who refused to follow the law regarding misdemeanor charge of unlawful sexual intercourse with a minor. West's Ann.Cal.Penal Code §§ 261.5(b), 1089.

[4] Jury ⚿33(2.10)
230k33(2.10)

[4] Jury ⚿149
230k149

Circumstance that, as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions. West's Ann.Cal.Penal Code § 1089.

[5] Criminal Law ⚿881(2)
110k881(2)

Jury has the ability to acquit a criminal defendant against the weight of the evidence.

[6] Criminal Law ⚿878(4)
110k878(4)

Jury in a criminal case may return inconsistent verdicts.

[7] Criminal Law ⚿753.3
110k753.3

Court may not direct a jury to enter a guilty verdict no matter how conclusive the evidence.

[8] Criminal Law ⚿881(1)
110k881(1)

General verdicts are required in criminal cases, to permit the jury wide latitude in reaching its verdict.

[9] Criminal Law ⚿882
110k882

Prohibition of special verdicts affirms the notation that, in criminal cases, it has always been the function of the jury to apply the law, as given by the

court in its charge, to the facts, while preserving the power of the jury to return a verdict in the teeth of the law and the facts.

[10] Criminal Law ⚿935(1)
110k935(1)

Verdict convicting a defendant that is not supported by substantial evidence, or is contrary to law, may be vacated on a motion for new trial, or the resulting judgment may be reversed on appeal.

[11] Jury ⚿149
230k149

Juror's statement that he objected to the law concerning unlawful sexual intercourse and confirmation that he was unwilling to abide by his oath to follow court's instructions was sufficient to establish juror's inability to perform his duties as a demonstrable reality. West's Ann.Cal.Penal Code § 1089.

[12] Criminal Law ⚿731
110k731

Jury nullification is contrary to ideal of equal justice for all and permits both the prosecution's case and the defendant's fate to depend upon the whims of a particular jury, rather than upon the equal application of settled rules of law.

[13] Criminal Law ⚿734
110k734

Jurors are required to determine the facts and render a verdict in accordance with the court's instructions on the law.

[14] Jury ⚿149
230k149

Juror who is unable or unwilling to determine the facts and render a verdict in accordance with the court's instructions on the law is unable to perform his or her duty as a juror and may be discharged. West's Ann.Cal.Penal Code § 1089.

*296 Barry P. Helft, San Francisco, under appointment by the Supreme Court, for Defendant and Appellant.

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Ronald E. Niver and Karl S. Mayer, Deputy Attorneys General, for Plaintiff and Respondent.

GEORGE, C.J.

A juror in this criminal case expressly refused to follow the trial court's instructions regarding the crime of unlawful sexual intercourse with a minor, because the juror disagreed with the law criminalizing such behavior. The trial court dismissed the juror and replaced him with an alternate juror. On appeal following conviction, defendant claims the juror should not have been discharged, because the juror's refusal to follow the law was proper under the concept of "jury nullification." The Court of Appeal rejected that contention and affirmed the judgment of conviction. We agree with the Court of Appeal and affirm the judgment.

I

Defendant Arasheik Wesley Williams was charged in an 11-count information with committing the offenses of false imprisonment (Pen.Code, § 236), [FN1] assault with a deadly weapon or by force likely to produce great bodily injury (§ 245, subd. (a)(1)), forcible rape (§ 261, subd. (a)(2)), battery with serious bodily injury (§§ 242, 243, subd. (d)), and torture (§ 206) against his former girlfriend, Jennifer B., during three incidents occurring on December 31, 1994, January 1, 1995, and January 9, 1995. The information further alleged that defendant used a deadly or dangerous weapon in the commission of five of the counts (§ 12022, subd. (b)(1)), used a deadly weapon in the commission of one of the charged rapes (§ 12022.3, subd. (a)), and inflicted great bodily injury on the victim *297 in the commission of another of the counts (§ 12022.7, subd. (a)).

FN1. All further statutory references are to the Penal Code, unless otherwise noted.

As to the December 31 incident, defendant was convicted of the misdemeanor offense of unlawful sexual intercourse with a minor (§ 261.5, subd. (b)) as a necessarily included offense of rape. As to the January 1 incident, defendant was acquitted of all

charges. As to the January 9 incident, defendant was convicted of assault by force likely to produce great bodily injury, false imprisonment, and torture. The jury found true the allegation that he inflicted great bodily injury on the victim, and found each of the remaining allegations not true.

Defendant was sentenced to the middle term of three years in prison on the conviction of assault by force likely to produce great bodily injury, plus a sentence enhancement of three years for inflicting great bodily injury. Sentences on the false imprisonment and torture convictions were stayed, and defendant was sentenced to a concurrent term of six months for unlawful sexual intercourse with a minor, for a total term of six years in prison

The Court of Appeal affirmed the judgment of conviction

II

As noted above, the charges in this case arose from three incidents involving defendant and his former girlfriend. Only the first incident is relevant to the issue upon which we granted review.

At the time of the December 31, 1994, incident, defendant was 18 years of age and his girlfriend, Jennifer B., was 16 years of age. Both defendant and Jennifer B. testified that they engaged in sexual intercourse on that date; however, defendant testified it was consensual, and Jennifer B. testified defendant forced her to engage in intercourse by threatening her with knives.

At trial, prior to the attorneys' closing arguments, the court indicated that it would instruct the jury that it could convict defendant of unlawful sexual intercourse with a minor as a lesser offense included within the charged offense of rape. Defendant's objection was overruled.

During argument, defense counsel made the following statement: "Something else has happened in this case.... They have added misdemeanors to all the charges you heard.... They added statutory rape suddenly without notice or preparation. Now, what is the role of a juror on the statutory misdemeanor rape? Your role as a juror is to fairly apply the law. That's why we don't want computers. We need the input of fair people, [defendant]'s peers, if you will. Law as you know is not uniformly applied. I can see five cars speeding and the highway patrol is not likely to arrest any of the five. Mores, custom [s] change. Times change. And the law must be applied fairly. So if the law is not being applied fairly, that's why you need fair jurors. Now there is a case called *Duncan versus Alaska* [*Louisiana*]. It's the Supreme Court of the United States, 391 U.S. 145, 88 Supreme Court, 1444 [20 L.Ed.2d 491]. And I would like to read to you just two lines: 'The guarantee of jury trial in the federal and state Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government.' And further on in the case at the end are the lovely words, 'A jury may, at times, afford a higher justice by refusing to enforce harsh laws.' Please understand." [FN2]

FN2. The language quoted by defense counsel actually is from the decision in *Duncan v. Louisiana* (1968) 391 U.S. 145, 155-156, 88 S.Ct. 1444, 20 L.Ed.2d 491. The "lovely words" quoted by defense counsel appear in Justice Harlan's dissenting opinion. (*Id.* at p. 187, 88 S.Ct. 1444 (dis. opn. of Harlan, J.).) Defense counsel did not quote the parenthetical phrase following those words, which raises concerns about the concept of juror nullification: "A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths)." (*Ibid.*)

*298 During the first day of deliberations, the trial court received a message from the jury foreperson indicating that Juror No. 10 "refuses to adhere to Judge's instruction to uphold the law in regard to rape and statutory rape, crime Section 261.5(b) of the Penal Code. He believes the law is wrong and, therefore, will not hear any discussions." [FN3] In response, the trial court questioned Juror No. 10 outside the presence of the other jurors:

FN3. The jury foreperson brought this matter to the court's attention on the foreperson's own initiative, without prior instruction or direction by the court. The trial in the present case occurred prior to the adoption of CALJIC No. 17.41.1

(1998), which states, in part: "[S]hould it occur that any juror refuses to deliberate or expresses an intention to disregard the law ... it is the obligation of the other jurors to immediately advise the Court of the situation." Because this instruction was not given, we have no occasion in this case to address the appropriateness or validity of this instruction. This issue is pending before us in a number of cases. (See, e.g., *People v. Engelman* (2000) 77 Cal.App.4th 1297, 92 Cal.Rptr.2d 416, review granted Apr. 4, 2000, S086462.)

"THE COURT: [I]t's been reported to me that you refuse to follow my instructions on the law in regard to rape and unlawful sexual intercourse, that you believe the law to be wrong and, therefore, you will not hear any discussion on that subject. Is that correct?

"[JUROR]: Pretty much, yes.

"THE COURT: All right. Are you governed by what was said during argument by counsel?

"[JUROR]: Yes.

"THE COURT: You understand that there was an improper suggestion and that it's a violation of the Rules of Professional Conduct?

"[JUROR]: No, I don't know that.

"THE COURT: All right. Well, I'm telling you that's what it was. And I would remind you too that you took an oath at the outset of the case in the following language: 'Do you and each of you understand and agree that you will well and truly try the cause now pending before this Court and a true verdict render according only to the evidence presented to you and to the instructions of the Court.' You understand that if you would not follow the instructions that have been given to you by the court that you would be violating that oath? Do you understand that?

"[JUROR]: I understand that.

"THE COURT: Are you willing to abide by the requirements of your oath?

"[JUROR]: I simply cannot see staining a man, a young man, for the rest of his life for what I believe to be a wrong reason.

"THE COURT: Well, you understand that statutory rape or unlawful sexual intercourse has been described to you as a misdemeanor? Did you follow that in the instructions?

"[JUROR]: I've been told it is a misdemeanor. I still don't see--if it were a $10 fine, I just don't see convicting a man and *299 staining his record for the rest of his life. I think that is wrong. I'm sorry, Judge.

"THE COURT: What you're saying is not the law either concerning that particular aspect.

"[JUROR]: I'm trying as best I can, Judge. And I'm willing to follow all the rules and regulations on the entire rest of the charges, but on that particular charge, I just feel duty-bound to object.

"THE COURT: So you're not willing then to follow your oath?

"[JUROR]: That is correct."

The trial court, over defendant's objection, excused Juror No. 10, replaced him with an alternate juror, and instructed the jury to begin its deliberations anew. The next day, the jury convicted defendant of the above described charges, including unlawful sexual intercourse with a minor.

III

[1] A trial court's authority to discharge a juror is granted by Penal Code section 1089, which provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, *or upon other good cause shown to the court is found to be unable to perform his duty,* or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors." [FN4] (Italics added; see also Code Civ. Proc., §§ 233, 234.) "We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court's

ruling, we will uphold it. [Citation.] We have also stated, however, that a juror's inability to perform as a juror must ' "appear in the record as a demonstrable reality." ' [Citation.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 843, 55 Cal.Rptr.2d 347, 919 P.2d 1280.)

FN4. As originally enacted in 1895, Penal Code section 1089 permitted the discharge of a juror and the substitution of an alternate juror only "before the final submission of the case" and only if "a juror die[s], or become[s] ill, so as to be unable to perform his duty." (Stats.1895, ch. 213, § 1, p. 279.) In 1933 the statute was amended to permit substitution of an alternate juror "at any time, whether before or after the final submission of the case to the jury," and expanded the basis for doing so to include "if a juror requests a discharge and good cause appears therefor." (Stats.1933, ch. 521, § 1, p. 1342.) In 1949, the statute again was amended to permit discharge if "upon other good cause shown to the court [the juror] is found to be unable to perform his duty." (Stats.1949, ch. 1312, § 1, p. 2300.)

[2] A juror who refuses to follow the court's instructions is "unable to perform his duty" within the meaning of Penal Code section 1089. As soon as a jury is selected, each juror must agree to render a true verdict " 'according only to the evidence presented ... and *to the instructions of the court.*' " (Code Civ. Proc., § 232, subd. (b), italics added.)

In *People v. Collins* (1976) 17 Cal.3d 687, 690, 131 Cal.Rptr. 782, 552 P.2d 742, after the jury had begun its deliberations, a juror sent a note to the judge asking to be excused because she was " 'unable to follow the Court's instructions concerning deliberation.' " Upon being questioned by the court, she explained "that she felt more emotionally than intellectually involved and that she thought she would not be able to make a decision based on the evidence or the law." (*Ibid.*) The trial court dismissed the juror over the defendant's objection. We affirmed the resulting *300 judgment of conviction, stating: "The extensive hearing in which the juror steadfastly maintained that she could not follow the court's instructions, that she had been upset throughout the trial and that she wanted to be excused, clearly justified a conclusion that she could not perform her duty and thus established good cause for her discharge." (*Id.* at p. 696, 131 Cal.Rptr. 782, 552 P.2d 742; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1446, fn. 2, 69 Cal.Rptr.2d 16 [trial court is "duty bound" to discharge a juror who is unable to follow the law]; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780- 1781, 54 Cal.Rptr.2d 521 [juror properly discharged because she "was unable to comprehend simple concepts, was unable to remember events during deliberations such as recent discussions or votes, and was not following the law"].)

In *People v. Daniels* (1991) 52 Cal.3d 815, 865, 277 Cal.Rptr. 122, 802 P.2d 906, this court upheld the removal of a juror for misconduct, stating: "[W]e believe the misconduct in the present case did indicate that Juror Francis was unable to perform his duty. *That duty includes the obligation to follow the instructions of the court,* and a judge may reasonably conclude that a juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of the trial cannot be counted on to follow instructions in the future." (Italics added.)

[3][4] Defendant contends, however, that the trial court's order denied him his right to trial by jury, because Juror No. 10 properly was exercising his alleged right to engage in juror nullification by refusing to follow the law regarding unlawful sexual intercourse with a minor. But defendant has cited no case, and we are aware of none, that holds that a trial court violates the defendant's right to a jury trial by excusing a juror who refuses to follow the law. The circumstance that, as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions.

[5][6][7] It long has been recognized that, in some instances, a jury has the ability to disregard, or nullify, the law. A jury has the ability to acquit a criminal defendant against the weight of the evidence. (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138, 41 S.Ct. 53, 65 L.Ed. 185 ["the jury has the power to bring in a verdict in the teeth of both law and facts"], not foll. on other grounds in *United States v. Gaudin* (1995) 515 U.S. 506, 520, 115 S.Ct. 2310, 132 L.Ed.2d 444; *United States v. Schmitz* (9th Cir.1975) 525 F.2d 793, 794 ["the jury has the inherent power to pardon one no matter how guilty"].) A jury in a criminal case may return inconsistent verdicts. (*Dunn v. United States* (1932)

284 U.S. 390, 393-394, 52 S.Ct. 189, 76 L.Ed. 356 [the acquittal may have been the jurors' "assumption of a power which they had no right to exercise, but to which they were disposed through lenity"]; *United States v. Powell* (1984) 469 U.S. 57, 64, 105 S.Ct. 471, 83 L.Ed.2d 461 [recognizing " 'the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons' "]; *People v. Palmer* (2001) 24 Cal.4th 856, 863, 103 Cal.Rptr.2d 13, 15 P.3d 234.) A court may not direct a jury to enter a guilty verdict "no matter how conclusive the evidence." (*United Brotherhood of Carpenters v. United States* (1947) 330 U.S. 395, 408, 67 S.Ct. 775, 91 L.Ed. 973; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182; *United States v. Garaway* (9th Cir.1970) 425 F.2d 185, 185; *United* *301 *States v. Hayward* (D.C.Cir.1969) 420 F.2d 142, 144.)

[8][9] General verdicts are required in criminal cases, in order to permit the jury wide latitude in reaching its verdict. (*United States v. Spock* (1st Cir.1969) 416 F.2d 165, 182.) "A general verdict insures the input of compassion into a jury's decisional process. The rule against special verdicts and special questions in criminal cases is thus nothing more nor less than a recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.' [Citation.] In the words of one thoughtful commentator, the prohibition of special verdicts affirms the notation that '[i]n criminal cases ... it has always been the function of the jury to apply the law, as given by the court in its charge, to the facts,' while preserving 'the power of the jury to return a verdict in the teeth of the law and the facts.' [Citation.]" (*United States v. McCracken* (5th Cir.1974) 488 F.2d 406, 419; *United States v. Wilson* (6th Cir.1980) 629 F.2d 439, 443 ["[s]ubmitting special questions to the jury invades the province of the jury and 'infringes on its power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by report of its deliberations; and on its power to follow or not to follow the instructions of the court....' [Citation.]" (Fn.omitted.)].) [FN5]

FN5. We observe that these cases refer to the ability of the jury as a whole to return a verdict that is contrary to the law or the facts. No case of which we are aware refers to an individual juror's ability to disregard the law.

[10] The jury's power to nullify the law is the consequence of a number of specific procedural protections granted criminal defendants. Chief Justice Bird, quoting Judge Learned Hand's description of jury nullification as the jury's " 'assumption of a power which they had no right to exercise, but to which they were disposed through lenity,' " observed: "This power is attributable to two unique features of criminal trials. First, a criminal jury has the right to return a general verdict which does not specify how it applied the law to the facts, or for that matter, what law was applied or what facts were found. [Citations.] [¶] Second, the constitutional double jeopardy bar prevents an appellate court from disregarding the jury's verdict in favor of the defendant and ordering a new trial on the same charge. [Citations.]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 599, 224 Cal.Rptr. 664, 715 P.2d 624 (conc. & dis. opn. of Bird, C.J.).) The United States Supreme Court has referred to the ability of a jury in a criminal case to nullify the law in the defendant's favor as "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." (*Harris v. Rivera* (1981) 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530; see also *People v. Palmer, supra,* 24 Cal.4th 856, 863, 103 Cal.Rptr.2d 13, 15 P.3d 234.) [FN6]

FN6. A jury is able to nullify the law only under certain limited circumstances. In a civil case, the jury's ability to nullify a law is sharply curtailed. The court may direct the jury in a civil case to enter a particular verdict (Code Civ. Proc., § 630; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630, 85 Cal.Rptr.2d 386; cf. *People v. Flood* (1998) 18 Cal.4th 470, 491, 76 Cal.Rptr.2d 180, 957 P.2d 869 [court may not direct verdict of guilty in criminal case]), and a verdict that is not supported by substantial evidence or is contrary to the law may be vacated on a motion for new trial or the resulting judgment may be reversed on appeal. Even in a criminal prosecution, the jury's ability to nullify the law is limited when it acts to the defendant's detriment. If the evidence is "insufficient to sustain a conviction," the court "shall order the entry of a judgment of acquittal." (§ 1118.1.) A verdict convicting a defendant that is not supported by substantial evidence, or is contrary to law, may be vacated on a motion for new trial, or the resulting judgment may be reversed on appeal.

*302 But the circumstance that the prosecution may

be powerless to challenge a jury verdict or finding that is prompted by the jury's refusal to apply a particular law does not lessen the obligation of each juror to obey the court's instructions. More than a century ago, the United States Supreme Court recognized that jurors are required to follow the trial court's instructions. In *Sparf v. United States* (1895) 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343, the trial court instructed the jury in a prosecution for murder that there was no evidence that would reduce the crime below the grade of murder. A juror asked whether the jury could return a verdict of manslaughter, and the trial court responded: "In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated, and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court." (*Id.* at p. 62, fn. 1., 15 S.Ct. 273)

In that case the United States Supreme Court found no error in the trial court's instructions, or in its refusal to instruct the jury that it could return a verdict of manslaughter. The high court conducted an exhaustive review of the authority then available, which repeatedly and consistently supported a single view, aptly stated as follows: " 'It is true, the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions.' " (*Sparf v. United States, supra,* 156 U.S. 51, 72, 15 S.Ct. 273, 39 L.Ed. 343.) The high court concluded: "We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be." (*Id.* at p. 102, 15 S.Ct. 273.)

In *Taylor v. Louisiana* (1975) 419 U.S. 522, 530, 95 S.Ct. 692, 42 L.Ed.2d 690, the United States Supreme Court, in holding that the fair-cross-section requirement is fundamental to the jury trial guaranteed by the Sixth Amendment, observed: "The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." But in *Lockett v. Ohio* (1978) 438 U.S. 586, 596-597, 98 S.Ct. 2954, 57 L.Ed.2d 973, the high court clarified: "Nothing in *Taylor,* however, suggests that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge." (See also *Morgan v. Illinois* (1992) 504 U.S. 719, 730, 112 S.Ct. 2222, 119 L.Ed.2d 492 [recognizing the "trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence"].)

The high court reaffirmed this view in *United States v. Gaudin, supra,* 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d [illegible], which acknowledged "[t]he right to have a jury make the ultimate determination of guilt," but also recognized that "[i]n criminal cases, as in civil, ... the judge must be permitted to instruct the jury on the law ***303** and to insist that the jury follow his instructions." (*Id.* at p. 513, 115 S.Ct. 2310.)

This view has deep roots. In 1835, in *United States v. Battiste* (C.C.D.Mass.1835) 24 F.Cas. 1042 (No. 14,545), Justice Story, sitting as a Circuit Justice, instructed the jury in a criminal case that they were the judges of the facts, but not of the law, stating: "[T]hey have the physical power to disregard the law, as laid down to them by the court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. 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. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain, what the law, as settled by the jury, actually was.... Every person accused as a criminal has a right to be tried according to the