

PODIUM

CIVIL LIBERTIES *By Harvey A. Silverglate*

The Perils of Being a Juror With a Conscience

FOR THE FIRST TIME in American history, a criminal trial juror has been placed on trial for contempt, for telling fellow jurors, during deliberations, that juries have the power to acquit even if they believe the accused violated the law. The case, tried in Gilpin County, Colo., has pitted judges and prosecutors, who fear the spread of "jury nullification," against an increasingly vocal movement of libertarians and others who seek to stem a growing tendency to curtail the ancient right to trial by jury.

Laura J. Kriho was a juror in the prosecution of a 19-year-old woman charged with possession of amphetamines. During jury selection, Ms. Kriho did not disclose two matters that the trial judge and district attorney later said were material omissions under oath: that in 1984 she had been charged with possession of LSD and received a deferred judgment and that she did not believe a juror had to follow the judge's instructions as to the law, and hence could acquit even a demonstrably guilty defendant. Even though she had not been asked direct questions as to these matters during jury selection, she was charged with perjury for failing to

disclose when asked a general question.

Additionally, the citation charged that Ms. Kriho, once selected for the jury, had violated the court's instructions by searching the Internet to learn the penalty facing the defendant, had informed her fellow jurors and had tried to enlist them in disobeying the judge's instructions. Arguing for acquittal, she claimed that drug problems should be handled by family and community, "not the courts."

Ms. Kriho and her attorney, Paul Grant, confidently prepared to defend Ms. Kriho's actions before a jury of her fellow citizens. Mr. Grant's research revealed that the last time an American trial judge held jurors in criminal contempt for failing to convict was in the 1670 trial of William Penn for preaching to an unlawful religious assembly. On appeal, the Court of Common Pleas freed them, establishing the power of jurors to decide not only the facts, but the law. Judges still retained the authority to instruct juries as to the applicable law, but jurors were empowered to decide the case and could not be punished for doing so.

This principle of jury independence became firm American legal tradition when in 1735, a New York jury, contrary to instructions, acquitted John Peter Zenger, a printer, of seditious libel for criticizing the king of England. In the 1850s, Northern juries repeatedly re-

fused to convict people who violated the Fugitive Slave Act by sheltering, rather than returning, runaway slaves.

Need-To-Know

There is a growing controversy, however, around whether jurors should be informed that they have this power. The Fully Informed Jury Association is seeking constitutional amendments requiring that judges so inform jurors. Judges and others are strongly opposed, concerned that lawlessness would result, returning to the era when Southern juries refused to convict white defendants who assaulted blacks.

Ms. Kriho's fellow jurors were called to the stand where, invading the sanctity of their closed deliberations, they were forced to testify as to discussions they had had with Ms. Kriho. Ms. Kriho had been unable to persuade any of the other jurors to her view, and the case had ended in a hung jury, with Ms. Kriho alone voting for acquittal. (Cynical observers of her trial observed, probably accurately, that had she voted for guilt, all her transgressions during voir dire and deliberations would have been forgiven, leaving the impression that she was prosecuted for voting to acquit.)

Ironically, Ms. Kriho herself did not get to appear before a jury. The prosecutor announced that he would not seek a

sentence in excess of six months. The U.S. Supreme Court has declared that the right to trial by jury applies only in "serious" cases, defined as those carrying a sentence of more than six months. Hence, Ms. Kriho was tried before Chief Judge Henry Nieto. To Laura Kriho and Paul Grant, it seemed like a stacked deck.

The trial ended Oct. 2, and as of this writing Judge Nieto has not announced his verdict.

This local drama is the tip of a nationwide iceberg in which trial by jury is under attack. There is a movement to eliminate the requirement of juror unanimity in criminal cases. Equally serious is this year's Supreme Court decision—*Lewis v. U.S.*, 116 S. Ct. 2163—depriving a defendant of a jury when facing multiple "petty" charges, none punishable by more than six months. Justices Anthony M. Kennedy and Stephen G. Breyer, concurring in the result, noted, "on the Court's view...there is no limit to the length of the sentence a judge can impose on a defendant without entitling him to a jury, so long as the prosecutor carves up the charges into segments punishable by no more than six months apiece." This evasion is cause for concern among those who believe that juries are the most effective block to official tyranny ever created. ■

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