

**COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT**

**Case No. A.C.
2008-P-1410**

**COMMONWEALTH
Appellee**

v.

**RUSSELL STROUP and RICHARD CUSICK
Defendants - Appellants**

**ON APPEAL FROM RULINGS AND ORDERS OF THE CENTRAL
DIVISION OF THE BOSTON MUNICIPAL COURT DEPARTMENT**

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
ARGUMENT	5
I. The unreasonable, unfounded criminalization of marijuana possession intrudes upon the liberty of the citizens of this Commonwealth.	6
a. In the absence of any rational, factually supportable justification for the criminalization of marijuana use, the citizen's liberty to use marijuana must be protected.	8
b. On every parameter on which the balance point on the continuum of legislative power might be thought to depend, science has moved toward an understanding that adults should have the liberty to use marijuana.	9
II. The Trial Judge erred by refusing to instruct the jury that: "For the defendant's act to be a crime it must be more than a violation of the statute, it must be an offense to the safety and tranquility of our community that in your judgment, as the conscience of our community, warrants your verdict of criminal guilt."	11
CONCLUSION AND REQUEST FOR RELIEF	25
STATUTORY ADDENDUM	27
CERTIFICATION; CERTIFICATION OF SERVICE	35

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases

<u>Commonwealth v. Anthes</u> , 71 Mass. 185 (1855)	15, 16, 20, 22
<u>Commonwealth v. Lanigan</u> 419 Mass. 15 (1994)	5, 9
<u>Commonwealth v. Leis</u> 355 Mass. 189 (1969)	5, 7, 10
<u>Commonwealth v. Latimore</u> 423 Mass. 129 (1996)	19
<u>Commonwealth v. Leno</u> 415 Mass. 835 (1993)	23, 24
<u>Commonwealth v. Lowder</u> 432 Mass. 92 (2000)	20
<u>Commonwealth v. Pellegrini</u> 414 Mass. 402 (1993)	19
<u>Commonwealth v. Porter</u> 51 Mass. 263 (1845)	15, 16, 19, 20, 22
<u>Commonwealth v. Taylor</u> 428 Mass. 623 (1999)	19
<u>Manning v. Municipal Court of the Roxbury Dist.</u> 372 Mass. 315 (1977)	19
<u>Marcoux v. Attorney General</u> 375 Mass. 63 (1978)	7, 8, 10
<u>Shepard v. Attorney General</u> 409 Mass. 398 (1991)	19

Statutes

1855 Mass. Acts 152	24
Mass. G.L. c. 94C, § 27	23
Mass. G.L. c. 94C, § 34	1, 16, 11, 25
Mass. G.L. c. 278, § 11 (1855-1979)	26

Constitutional Provisions

U.S. Constitution

U.S. Const. amend. VI 14

U.S. Const. amend. VII 14

Massachusetts Constitution

Mass. Const. pt. 1 art. I 9

Mass. Const. pt. 1 art. II 9

Mass. Const. pt. 1 art. IV 9

Mass. Const. pt. 1 art. V 9

Mass. Const. pt. 1 art. VII 9

Mass. Const. pt. 1 art. X 9

Mass. Const. pt. 1 art. XI 9

Mass. Const. pt. 1 art. XII 9

Mass. Const. pt. 1 art. XV 9

Mass. Const. pt. 1 art. XVIII 8, 9

Mass. Const. pt. 1 art. XXX 9

Mass. Const. pt. 2, c. 1, § 1, art. IV 9

Mass. Const. pt. 2, c. 3, art. II 9

Mass. Const. pt. 2, c. 3, art. VI 9

Books and Articles

Akhil Amar, *The Bill of Rights as Constitution*,
100 Yale L.J. 1131 (1991), 14

Rachel Barkow, *Institutional Design and the
Policing of Prosecutors: Lessons from
Administrative Law*, 61 Stan. L. Rev.
(forthcoming, 2009) 21

Randy Barnett, <i>Restoring the Lost Constitution</i> (2004)	9
Jeremy Bentham, <i>Anarchical Fallacies</i> (1843)	18
David Dyzenhaus and Arthur Ripstein, eds., <i>Law and Morality: Readings in Legal Philosophy</i> (2001).	16
Morton Horwitz, <i>The Transformation of American Law 1780-1860</i> (1977)	14, 15
Noah Feldman, <i>Divided by God: America's church-state problem – and what we should do about it</i> (2005)	18
Robert Jones, <i>Finishing A Friendly Argument: The Jury and The Historical Origins of Diversity Jurisdiction</i> , 82 NYU L. Rev. 997	13
Perry Miller, <i>The Life of the Mind in America</i> (1965)	15
William E. Nelson, <i>The Americanization of the Common Law</i> (1994)	15
Jack N. Rakove, <i>Original Meanings</i> (1996)	12
Clinton Lawrence Rossiter, <i>Seedtime of the Republic</i> (1953)	11
Judith N. Shklar, <i>Legalism: Law, Morals, and Political Trials</i> (1964)	18

Other References

Declaration of Independence, Declaration Grievance 24 (U.S. 1776)	14
"Trial by Jury: Jury Orientation Video", Commonwealth of Massachusetts, Office of the Jury Commissioner.	11

STATEMENT OF ISSUES

1. Should the Court remand for an evidentiary hearing because the allegations introduced forty years ago that marijuana use is harmful are outdated and have been thoroughly rebutted?

2. Did the trial judge, in contravention of the Massachusetts Declaration of Rights and the United States constitution deprive the jury of its constitutional responsibility to do justice?

STATEMENT OF THE CASE

Defendants Richard Cusick and Russell Stroup were charged with possession of marijuana in violation of G.L. c. 94C, § 34. They filed a pre-trial Motion to Dismiss and Request for Evidentiary Hearing on the grounds that the criminalization of the possession of marijuana is unconstitutional. This motion was denied by Redd, J. R.A. 2. A Motion to Reconsider (R.A. 113) was likewise denied. R.A. 3. Defendants requested a jury instruction that the jury be told of its responsibility to decide both the facts and the justice of the case. This motion was denied, renewed at the close of the evidence, and again denied. The defendants were convicted and both sentenced to one day in a house of correction, deemed served. Defendants now appeal.

STATEMENT OF FACTS

Defendants are leaders in the marijuana decriminalization movement. Defendant Stroup is the founder of NORML, the National Organization for Reform of Marijuana Laws. Trans., May 13, 2008, R. 65, L. 6 - L. 17. Defendant Cusick is Associate Publisher of High Times Magazine. Trans., May 13, 2008, R. 58, L. 21 - R. 60, L. 2. They assert that the use of marijuana has medicinal, recreational, spiritual and creative benefits for adults.¹ Trans., May 13, 2008, R. 62, L. 8 - 12, R. 68, L. 11 - R. 69, L. 9. They have each participated yearly in the Boston Freedom Rally on Boston Common. Trans., May 13, 2008, R. 60, L. 3 - L. 6; R. 66, L. 4 - 7, R. 69, L. 17 - 19. Their position is supported by millions of Massachusetts citizens, who voted for the marijuana decriminalization initiative on November 4.

On September 15, 2007, at about fifteen minutes after noon, at the annual Freedom Rally on Boston Common, Boston Police Officer Robert Walsh observed the defendants standing by themselves sharing a marijuana cigarette. Officer Walsh, correctly

¹ See Aff. of Lester Grinspoon, R.A. 179.

believing that the cigarette was marijuana, arrested the defendants. Trans. R. 42, L. 9 - 25, R. 44, L. 3 - R. 45, L. 9, R. 46, L. 1 - 25, R. 56, L. 21 - R. 57, L. 4, R. 57, L. 17 - R. 58, L. 5. A magistrate issued the criminal complaints under G.L. c. 94C, § 34. R.A. R. 53, L. 1 - 14 and R. 8 and 16.

In support of their motion to dismiss as unconstitutional, Defendants submitted the affidavit of Dr. Lester Grinspoon, Associate Professor of Psychiatry, Emeritus at Harvard Medical School. R.A. 23 - 100. They requested an evidentiary hearing where they would demonstrate, through expert testimony, that marijuana is harmless and that its prohibition is not rationally related to a legitimate legislative purpose. R.A. 19 - 20. The motion was denied.

Defendants' Motion for Reconsideration was supported by a second affidavit by Dr. Grinspoon (R.A. 179 - 199) and those of Jeffrey Miron, PhD., Senior Lecturer in the Department of Economics at Harvard University (R.A. 116 - 158); Professor Richard J. Bonnie, Harrison Foundation Professor of Law and Medicine, Professor of Psychiatry and Neurobehavioral Science and Director of the Institute of Law, Psychiatry and Public Policy at the University of

Virginia (R.A. 159 - 178); and of Keith C. Saunders, PhD., Adjunct Professor of Sociology at the University of Massachusetts, Lowell and Senior Lecturer in Sociology at Northeastern University (R.A. 200 - 228). Taken together, these affidavits from recognized scientific experts state that marijuana has no ill effects either on an individual's health or psyche, and that it in fact can often be of benefit in treating various medical ailments. The experts also offered to prove that the use of marijuana does not lead to dependence or addiction. This motion was also denied.

At trial, Defendants testified that they had shared a marijuana cigarette. At the conclusion of the testimony, Defendants' counsel requested that the trial judge instruct the jury that it is the conscience of the community and that, in addition to finding the facts, it has the further responsibility to decide whether the defendants' acts are an offense to the safety and tranquility of the community. R.A. 229 - 233.

MR. NESSON: I would request that you consider the one paragraph, "For the defendant's act to be a crime is more than a violation of the statute, it is an offense to the safety and tranquility of our community that in your

judgment, as the conscience of our community,
warrants our verdict of criminal guilt." ...

THE COURT: I will deny it, for the record.

Trans., May 12, 2008, R. 26, L. 23 - R. 27, L. 7; R.A.
256- 257.

In the absence of this instruction, Defendants
were convicted of criminal possession of marijuana.

Defendants appeal. The issues we raise have not
been mooted by the ballot initiative recently and
overwhelmingly passed by the citizens of
Massachusetts. The convictions in this case predate
the passage of the initiative. The judiciary should
acknowledge what the people of Massachusetts now
clearly accept: that marijuana is harmless and using
it should not be criminal.

ARGUMENT

At the evidentiary hearing held in Commonwealth
v. Leis, 355 Mass. 189 (1969), the Commonwealth's
witnesses asserted that marijuana use was harmful to
individual users and to the Commonwealth at large.
Since their evidence consisted merely of
unsubstantiated, unproven allegations, it should have
been -- and would now be -- excluded as 'junk science'
under Commonwealth v. Lanigan, 419 Mass. 15 (1994).

Thus, the district court in this case should have held a new evidentiary hearing or taken as facts the overwhelming scientific expert evidence in the proffered affidavits that the 1969 allegations had no basis in scientific fact, and that marijuana has no harmful effects.

Furthermore, at trial, the judge should have instructed the jury properly and fully as to their role as the trier both of the facts and of the justice of the application of this statute to the defendants. Given the evidence of overwhelming public sentiment against the criminalization of marijuana among the citizens in the Commonwealth, the failure to instruct deprived the defendants of a fair trial.

I. The unreasonable, unfounded criminalization of marijuana possession intrudes upon the liberty of the citizens of this Commonwealth.

The prohibition of marijuana possession contained in G.L. c. 94C, § 34 is unconstitutional because it violates citizens' right to liberty. Modern scientific research proves that there are no serious negative effects from marijuana usage. Statutory criminalization of its use is thus inappropriate. In

light of new, more reliable scientific evidence, prior holdings on this issue must be overturned.

The first constitutional challenge to this statute occurred in 1969 in the case of Commonwealth v. Leis, 355 Mass. 189 (1969). Leis, charged with possession of marijuana, moved to dismiss on grounds of the statute's irrationality. The trial judge conducted an evidentiary hearing on this motion at which the Commonwealth asserted that marijuana could trigger psychotic breaks, lead to the use of more dangerous drugs, and cause automobile accidents. On appeal, the Supreme Judicial Court noted that they offered no scientific proof of these or any other harms. Although it affirmed the defendant's conviction, it noted that the Commonwealth did not prove its allegations nor could it do so: "[A]t present [there is either] unavailability or inability to collect absolute, statistical proof that the smoking of marijuana (1) triggers 'psychotic breaks', (2) leads to the use of more dangerous drugs and (3) causes automobile accidents." *Id.* at 195.

The statute was challenged again in 1978, in Marcoux v. Attorney General, 375 Mass. 63, in a class action seeking a declaratory judgment that

Massachusetts adults were free to use marijuana within the privacy of their homes. No evidentiary hearing was held. The Supreme Judicial Court affirmed *Leis*, concluding that the right to use marijuana did not outweigh the legislatively asserted needs of police power. "The total situation finds a place on the continuum of constitutional vulnerability where judicial nullification of the proscriptive legislation appears unwarranted." *Id.* at 71.

Thirty years later, the balance on the continuum has shifted to the point where criminalization is now unconstitutional.

a. In the absence of any rational, factually supportable justification for the criminalization of marijuana use, the citizen's liberty to use marijuana must be protected.

The defendants as do all citizens "have a right to require of their lawgivers ... an exact and constant observance" of "the fundamental principles of the constitution." Mass. Const. pt. 1, art. XVIII.²

² Article XVIII is not hortatory, but a rule of construction for the Court to follow when called upon to determine whether a legislative act is "wholesome and reasonable" and "not repugnant or contrary to th[e] constitution." Mass. Const. pt. 2, c. 1, § 1, art. IV. It requires consideration of the whole constitution when adjudicating claims of

Article XVIII creates a presumption that the people retain all liberties except those that are necessary to curtail.³ This presumption of liberty places a burden on the government to show why its interference with liberty is reasonable.⁴ Even if we require of the government only the most minimal burden of proof -- that of producing experts capable of passing the *Lanigan* test to give credible support to any rational basis for criminalizing use by adults of marijuana -- that burden cannot and has not been met.

b. On every parameter on which the balance point on the continuum of legislative power might be thought to depend, science has moved toward an understanding that adults should have the liberty to use marijuana.

Contrary to the out-of-date unproven allegations presented to the court in 1969, current medical and scientific evidence proves that there is no causal link between marijuana use and mental illness (R.A. 25-40); no causal link between marijuana use and

unconstitutionality. In the case before the Court, particular attention should be paid to the Preamble, arts. 1, 2, 4, 5, 7, 10, 11, 12, 15, 18, and 30 of the Declaration of Rights; pt. 2, c. 1, §1, art. 4; pt. 2, c. 3, art. 2; and, pt. 2, c. 6, art. 6.

³ Randy Barnett, *Restoring the Lost Constitution* (2004), explaining a similar provision of the Ninth Amendment to the United States Constitution.

⁴ *Id.* at 260

automobile accidents (R.A. 45-53); no association with pulmonary problems (R.A. 54-62); no association with cancer (R.A. 55); no risk of fatal overdose, no matter how much ingested (R.A. 71); and no physical dependency (R.A. 62-68), the standard for addictive substances.

To the contrary, science now supports the proposition that marijuana is, in many instances, medicinally beneficial. Marijuana is used to treat glaucoma (R.A. 191). It alleviates symptoms of cancer, osteoarthritis, post-traumatic stress disorder, Crohn's disease, multiple sclerosis, and AIDS (R.A. 188). It is often more effective than the standard medications commonly prescribed to elevate mood and stimulate appetite (R.A. 189-196). It relieves pain associated with chronic muscle spasms and tremors common in paraplegics, quadriplegics, other victims of nerve damage and those suffering from cerebral palsy or multiple sclerosis (R.A. 192-194). The very fact that the medicinal benefits of marijuana were not a part of the Commonwealth's expert testimony in *Leis* shows how far the balance point has shifted on the *Marcoux* continuum.

We ask this Court to authorize a new evidentiary hearing based on expert testimony consistent with the most current standards of admissibility, or, alternatively, to declare G.L. c. 94C, § 34 unconstitutional based upon the Defendants' scientific affidavits offered in the court below.

II. The Trial Judge erred by refusing to instruct the jury that it had responsibility to decide the whole case and by refusing to instruct that: "For the defendant's act to be a crime it must be more than a violation of the statute, it must be an offense to the safety and tranquility of our community that in your judgment, as the conscience of our community, warrants your verdict of criminal guilt."

Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, instructs prospective jurors at the outset of jury service that "trial by jury is a fundamental right guaranteed by the United States and the Massachusetts constitutions." She quotes John Adams: "trial by jury [is] the heart and lungs of liberty."⁵ She quotes our Massachusetts constitution. "Jury trial [is] sacred."⁶

⁵ John Adams, "Letter from the Earl of Clarendon to William Pym", January 27, 1766, quoted by Clinton Lawrence Rossiter, *Seedtime of the Republic* 388-89 (1953)

⁶ "Trial by Jury: Jury Orientation Video", Commonwealth of Massachusetts, Office of the Jury Commissioner.

What Justice Marshall fails to explain, however, is that, over time, trial by jury has been eviscerated in our commonwealth. In the early 1800s, Massachusetts judges began to take away the jury's responsibility to act as a self-conscious check on government criminal prosecutions. Even up to the present time, Massachusetts judges continue to affirm the dicta of those early judicial opinions, reflexively adding casual dicta of their own.

As a result, we have come very far from the original intent of our constitution. The general verdict of the jury was to be a judgment of conscience rendered by the jury speaking as the ultimate authority on the justice of the state's prosecution. Today, the criminal jury is no longer the "palladium of free government" envisioned by the Founding Fathers⁷; it has been reduced to a mere adjunct of the judge – a fact-finder whose job is to be accomplished without regard for or concern to the wisdom or justice of the state's application of its statute to the particular case before it. No longer does the jury speak as the conscience of the community; nor does it

⁷ Alexander Hamilton, *Federalist Papers* #83, quoted by Jack N. Rakove, *Original Meanings* 327 (1996)

judge the justice of the state's assertion of guilt. Rather than rendering a substantive moral judgment of conscience as to whether a defendant has violated the law, it now decides only whether a statute ("the letter of the law") has been violated. This is a decimated shadow of the original jury's responsibility. Had the jury's function been so narrowly interpreted in revolutionary times, the British would have had no trouble enforcing the Intolerable Acts, the British soldiers in the Boston Massacre would have been executed, and 'sacred' trial by jury would never have been called a bulwark of liberty or the "palladium of free government."

In Colonial times the jury's power to judge the wisdom and justice of government prosecutions was a key means by which Massachusetts protected its citizens from abuses by the British.⁸ Colonial juries thwarted oppressive British prosecutions by acquitting those whom the British sought to prosecute, notwithstanding their violation of the letter of British statutes.⁹ When the British sought to evade the

⁸ Robert Jones, *Finishing A Friendly Argument: The Jury and The Historical Origins of Diversity Jurisdiction*, 82 NYU L. REV. 997, 1028-1029 (2007).

⁹ *Id.* at 1028.

power of American juries by removing cases to England or trying cases in admiralty courts without juries, Americans rebelled. We listed British interference with trial by jury among our grievances in our Declaration of Independence.¹⁰ We enshrined trial by jury in the Massachusetts Declaration of Rights as "sacred."¹¹ Every colony, in framing its own new constitution, embraced jury protection for individual citizens against unjust prosecution by the state.¹² We built trial by jury into the United States Constitution.¹³ No idea was more central to the federal constitution's Bill of Rights.^{14 15}

Judges in the 1800s, led by Joseph Story and Lemuel Shaw, radically reduced the power and understood responsibility of the American jury.¹⁶ Various reasons were adduced for the change. Rapidly growing business interests in Massachusetts needed

¹⁰ Declaration of Independence, Declaration Grievance 24 (U.S. 1776)

¹¹ Mass. Const. pt. 1 art. XV.

¹² Akhil Amar, *The Bill of Rights as Constitution*, 100 Yale L.J. 1131, 1183 (1991)

¹³ U.S. Const. amend. VI & VII.

¹⁴ Akhil Amar, *The Bill of Rights as Constitution*, 100 Yale L.J. 1131, 1190 (1991)

¹⁵ Letter from Thomas Jefferson to Thomas Paine (1789), ME 7:408, Papers 15:269.

¹⁶ Morton Horwitz, *The Transformation of American Law 1780-1860* (1977); William E. Nelson, *The Americanization of the Common Law* 165 (1994).

more stability and certainty in commercial law than the jury system was providing.¹⁷ Professionalization of judges,¹⁸ the foundation of law schools,¹⁹ the adoption of English common law,²⁰ and the greater availability of legal knowledge in books²¹ all contributed to concern that jurors lacked the necessary training in law to be left responsible for its interpretation.²² Panels of judges to try cases, which had been the colonial practice, were eliminated in favor of a single judge presiding and instructing the jury on matters of law.²³ Judges began to order new trials in civil cases when jury verdicts went against the weight of the evidence.²⁴ Judges took for themselves the power to decide the constitutionality and proper interpretation of statutes.²⁵ Judges took for

¹⁷ Morton Horwitz, *The Transformation of American Law 1780-1860*, 28-30 (1977).

¹⁸ Perry Miller, *The Life of the Mind in America* 102, 140-142 (1965).

¹⁹ *Id.* at 156-7.

²⁰ *Id.* at 105-9.

²¹ *Id.* at 134.

²² *Id.* at 110.

²³ William E. Nelson, *The Americanization of the Common Law* 167 (1994)

²⁴ Morton Horwitz, *The Transformation of American Law 1780-1860* (1977)

²⁵ Commonwealth v. Porter, 51 Mass. 263 (1845);
Commonwealth v. Anthes, 71 Mass. 185 (1855)

themselves the ultimate authority to say what the law is.

For the most part these developments are, at this point in history, water under the dam. It can no longer be seriously argued – and it is not argued here – that juries should interpret statutory provisions, decide evidentiary questions, or resolve constitutional issues. But none of the various forces of change justified the sacrifice of the criminal jury's critical function of protecting citizens from overreaching prosecutions with self-conscious and informed judgment of conscience. The elimination of this sacred jury function was accomplished not by constitutional amendment but by ill-considered judicial dicta that should now be reconsidered.

Two cases in Massachusetts have been understood to justify the denial to the criminal jury of responsibility for its verdict grounded in conscience: Commonwealth v. Porter, 51 Mass. 263 (1845) and Commonwealth v. Anthes, 71 Mass. 185 (1855). Both were decided by Chief Justice Lemuel Shaw.²⁶ Both involved

²⁶ Shaw may have been the model for Herman Melville in Billy Budd of Captain Vere. See for example, Robert Cover "Of Creon and Captain Vere" in David Dyzenhous

situations at trial in which judge and defense counsel were at odds in argument to the jury over whose view of the law was right. Neither involved a defense that recognized the correctness of the judge's articulation of the law, yet asked the jury to acquit the defendant nonetheless and notwithstanding the defendant's violation of the letter of the law as the judge had given it. These decisions have ever since been wrongfully assumed to foreclose any appeal to jury conscience that goes beyond the letter of the law.

Porter was charged with violation of a liquor licensing statute. His lawyer argued to the jury that the statute, properly interpreted, did not apply to Porter's conduct. The trial judge rejected this argument and stopped Porter's lawyer from making it to the jury. On appeal, Shaw held that it is the province of the trial judge definitively to decide all matters of law. But having so concluded, Shaw went on to assert in dicta that this left the jury only the function of finding the facts and applying the letter of the law as given by the judge. Declared Shaw: "if certain facts necessary to constitute the offence..."

and Arthur Ripstein ed., *Law and Morality: Readings in Legal Philosophy* 152 (2001).

are proved to their satisfaction, they [the jury] are to find the defendant guilty.”²⁷

This dictum shifted the moral foundation of the jury’s verdict from moral guilt of blameworthy conduct to civil guilt of violating a statute. It eliminated the jury’s responsibility to bring wisdom grounded in the conscience of community to bear on the State’s claim of right to take the defendant’s liberty away.

The ‘law’ originally committed to the jury as part of its function of deciding the whole criminal case by general verdict was broader in concept than the ‘law’ of which Shaw spoke as the proper province of the judge. Shaw was speaking of law as legality.²⁸ The other part of law always committed to the jury was the law of conscience. By Shaw’s time, the law of conscience which had been felt as a surrounding presence at the time of our constitutional founding²⁹ was being dismissed by some, including Shaw, as “nonsense on stilts.”³⁰ Shaw saw ‘law’ as the positive

²⁷ Commonwealth v. Porter, 51 Mass. 263, at 283.

²⁸ See Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (1964).

²⁹ Noah Feldman, *Divided by God: America’s church-state problem – and what we should do about it* (2005), at 27.

³⁰ Jeremy Bentham, *Anarchical Fallacies* (1843) at line 230, available at

product of state law-making machinery – rules and statutes and constitution. He thought that whether a decision by the state to prosecute the defendant is wise is not for judges to decide,³¹ and he asserted in dictum that it is not for the jury either.

Shaw was wrong. Law in its grand sense includes the moral judgment of the community – its sense of justice and fairness. The jury was once responsible for bringing wisdom and common sense rooted in the conscience of the community to bear as a check on state prosecution in the single case before it. That is what our founders understood.

Many people of the Commonwealth continued to so understand, even in 1845 when Shaw wrote otherwise. The people of Massachusetts resisted his devaluing of the jury. First they attempted to pass a constitutional amendment declaring the criminal jury's

http://www.law.georgetown.edu/faculty/lpw/documents/Benthams_Anarchical_Fallacies.pdf

³¹ Commonwealth v. Taylor, 428 Mass. 623 (1999). We note that our decisions uniformly uphold a prosecutor's wide discretion in deciding whether to prosecute a particular defendant. See Commonwealth v. Latimore, 423 Mass. 129, 136, (1996); Commonwealth v. Pellegrini, 414 Mass. 402, 404-405, (1993); Shepard v. Attorney Gen., 409 Mass. 398, 401-402 (1991); Manning v. Municipal Court of the Roxbury Dist., 372 Mass. 315, 318 (1977). This prosecutorial discretion is exclusive to the executive branch.

right “to determine the law and the facts of the case.” This provision was adopted by the convention but failed to become law when the voters rejected the entire new Constitution. The legislature then passed a statute, *An Act concerning the Duties and Rights of Jurors*, 1855 Mass. Acts 152, tracking the language of the defeated amendment and recognizing the criminal jury’s right to decide questions of law.³² But Shaw defeated this statutory effort. In Commonwealth v. Anthes, 71 Mass. 185 (1855), he reaffirmed his *Porter* dictum and declared the statute unconstitutional.

Shaw argued in *Porter* and *Anthes* that to leave the originally intended responsibility to the jury would create uncertainty in the law. Unless juries were required to follow the law as given to them by the judge, Shaw reasoned, law would not be certain. *Id.* at 196. But Shaw went too far. He falsely elided certainty about what the law is with certainty as to whether law would be enforced. It is true that improving certainty about the positive enacted law is desirable and could not have been achieved in a regime

³² Speaking of the language of this statute, the Supreme Judicial recently noted that “It would be an under-statement to say that the enactment of this language in 1855 was controversial.” Commonwealth v. Lowder, 432 Mass. 92, 96 (2000).

in which defense counsel could argue interpretations of law to the jury contrary to the judge.

But certainty in the enforcement of a law by taking away the jury's historic constitutional duty to decide the justice of the case before it is an entirely different matter. Far from producing certainty that the law would be fully and fairly enforced, Shaw's dictum establishes an utterly unreviewable prosecutorial discretion to pick and choose among myriad possible statutory violators those on whom the state's criminal prosecution will fall. In consequence of the change wrought by Shaw there is now no effective legal check whatsoever to constrain the manner in which prosecutors exercise their discretion to bring charges. This creates a glaring and dangerous exception to the constitutional design of separation of powers – according to Professor Rachel Barkow, “the most significant design flaw in the...criminal system.”³³

Shaw eliminated conflict between judge and counsel on legal matters of evidentiary, statutory and constitutional interpretation, thereby advancing

³³ Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. (forthcoming, 2009)

certainty as to what the law is. Shaw should not have wiped out the jury's historic function as the check of community conscience upon state prosecution. The statute of 1855 that Shaw declared unconstitutional provided a sensible distribution of function among judge, counsel and jury in criminal cases. It would have left to judges all matters of legality, yet still have preserved for the jury its role as check against misused prosecutorial discretion. The statute of 1855, G.L. c. 278, § 11 (from 1855-1979), provided in relevant part that in all criminal trials the judge was to "superintend the course of the trials, decide upon the admission and rejection of evidence, upon all questions of law raised during the trials and upon all collateral and incidental proceedings, and ... charge the jury" - in other words, all that was actually at issue in *Porter* and *Anthes*. But the statute nonetheless reasserted the core jury function: "after receiving the instructions of the court, [the jury] shall decide, in their discretion, by a general verdict, both the fact and the law involved in the issue."

One might wish that the Massachusetts legislature had been more articulate in its use of the word "law"

twice in the statute with differing meanings, and had left no doubt that the issue in a criminal case is the defendant's guilt or innocence, not just whether he violated a statute. But it is a fair reading of the statute that it intended to leave to judges all matters of legal interpretation, while leaving to the jury the common-sense function and responsibility of judging the defendant's criminal guilt.

There is but one modern Massachusetts case factually on point, involving defendants who, like the defendants in this case, conceded violation of the letter of the state's law as a matter of fact yet sought jury acquittal notwithstanding the violation. In Commonwealth v. Leno, 415 Mass. 835 (1993), the defendants volunteered their work in a needle exchange program to limit the spread of AIDS. They legally purchased sterile needles and traded them at no charge for dirty needles at a street location in Lynn Massachusetts. They were arrested, prosecuted and convicted for distributing instruments to administer controlled substances, in violation of G.L. c. 94C, § 27 (1990 ed.). At trial they did not deny their violation of the statute but sought instead to present a defense of necessity to the jury. The trial judge

stopped them. They were convicted and appealed. The Supreme Judicial Court affirmed the trial judge on the narrow ground that the legal defense of necessity was not available to the defendants in this situation.

"The parties limit their arguments to the issue whether an instruction on necessity was required; we also limit our consideration to that issue." *Id.* at 840, Fn. 6. Nonetheless, in the concluding paragraph to its opinion the Court surprisingly continued the tradition begun by Shaw of dismissing in dicta the jury's justice function in criminal cases:

The defendants' argument raises the issue of jury nullification, not the defense of necessity ... "We recognize that jurors may return verdicts which do not comport with the judge's instructions. We do not accept the premise that jurors have a right to nullify the law on which they are instructed by the judge, or that the judge must inform them of their power. See, Commonwealth v. Hebert 379 Mass. 752 (1980)....

Id. at 842.

We do not seek "nullification." We do not seek acceptance of the premise that the jury has a right to nullify the law. We did not ask the trial judge to so instruct. We agree, a jury has no such right or power and should not be instructed that it does.

The jury's only power is to acquit the defendant in the single case before it. We request and claim a

right to have the presiding judge at trial properly and fully explain to the jury its responsibility not only to judge whether the defendant violated the letter of the relevant statute but also to judge the justice of the prosecution according to the law of conscience.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons the Appellants requests this Honorable Court to:

- order the defendant's convictions set aside;
- remand the cases for the evidentiary hearing they were denied;
- or hold G.L. c. 94C, § 34's prohibition on the possession of marijuana unconstitutional, taking the facts offered in the affidavits of Dr. Lester Grinspoon and others as true.

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STATUTORY ADDENDUM

UNITED STATES CONSTITUTIONAL PROVISIONS

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

MASSACHUSETTS CONSTITUTIONAL PROVISIONS

Preamble

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an

impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain and establish the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.

Declaration of Rights

Article 1. as replaced by Amendment Article CVI.

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 2. It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Article 4. The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America in Congress assembled.

Article 5. All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

Article 7. Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

Article 10. Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

Article 11. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article 12. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 15. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.

Article 18. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates, an exact and constant observance of them, in the formation and execution of

the laws necessary for the good administration of the commonwealth.

Article 30. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

The Frame of Government

Part 2, c. 1, § 1, Art 4. And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth; the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, powers, and limits, of the several civil and military officers of this commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this constitution; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the governor of this commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the

government of the said commonwealth, and the protection and preservation of the subjects thereof, according to such acts as are or shall be in force within the same.

Part 2, C. 3, Article 2. Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.

Part 2, C. 6, Article 6. All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.

STATUTORY PROVISIONS

G.L. c. 94C, § 34 Unlawful possession of particular controlled substances, including heroin and marihuana

Section 34. No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who

violates this section by possession of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any

disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

It shall be a prima facie defense to a charge of possession of marihuana under this section that the defendant is a patient certified to participate in a therapeutic research program described in chapter ninety-four D, and possessed the marihuana for personal use pursuant to such program.

CERTIFICATION

I certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Charles R. Nesson

CERTIFICATE OF SERVICE

I, Charles R. Nesson, hereby certify that on November 18, 2008, I served two true copies of the within, together with two copies of the Record Appendix in hand upon John P. Zanini, ADA, Suffolk County District Attorney's Office, One Bulfinch Place, Boston, MA 02114-2915.

Charles R. Nesson