

ing that jurors are judges of both law and fact. Kelly and his fellow Santa Cruz judges direct their juries to follow their legal guidelines without question or dissent. Jurors are routinely ordered to determine only what the facts are and leave to the judge how to apply the law.

In this case, Kelly outlined the legal elements of the crime that, if proved beyond a reasonable doubt, *required* jurors to vote guilty, however unjust they feel the law, however unwarranted a conviction. The full weight of the court was laid upon the heads of the jury to chill any independent doubts. Most jurors have not heard of the right of jury nullification. But jurors aware of their jury nullification rights and powers know that they may ignore a judge's instructions.

The jury itself may decide whether a law applies, whether it is just or constitutional, whether a particular prosecution is politically motivated, whether the likely sentence to be imposed is just, etc. These are considerations that Kelly routinely orders juries to ignore and leave up to him. Jury nullification is the right of jurors to disregard the letter of the law to uphold the higher, more vital spirit of justice. Ignoring judicial orders to follow the law at whatever cost to conscience is the historical practice of American juries that refused to return fugitive slaves, to jail war protesters, or to send marijuana users to prison. Consider now what went on in the jury room in this case and we will return to the issue of jury nullification.

A SOLE JUROR FOLLOWS HIS CONSCIENCE AND DISSENTS

In the end, it appears that a sole juror in the disrupting case and two in the trespass case were instrumental in blocking all 12 convictions. Juror Jim Cohen, a county employee, was the primary hold-out, ironically the very one the defense attorneys were most reluctant to leave on the jury. He discussed the class bias of the jurors in an interview with *Street Spirit*:

"Most of the people that were on the jury were... not working class people. They were people who had money. They were people that were the wives of people that were upper-middle-class people from Aptos. There was a tremendous class prejudice in the first place going on there. The social pressure inside the jury room was just incredible to just convict them and go. [It showed itself] by body language, direct attack, insult, and so forth... Some people said in favor of their desire to convict: 'If we don't send a message, the community is going to think that it's okay for people to demonstrate and protest.' I said, 'Oh, you mean it's not okay for people to demonstrate and protest? Where are we? Is this downtown Albania?'"

The jury foreperson refused to allow secret ballots and openly tried to lead the jury to conviction. Initially the jury voted 7-5 that the first element of the "disrupting a public assembly" crime had not been met, in that the disruption was not "significant." Since that one element of the crime was not proven, why were jurors voting disproportionately to convict? Vague authoritarian arguments like, "if we acquit, we are sanctioning anarchy," became the buzzwords of the day. Final votes were all 10-2 or 11-1 for conviction with Cohen on the dissenting end.

Cohen explains why: "I think it was the entire process. I think people got burnt out; they wanted to make it easy on themselves. Nobody had the courage to look at the issue of what was really happening with the case... They felt they could not withstand pressure from members of the Business Association that they knew, personal friends who would not approve, spouses who would not approve. One person said they were afraid maybe their car would be trashed... In any social situation right now where people are trying to debate anything, the pressure is: 'they're

guilty, let's go back to our lives."

In spite of this, Cohen reports a remarkable conclusion: "But to me the most interesting thing was that afterwards — after the trial was over — five people [jurors] came to me and said, 'Gee, I really didn't have the balls to do what you were doing, but I'm really glad you did.'"

Cohen explained that the jury failed to get at the critical issue of whether protesters had been arrested for the content of their protest, rather than the activity itself. "The jury foreperson actually prohibited us from talking about the content... If people had been getting up saying, 'hooray for the business association,' they could have demonstrated as long as they wanted to. That was very clear. Totally hung on the issue of significant disruption, we never got to issue four which was content versus activity."

The important question in the trespass charge was the intent of the defendants. Cohen said, "Someone said to me at one point: 'The Constitution is really irrelevant to this.' I said, 'Well, actually in my opinion the Constitution is always relevant.' We really must discuss that even if you don't agree with its application — at least that's the framework we need to be in. Not that question of whether it wasn't convenient for city council to hear somebody's testimony."

"Considering the constitutionality of the laws versus if justice was really the issue, then, of course, they would never even have been charged because the injustice of this case lies entirely on the side of the city council and the business people in the Santa Cruz community. So you really cannot consider justice unless you consider the entire picture. So if that's jury nullification, then definitely that's what I did."

Typical in such jury nullification cases, Cohen considered the broader issues. He said it was "not a question of elements being proven or not proven but of the deeper relevance of the Constitution and particularly of the First Amendment. The

arrest process began 15 seconds after defendant Jim Cosner presented the petition. What is this? Tienanmen Square? The moving force in this matter was the refusal of City Council to act on the issue [of the rights of homeless people]. The issue is too critical, too significant to the entire country. It's not simply a question of did they trespass or not."

Cohen decided that elementary justice required a not guilty vote regardless of the law, the judge's instructions, or the specific elements of the crime. One of his considerations was "insufficient criminal intent," but also key was his revulsion to the undemocratic process Rotkin engineered at the council meeting, and his belief in the urgency of the need of homeless people to sleep — so dramatically presented with chains and padlocks.

Cohen agreed he was sending Rotkin, the police, and the courts the message: "Whatever niceties of the law you've selected to silence this unpopular message, whatever technical elements are or are not proven, I won't let you extend your already chilling power to silence these protesters. However unorthodox their method, it was their message you sought to exclude — from the council, from the watching public, and now, by putting them in jail, from the entire community. I will not join you in further punishing them for their brief symbolic protest. I will not ratify your use of the courts to punish people of good heart bringing an important issue to public notice that you were determined to ignore."

Juries must give heavy weight to the First Amendment right to petition and protest in a legislative forum. Attorneys also argued there was reasonable doubt over what precipitated the disruption — the Rotkin distortion of democracy or the protesters' shock and anger at seeing the

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