AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Judicial Power and Constitutional Authority

**Kansas v. McClanahan, 212 Kan. 208** (Kan., 1973)

*Carroll William McClanahan was acquitted by a jury on the charge of grand theft. The state appealed, arguing that the judge had committed a legal error when instructing the jury before its deliberations. Although the state supreme court believed that McClanahan was protected from a second criminal trial by double jeopardy, it accepted the appeal in order to resolve the legal question “of general importance to the administration of criminal justice in this state.” The trial judge used a set of jury instructions that had been recommended by the Judicial Council of Kansas, a state advisory commission that studies the judiciary. The prosecutor objected that the instructions were prejudicial to the state’s case. The jury instructions at issue informed the jury that “you are entitled to act upon your conscientious feeling about what is a fair result in the case and acquit the defendant if you believe that justice requires such a result.” Such an instruction, it was contended, advocated “jury nullification,” the view that juries had the right to disregard the law (or judicial interpretations of the law) when rendering verdicts. The traditional jury instructions in Kansas, by contrast, simply directed the jurors that they should “should decide the case by applying the law to the facts as you find them” and that their duty was to “follow all of the instructions” from the judge, including the judge’s instructions on the “law that applies to this case.” The Kansas Supreme Court unanimously ruled that only the traditional instruction was consistent with the proper role of the judge and jury and with the maintenance of the rule of law.*

FROMME, JUSTICE.

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Kansas has long recognized the diverse functions of the court and the jury, and in the early history of the criminal law of this state this court said:

". . . [T]he jury are the exclusive judges of the facts; but not so with the questions of law that are involved. In those cases it is the duty of the court to instruct the jury and decide for them all questions of law that properly arise in the case; and it is incumbent upon the jury to apply the law so given to the facts of the case, and conform their verdict and decision to the instructions. . . ." *State v. Verry*, 36 Kan. 416, 419 (1887)

This conception of the diverse functions of court and jury appears in the Kansas code of criminal procedure, effective July 1, 1970 . . . which provides: "When the trial is to a jury, questions of law shall be decided by the court and issues of fact shall be determined by the jury."

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Our attention is immediately drawn to the statement by the [Judicial Council of Kansas] that the instruction should not be given over the objection of the defendant for the reason that to do so could result in a defendant being convicted without the statutory elements of the crime being proven. Assuming this is correct the defendant would have nothing to lose by consenting to the instruction. If the instruction was given and he was acquitted he would be free of the charge. If he was convicted he could promptly appeal and show that certain of the statutory elements of the crime had not been established. Jeopardy would have attached and he would be free of the charge. A fair and impartial trial demands that standards of fairness and impartiality be applied equally to the rights of the accused and of the state.

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Our whole system of criminal law is based upon rules of law for the protection of the accused and especially should this be true when the charge is a heinous crime. Without restraints being placed upon a jury by our system of jurisprudence the conscience of a jury in a case which causes public outrage might well reflect a lack of rationality rather than a proper display of community conscience. In such cases the rule of law becomes imperative if the accused is to receive a fair trial. The state criminal law should be equally enforced throughout the state. Criminal punishment cannot depend upon "community conscience" or "community standards."

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The committee notes on use of this instruction mention that Maryland recognizes in criminal trials the jury is the judge of both the facts and the law. This practice results from constitutional mandate. Only three states have such a provision in their constitutions, Georgia, Indiana and Maryland. We have no similar provision in the Constitution of the State of Kansas. . . .

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The argument erroneously equates the jury's raw physical power to disregard the law as laid down in the instructions of the court with the jury's proper function and legal duty to accept the law as given to it by the court. The physical power of a jury to acquit an accused in the face of what appears to be overwhelming evidence of guilt has not been seriously questioned since 1670 when the jurymen who heard the case against William Penn and William Mead flatly refused to return a verdict of guilty for preaching to an unlawful assembly in Gracechurch Street. It is recorded that all jurors in that celebrated case were fined and jailed. Several of them spent months in prison until the case was reviewed on a writ of habeas corpus and the English court delivered the opinion which first recognized and established the raw physical power of English juries to render a verdict of acquittal. *Bushnell’s Case*, 6 Howell’s State Trials 999 (1670). . . . However, power is one thing and proper function and legal duty is another. The jury's legal duty to act "according to the law" is clearly set forth in the statutory oath administered to every juror. . . .

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In considering the instructions as a whole and in their entirety the conflict between Instruction No. 1 and the balance of the instructions becomes apparent. Instruction No. 1 advises the jurors that their guiding principle must be their personal conscientious feelings about what is a fair result in the case and that the judge's statements of the law are secondary aids to be considered or disregarded so long as they arrive at a conscientious determination of a fair result in the case. However, the balance of the instructions informs the jurors that they must follow rules of law, determine the sufficiency of the evidence to support the elements of the crime, and that their "verdict must be founded entirely upon the evidence admitted and the law as given in these instructions." We believe this conflict in the instructions will result in confusion and injustice. . . .

It is universally accepted in this country, with the exception of Georgia, Indiana and Maryland, which are under constitutional mandate, that it is not the proper function or legal right of a jury to determine the law applicable to the case they are hearing. . . .

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. . . . The instruction which we disapprove stresses the conscience of the jury as a basis for acquittal but fails to properly consider the effect of the instruction as to a conviction. The injustice which could result from adopting such an instruction when an accused is charged with a heinous crime is apparent. The administration of justice cannot be left to community standards or community conscience but must depend upon the protections afforded by the rule of law. The jury must be directed to apply the rules of law to the evidence even though it must do so in the face of public outcry and indignation. Disregard for the principles of established law creates anarchy and destroys the very protections which the law affords an accused. . . .

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Although it must be conceded that the jurors in a criminal case have the raw physical power to disregard both the rules of law and the evidence in order to acquit a defendant, it is the proper function and duty of a jury to accept the rules of law given to it in the instructions by the court, apply those rules of law in determining what facts are proven and render a verdict based thereon.

The appeals by the state are sustained.