

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET # 0701CR7229

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RICHARD CUSICK,)
Defendant)

and

DOCKET # 0701CR7230

COMMONWEALTH OF MASSACHUSETTS,)
)
v.)
)
RUSSELL K. STROUP,)
Defendant)

DEFENDANTS' JOINT MEMORANDUM IN SUPPORT OF
REQUESTED PRELIMINARY AND CLOSING JURY
INSTRUCTIONS; AND NOTICE OF COUNSEL'S
INTENDED CLOSING ARGUMENT

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

Thomas Jefferson¹

¹ Thomas Jefferson to Thomas Paine, 1789. ME 7:408, Papers 15:269.

Liberty is the highest value recognized in both the Massachusetts Declaration of Rights and the United States Constitution and Bill of Rights. As a bulwark of liberty against government oppression, our founding fathers built into our government careful and thoughtful checks and balances. They created not one institutional power but three -- the Legislature, the Executive and the Judiciary -- off-setting them against each other with checks and balances. Where a citizen's liberty was placed in jeopardy by criminal prosecution they provided a further and ultimate check: the jury. No citizen's liberty was to be sacrificed without grand jury charge and petit jury conviction.

I. THE MASSACHUSETTS DECLARATION OF RIGHTS ESTABLISHED JURIES AS A FINAL BULWARK AGAINST THE TAKING OF A CITIZEN'S LIBERTY.

Two hundred and fifty years of history has seen our jury protections decay. The grand jury as a liberty-protecting institution is now reduced to a joke about a ham sandwich. The petit jury has been limited to determining only whether the defendant has violated the letter of a law. Lawyers who urge juries

to rise above the letter of the law can be held in contempt of court.

It is precisely the fear of governmental abuse through the arbitrary imposition of the letter of law that led Americans to revolt and then to protect their liberty with the bulwark of the jury.² Massachusetts history is particularly rich in its articulation of the jury's right to judge the whole case, fact and law. John Adams wrote in 1771: "It is not only [a 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."³ Theophilus Parsons, Chief Justice of the Supreme Judicial Court, member of the state constitutional convention of 1779-1780, one of the committee of twenty-six who drafted the constitution, is recorded as stating at the Massachusetts Convention on the ratification of the Constitution, January 23, 1788, that:

² Akhil Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131 (1991).

³ 2 *Life and Works of John Adams*, (C.F. Adams ed. 1856) 253-255; *Report of the Trial of the British Soldiers* (1824) 44-45, 127-128.

The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal of 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."

Debates in the Several State Conventions on the Adoption of the Federal Constitution, Jonathan Elliot, ed., v.2 p.94 (Philadelphia, 1836).

II. MISINTERPRETATION OF THIS PRINCIPLE BEGAN WITH DICTA AND CONTINUES IMPROPERLY TO IMPEDE THE JURY'S FUNCTION AS THE ULTIMATE SOURCE OF OUR SOCIETY'S LEGAL EXPRESSION OF CRIMINAL GUILT.

The original understanding of the jury as the ultimate power over and protector of liberty was radically changed by judges in the nineteenth century. Led by Massachusetts Chief Justice Lemuel Shaw, judges asserted their ultimate authority over the jury on all issues of law as opposed to the domain of fact. It is the judicial role, Shaw declared, to define the legal framework within which the jury performs its function. This includes issues of evidentiary admissibility, statutory interpretation, and constitutionality. Shaw held that these legal rulings are not mere

recommendations from judge to jury which the jury is free to ignore, but definitive rulings which jurors are bound to follow. Commonwealth v. Porter, 51 Mass. 263 (1845); Commonwealth v. Anthes, 71 Mass. 185 (1855).

Had this assertion of authority by judges been limited to purely legal issues of process, statutory interpretation and constitutionality, there would have been no denigration of the originally intended power of a jury. But Shaw asserted in dicta that if the facts necessary to constitute a statutory offence are proved to be true, the jury must find the defendant guilty⁴, and judges have since relied upon this dictum⁵ to unfairly abridge the jury's fundamental function as the ultimate judge of the criminality of a defendant's conduct. The jury's function must and should go beyond mere confirmation that a statute has been violated.⁶

III. A RETURN TO THE ORIGINAL UNDERSTANDING OF THE JURY'S ULTIMATE POWER TO DECIDE THE LAW WOULD SERVE, NOT RISK INJUSTICE.

⁴ Commonwealth v. Anthes, 71 Mass. 185, 199 (1855).

⁵ See, e.g., M.C.L.E. Instruction 2.05, based on Commonwealth v. Webster, 59 Mass. 295, 320 (1950).

⁶ Comment, The Changing Role of the Jury in The Nineteenth Century, 74 Yale L.J. 170, 177-183 (1964), cited by Commonwealth v. Lowder, 432 Mass 92 (2000).

A potential worry about recognizing and supporting the jury's ultimate authority to determine whether the state can take away a defendant's liberty is the fear of juries so racist, prejudiced or insular that they would do injustice. Such fear takes two forms, fear that juries swayed by racism or other bias will use their ultimate power to falsely and arbitrarily convict innocent people, and fear that juries might demonstrate pockets of resistance to the enforcement of unpopular laws expressed in wide-spread jury acquittals. The obvious remedy for such bias is readily at hand. Judges have the undisputed powers to dismiss charges and direct verdicts of not guilty whenever the proof does not demonstrate a statutory violation. Mass.R.Crim .P. 25; G.L. c.278, §11.⁷ Only after passing the gateway of the judge's assessment of the constitutionality of the legislature's statute (as tested by motion to dismiss) and the sufficiency of the evidence to prove violation of the statute (as tested by motion for directed verdict at the close of all the evidence) is a defendant's fate committed to a

⁷ Prior to passage of Chapter 344, Section 43A of the Acts and Resolves of 1979, titled "An Act Conforming the General Laws to the Massachusetts Rules of Criminal Procedure" section 11 retained the provisions of Chapter 152 of the Acts of 1855, that was the focus of Commonwealth v. Anthes, supra.

jury of his peers. Commonwealth v. Lowder, 432 Mass 92 (2000).

The second fear that insular communities of jurors resistant to the enforcement of unpopular laws is appropriately addressed by choice of prosecutorial venue. If opposition among the citizenry to the enforcement of a statute is so widespread as to make choice of prosecutorial venue unavailing, then let the legislature take note, the people are speaking.

It is not sufficient protection for the accused that judges have the power to declare some legislative acts unconstitutional. Judges, out of deference for the legislature as a collateral branch of government, are bound to regard as constitutional any legislative act for which a rational basis can be found, even if this was not the basis for its adoption and is not the basis for its enforcement, and regardless of the weight of wisdom and scientific evidence on the other side. The rational basis test is a minimal hurdle, to say the least, especially where the right of liberty is concerned. A whole range of considerations concerning the justice of the application of the statute to take liberty away from a citizen defendant

remains for appropriate jury consideration and decision.

IV. DEFENDANTS, THROUGH COUNSEL, ARE ENTITLED TO ARGUE TO THE JURY THAT THEY HAVE COMMITTED NO CRIME.

It is the design of our constitution to protect citizens from arbitrary loss of their liberty by requiring the state to proceed through a process of definition of offense, charge and proof, but as a precondition for submission of a charge to a jury of the people, not as an authorization to treat behaviors which are not "crime" as if they are. The people, in the form of the jury, are the ultimate judge of whether behavior is a crime. Assertion by legislature, executive and judiciary is merely a submission of the proposition that the defendant's behavior is a "crime". It is the jury's function to determine whether or not the defendant's behavior warrants our society's collective judgment of criminal guilt.⁸

Counsel in this case will argue to the jury that Keith Stroup's and Rick Cusick's behavior, although it may be found to contravene Massachusetts General Law

⁸ See Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582, 608-610 (1939).

94C chapter 34, was not therefore necessarily a criminal offense against society. That latter and ultimate question is for the jury to decide as the representatives of society. Not until they have answered that further question in the affirmative can the jury conclude that the defendant is guilty of a crime.

It is here that the defendant's counsel must play a vital role. Counsel's argument to the jury should not be regarded in any way as in conflict with a proper interpretation of Massachusetts law. Counsel will not contest before the jury the legal rulings of the court. If the court asserts as law that the jury must convict if it finds a violation of the letter of the law, that instruction is unconstitutional and fundamentally at odds with our right to trial by jury.

Respectfully submitted,

RICHARD CUSICK,
By his attorneys,

R. KEITH STROUP,
By his attorney,

Matthew H. Feinberg
BBO#161380
Feinberg & Kamholtz
125 Summer Street

Charles R. Nesson
BBO#369320
Harvard Law School
HFB 404

Boston, Ma 02110
(617) 526-0700

Cambridge MA 02138
617-495-4609

Steven S. Epstein
BBO#546862
P.O. Box 266
Georgetown, MA 01833
(978) 352-3300

CERTIFICATE OF SERVICE

I, Steven S. Epstein, Esquire, hereby
certify that I served the within by delivering a copy
in-hand to _____ the
Assistant District Attorney for Suffolk County

Date

Steven S. Epstein