Primer on the Grand Jury, Common Law, Natural Law, and Equity

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Judge with a Sense of Justice, Honor, and Mercy

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1. WHAT IS A COMMON LAW GRAND JURY?

The common law grand jury is an investigative body that can accuse anyone of a crime, including government servants. The purpose of the grand jury is to protect and watch over the public morals, health, safety, peace, general welfare, and comfort of the county. It is found in the Fifth Amendment of the U.S. Constitution which states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury …".

The grand jury is also the watchdog of a community (e.g. it can even report on the condition of the roads).[1]

> In many states grand jurors are required by statute to examine into the condition of jails, asylums and other public institutions; examine the books and accounts of the various public officials in the county, fix the tax rate, and have a general supervision over public improvements.[2]

It is free to pursue its investigations on any subject free of external influence or supervision so long as it does not tread upon the legitimate rights of witnesses called before it.[3] A grand jury sits not to determine guilt or innocence, but assesses whether there is an adequate basis for bringing a criminal charge, and only hears evidence on behalf of the prosecution, since the finding of an indictment is only in the nature of an inquiry or accusation, which, afterwards, is to be tried and determined by a trial jury.[4]

Judge King, in 1845, described the extraordinary modes of criminal procedure which may be pursued by a grand jury, in the following words:

> "The first of these is, where criminal courts of their own motion call the attention of grand juries to and direct the investigation of matters of general public import, which, from their nature and operation in the entire community, justify such intervention. The action of the court on such occasions rather bear on things than persons; the object being the suppression of general and public evils, affecting in their influence and operation communities rather than individuals and therefore, more properly the subject of general than special complaint. Such as great riots that shake the social fabric, carrying terror and dismay among the citizens; general public nuisances affecting the public health and comfort; multiplied and flagrant vices tending to debauch and corrupt the public morals, and the like. …
>
> "The third and last of the extraordinary modes of criminal procedure known to our penal code, is that which is originated by the presentment of a grand jury. A presentment, properly speaking, is a notice taken by a grand jury of any offence from their own knowledge or observation, without a bill of indictment being laid before them at the suit of the commonwealth. Like an indictment, however, it must be the act of the whole jury, not less than twelve concurring on it, except that it emanates from their own knowledge, and not from the public accuser, and except that it wants technical form. It is regarded as instructions for an indictment. That a grand jury may adopt such a course of procedure, without a previous preliminary hearing of the accused, is not to be questioned by this court." *The Grand Jury*, George J. Edwards Jr., p. 106-108 (1906). [http://www.constitution.org/gje/gj_00.htm]

The government cannot be in charge of deciding for themselves whether or not they should indict themselves

1 Search Google for "grand jury condition of roads".
2 *The Grand Jury*, George Edwards, p. 121
3 *U.S. v. Williams*, 504 U.S. 36, 48 (1992)
4 *The Grand Jury*, George Edwards, p. 140

on criminal charges. This is precisely why we have so much corruption in our government. It is the duty of the people to stand up as the faithful and wise stewards and bring the servants who think themselves master back into subjection.

2. AUTHORITY TO IMPANEL A COMMON LAW GRAND JURY

The legal authority for the common law grand jury comes from the Magna Charta of 1215, paragraph 61, which requires 25 jurors, 4 of which are administrators.[5] It can be distinguished from all other forms of grand juries since they have less than 25 jurors and thus are not founded on the Magna Charta. It was affirmed in 1296 as the common law.[6]

The Magna Carta provides that the barons may elect at their pleasure twenty five barons from the realm, who will observe, and cause to be observed, the peace and privileges granted by the King by this charter. If the King or any one of his servants shall have transgressed the people's rights, and this is shown to four barons of the twenty five, those four barons shall show the King or his people their error, and ask them to amend it without delay. If they do not amend it within forty days, the four barons shall refer the matter to the remainder of the twenty five barons, who with the whole land in common, shall distrain and oppress the King in every way in their power until amends shall have been made according to their judgment. Moreover, if those twenty five disagree among themselves or are unwilling or unable to be present, the majority of those present shall decide what is binding and valid, just as if all the twenty five had consented to it. [7]

The common law grand jury is independent of government like a fourth branch of government, administered directly by and on behalf of the American people, and the People don't need government's permission to conduct it. This is discussed in the case of *United States v. Williams*, in the section *Functioning of the Grand Jury.*

In reality there is only one Grand Jury within a state, with locations in each county. We can draw off the jury pool from any county to serve on another, if necessary. When the administrators of each county come together on an issue they can use the seal of each county on an arbitration or presentment document which can produce extraordinary results.

3. SOVEREIGNTY OF THE PEOPLE

Definition of *citizen*: One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. Bouvier's Law Dictionary,[8] 1914 Ed. p. 490.

Definition of *sovereignty*: Abstractly, sovereignty resides in the body of the nation and belongs to the people. But these powers are generally exercised by delegation. … Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state. Bouvier's Law Dictionary, 1914 Ed. p. 1016.

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5 http://1215.org/lawnotes/lawnotes/magna.htm paragraph 61.

6 http://1215.org/lawnotes/lawnotes/cartarum.htm

7 Different versions of Magna Carta were issued, in 1215, 1216, 1217, and 1225. The Charter of 1225 was reissued in 1297 and confirmed as part of England's statute law. The Cartarum applies to the 1297 version which does not have the paragraph 61 enforcement clause of the 1215 version. See https://en.wikipedia.org/wiki/Magna_Carta.

8 Note: Bouvier's Law Dictionary, 1856, 1897, and 1914 editions, as well as Black's Law Dictionary 4th Ed., Cochran's Law Dictionary (1888), and Osborne's Law Dictionary (1927) are all available for download from books.google.com.

Definition of *Republic*: [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; ... . James Madison, Federalist Papers, No. 39.

In this country as we will see, the people are sovereign; but if there was no mechanism to exercise it, the notion of sovereign people would be meaningless. The grand jury exercises that sovereignty for the governance and protection of society. **While on the grand jury, remember that you are the government, exercising the sovereignty of the people.**

Following is a random sampling of state constitutions; these samples all mention that the *people* ordained and/or established the constitution, while most but not all mentioned that political power is inherent in the people:

Alabama: "We, the people of the State of Alabama, … do ordain and establish the following Constitution ..." … That all political power is inherent in the people, … and … they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient."

Arkansas: "We, the People of the State of Arkansas ... do ordain and establish this Constitution." … "All political power is inherent in the people and government is instituted for their protection, security and benefit; and they have the right to alter, reform or abolish the same, in such manner as they may think proper."

California: "We, the People of the State of California ... do establish this Constitution." … "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

Iowa: "WE THE PEOPLE OF THE STATE OF IOWA … do ordain and establish a free and independent government,... ." "All political power is inherent in the people. … and they have the right, at all times, to alter or reform the same, whenever the public good may require it."

Kentucky: "We, the people of the Commonwealth of Kentucky, … , do ordain and establish this Constitution." "All power is inherent in the people, … and they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper."

Michigan: "We, the people of the State of Michigan, … , do ordain and establish this constitution." … "All political power is inherent in the people."

New York: "We The People of the State of New York, DO ESTABLISH THIS CONSTITUTION."

Texas: "... the people of the State of Texas, do ordain and establish this Constitution." … "All political power is inherent in the people ... " … "they have at all times the inalienable right to alter, reform or abolish their

government in such manner as they may think expedient."

United States: "We the People of the United States … do ordain and establish this Constitution for the United States of America."

The Treaty of Paris of 1783 brought an end to the American Revolutionary War. All Americans ceased to be subjects of King George the Third, and became sovereign; here is Article 1 of the treaty:

> His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent states, that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof.[9]

Here are a few citations, mostly from court opinions:[10]

> The people of this state, as the successors of its former sovereign, are entitled to all the rights which formerly belonged to the king by his prerogative. Through the medium of their legislature they may exercise all the powers which previous to the revolution could have been exercised either by the king alone, or by him in conjunction with his parliament; subject only to those restrictions which have been imposed by the constitution of this state or of the United States. *Lansing v. Smith*, 4 Wend. 9, 20 (N.Y.) (1829)

> A consequence of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice. His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit and protection of the subject. -- Blackstone's Commentaries, Book 1, p. 270[11]

> If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former. There is reason to suspect that some of the difficulties which embarrass the present question, arise from inattention to differences which subsist between them.

> It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the sovereign, and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant derives all franchises, immunities and

9 See a summary at http://en.wikipedia.org/wiki/Treaty_of_Paris_(1783); see the actual text at http://www.law.ou.edu/ushistory/paris.shtml.

10 See http://famguardian.org/taxfreedom/CitesByTopic/sovereignty.htm for a large number of citations.

11 http://oll.libertyfund.org/title/2140

privileges; it is easy to perceive that such a sovereign could not be amenable to a Court of Justice, or subjected to judicial controul and actual constraint. It was of necessity, therefore, that suability became incompatible with such sovereignty. Besides, the Prince having all the Executive powers, the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued. **The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects ... and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.** [*Chisholm v. Georgia*, 2 Dall (U.S.) 419, 454 [p. 113] (1793)[12] emphasis added]

We of this mighty western Republic have to grapple with the dangers that spring from popular self-government tried on a scale incomparably vaster than ever before in the history of mankind, and from an abounding material prosperity greater also than anything which the world has hitherto seen.

As regards the first set of dangers, it behooves us to remember that men can never escape being governed. Either they must govern themselves or they must submit to being governed by others. If from lawlessness or fickleness, from folly or self-indulgence, they refuse to govern themselves then most assuredly in the end they will have to be governed from the outside. **They can prevent the need of government from without only by showing they possess the power of government from within. A sovereign cannot make excuses for his failures; a sovereign must accept the responsibility for the exercise of power that inheres in him; and where, as is true in our Republic, the people are sovereign, then the people must show a sober understanding and a sane and steadfast purpose if they are to preserve that orderly liberty upon which as a foundation every republic must rest.** [President Theodore Roosevelt; Opening of the Jamestown Exposition; Norfolk, VA, April 26, 1907; emphasis added]

In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967)

In the United States, sovereignty resides in the people, who act through the organs established by the Constitution. *Chisholm v. Georgia*, 2 Dall. 419, 471; *Penhallow v. Doane's Administrators*, 3 Dall. 54, 93; *McCulloch v. Maryland*, 4 Wheat. 316, 404, 405; *Yick Wo v. Hopkins*, 118 U.S. 356, 370. The Congress as the instrumentality of sovereignty is endowed with certain powers to be exerted on behalf of the people in the manner and with the effect the Constitution ordains. The Congress cannot invoke the sovereign power of the people to override their will as thus declared. *Perry v. United States,* 294 U.S. 330, 353 (1935)

"…a government which is founded by the people, who possess exclusively the sovereignty… ." … "In this great nation there is but one order, that of the people, whose power, by a peculiarly happy improvement of the representative principle, is transferred from them, without impairing in the

12 You can read most cited cases for yourself at scholar.google.com.

slightest degree their sovereignty, to bodies of their own creation, and to persons elected by themselves, in the full extent necessary for all the purposes of free, enlightened and efficient government. The whole system is elective, the complete sovereignty being in the people, and every officer in every department deriving his authority from and being responsible to them for his conduct." [James Monroe, Second Inaugural Speech March 5, 1821; http://bartleby.com/124/pres21.html]

Thomas Jefferson said:

"The constitutions of most of our states assert that all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent, (as in electing their functionaries executive and legislative, and deciding by a jury of themselves, both fact and law, in all judiciary cases in which any fact is involved) or they may ask by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person; freedom of religion; freedom of property; and freedom of the press."[13]

I shall notice one idea more in defence of the act, and only one. It is the appeal made in the preamble to the sovereign power of the state. I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found any where in our systems of government. The people possess, as it regards their governments, a revolutionary sovereign power; but so long as the governments remain which they have instituted, to establish justice and "to secure the enjoyment of the right of life, liberty and property, and of pursuing happiness;" sovereign power,?? or, which I take to be the same thing, power without limitation, is no where to be found in any branch or department of the government, either state or national; nor indeed in all of them put together. The constitution of the United States expressly forbids the passage of a bill of attainder, or *ex post facto law*, or the granting of any title of nobility, by the general or state governments. The same instrument likewise limits the powers of the general government to those expressly granted, and places many other restrictions upon the power of the state governments.--The constitutions of the different states likewise contain many prohibitions and limitations of power. The tenth article of our state constitution, consisting of twenty eight sections, is made up of restrictions and prohibitions upon legislative and judicial power, and concludes with the emphatic declaration, "that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void." These numerous limitations and restrictions prove, that the idea of sovereignty in government, was not tolerated by the wise founders of our systems. "Sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe, that the idea of sovereign power in the government of a republic, is incompatible with the existence and permanent foundation of civil liberty, and the rights of property. The history of man, in all ages, has shown the necessity of the strongest checks upon power, whether it be exercised by one man, a few or many. Our revolution broke up the foundations of sovereignty in government; and our written constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever. I can not, therefore, recognize the appeal to the sovereignty of the state, as a justification of the act in question. [*Gaines v. Buford*, 31 Ky. (1 Dana) 481, 501 (1883)]

13 Thomas Jefferson, letter to John Cartwright; June 5, 1824; "The Thomas Jefferson Papers," http://founders.archives.gov/documents/Jefferson/98-01-02-4313

But it is very common for the courts to refer to the states and united states as being sovereign (described in a later section), and cannot be sued without their consent. Still, we have seen that the people are sovereign, and a grand jury can nullify any act of their servants that they deem unjust.

4. POWERS OF A GRAND JURY

The following gives you an idea of the power of a grand jury. George Edwards, in his book *The Grand Jury*[14] (1906) said:

> That the grand jury is an irresponsible body is admitted and it is this want of responsibility which the opponents of the institution seize eagerly upon in their endeavor to show why the institution should be abolished. An American writer thus expresses his views: "The principal objection which can be urged against the grand jury, as now constituted, is the absolute personal irresponsibility of the individual juror attendant upon the performance of his duties. He is a law unto himself; no power can regulate him and no power can control him. He can be called before no earthly tribunal, except his own conscience, to account for his action. He can pursue an enemy for personal motives of revenge; he can favor a friend or political associate; he can advance and maintain before the jury by argument ideas that he would never father in any other place; he can shirk responsibility by voting to turn the guilty loose, pleading for mercy for the confessed criminal and the next moment cast his vote to indict the innocent, but friendless accused; ignoring in order to do so his oath and every distinction between hearsay and competent evidence. The state's attorney is powerless to protest against or prevent these insane antics upon the juror's part, and the court is as equally unable to prevent the denial of justice." Edwards, p. 40.

If you are dealing with a statutory crime, find the underlying principle, and see if the statute is in alignment with the natural laws enumerated below. Be sure the law goes no further than *necessary* to remedy the perceived harm. This is what makes this a free country.

If you are dealing with a crime that is not wrong, but merely prohibited (e.g., running a red light), determine if the facts of the case justify that there was harm or threat of harm to society. If there is no traffic, consider that there may be no justification for conviction. Note that under the common law, there are no prohibited acts (mala prohibita), only acts that are wrong as such (mala in se).[15]

It is the duty of the Common Law Grand Jury to expose all fraud and corruption whether it is in the political or judicial realm and stop it.

OATH OF GRAND JURORS

What is the difference between a group of 25, and a grand jury? The oath of office. "The oath of a grand juryman," says Judge Wilson, "is the commission under which he acts." The oath to be taken by the grand jury is as follows:

> "You do solemnly swear (or affirm), that you will diligently inquire and true presentment or indictment make of all matters and things that shall come to your knowledge. You will keep your own counsel, and that of your fellows, and of the government, and will not disclose the testimony of any witness examined before you, nor anything which you or any other grand juror may have said, nor the manner

14 A searchable version is at www.constitution.org/gje/gj_00.htm

15 Described in a later section.

in which you or any other grand juror may have voted on any matter before you, unless required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand jury room, in a criminal case, shall be under investigation. You shall present no person through malice, prejudice, hatred or ill will, nor leave any unpresented through fear, favor, love or affection, or for any reward or the promise or hope thereof, but you shall present things truly as they come to your knowledge, according to the best of your understanding. You shall protect and defend the constitution of the state and the United States, and apply the principles of natural law as informed by your conscience. You shall strictly adhere to the maxims that (1) every right when withheld must have a remedy, with a view to restitution; and (2) no law can go beyond what is necessary to remedy a perceived harm. So help you God."[16]

A grand juror asked what was meant by the words "diligently inquire," to which Chief Justice McKean replied, "The expression meant, diligently to inquire into the circumstances of the charge, the credibility of the witnesses who support it, and from the whole, to judge whether the person accused ought to be put upon his trial. For (he added) though it would be improper to determine the merits of the cause, it is incumbent upon the grand jury to satisfy their minds, by a diligent inquiry, that there is a probable ground for the accusation, before they give it their authority, and call upon the defendant to make a public defense." Edwards, p. 101

In his charge to the grand jury in the Circuit Court for the District of Maryland in 1836, Chief Justice Taney, of the United States Supreme Court, said, "But in our desire to bring the guilty to punishment, we must still take care to guard the innocent from injury; and every one is deemed to be innocent until the contrary appears by sufficient legal proof. You will, therefore, in every case that may come before you, carefully weigh the testimony, and present no one, unless in your deliberate judgment, the evidence before you is sufficient in the absence of any other proof, to justify the conviction of the party accused." Edwards, p. 102

Chief Justice Chase in the following language said: "You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offences may have come. Your authority and your duty go much further. You may and you should, summon before you, officers of the government, and others whom you may have reason to believe possess information proper for your action, and examine them fully." Edwards, p. 102.

DUTY OF THE GRAND JURY

If anyone's unalienable rights have been violated, or removed, without a legal sentence of their peers, from their lands, home, liberties or lawful right, we [the twenty-five] shall straightway restore them. And if a dispute shall arise concerning this matter it shall be settled according to the judgment of the twenty-five Grand Jurors, the sureties of the peace.[17] -- Magna Carta, 1215, ¶ 52.

16 This oath is a compilation of oaths from numerous states listed by George Edwards on p. 94.

17 The actual text of paragraph 52 reads: "If anyone shall have been disseized by us, or removed, without a legal sentence of his peers, from his lands, castles, liberties or lawful right, we shall straightway restore them to him. And if a dispute shall arise concerning this matter it shall be settled according to the judgment of the twenty-five barons who are mentioned below as sureties for the peace." https://www.1215.org/lawnotes/lawnotes/magna.htm

The grand jury is to apply justice, honor, and mercy, in resolving disputes. If there is doubt about proper procedure, remember that the people are sovereign, the sovereign is the lawmaker, and the lawmaker can make it up as it goes.

5. THE TRIAL JURY AND JURY NULLIFICATION

The jury is the highest authority in the land. When you are on a jury, you are the voice of government and can nullify any hostile or oppressive law. Your decisions cannot be second guessed. Know your rights as a trial juror; if the judge tells you that you are to decide the facts only, but he is to decide the law, he can then decide the outcome of the case. So ignore the judge and follow these jury instructions from the U.S. Supreme Court in 1794:

> We have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision. *Georgia v. Brailsford*, 3 US 1, 4 (1794).

If it was good enough for the Supreme Court in 1794, it is good enough for us today.

In *U.S. v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), the Appellate Court gave a comprehensive history of the jury power; a portion is given here:

> There has evolved in the Anglo-American system an undoubted jury prerogative-in-fact, derived from its power to bring in a general verdict of not guilty in a criminal case, that is not reversible by the court. The power of the courts to punish jurors for corrupt or incorrect verdicts, which persisted after the medieval system of attaint by another jury became obsolete, was repudiated in 1670... .
>
> The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. *Dougherty*, 1130. …

Today, the "settled" rule is that the judge is to judge the law, and the jury to judge the facts:

> The jury's role was respected as significant and wholesome, but it was not to be given instructions that articulated a right to do whatever it willed. The old rule survives today only as a singular relic. *Dougherty*, 1133.[18]

The fact is, a juror can judge the law *and the government*, as well as the facts. The people are sovereign, and the judges are the servants. As stated previously: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." And the public good may require it at trial; to insure the rightness of a law as applied to a particular case, the jury may veto that law.

If, to become a juror, the judge requires you take an oath to obey him, he is claiming your sovereignty; take the oath because you owe it to the defendant, but disobey it as an unlawful oath since "all political power is inherent in the people." He can give you his version of what he thinks the law is, but you should treat him like any other witness. If you disobey the judge and decide the law, there is no penalty because it is within your rights. Judge

18 This position is supported in *Bohanon v. Farmers Ins. of Columbus, Inc.*, Not Reported in N.E.2d (2005), 2005 -Ohio- 5399 p. 8, which cited *Hickman v. Jones*, 76 US 197, 201 (1870): "The jury should take the law as laid down by the court and give it full effect."

according to your conscience. That is your link to natural law.[19]

6. WHAT IS COMMON LAW?

> Definition. By the "common law" is meant that portion of the municipal law which does not rest for its authority upon any express act of the legislature, but is founded upon usage and custom. It is called the unwritten law, in contradistinction to the written or statute law.[20] [Footnote 8: "By the common law is meant those maxims, principles, and forms of judicial proceeding which have no written law to prescribe or warrant them, but which, founded on the laws of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and, by such incorporation, form a part of the municipal code of each state or nation which has emerged from the loose and erratic habits of savage government."]
>
> The common law in the United States consists, for the most part, of the common law of England, except in so far as it has been abolished by statute; but it also includes other laws. When our ancestors emigrated from England, they brought with them the common law as it then existed, except such parts as were inapplicable to their new state and condition. This became the common or unwritten law of the colonies settled by the English, and continued to be a part of their common law when they became states. It is still the common law in the various states, except in so far as it has been abolished or superseded by statute.[21]
>
> To what extent the common law is flexible. – I admire that principle of flexibility in the common law, which enables it to be adapted to the ever-varying condition of human society; and it is in that respect, unquestionably, altogether superior to to [sic] any written code. But I understand that flexibility to consist, not in the change of great and essential principles, but in the application of old principles to new cases, and in the modification of the rules flowing from them, to such cases as they arise; so as to presume the reason of the rules, and the spirit of the law. *Rensselaer Glass Factory v. Reid*, 5 Cow. 587, 628 (Court for Correction of Errors, NY 1825)

The term "common law" described the law held in common between the different circuits served by itinerant judges who traveled from town to town to dispense the King's justice. This common law superseded purely local customs.[22] The colonists brought the English common law to America, and claimed it as their birthright. It continued in full force up to the American Revolution, and was adopted by the thirteen states and the new American nation as a guarantee of freedom. Only those principles of the English common law as were applicable to our views of liberty and freedom were adopted as our own.

> A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by

19 More citations on the jury: http://www.fija.org/docs/JG_Jurors_Handbook.pdf. The jury in some states is secured the right to judge the law: http://www.fija.org/docs/JG_state_language_on_jury_nullification.pdf. *Jury Nullification: The Top Secret Constitutional Right,* James Joseph Duane http://www.constitution.org%2F2ll%2F2ndschol%2F131jur.pdf.

20 *A Treatise on the Law of Crimes*, Clark and Marshall (1900); p. 19. Download from books.google.com. Just reading the table of contents will give you an overview of the scope of the common law.

21 Ibid. p. 20.

22 http://en.wikipedia.org/wiki/Common_law. Also see: *A Concise History of the Common Law* – Theodore Frank Thomas Plucknett, (1956), Ch. 3, Section *ITINERANT JUSTICES*, p. 58. Free download from http://oll.libertyfund.org/title/2458/242623.

> the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. Bouvier's Law Dict., common law, p. 568 (1914 Ed.) [citations deleted]

The English common law took shape largely as a result of ecclesiastical scholars who brought to it well formed principles of natural law during the Twelfth and Thirteenth Centuries.[23] Thus, the common law is man's best conception, formulation, or approximation of natural law, but is itself not natural law. Natural law is unchanging like the laws of physics; common law evolved with time.

The common law embraces both civil and criminal actions.[24] There are eleven civil actions which fall under the categories of Tort or Contract:[25]

Tort

Trespass (injury committed with force)

Trespass on the Case (aka Case) (injury unaccompanied with force or which results indirectly from the act of the defendant; used where no other theory or Form of Action is available)

Trover (used to recover damages against one who has, without right, converted to his own use plaintiff's property)

Ejectment (used to regain the possession of real property)

Detinue (used to recover personal chattels from one who acquired them lawfully but retains them without right, plus damages)

Replevin (used to regain possession of personal chattels taken unlawfully, plus damages)

Contract

Debt (used to recover a sum certain or readily reduced to a certainty)

Covenant (used to recover damages for breach of covenant)

Account (used to recover for breach of fiduciary capacity)

Special Assumpsit (used for the breach of an express (but not implied) contract, oral or written)

General (Indebitatus) Assumpsit (used for the breach of a fictitious or implied contract or legal duty)

Criminal actions include murder, rape, robbery, receiving stolen goods, forgery, manslaughter, assault, battery, cheats, malicious mischief, mayhem, abortion, sodomy, kidnapping, false imprisonment, arson, larceny, burglary, treason, trespass, misconduct in public office, refusal to execute public office, escape, riot, unlawful assembly,

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23 Antieau, p. 186. Also see *Excellence of the Common Law,* Brent Winters, p. 281: “The early Roman Church took up the Greek's natural law theory and labeled it as Christian.” Also see § 4.4 (p. 338): Christianity and the Common Law.

24 “Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and, secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.” Blackstone's Commentaries on the Laws of England, Vol. 1, Book I, Chap. 1, p. 122 “Of the Absolute Rights of Individuals.” http://oll.libertyfund.org/title/2140/198653.

25 *Handbook of Common Law Pleading,* Koffler and Reppy, West Publ. Co. 1969, Summary of Contents.

breach of the peace, blasphemy, eavesdropping, conspiracy, bribery, and others.

The method of common law pleading has changed since the 1850s.[26] The trial of legal issues in the United States was subject to many defects, due largely to the fact that the entire English Procedural System had grown up in a patchwork fashion. It has been said that the great body of statutes are there to remedy the defects in the common law, in order to accommodate changing conditions. Efforts to reform the system of common law pleading produced the Federal Rules of Civil Procedure in 1938, and as a consequence modified the system of pleading as developed at common law, and in some jurisdictions totally swept it away in its entirety, so the Reformers thought, but subsequent events have cast grave doubts on this conclusion, as the stubborn fact is that common law pleading still survives as the basis of our modern remedial law.[27]

7. WHAT IS A STATUTE?

A statute is defined as:

> "A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state. ...
>
> This word is used to designate the written law in contradistinction to the unwritten law.
>
> … the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits, or prohibits anything is designated a statute, without considering from what source it arises."[28]

However, a *statute* is not the law, but is a written account of one application of the *common law* to a particular case; the common law is a legal principle and remains unwritten. The common law:

> ... is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from statute law. When it is spoken of as the *lex non scripta* [unwritten law], it is meant that it is law not written by authority of law. The Statutes are the expression of law in a written form, which form is essential to the statute. **The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten.** … It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence

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26 For pleading, see https://en.wikipedia.org/wiki/Pleading; https://en.wikipedia.org/wiki/Pleading_(United_States); and https://en.wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure

27 *Handbook of Common Law Pleading, Koffler and Reppy*, West Publ. Co. 1969, p. 3-4, note 15. "While the New Rules have abolished the distinctive Common-Law Forms, the essential and differentiating rules applicable to Pleading as established at Common Law still survive as a basis of Remedial Law."

28 Bouvier's Law Dictionary, 1914 Ed., p. 3129.

it is said that the rules of the common law are flexible.[29] [emphasis added]

William Hornblower considered the pros and cons of reducing the common law to statutory form:

> Unfortunately, however, statutory law is quite as uncertain as judge-made [common] law, nay, even more so. Experience shows that when rules of law are reduced to statutory form the work of interpretation and construction commences. Each word in the statute assumes importance and calls for enforcement. A "but" or an "and" becomes as important as the subject or the predicate of the sentence. In judge-made law this element of uncertainty is largely eliminated, since the opinion amplifies, reiterates in different form, illustrates and applies the principles enunciated. But in a statute, conciseness, exactness and precision are sought after, and each particle or preposition is as much the will of the Legislature and as binding upon the courts as are the nouns and the verbs.[30]
>
> … No greater fallacy is indulged in by the advocates of codification than that it will diminish litigation. Statutes brood litigation. Experience demonstrates this. Whatever other merits codification may have, the diminution of litigation is certainly not one of them. Hornblower p. 9.
>
> … The vast bulk of litigation arises not from doubt as to the principles, but from doubt as to the application of well settled principles to a particular state of facts, or from doubt as to whether one or another of two well-settled principles should govern, or from doubt whether some well-known exception to the general rule should not be allowed to operate in order to moot a new and peculiar condition of circumstances. And just here, where the work of actual litigation commences, a Code would fail us. It is impracticable without expanding the Code to an enormous and unwieldly bulk to give more than the general principles of the law. The application of those principles, and the choice between one principle and another as governing the particular case in hand, would still have to be wrought out by the courts, and the courts must go back to reported cases to guide them in this task, or be left to navigate an unknown sea without a chart to guide them. Hornblower p. 10.

He cited another problem with statutes:

> … Lawyers and litigants procure amendments to suit their own real or supposed interests; men with cranks and crotchets take their turn at amending the law, and instead of the "elasticity" of judge-made law, which is at least the result of honest and intelligent efforts to reach substantial justice, we have the "elasticity" of statutory law, which is the result of lobbying, influence, politics, or at the very best of chance or Imp-hazard blundering. Hornblower p. 13.

Blackstone noted that prudent statutes leave a person the entire master of his conduct, but protect the public good:

> So that laws, when prudently framed, are by no means subversive, but rather introductive, of liberty; for, as Mr. Locke has well observed, where there is no law there is no freedom. But then, on the other

29 Bouvier's Law Dictionary, 1914 Ed., *common law*, p. 564-565.

30 *Is Codification of the Law Expedient?: an address delivered before the American Social Science Association (Department of Jurisprudence) at Saratoga, N.Y., September 6, 1888*, William Hornblower, p. 9. www.constitution.org/cmt/hornblower/cod_law_over.pdf

> hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.[31]

Kent, an acclaimed writer on American law wrote:

> Statutes are likewise to be construed in reference to the principles of the common law ; for it is not to be presumed the legislature intended to make any innovation upon the common law further than the case absolutely required.[32]

8. HOW THE COMMON LAW IS DETERMINED

> For the most part, the common law is in fact unwritten law, —usage and tradition,—but there is abundant evidence of it in the reports of decisions, and in the writings of recognized authorities, like Coke, Hale, Hawkins, Foster, East, and others. The judges determine from such sources what the law is. What this law is, said Blackstone, is to be determined "by the judges in the several courts of justice. They are the depositaries of the laws, the living oracles, who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land. The knowledge of that law is derived from experience and study, * * * and from being long personally accustomed to the judicial decisions of their predecessors." "In coming to such decision," said Chief Justice Shaw, "judges are bound to resort to the best sources of instruction, such as the records of courts of justice, well-authenticated histories of trials, and books of reports, digests, and brief statements of such decisions, prepared by suitable persons, and the treatises of sages of the profession, whose works have an established reputation for correctness."
>
> In other words, it is the duty of the courts to determine what the established rules and customs of the common law are, and then to apply them to the facts of the particular case that may be before them for decision.[33]

The doctrines of the common law are being reduced to the statutory form for the following reasons:

First, when a moral principle of society evolves to a new level of understanding regarding natural rights, a statute will change the common law to reflect that new understanding. For example, under the common law, when a man and woman marry, they become one entity under the law: Mr. and Mrs. Smith. It was not possible for one to sue the other for larceny because the woman's property belonged to the man.

> (a) a wife could not own property separate from her husband; upon marriage, her property and possession became his, with the result that a husband could not steal the property of his wife since it was not the property of 'another', and (b) the unity of husband and wife which marriage created, with the result that neither spouse was a 'person' separate and apart from the other … .

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31 *Of the Absolute Rights of Individuals,* Sir William Blackstone, (1766), p. 5. Blackstone's Commentaries on the Laws of England was the book used by our Founding Fathers to educate themselves in the common law.

32 *An Abridgment of Kent's Commentaries on American Law*, Eben Francis Thompson, p. 95, 1886.

33 *A Treatise on the Law of Crimes,* Clark and Marshall (1900), p. 24-25. Download from books.google.com.

> By chapter 200 of the Laws of 1848 ..., a married woman was given the right to own and hold property in her own name and for her own use, as though unmarried.
>
> By chapter 172 of the Laws of 1862 ..., a married woman was given the right to sue and be sued with respect to her separate property, as though unmarried. *People v. Morton*, 284 AD 413, 414 - NY: Appellate Div., 2nd Dept., (1954).

A second reason for converting the common law to statute is to correct any misunderstanding or other problem with the common law.

Third, it is urged that the common law is incompatible with the Constitutional prohibition against ex post facto laws (Art.1 Sec. 9 Cl. 3 and Art. 1 Sec. 10, Cl. 2). You cannot write a law for the crime after it is committed, and a person cannot go anywhere to peruse the law, and does not know what the law is until the courts make a ruling.[34] However, during the development of the common law in the 13th century, most people could neither read nor write,[35] so we should not assume that the Constutution conflicts with itself when it asserts common law (7th Amendment). As Hornblower said:

> Judgemade law [i.e., common law], on the whole, tends to conform itself to the principles of common sense, right reason and justice. Statutory law, on the other hand, tends to become technical and arbitrary. A rule of law stated in statutory form becomes rigid and is more and more rigidified as time goes on.[36]

In ancient times, the jury judged the law according to their conscience; conscience is man's link to natural law and provides our sense of truth, right and wrong. With time, their decisions became the common law, and thus the natural law found its way into the common law.

Common law is like water that flows in innumerable paths to accommodate various needs and conditions. A statute freezes common law to a specific path or case; however, the common law has been secured by our constitutions and cannot be abolished, being the closest expression of natural law.[37] This places the responsibility upon the jury and grand jury to find and apply the underlying principle by using their conscience, their link to natural law, and challenge a statute if it is in conflict with natural law in a particular case (the jurors cannot be expected to know the common law), since the statute has no self-contained power of adaptation to cases not foreseen by legislators.

9. WHAT IS A CRIME?

"To be a crime, an act must be prohibited and made punishable by law, and it must be so, both at the time it is committed, and at the time it is punished. This prohibition is either by (a) the common or unwritten law, or (b) by

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34 As stated by Hornblower, supra, p. 5: "Another serious objection urged against judge-made law is that it is largely *ex post facto,* ... the Courts declare the law upon a given state of facts in an actual controversy after the parties have acted, instead of the law being declared in advance by the Legislature to meet future cases."

35 *A Concise History of the Common Law* – Theodore Frank Thomas Plucknett (1956), p. 214; download from http://oll.libertyfund.org/title/2458/242623

36 Hornblower, supra, p. 8.

37 All the states adopted the common law, except Louisiana which is a civil law state. In some states the common law has been abolished.

statute."[38]

CRIMES MALA IN SE AND MALA PROHIBITA

> Crimes are divided into those that are *mala in se*, or wrong in themselves, and those that are *mala prohibita*, or wrong merely because they are prohibited and punished by statute. Crimes *mala in se* include all common-law offenses, for the common law punishes no act that is not wrong in itself. They include, in addition to felonies, all breaches of the public peace or order, injuries to person or property, outrages upon public decency or good morals, and willful and corrupt breaches of official duty. Acts *mala prohibita* include any act forbidden by statute, but not otherwise wrong. This distinction has been criticized, but it is clear, and is often of the utmost importance.[39]

POLICE POWER

Definition: Police Power -- The power vested in the legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects. It is much easier to realize the instances and sources of this power than to mark its boundaries or prescribe limits to its exercise. The power to govern men and things, extending to the protection of the lives, limbs, health, comfort, and quiet of all persons and the protection of all property within the state. Bouvier's Law Dictionary, p. 2615. It is the application of the personal right or principle of self-preservation of the body politic. p. 2616.

The police power is the power that every state has to pass any law to protect the public morals, health, safety, peace, comfort, and general welfare of society, and protect our unalienable rights given by our Creator. To emphasize: The power is just when it *protects the rights of others*, *while minimally infringing upon preexisting rights.* Laws under the police power are generally mala prohibita, i.e., not wrong in themselves, but merely prohibited (or mandated). For example, traffic laws are mala prohibita; there is no natural consequence of running a red light when there is no traffic.

The police power is described by the courts as follows:

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.
>
> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial

38 *A Treatise on the Law of Crimes,* supra, p. 18.
39 *Treatise*, Ibid. p. 12-13.

use of property.

> "It extends ... to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." *Slaughter House Cases*, 16 Wall 36, 62 (1873).

> While it is for the legislature generally to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and the exercise of its discretion in this respect is not subject to review by the courts, a statute, to be upheld as an exercise of the police power, must have some relation to these ends. The rights of property cannot be invaded under the guise of a police regulation for the protection of health, etc., when it is manifest that such is not the object of the regulation. *A Treatise on the Law of Crimes,* Clark and Marshall 1900[40]

The prohibition of raw milk, compulsory use of seat belts, and numerous other laws have a rational basis in protecting individuals or society, but they are not necessary and proper, i.e., minimally intrusive upon liberties. Just because a police law promotes the general welfare, doesn't mean it is legitimate. A court gave an example of how an expert on healthy living could suggest good rules to follow; the temperature of the air, size of the rooms, the hours of sleeping, retiring, and rising, the amount and kind of food to eat, the number of meals, amount and kind of exercise,[41]

> ...and other things too numerous to mention might be suggested for legislative interference, each with a provision for a severe penalty for its violation, with a division of the penalty, perhaps, between the informer and the public, till one would be placed in such a straight-jacket, so to speak, that liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property, — those things commonly supposed to make a nation intelligent, progressive, prosperous and great, — would be largely impaired and in some cases destroyed. That such an extreme would be regulation run mad and is quite improbable, 'tis true, but it would be possible without limitations of some sort, if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort or convenience. *State v. Redmon*, 114 N.W. 137, 141 (1907).

The above case was qualified by the following case; the court ruled that a law requiring that bakeries not be more than five feet below ground level was a legitimate use of the police power:

> But individual cases cannot determine the necessity of a general law on the subject, nor indeed rule the question of classification. The question is whether in general the public health will be promoted by the rule, and not whether isolated cases do not need such a rule. If the rule be in the interest of the public health, it must be general and all within the class controlled by it. … In dealing with the subject under consideration, this court … said: "The reasons for a given statute are for the Legislature, if there are any which can fairly have weight. They are not for the courts. The latter have no control over the validity of a law, unless they can say with substantial certainty that no argument or consideration of

40 Download from books.google.com. Of special interest would be sections 8 and 14 on Abolition of the Common Law.
41 Add to this list, low-water toilets, non-incandescent light bulbs, vitamins and minerals ...

public policy exists which could have weight with any reasonable and honest man. If any such argument or reason can be suggested, its weight or sufficiency is not debatable in the courts." *Benz v. Kremer*, 125 N.W. 99, 102, 142 Wis. 1 (1910)

A dissenting opinion stated that bakeries five feet below ground level, though without sunlight and fresh air, could be made safe; it is "... entirely practicable to render such places reasonably suitable for such business." *Benz*, 104. Later we will see that all regulations under the police power can go no further than what is *necessary* to remedy a perceived harm. And, the law must *harmonize diverse interests* where possible. A jury should nullify a general law in particular cases as necessary.

10. WHAT IS NATURAL LAW?

Natural law is the law of cause and effect underlying all of creation, and is expressed in mathematics, physics, and chemistry etc., but in the current context natural law encompasses those laws underlying man's inherent nature and social behavior. Natural law is not man-made and can be said to be another phrase for the Will of God. It contains within it the punishment for its violation; thus natural law provides natural justice. All wrong actions produce suffering, and all right actions produce happiness. In this way, natural law provides a guidepost to teach what is right and wrong, and with time man's municipal law will reflect natural law.

Man made bodies of law such as common law, administrative law, admiralty,[42] and equity, must conform to natural law; and why must they conform? For the same reason you don't pour water into your gas tank, or drive nails with a screw driver. Actions contrary to nature create problems. You could even say that a gas engine has a right to gasoline, and a nail a right to a hammer. Man has a right to laws in accord with his God-given nature. The nature of the right determines the governing law, and laws contrary to nature are void to the extent of the violation. As stated by Blackstone: "[A]ll municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of, and auxiliary to, that law."[43]

The United States and Constitution were founded on a basis of natural law. The Declaration of Independence lists a few of the many natural rights possessed by man: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." But we have many more; the Bill of Rights of the U.S. Constitution enumerates many of them, and those not enumerated are reserved to the states and the people by the 9th and 10th Amendments.[44] What makes these rights unalienable is that they are God-given, and based upon mans inherent nature. Furthermore, these truths are "self-evident"; the "self" in the form of conscience is man's link to natural law that gives him the sense of what is right and wrong, without which justice would not be possible.

11. THE TRADITION OF NATURAL LAW

There are numerous scholars who have written about natural law over the last several thousand years. Chester

42 Admiralty: A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. … It extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters connecting them. Bouvier's Law Dictionary, 1914 Ed. p. 140-141.

43 *Commentaries on the Laws of England*, William Blackstone, Book 1 (1753), p. 254.

44 9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Antieau[45] listed hundreds of citations throughout the centuries from before Christ through the 20th century, of many writers who regularly claimed that rulers are subject to divine law, that subjects are not bound to obey rulers who act against the laws of God and are even bound to disobey, and all positive laws must conform to the laws of God and reason. These scholars include Xenophon, Socrates, Plato, Aristotle, Confucius, Mencius, Heracleitus of Ephesus, Cicero, Thomas Aquinas, Tertullian, Origen, Isadore of Seville, Gratian, and Locke. Their writings can be grouped into five categories.[46] Since natural law has been dormant since the early 1900s, a fair number of citations are provided to inform the reader:

1. Positive Laws (i.e. Statutes) Must be Just
   a) Aquinas wrote "[T]hat which is not just seems to be no law at all, wherefore the force of the law depends on the extent of its justice."... "If the subjects have a government … which commands unjust things, they have no obligation of obedience, unless perhaps incidentally, for the sake of avoiding scandal or danger."[47]
   b) Augustine wrote "That is not law, which is not just."[48]
   c) John Calvin, in 1536, asserted that men can and must disobey government when they deviate from God's laws.[49]
   d) Vindiciae Contra Tyrannos of 1573 said that "Every Christian must agree that his duty is to obey God rather than the king, in case the king commands anything against God's law … it is more than lawful; it is a positive duty."[50]
   e) William of Ockham (Occam) (1280 – 1349) said that "any civil law whatsoever which is repugnant to divine law or evident reason is not law" and should not be obeyed.[51]
   f) Ambrose (339 – 397 A.D.) said "In cases where a ruler orders what is contrary to divine law, passive resistance is permissible. ... Indeed, a conscientious man must sooner die than obey a command which he knows is wrong."[52]
2. Positive Laws Must Be Reasonable and Not Arbitrary
   a) John Adams wrote in 1774: "When kings, ministers, governors, or legislators . . . prostitute those powers for the purposes of oppression . . . they are no longer to be deemed magistrates vested with a second character, but become public enemies and ought to be resisted."[53]
   b) Cicero wrote that a positive law must be in agreement with "right reason" to be in accord with natural law. "Our laws must be based on rational principles." … "True law is right reason in agreement with nature."[54]
   c) John Locke wrote that "whenever the legislature endeavor … to reduce (the people) to slavery under

45 *The Higher Laws: Origins of Modern Constitutional Law,* Chester James Antieau, J.D., S.J.D., LL.D., Emeritus Professor of Constitutional Law at Georgetown University, William Hein & Co., Buffalo, New York, 1994. Citations to Antieau include the page of his book, followed by the citation of the original source.

46 These principles of natural law listed herein, and the work of Charles Antieau, have been taken from the book *The LAWFUL Remedy to Tyranny,* Richard Walbaum (2011) www.naturallawremedy.com.

47 Antieau, 24: Aquinas, Summa Theologica, Q. 91, Art. 1. Note: References to Antieau contain the page number of his book, followed by the citation he provides to the original source.

48 Antieau, 24: Augustine, On Free Will, Book 1, ch. v.

49 Antieau, 25: Calvin, Institutes of the Christian Religion, (1541) Book IV, ch. 20; J.W. Allen, op. cit. 55; G. P. Gooch, English Democratic Ideas in the Seventeenth Century (New York 1959) 5.

50 Antieau, 25: Quoted by Sabine, History of Political Theory (3rd ed., New York 1961) 380.

51 Antieau, p. 7.

52 Antieau, p. 4.

53 Antieau, 162: Charles F. Adams ed., Works of John Adams (Boston 1850-6) 1, 193.

54 Antieau, 50-51: The Republic, III, xxii, 33 (Keys trans., Harvard 1951).

arbitrary power, (the people) are thereupon absolved from any further obedience, and are left to the common refuge which God hath provided for all men against force and violence." … "By this breach of trust (the rulers) forfeit the power the people had put into their hands … and it devolves upon the people (to) provide for their own safety and security."[55]

d) Cicero, whose view on Natural Law was to become the enlightened guide for virtually all the jurists of the Middle Ages and the entire Western world, said that "the most foolish notion of all is the belief that everything is just which is found in the customs or laws of a nation." He stated his disdain for "the many deadly, the many pestilential statutes which nations put in force," and said: "These can no more deserve to be called laws than the rules a band of robbers might pass in their assembly."[56]

3. Positive Laws Must Be Enacted For and Serve the Common Good
   a) John Locke wrote in 1690 that "there are bounds which the law of God and nature have set to the legislative power … in all Forms of Government." Positive "laws ought to be designed for no other end ultimately but for the good of the People."[57]
   b) Augustine wrote: "To rule is nothing other than to serve the utility of others."[58]
   c) Epicurus stated that to satisfy higher law, positive enactments must have a practical utility, i.e, contribute to the common good.[59]
   d) Thomas Aquinas wrote that "if … a rulership aims, not at the common good of the multitude, but at the private good of the ruler, it will be an unjust and perverted rulership."[60] … "Any ruler" he said, commits "acts of violence rather than law" when he "lays on his subjects burdensome laws which do not pertain to the common good."[61] He added that if the law is not "ordained to the common welfare of men … it has no obligatory force."[62]
   e) The Reverend Samuel West in 1776 stated that whenever those who "pursue measures directly destructive of the public good … they forfeit their right to obedience from the subject, they become pests of society and the community is under the strongest obligation of duty to God and to its members, to resist and oppose them, which will be so far from resisting the order of God that it will be strictly obeying his commands."[63]
   f) Jonathan Mayhew (1720 – 1776) said "... when a king turns tyrant and makes his subjects his prey to devour and to destroy, we are bound to throw off our allegiance to him and to resist."[64]
4. Positive Laws Must Treat All Equally
   a) John Locke wrote that rulers must "have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough."[65]
   b) Samuel Adams wrote that "equal and impartial liberty, in matters spiritual and temporal, is a thing that all men are clearly entitled to by the eternal immutable laws of God."[66]
   c) Aquinas wrote that natural law is violated by positive laws "whose weight may be unequally distributed

55 Antieau, 27: Locke, Treatises of Government (1690) II, ch. XIX, § 222.
56 Antieau, p. 51.
57 Antieau, 29: Locke, Treatises on Government (1690) II, ch. xi, § 142.
58 Antieau, 29: Augustine, City of God, XIX, § 15 (Mod. Lib. ed., § 14)
59 Antieau, p. 50.
60 Antieau, 29: Aquinas, De Regimine Principum, Ch. I, § 10.
61 Antieau, 29: Aquinas, Summa Theological, Ia IIae, Q. 96, Art. 4.
62 Antieau, 29: Id., Q. p6, Art. 6.
63 Antieau, 30: Thornton, The Pulpit of the American Revolution (1st ed., Boston 1860) 283-4.
64 Antieau, p. 4.
65 Antieau, 31: Locke, Two Treatises of Governmet (1690) II, ch. XI, § 142.
66 Adams, Rights of the Colonists (1772), in Jensen ed., Tracts of the American Revolution 1763-1776 (Indianapolis 1967) 236.

throughout the community, even if they may be intended for the common good."[67]

d) Ambrose wrote that all men are equal under God's law.[68]

5. Litigation of Positive Laws Must Exercise Procedural Fairness
   a) The Supreme Court held that "[T]here are certain immutable principles of justice which inhere in the very idea of free government... . Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice." *Holden v. Hardy,* 169 U.S. 366, 389-390 (1898)
   b) Thomas Hobbes wrote "that no man may be judge or arbiter in (his) own cause."[69]
   c) According to Chester Antieau, all parties in litigation shall have an opportunity to be heard, which goes back in English law to the early part of the 17th Century.[70]
   d) Antieau also stated that distinguished Nigerian scholars have attested that "there is no doubt that [natural justice] has an antiquated origin in the theory of natural law,"[71] and has been an effective means in assuring procedural fairness in England and many other countries.[72]

NECESSITY AND THE PRESUMPTION OF LIBERTY

The **real genius** is in how these natural law principles were implemented in our system, by a *presumption of liberty* which obeys the following three rules:[73]

1) The law can go no further than *necessary* to remedy the perceived harm. Absent harm, there can be no law.[74]
2) The law must be tailored for minimal intrusion on individual liberties.
3) Where possible, the law must harmonize diverse interests.

With these rules, the result is: Absent harm, there can be no legislation, and the rights of individuals and society are protected. This makes us a free country, where the majority is forbidden from acting except out of necessity; rights yield only to necessity. Just because a police law promotes the general welfare, doesn't mean it is legitimate. A jury and grand jury can verify that a statute is in accord with these principles of natural law.

Here are some citations that exemplify the *presumption of liberty*:[75] In the first quote, think "raw milk," "food," and "marijuana":

1) [The court quoted another case:] "It has been demonstrated and satisfactorily explained in its application to

67 Antieau, 112: Aquinas, Commentary on the Sentences of Peter Lombard (1253-5) II, XLIV, ii. 2, ed. 1; Aquinas, Summa Theologica, Ia IIae, 2. 104, art. 6.

68 Antieau, 30: Ambrose, Ep. 37. 9.

69 Antieau, 173: Hobbs, De Cive (1651) (Lambrecht, New York 1949 ed.) 26.

70 Antieau, 174: Hucker, Immigration, Natural Justice and the Bill of Rights, 13 Osgoode Hall L. Rev. 649, 656 (1975).

71 Antieau, 172: Aihe and Oluyede, Cases & Materials on Constitutional Law in Nigeria (Oxford 1979) 94.

72 Antieau, 172: Jackson, Natural Justice (London 1973) 37. Citations for seven other countries are given.

73 *The LAWFUL Remedy to Tyranny*, Richard Walbaum, (2011), Sec. 48.

74 Compare "Absent harm there can be no law", with "Absent a victim there can be no crime; the state cannot be a victim" (contained in the National Liberty Alliance's Administrator vow).

State is defined: "A body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage, by the joint efforts of their combined strength." Bouviers Law Dictionary, 1914 Ed. p. 3120.

If the society (the state) cannot be a victim, this abolishes the police power to protect the public morals, health, safety, peace, comfort, and general welfare of society, and abolishes the principle of self-preservation of the body politic described below.

75 For a more thorough discussion, see *The LAWFUL Remedy to Tyranny*, Richard Walbaum, (2011), Sec. 51.

a sufficient number of parallel and similar cases, in order to lay it down as an invariable rule, that no trade can be subjected to police regulation of any kind unless its prosecution involves some harm or injury to the public or third persons, and in any case the regulation cannot extend beyond the evil which is to be restrained. … no trade can be prohibited altogether, unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons." *Marymont v. Banking Board*, 33 Nev. 333, 351 (Supreme Court of Nevada, 1910).

2) "[T]he constitutional right to use property without regulation is plain, unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity [that its reasonableness] depends. All, then, seems to be embraced in the question of necessity." *People v. Smith*, 66 N.W. 382, 383 (1896). [This is a good case on the principle of necessity.]
3) "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. … [T]he owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly." [Citing deleted] *Wolff Co. v. Industrial Court*, 262 U.S. 522, 534-535 (1922).
4) "The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power." [*State v. Redmon*, 114 N.W. 137, 142 (1907)]
5) "Our constitutions are founded upon individualism, and they make prominent the theory that to the individual should be granted all the rights consistent with public safety; and our development is chiefly attributable to the firm establishment and maintenance of those rights by an authorized resort to the courts for their protection against all hostile legislation which is not required by considerations of the public health or safety. In the absence of such considerations those rights are alike immutable; in their presence they must alike yield." *State v. Gravett*, 62 NE 325, 326 (1901).
6) "… [L]iberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property, -- those things commonly supposed to make a nation intelligent, progressive, prosperous and great, -- would be largely impaired and in some cases destroyed … , if a police law be conclusively legitimate merely because it promotes, however trifling in degree, public health, comfort or convenience." [*State v. Redmon*, 114 N.W. 137, 141 (1907)]
7) "Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."[76]

From the above it should be clear that government cannot protect you against your will. For example, government can regulate raw milk to the extent necessary to protect society from harm, but since it has been shown that some states are capable of regulating raw milk without harm, it follows that all states are capable, and prohibition is not lawful under the police power. Furthermore, you are not a ward of the state, and you may waive the protection of government by use of contract with the milk producer, in accord with the principle that government is by consent of the governed; in this way you can acquire raw milk, but any resulting illness is between you and the producer, and God or natural law, and you cannot resort to the statutes for a remedy.

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76 Blackstone's Commentaries on the Laws of England, Vol. 1, Book I, Chap. 1, p. 125 "Of the Absolute Rights of Individuals." http://oll.libertyfund.org/title/2140/198653

NECESSITY VERSUS CONSENT

The Declaration of Independence states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the **consent of the governed.**" It is not possible to achieve 100% consent in any large group, and therefore to be moral and just, the laws must go no further than necessary to remedy a perceived evil. Blackstone stated:

> "And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that considers a moment would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power, and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws **(and no farther)** as is necessary and expedient for the general advantage of the public." Blackstone, Book 1 Chapter 1, OF THE ABSOLUTE RIGHTS OF INDIVIDUALS. p. 125. Emphasis added.

Our rights were lost and our constitution was mostly abolished around the 1930s by three Supreme Court cases. The Court changed the rules in order to accommodate FDR's New Deal, which the Court was finding unconstitutional:

1. First, the presumption of liberty was lost in 1931. In the case of *O'Gorman v. Hartford,* 282 U.S. 251 (1931),[77] the Supreme Court replaced the presumption of liberty with the presumption of constitutionality which must prevail in the absence of some factual foundation of record for overthrowing the statute.

2. Second, the Supreme Court granted the power of general welfare to government in 1936 in the case of *U.S. v. Butler,* 297 U.S. 1 (1936), a power not seen for the first 145 years of this nation. This allowed government to tax and spend for anything it wanted, allowing government to buy votes from people who wanted to feed at the public trough. "... [T]he spending power 'is not limited by the direct grants of legislative power found in the Constitution.' " *Pace v. Bogalusa City School Bd.*, 403 F.3d 272, 278 (2005).

3. The Commerce Clause was expanded to include anything which *substantially affects interstate commerce,* in the case of *Wickard v. Filburn,* 317 U.S. 111 (1942), to give the federal government all powers previously reserved to the states under the 10th Amendment.[78] When asked, the Supreme Court was unable to articulate a single power reserved to the states [See *United States v. Lopez*, 514 U.S. 549, 584 (1995) for Justice Thomas's blistering dissent].[79]

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77 This was followed by Footnote Four of *United States v. Carolene Products Company,* 304 U.S. 144 (1938), which introduced the notion of "levels of scrutiny", and is considered to be "the most famous footnote in constitutional law." See http://en.wikipedia.org/wiki/Footnote_4#Footnote_Four

78 "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Wickard* at p. 124.

79 See *US v Myers*, 591 F.Supp.2d 1312, 1317 (2008) for a good and broad history and dissenting opinion.

The Supreme Court cannot abolish our rights by merely changing the rules. The grand jury has a right to reassert natural law.

12. EQUITY

Wikipedia provides a nice explanation distinguishing common law and equity.

> In modern practice, perhaps the most important distinction between law and equity is the set of remedies each offers. The most common civil remedy a court of law can award is monetary damages. Equity, however, enters injunctions or decrees directing someone either to act or to forbear from acting. Often, this form of relief is in practical terms more valuable to a litigant; for example, a plaintiff whose neighbor will not return his only milk cow, which had wandered onto the neighbor's property, may want that particular cow back, not just its monetary value. However, in general, **a litigant cannot obtain equitable relief unless there is "no adequate remedy at law"; that is, a court will not grant an injunction unless monetary damages are an insufficient remedy for the injury in question.**[80] [emphasis added]

Equity is a body of law that was created several hundred years after the common law, to introduce fairness when damages were an unsuitable remedy. If a judge's ruling was unfair, a person could appeal directly to the king who, as the sovereign, was the "fount of justice". The king began to delegate this function to his chancellors, and soon the Chancery, the king's secretarial department, began to resemble a judicial body known as the "Court of Chancery". Equity, as a body of rules, varied from chancellor to chancellor.

Today, a court of equity is bound by settled rules as completely as a court of common law. "There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles." Snell p. 4. "To indicate the distinction between equity and common law: "The systems of jurisprudence in our courts, both of law and equity, are *norv* [sic] equally artificial systems, founded on the same principles of justice and positive law; but varied by different usages in the *forms* or *modes of their proceedings.*"" Snell p. 5. The principles of common law are founded on reason and equity, and continued to be *lex non scripta* (unwritten law). But in the course of time, legal precedents forced the common law to be *lex scripta*, positive and inflexible, so the rule of right and justice could not accommodate itself to every case. They fell short of their judicial duties. A new tribunal based on principles of civil law arose, called the Court of Chancery. Snell p. 7. The most important maxims of equity: 1) Equity will not suffer a wrong without a remedy. 2) Equity follows the law. 3) Where there are equal equities, the first in time shall prevail. 4) Where there is equal equity the law must prevail. 5) He who seeks equity must do equity. 6) He who comes into equity must come with clean hands. 7) Equity aids the vigilant, not the indolent. 8) Equality is equity. 9) Equity looks to the intent rather than the form. 10) Equity looks on that as done which ought to be done. 11) Equity imputes an intention to fulfill an obligation.[81]

13. ADMINISTRATIVE LAW

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80 Wikipedia provides a nice explanation of the development and history of equity. https://en.wikipedia.org/wiki/Equity_(law)

81 *The Principles of Equity,* Snell and Griffith, 1872*;* download from books.google.com. This book provides the history and principles of equity, and the distinction from common law. p. 12.

Administrative law was *invented* around 1933, and its growth occurred in the ten or fifteen years following,[82] in order to regulate the new agencies of the New Deal.[83] It resulted from the inability of legislatures and courts to perform the increasing functions of government due to the increased growth of administrative agencies, the requirement of constant supervision by experts in complex areas, and the necessity of efficiency and flexibility. Administrative agencies have extensive investigative, rulemaking, and adjudicating powers. Administrative law combines in a single government agency legislative, executive, and judicial powers which have traditionally been kept separate in the American form of government. This creates legal problems regarding the maintenance of private rights, while at the same time providing for the efficiencies of the administrative process. Administrative law embodies concepts that are considered hostile to the common law, and controversies are controlled by statutory law instead of the principles of common law or equity. Once all administrative remedies are exhausted, a person is then entitled to judicial review.[84]

Administrative law is unconstitutional, and after 80 years, it is now being challenged.[85]

14. **JUSTICE**

> Definition of *Justice*: The constant and perpetual disposition to render every man his due. The conformity of our actions and our will to the law. … In the most extensive sense of the word, "justice" differs little from "virtue;" for it includes within itself the whole circle of virtues. Yet the common distinction between them is that that which, considered positively and in itself, is called "virtue," when considered relatively and with respect to others has the name of "justice." But "justice," being in itself a part of "virtue," is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought. [Bouvier's Law Dictionary, 1914 Ed. Vol. 2. p. 81]

The above definition is rather dense. The universe is governed by natural law, and natural law is just and follows the rule "as you sow, so shall you reap." If you love, you will be loved. If you hate, you will be hated. If you steal, you will be stolen from. Fill in the blank; you always get what you deserve, you never get away with anything, effects follow from causes, and reactions follow from actions. The universe cannot be deceived, a reaction will come.[86] While natural law always provides perfect justice in its own time, it is proper for government to punish the dense minded to protect society, to teach them that actions do have consequences, since the consequences provided by natural law are often delayed. And, if man provides the reaction, nature will not have to.

REMEDY FOR EVERY INJURY

William Blackstone stated:

> "In all other cases it is a general and indisputable rule, that where there is a legal right there is also a

82 1 Am Jur 2d - Administrative Law, Sec. 13.

83 *The LAWFUL Remedy to Tyranny,* Richard Walbaum, Sec. 9, www.NaturalLawRemedy.com.

84 *LAWFUL Remedy,* Sec. 28.

85 http://wallstreetonparade.com/2015/06/yesterdays-federal-court-decision-constitutional-tyranny-at-the-sec/

86 Bible, New International Version, Ecclesiastes 12: 13-14: "Fear God and keep his commandments, for this is the duty of all mankind. For God will bring every deed into judgment, including every hidden thing, whether it is good or evil." Also see *The Science of Being and Art of Living*, Maharishi Mahesh Yogi, Section titled "How to Make Full Use of Ones Surroundings".

legal remedy, by suit or action at law, whenever that right is invaded." Blackstone, p. 23.[87] "I am next to consider such injuries as are cognizable by the Courts of common law. And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals are, for that very reason, within the cognizance of the common law courts of justice. For it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." Blackstone, Id. p. 109.

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. *Marbury v. Madison*, 5 U.S. 137, 163 (1803)

RIGHT AND WRONG

Noah Webster, the Father of American Scholarship and Education, said:[88]

In my view, the Christian religion is the most important and one of the first things in which all children, under a free government ought to be instructed … No truth is more evident to my mind than that the Christian religion must be the basis of any government intended to secure the rights and privileges of a free people.

The moral principles and precepts contained in the Scriptures ought to form the basis of all of our civil constitutions and laws … All the miseries and evils which men suffer from vice, crime, ambition, injustice, oppression, slavery and war, proceed from their despising or neglecting the precepts contained in the Bible.

When you become entitled to exercise the right of voting for public officers, let it be impressed on your mind that God commands you to choose for rulers just men who will rule in the fear of God. The preservation of a republican government depends on the faithful discharge of this duty; if the citizens neglect their duty and place unprincipled men if office, the government will soon be corrupted; laws will be made not for the public good so much as for selfish or local purposes; corrupt or incompetent men will be appointed to execute the laws; the public revenues will be squandered on unworthy men; and the rights of the citizens will be violated or disregarded. If a republican government fails to secure public prosperity and happiness, it must be because the citizens neglect the Divine commands and elect bad men to make and administer the laws.

Maharishi Mahesh Yogi explains how one may distinguish right from wrong:[89]

Right is that which produces a good influence everywhere. Certainly right and wrong are relative terms and, therefore, nothing in relative existence can be said to be absolutely right or absolutely wrong. But even so, right and wrong can only be judged by their influence for good or bad. If something produces

87 http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-2
88 http://ringthebellsoffreedom.com/Quotes/nwebstercontent.htm
89 *The Science of Being and Art of Living*, Maharishi Mahesh Yogi, 1963. Ch. 10 - "Right and Wrong".

a good influence everywhere it can be said to be right.

The human intellect has no adequate criterion for right and wrong because reason is limited and the vision of the human mind is minute when compared to the vast and unlimited field of influence produced by an action in the whole universe. …

The authority of the scriptures is the supreme criterion of right and wrong in relative life. All that the scriptures say, when they are understood correctly, should be regarded as authoritative when considering right and wrong.

Since there are scriptures of many different religions, the question may arise as to which one should be the authority. Although the languages of the scriptures differ and there have been different exponents of the scriptures recording at different times in the long history of the world, the essential truth in all is the same. … The followers of any religion, therefore, will find a criterion for right and wrong in the correct understanding of their own scriptures.

Blackstone, in his Commentaries on the Laws of England, Vol.1 p. 42 (1753) said:

The doctrines [of divine Providence] thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity.

15. CONSTITUTIONAL RIGHTS SECURED AGAINST GOVERNMENT

In *Byars v. United States,* 273 US 28, 32 (1927), the court said:

...the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. United States*, 116 U.S. 616, 635; *Gouled v. United States*, 255 U.S. 298, 304. …

"... the plain spirit and purpose of the constitutional prohibitions [is] intended to secure the people against unauthorized official action. The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right. *Byars* p. 33-34.

In *Hoke vs. Henderson*, the Supreme Court of North Carolina said:

The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the legislature in the constitutions of the country; or is null, as being contrary to and inconsistent with the provisions of those instruments ... depends upon the comparison of the

intentions and will of the people as expressed in the constitution, as the fundamental law, unalterable except by the people themselves, with the intentions and will of the agents chosen under that instrument, to whom is confided the exercise of the powers therein delegated or not prohibited. Such agents are all public servants in this state; and the agency is necessarily subordinate to the superior authority of the constitution, which emanated directly from the whole people. ... But when the representatives pass an act upon a subject upon which the people have *8 said in the constitution, they shall not legislate at all, ... then it becomes the province of those who are to expound and enforce the laws, to determine which will, thus declared, is the law. ... [If] it be found that the act is without warrant in the constitution, and is inconsistent with the will of the people as there declared, the court cannot execute the act, but must obey the superior law, given by the people alike to their judicial and to their legislative agents. p. *7 ...

But *prima facie,* every act of the Legislature is within its authority, and is to be declared unconstitutional only in cases where no doubt exists. p. *10 ...

Those terms "law of the land" do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer, than to be "taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed; and be deprived of his property, his liberty and his life," without crime? … In reference to the infliction of punishment and divesting *16 of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words; and that the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land," for those purposes. Although in some instances the principle may have been misapplied, yet it seems, in every case in which it hath come into discussion, to be admitted to be a sound one, and the true import of the constitution. p. *15 … *Hoke vs. Henderson*, 4 Dev. 1; 15 N.C. 1 (Supreme Court N.C. 1833)

16. WAIVER OF PROTECTION OF GOVERNMENT

We have the right to perform and and every activity, but every right can be regulated under the police power to protect the public morals, health, safety, peace, comfort, and general welfare of society; and such regulation can go no further than *necessary* to remedy the perceived harm.

The state cannot protect you against your will. Some examples include the illegalization of certain forms of alternate cancer treatment; the banning of raw milk; and the use of herbs given by God.[90] In these cases where individual activity causes no harm to others, a person cannot be made a ward of the state without power to decide what is best for himself. Individuals must be able to consensually waive protections and rights which, if imposed, would compromise their God-given rights.

90 It can never be said that any herb created by God can be prohibited by the state, as that would place the state above God. But any herb shown to be harmful to society if improperly used can be regulated to the extent necessary. Thus, marijuana and hemp oil cannot be prohibited for medicinal use as they have been shown to be useful remedies for cancer etc.

The waiver of state protection may be done by contract. If the state will not allow the contract, the state is treating like you a ward of state, and disobedience is the proper course based upon the arbitrary or unreasonable nature of the law, and the lack of necessity of the law to protect society. The individuals involved can also be sued. Free men in a free society cannot be protected against their will. You may need to get all your customers under contract; you will be creating private law.

Waiver can also be done by posting *terms of use* on your website if you are providing "illegal" information such as cures to diseases. You give your readers notice that the information contained herein is available only to those willing to waive their right to the protection of government.[91]

17. UNITED STATES CODES

The following federal codes are some remedies of the people when rights are violated. The following are not citations, but summaries:

18 USC §2382: Misprision of treason Whoever having knowledge of treason, conceals and does not make known the same to some judge is guilty of treason for contempt against the sovereign and shall be fined under this title or imprisoned not more than seven years, or both.
18 USC §201: Bribery - of any public servant directly or indirectly gives, offers, or promises anything of value to any person to influence any official act.
18 USC §241: Conspiracy Against Rights: If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State in the free exercise or enjoyment of any right they shall be fined under this title or imprisoned not more than ten years, or both.
18 USC §242: Deprivation of Rights Under Color of Law: Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State the deprivation of any rights shall be fined under this title or imprisoned not more than one year, or both;
18 USC §2071: Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, documents filed or deposited with any clerk or officer of any court, shall be fined or imprisoned not more than three years, or both.
18 USC §2076: Clerk is to File: Whoever, being a clerk willfully refuses or neglects to make or forward any report, certificate, statement, or document as required by law, shall be fined under this title or imprisoned not more than one year, or both.

42 USC §1983: Civil Action for Deprivation of Rights: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.
42 USC §1985: Conspiracy to Interfere With Civil Rights: If two or more persons in any State or Territory conspire for the purpose of depriving, either directly or indirectly any persons rights the party so injured or deprived may have an action for the recovery of damages against any one or more of the conspirators.
42 USC §1986: Action for Neglect to Prevent: Every person who, having knowledge that any of the wrongs of

91 For a real example of how this is done, see www.Hidden-Cancer-Cures.com; read the first few paragraphs and the terms of use. The FTC attacked the website for making "illegal" cures for cancer, and after informing them of the terms of use, they disappeared, never to be heard from again. You can read their letter and the reply on the site.

§1985 conspired to be done or are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured.

To pursue an action against a state or state official, follow the Federal Practice Manual at http://www.federalpracticemanual.org. And read the section *Government Immunity to Suit* below.

18. ATTRIBUTES OF COURTS OF RECORD

The concept of "court of record" is important because it defines the role of the judge in a court at law, whether he can render a judgement, or just act as a manager. A "court of record" has four attributes, and may have a fifth:[92]

1) A judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it.

In a "court of record", the magistrate conducts the proceedings but does not make a ruling or judgment; that is the function of the jury, unless there is no jury.

2) Proceeding according to the course of common law.

The common law as described previously is the unwritten law which embodies principles of natural law.

3) Its acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony.

The proceedings may be transcribed by court reporter, or recorded electronically.

4) Has power to fine or imprison for contempt.

5) Generally possesses a seal.

A seal is an impression upon wax, wafer, or some other tenacious substance capable of being impressed. It does not seem necessary that an impression be made. Bouvier's Law Dictionary, 1914 Ed., "seal", p. 3019. ... "The word "seal" written or printed within a scroll is held to be a sufficient seal." p. 3020.

The purpose of the seal is to authenticate a document.

Definition of *at law*: This phrase is used to point out that a thing is to be done according to the course of the common law; it is distinguished from a proceeding in equity. 2. In many cases when there is no remedy at law, one will be afforded in equity. Bouvier's Law Dictionary, 1856 Ed.

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92 Courts of record [are] those whose acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony, and which have power to fine or imprison for contempt. … , and they generally possess a seal.
A "court of record" is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of common law, its acts and proceedings being enrolled for a perpetual memorial. Black's Law Dictionary on "Court", 4th Ed. p. 425-426.

19. SUPREMACY CLAUSE, AND NULLIFICATION

The U.S. Constitution is the supreme law of the land; the Supremacy Clause of the U.S. Constitutions states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Constitution, Art. 6

The U.S. Supreme Court said:

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

The federal government only has power that is specifically enumerated in the Constitution:

> The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them. *Turner v. Williams*, 194 U.S. 279, 295 (1904) [Separate opinion by Justice Brewer.] .

The Supreme Court does not have the final say on the Constitution's interpretation. When two or more parties enter into a contract, and there is no independent arbiter of the meaning of the contract, the parties themselves must decide the meaning when there is a conflict. As expressed by the legislature of Rhode Island in 1809:

> [T]he people of this State, as one of the parties to the Federal compact, have a right to express their sense of any violation of its provisions and that it is the duty of this General Assembly as the organ of their sentiments and the depository of their authority, to interpose for the purpose of protecting them from the ruinous inflictions of usurped and unconstitutional power.[93]

20. GOVERNMENT IMMUNITY TO SUIT

SOVEREIGN IMMUNITY

The principle of "sovereign immunity" means that the state is sovereign and cannot be sued without its permission. The reason is succinctly summarized in *Alden v. Maine*, 527 US 706, 735 (1999), "`[The King] can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor' "; … "[N]o feudal lord could be sued in his own court".[94]

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93 *State Documents on Federal Relations: The States and the United States,* ed. Herman V. Ames (New York: Longmans, Green, 1911), p. 43 (Book Volume I). Available from books.google.com.

94 *Alden* has extensive arguments; for an easier summary see *Defendini Collazo et al. v. E.L.A., Cotto*, 1993 JTS 119 (1993) [Sec. II. Historical Background, p. 3]. Or, read the headnotes at http://caselaw.findlaw.com/us-supreme-court/527/706.html.

There are good reasons for sovereign immunity. In 1882 the Supreme Court said:

> [I]t is essential to the common defense and general welfare, that the sovereign should not, without its consent, be dispossessed by judicial process of forts, arsenals, military posts, and ships of war necessary to guard the national existence against insurrection and invasion; of custom houses and revenue cutters, employed in the collection of the revenue; or of light-houses and light-ships, established for the security of commerce with foreign nations and among the different parts of the country. *United States v. Lee*, 106 US 196, 265 (1882).

The current law was summarized by the District Court in *Nickerson v. Texas*, 35 F.Supp.2d 512, 517 (1998): 1) The 11th Amendment[95] does not bar an action against a state officer to restrain unconstitutional conduct on his part. 2) Courts may grant prospective, injunctive and declaratory relief against state officers. 3) Congress did not intend to abrogate state sovereign immunity in 42 USC § 1983 claims. 4) The 11th Amendment does not bar suit in federal court against a state official for the purpose of obtaining an injunction against his enforcement of a state law alleged to be unconstitutional. 5) A suit to enjoin state officers from limiting production of oil wells is not a suit against the state. 6) A suit against a state officer does not violate principle of state immunity because it is not a suit against the state.

Notice that under the current doctrine, **you can sue your state or state employee in federal court for an injunction to prevent future violations, but you cannot sue your state for monetary damages unless your state has explicitly given its consent and waived its sovereign immunity;**[96] **and you can sue a state officer in federal court for monetary damages if that officer has violated state law, or acted outside his discretion.**[97] More on this later.

LEGAL THEORY OF STATE SOVEREIGN IMMUNITY

Investigating the question of state sovereign immunity will take you deep into a worm hole, and you will find only worms.[98] The Supreme Court in a recent case provided a comprehensive explanation of sovereign immunity and the 11th Amendment:

> As a consequence, we have looked to "history and experience, and the established order of things," rather than "[a]dhering to the mere letter" of the Eleventh Amendment, in determining the scope of the

95 11th Amendment: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

96 Check your state's Tort Claims Act to see if it waived immunity. For example, Iowa Code 669.4: 3. The immunity of the state from suit and liability is waived to the extent provided in this chapter. 2. The state shall be liable in respect to such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the state shall not be liable for interest prior to judgment or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the state were a private litigant.

97 However, an earlier U.S. Supreme Court stated: "when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, **but not one that awards retroactive monetary relief.**" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

98 To start with, the 11th Amendment by its language prevents a citizen of another state from suing a state, but it does not prevent a citizen of a state from suing his own state. Nevertheless, court opinions refer to 11th Amendment immunity against a citizen of his own state. This is a misnomer.

States' constitutional immunity from suit.

Following this approach, the Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment. In *Hans*, [*Hans v. Louisiana*, 134 U. S. 1 (1890)] the Court held that sovereign immunity barred a citizen from suing his own State under the federal-question head of jurisdiction. *Alden v. Maine*, 527 US 706, 727 (1999) [citations deleted]

These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. *Alden v. Maine*, 527 U.S. 706, 727 (1999).

… ("[W]e long have recognized that blind reliance upon the text of the Eleventh Amendment is ` "to strain the Constitution and the law to a construction never imagined or dreamed of"` "). *Alden* at 730.

The dissenting opinion in *Alden* is as long as the lengthy majority opinion. As stated by the dissent:

Blackstone[99] considered it "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 Blackstone *23. The generation of the Framers thought the principle so crucial that several States put it into their constitutions. And when Chief Justice Marshall asked about Marbury: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?," *Marbury v. Madison*, 1 Cranch 137, 162 (1803), the question was rhetorical, and the answer clear:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." *Alden* at 812.

The 11th Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

There is a maxim of law *Expressio Unius Est Exclusio Alterius* – The express mention of one thing implies the exclusion of another;[100] citizens of the same state was excluded by including citizens of another state or foreign state. The 11th Amendment, as interpreted by the Supreme Court, does not care whether a suit is prosecuted by a citizen from another state or a citizen of his state; the Court ignores the distinction given in the Amendment. The judicial power extends only with explicit consent of the state.

99 Blackstone wrote *Commentaries on the Laws of England*, a foundational treatise on the common law.
100 *A Selection of Legal Maxims*, Herbert Broom, Esq., p. 414, 1852. Download from books.google.com.

In his article *Hypocrisy of Alden V. Maine*,[101] Erwin Chemerinsky first quotes Justice Kennedy in *Alden*:

> "… [T]he scope of the States' immunity from suit is demarcated not by the text of the [11th] Amendment alone but by fundamental postulates implicit in the constitutional design."[102]

Mr. Chemerinsky counters:

> [T]here are serious problems with this argument. … The structure of the Constitution is almost exclusively about the federal government. The few provisions concerning state governments do not say or imply anything about sovereign immunity. … Second, Justice Kennedy's structural argument again ignores the Supremacy Clause.[103] A key structural aspect of the United States Constitution is its declaration that it, and laws and treaties made pursuant to it, is the supreme law of the land. How can the supremacy of federal law be assured and vindicated if states can violate the Constitution or federal laws and not be held accountable? … What, then, is the assurance that state governments will comply with federal law? Trust in the good faith of state governments? … The reality is that state governments, intentionally or unintentionally, at times will violate federal law. To rely on trust in the good faith of state governments is no assurance of the supremacy of federal law at all. … *Alden's* conclusion that state governments cannot be sued in state court without their consent cannot be justified based on the text, the Framers' intent, tradition, or the structure of the Constitution.

The question of who could sue the state was decided and enumerated by the 11th Amendment which did not bar citizens from suing their state. If the states and people wanted no one to sue the states, the 11th Amendment would have so stated. The Supreme Court does not write the law and cannot amend the Constitution. The Constitution is the supreme law of the land, not the Supreme Court which admits it is not following the Constitution; this voids the *Alden* ruling, for both the grand jury and the Supreme Court have taken an oath to uphold the Constitution.

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. *Norton v. Shelby County*, 118 US 425, 442 (1886).

The advice to the grand jury is this: Every wrong must have a remedy,[104] and if the state commits a tort, you should not allow it to claim immunity to avoid restitution. The grand jury and trial jury *are* the government, and should be alert to prevent such abuse. The people are sovereign, who in a republican form of government normally work through their representatives.

While the 5th Amendment due process clause gives the people protection against wrongs committed by the federal

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101 Erwin Chemerinsky,*The Hypocrisy of Alden v. Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court*, 33 Loy. L.A. L. Rev. 1283 (2000). Available at: http://digitalcommons.lmu.edu/llr/vol33/iss4/3

102 *Alden v. Maine*, 119 **S.** Ct. 2240, 2254 (1999) (citations omitted).

103 Article 6 Sec. 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. http://www.usconstitution.net/const.html

104 See the *Marbury v. Madison* quote cited in this sub-section.

government, that protection does not apply to state wrongs. The 14th Amendment[105] due process clause protects the people against wrongs committed by the states. This clause gave the people the power to sue a state or state employee for violating the federal right of due process; if the state violates its own laws, that is a violation of the federal right to due process.[106]

> In 1882, the U.S. Supreme Court in United States v. Lee, 106 U.S. 196, 205-209 (1882), seems to abandon its prior holdings and vigorously attacks the adoption of the sovereign immunity doctrine in the United States. The Court underscored the fact that the historical and philosophical foundations of the doctrine were at odds with the democratic system created by the Constitution. … Under our system the people, who are there [in England] called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch.

As stated in previous sections, the people are sovereign, who delegated a portion of that sovereignty to the state to act as their servants, not as their sovereigns. The Supreme Court of Kentucky said:

> I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found any where in our systems of government. … [S]overeign power,?? or, which I take to be the same thing, power without limitation, is no where to be found in any branch or department of the government. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 501 (1883)[107]

If the state is sovereign and cannot be sued for an unconstitutional act, this could arrest the execution of any law; but you can proceed against the state's *officers* in federal court for an unconstitutional act:

> '[A denial of jurisdiction] asserts that the agents of a state, alleging the authority of a law void in itself because repugnant to the constitution, may arrest the execution of any law in the United States.' *United States v. Lee*, 106 US 196, 214 (1882)

> 'Where the state is concerned, the state should be a made a party, if it can be done. That it cannot be done [due to sovereign immunity] is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record. *Lee*, p. 215. [108]

If an official acts outside of his authority or in an unconstitutional manner:[109]

> ...**[I]t has been established that sovereign immunity is no defense in suits against officers who allegedly act unconstitutionally or in excess of authority.** *City of Santa Clara, Cal. v. Kleppe*, 418 F. Supp. 1243, 1250 (Dist. Court, ND California 1976)

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105 The 14 Amendment of the U.S. Constitution states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

106 28 USC § 1652 requires that state laws be regarded as rules of decision.

107 Find the full quote in the section *Sovereignty of the People.*

108 For a history of sovereign immunity, see *Defendini Collazo et al v E.L.A., Cotto,* 1993 JTS 119 (1993) [Sec. II Historical Background], which recognizes disagreement with *US v. lee*.

109 For a history of immunity of public officials, see *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (1987), Sec. IV, p. 157.

In *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (1987), the court said:

> Thus, today the general rule in the federal courts, and a minority of states, is that a public official is absolutely immune from common law tort liability for any discretionary act done within the scope of the official's authority without regard to motive. In other words, immunity applies whether the allegedly tortious conduct was done maliciously, corruptly or in bad faith. Courts applying this rule have determined that the proper and effective administration of public affairs simply outweighs redress of the occasional wrong caused by an official during activity otherwise within the official's authority.
>
> Following the lead of the federal courts, state courts also began to recognize common law immunity for public officials. However, in sharp contrast to the federal courts, the overwhelming majority of states adopted a rule of qualified immunity. This rule remains the majority view among the states today.
>
> Under a rule of qualified immunity, a public official is shielded from liability only when discretionary acts within the scope of the official's authority are done in good faith and are not malicious or corrupt. In other words, "malice, bad faith or corrupt motive transforms an otherwise immune act into one from which liability may ensue." Courts applying this rule reason that:
>
> > qualified [immunity] is sufficient to protect the honest officer who tries to do his duty ... official immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power with which they are entrusted by the people; and that the burden and inconvenience to the officer of an inquiry into his motives is far outweighed by the possible evils of the deliberate misconduct. *Aspen*, p. 157 [citations deleted][110]

Another court confirmed:

> While the law of the subject in some respects is confusing, *Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947)*, the inapplicability of the doctrine [of sovereign immunity] to this case is relatively clear. Since *Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)*, it has been established that sovereign immunity is no defense in suits against officers who allegedly act unconstitutionally or in excess of authority. *Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1250 (1976) [numerous citations deleted.]

JUDICIAL IMMUNITY

An officer of the government has immunity from suit if he is exercising a judicial function. But if the officer's action is unconstitutional, or he acts outside of his authority, then he loses his immunity. He must act within his jurisdiction as to subject matter and person.

> … [T]he Supreme Court offered a non-exhaustive list … relevant to a determination of whether an official enjoys … immunity: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d)

110 See also *Weed v. Bachner Co. Inc.*, 230 P.3d 697 (2010) which comments on the *Aspen* case.

the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. *Keystone Redevelopment Partners, LLC v. Decker*, 631 F. 3d 89, 95 (Court of Appeals, 3rd Circuit 2011). [For a list of six "safeguards" mentioned above, see p. 97; for "adversary nature", p. 99].[111]

… Government officials who perform discretionary duties are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Keystone*, p. 107.

There is a general rule that a ministerial officer who acts wrongfully, although in good faith, is nevertheless liable in a civil action and cannot claim the immunity of the sovereign. *Cooper v. O'Connor*, 99 F.2d 135, 137 (Court of Appeals, Dist. of Columbia Circuit, 1938).[112]

We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 US 800, 818 (1982).

The Supreme Court said:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives. *U.S. v. Lee*, 106 U.S. 196, 220 (1882)

However, if the judge acts within his authority:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

We do not believe that this settled principle of law was abolished by [42 USC] § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative

111 For more examples see *Flying Dog Brewery, LLLP v. Michigan Liquor Control Com'n*, 597 Fed.Appx. 342 (2015).
112 See *Aspen Exploration Corp. v. Sheffield* in the previous sub-section.

record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held … that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

The common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to one. Their claim is rather that they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid. *Pierson v. Ray,* 386 US 547, 554-555, dissenting opinion, - Supreme Court 1967. [citations deleted]

In order to claim immunity from civil action for his acts, it is generally necessary that a judge be acting within his jurisdiction as to subject matter and person. *Davis v. Burris*, 51 Ariz. 220, 223 (1938)

For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. … Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. *Bradley v. Fisher*, 13 Wall. 335, 80 US 335 (1872)

MUNICIPAL IMMUNITY

A municipal corporation has no immunity if it violates the Federal Constitution:

"There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869) (hereinafter Shearman & Redfield). *Owen v. Independence,* 445 US 622, 640 (1980).

But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling v. Constantin*, 287 U. S. 378, 398 (1932): "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." *Owen* at p. 649.

> **The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.** [Emphasis added] Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. *Owen* at p. 651-652.

21. INCOME TAXATION

If the grand jury is involved in a case regarding income taxes, the book *Cracking the Code: The Fascinating Truth About Taxation in America* by Peter Hendrickson, is recommended. Mr. Hendrickson used keyword searching of the entire Internal Revenue Code, to discover what it really said. Read the home page at http://losthorizons.com/.

22. SUGGESTED READING

A Treatise on the Law of Crimes, Clark and Marshall (1900); download from books.google.com
The Principles of Equity, Snell and Griffith (1872); download from books.google.com
A Concise History of the Common Law – Theodore Frank Thomas Plucknett (1956); download from http://oll.libertyfund.org/title/2458/242623
Criminal Pleading and Practice, with Precedents of Indictments, and Special Pleas, James Bassett (1870) p. 18. download from books.google.com
Grand Jury Practice, Howard W. Goldstein (2005); read at books.google.com (can't be downloaded).
The Grand Jury, George J. Edwards Jr., (1906); download from http://www.constitution.org/gje/gj_00.htm
Cracking the Code, The Fascinating Truth About Taxation in America, Peter Hendrickson http://losthorizons.com
Blackstone's Commentaries on the Laws of England, Sir William Blackstone, (1766). This was the book used by our Founding Fathers to educate themselves in the common law. http://oll.libertyfund.org/title/2140/198653. Especially see the section *Of the Absolute Rights of Individuals.*

APPENDIX: FUNCTIONING OF THE GRAND JURY

As an inexperienced grand jury may not know how to proceed, here are some points of reference. Also, it would be good policy to follow the federal rules over grand juries so that an indictment is not quashed.

Notes from the case *United States v. Williams*

In *United States v. Williams,* 504 US 36, 47 (1992), the U.S. Supreme Court said [citations deleted]:

> Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such "supervisory" judicial authority exists... .
>
> "Rooted in long centuries of Anglo-American history," the grand jury is mentioned in the Bill of Rights,[113] but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "'is a constitutional fixture in its own right.'" In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. Although the grand jury normally operates, of course, in the

113 Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...".

courthouse and under judicial auspices, its institutional relationship with the judicial branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.

The grand jury's functional independence from the judicial branch is evident both in the scope of its power to investigate criminal wrongdoing, and in the manner in which that power is exercised. “Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.' ” It need not identify the offender it suspects, or even “the precise nature of the offense” it is investigating. The grand jury requires no authorization from its constituting court to initiate an investigation, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. It swears in its own witnesses, Fed.Rule Crim.Proc. 6(c), and deliberates in total secrecy.

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial privileges recognized by the common law (same with respect to privilege for confidential marital communications). Even in this setting, however, we have insisted that the grand jury remain “free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.” Recognizing this tradition of independence, we have said that the Fifth Amendment's “constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge* '. . . .”.

No doubt in view of the grand jury proceeding's status as other than a constituent element of a “criminal prosecutio[n],” U.S. Const., Amdt. VI, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. And although “the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee” against self-incrimination, our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination “is nevertheless valid.”

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *Calandra v. United States, supra,* [414 US 338 (1974)] a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of “the potential injury to the historic role and

functions of the grand jury." We declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules."

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings.

Notes from the book *Proving Federal Crimes*[114]

Chapter III: The Grand Jury and Immunity

Procedures

The Constitution requires that federal felonies be charged by grand jury indictment. U.S. Const. Amend. V. The grand jury may use its subpoena[115] powers to determine whether there is probable cause to believe a crime has been committed and that a particular individual or corporation committed it. Information gathered during the course of a grand jury's investigation is also a primary source of evidence which may be offered by the prosecution at trial. p. 3-1.

The powers of the grand jury are not defined in federal statutory law. The statutes authorize district courts to call grand juries, provide for the manner of such calling, define a quorum, and give the court the right to excuse or discharge grand jurors; but, the powers of the grand jury, a common-law institution, have been defined by the courts on a case-by-case basis. p. 3-1

But remember that the common-law grand jury is based upon the Magna Charta, and is effectively a fourth branch of government independent of the other three, and not controlled by the judicial branch.

Federal grand juries must consist of at least 16 and not more than 23 persons.

Thus, they are based on statute and not on the Magna Carta Sec. 61 because they do not follow the 25 juror requirement.

While the Second Circuit has taken the position that the absence of some grand jurors during the presentation of some of the evidence does not affect the validity of an indictment, at least one district court has taken the view that at least 12 jurors must be present at all sessions of the grand jury where evidence is heard. All grand jury proceedings, except deliberations or voting, must be recorded electronically or by stenographer. The attorney for the government is responsible for maintaining the recordings or the reporter's notes. No federal grand jury can indict without the concurrence of the attorney for the government. He must sign the indictment. p. 3-1

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114 *Proving Federal Crimes*, U.S. Department of Justice, James C. Cissell, 1980. Page numbers in the text refer to this document. Not all points from the book have been covered, and citations have been deleted. Also see *Federal Rules of Criminal Procedure* available online.

115 An order issued under the authority of a court, commanding a person to appear in court on a particular date, usually to give testimony in a legal case. TheFreeDictionary.com.

This would not apply in a grand jury presentment. A presentment is similar to an indictment, but it is initiated by the jury itself, not the prosecutor.

> A court cannot compel an attorney for the government to sign an indictment because in signing the indictment the attorney for the government is exercising a power belonging to the executive branch of the government. In *U.S. v. Mandujano*, 425 U.S 564 (1976),[116] the Supreme Court ruled that the sixth amendment right to counsel does not apply to grand jury appearances because criminal proceedings have not yet been instigated. However, a witness may leave the grand jury room to consult with counsel … subject to reasonable limitations. A witness has the right to object to the presence of unauthorized persons during his testimony. … p. 3-2

Supervisory Powers of District Court

> Although the grand jury must turn to the court for enforcement of its orders, it has an independent constitutional identity and is not subject to the courts' directions and orders with respect to the exercise of its essential functions. … A court may not interfere with the prosecutor's decision of what evidence to present to the grand jury and how to present it. p. 3-1 – 3-2.

Evidence Before Grand Jury

> If an indictment is valid on its face, it is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even evidence obtained in violation of the defendant's fifth amendment privilege against self-incrimination. A grand jury may return an indictment based partly or solely on hearsay evidence. p. 3-3. Use of hearsay evidence when non-hearsay testimony is readily available could invalidate an indictment … . An indictment may not be based solely on the informal unsworn hearsay testimony of the prosecutor. … p. 3-3

> Because the grand jury determines only probable cause, the prosecutor may be selective in deciding what evidence to present to the grand jury. There is no obligation to present all evidence that might be exculpatory [shows lack of guilt] or undermine the credibility of the government's witnesses. [citations deleted] … Some courts have made exceptions to the general rule that a prosecutor need not present exculpatory evidence to the grand jury in factual situations where fairness would dictate such a result. p. 3-3.

Calling and questioning of Witnesses and Warnings

> The grand jury's broad authority to subpoena witnesses is considered essential to its task and the Supreme Court has declined to make exceptions to the longstanding principle that "the public has a right to every man's evidence." A witness may not refuse to answer questions before a grand jury unless he can assert his fifth amendment privilege or establish that some other common-law privilege

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116 There are about a dozen cases that treat the *Mandujano* opinion negatively. This court also held:

> The Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury. "Our legal system provides methods for challenging the Government's right to ask questions - lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." p. 23.

Also see *Brenson v. Warden*, Slip Copy (2015)

applies. … p. 3-4.

The grand jury's right to inquire into possible offenses is generally "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." The only rule in the Federal Rules of Evidence that applies to grand jury proceedings is Rule 501 (privileges). See Rules 101 and 1101(c) and (d). ... p. 3-4

A witness may not refuse to respond to a subpoena or refuse to answer questions on the grounds of relevance, or because he feels that testifying may result in physical harm. A witness must respond to a grand jury subpoena even if his compliance results in hardship or inconvenience. … p. 3-4.

A potential defendant may properly be subpoenaed to appear before a grand jury that is investigating his activities. "It is in keeping with the grand jury's historic function as a shield against arbitrary accusations to call before it persons suspected of criminal activity, so that the investigation can be complete." However, a potential defendant does not have the right to appear before the grand jury. There is no duty of the prosectuiion to tell a grand jury witness what evidence it may have against him. … p. 3-4

Once an indictment has been returned, it is an abuse of process to call a defendant to testify concerning pending charges or to use the grand jury's subpoena power to gather other evidence for trial. However, despite the fact that a prosecution is pending, the government may call witnesses before the grand jury if the primary purpose of calling them is to investigate the possible commission of other offenses, even if the evidence received may also relate to the pending indictment. A grand jury should never be used to gather evidence for a civil case. p. 3-4.

A grand jury witness should be given fair opportunity to respond fully to questions and, whenever possible, should not be limited to the "yes" or "no" answers that typify responses to leading questions. ... Unnecessary, repetitious questioning designed to coax a witness into the commission of perjury or contempt of court is an abuse of the grand jury process. … And an indictment has been dismissed where a district court found that the prosecutor misled the potential defendant-witness into believing he could be compelled to answer without explaining his fifth amendment rights and the immunity procedure. p. 3-5

Subpoenas Duces Tecum[117]

The grand jury has the power to subpoena physical evidence in addition to testimony. It can subpoena voice exemplars and handwriting samples. It can summon a witness to appear in a lineup, and a district court may order reasonable physical force to compel a defiant grand jury witness to appear in a lineup. However, the majory of cases concerning subpoenas duces tecum involve requests by grand juries for documents. p. 3-7

Grand jury subpoenas are governed by Rule 17(c) of the Federal Rules of Criminal Procedure which provides that a court may quash or modify any subpoena duces tecum if compliance therewith would

117 A writ directing a person to appear in court and to bring some document described in the writ.

be unreasonable or oppressive (… a court may consider cost in determining whether a subpoena is unreasonable or oppressive). The party opposing enforcement of the subpoena bears the burden of showing that it is unreasonable or oppressive. The issue can be raised by the witness filing a motion to quash pursuant to Rule 17(c) or by the witness' refusal to comply, thereby forcing the government to move for enforcement. … p. 3-7 - 3-8

(1) the material sought must be relevant to the investigation being pursued (… have some conceivable relation to a legitimate object of grand jury inquiry); (2) the documents sought must be described with reasonable particularity; and (3) the subpoena must be limited to a reasonable period of time (… the statute of limitations may be used as a guide ...). p. 3-7 - 3-8

The records of a state are not immune from grand jury process because of any constitutional considerations of state sovereignty. p. 3-8

Secrecy of Proceedings and Disclosure

The Supreme Court has consistently held that the proper functioning of the grand jury system depends upon maintaining the secrecy of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule. p. 3-9

Rule 6(e)(2) of the Federal Rules of Criminal Procedure imposes an obligation to maintain the secrecy of matters occuring before the grand jury upon grand jurose, interpreters, stenographers, operators of recording devices, typists who transcribe testimony, attorneys for the government and government personnel authorized to assist attorneys for the government. p. 3-9

Rule 6(e) further defines four limited exceptions to the secrecy requirement: (1) disclosure to an attorney for the government in the performance of such attorney's duty; (2) disclosure to such government personnel as an attorney for the government deems necessary to assist such attorney in the enforcement of federal criminal law; (3) disclosure by a court preliminary to or in connection with a judicial proceeding; and (4) disclosure to a defendant who can demonstrate that matters occurring before the grand jury may be grounds for dismissing the indictment. p. 3-9

Rule 6(e) does not impose a secrecy obligation on witnesses; and it is improper for a prosecutor to instruct a witness that he must keep his knowledge of the proceedings confidential. However, a witness has no general right to a transcript of his testimony. p. 3-9

The phrase “matters occurring before the grand jury” is not limited to the testimony of witnesses, but also extends to internal memoranda that would reflect what transpired before the grand jury. As a

general rule, however, physical evidence, such as a document, does not become secret merely because it has been presented to a grand jury if it was created for purposes other than the grand jury investigation, and its disclosure "does not constitute disclosure of matters occurring before the grand jury." … Courts have similarly interpreted the phrase where private parties sought documents, subpoenaed by a grand jury, for use in civil litigation. A court order must be obtained to disclose documents or physical evidence subpoenaed by a grand jury if some form of privilege, such as the right of the owner to maintain the confidentiality of his records, would otherwise shield them from inspection. Third parties from whom documents were subpoenaed have a right to intervene at the stage of a Rule 16 discovery motion. Situations may also arise where disclosing documents may in fact reveal what transpired before the grand jury. An example would be a general request for "all documents collected or received in connection with the investigation of antitrust violations ….". p. 3-10

The *Stanford* court approved such disclosure orders [to state government servants] where the grand jury took the precautions of swearing in the state government personnel as agents of the grand jury, instructed them as to their duties, and cautioned them as to their secrecy obligations. p. 3-11

Reasoning that a witness is aware of his own testimony, courts have held that permitting a witness to review a transcript of his own testimony prior to trial is not a prohibited disclosure. It is improper, however, for one witness to disclose the grand jury testimony of one witness to another witness. *Bazzano* distinguishes prohibited verbatim disclousre from the acceptable practice in which a prosecutor states in general terms the evidence which other witnesses may give. p. 3-11

[Quoting a court opinion:] "a private party seeking to obtain grand jury transcripts must demonstrate that "without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." Moreover, the Court required that the showing of need for the transcripts be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discretely and limitedly." " p. 3-11

… the party seeking disclosure bears the burden of demonstrating that the public interest in disclosure outweighs the interest in secrecy... . More than a general need for discovery must be shown in order to tip the balance in favor of lifting the veil of secrecy... . p. 3-11

The Freedom of Information Act, 5 U.S.C. §552, does not create a right to obtain grand jury transcripts. p. 3-12

Immunity

The Organized Crime Control Act of 1970 added sections 6001–6005 to Title 18 of the United States Code … . The immunity granted under this provision is that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 18 U.S.C. §6002. p. 3-13

… the Supreme Court held that this limited grant of immunity by which testimony is compelled under threat of imprisonment is constitutional: "We conclude that the immunity provided by 18 U.S.C. §6002

leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege [agains self incrimination]. The immunity therefore is coextensive with the privilege and suffices to supplant it." p. 3-13

Once the witness has been granted immunity, he may not refuse to testify on the ground of the privilege against self-incrimination. p. 3-14

Procedures for Enforcement of Subpoenas and Orders Compelling Testimony

When a witness refuses to testify or to provide other information to a grand jury, the attorney for the government can ask the court for an order to show cause why the witness should not be held in comtempt. Rule 17(g) Fed. R. Crim. P. [Also see the Recalcitrant Witness Statute, 28 U.S.C. §1826 which should be tried first, before contempt under 18 U.S.C. §401 as applied by Rule 42 of Fed. R. Crim. P.] p. 3-16

A grand jury may also charge a violation of 18 U.S.C. §401.

Grand Jury Reports

In addition to its authority to indict or return a no true bill, a federal grand jury possesses a common law authority to issue a report that does not indict for a crime. [See 18 U.S.C. §3333 for procedures.] The subject matter of such reports is limited by that section to matters relating to organized crime conditions in the district or the noncriminal misconduct in office of appointed public officers or employees. The district judge who receives the grand jury's report may expunge portions of such a report and order that it be disseminated. Decisions to disseminate such reports are appealable by interested parties under the All Writs Act, 28 U.S.C. §1651; the standard of review is abuse of discretion. p. 3-18

Notes from the book *Criminal Pleading and Practice*

Section 9: How an indictment is found.

It has been stated that the indictment is a written accusation of a crime preferred to, and presented, that is found upon oath by a grand jury. The grand jury having been duly nominated and summoned, are on the opening of the court on the first day of term impaneled; the full number is twenty-three, but sixteen form a quorum, and are competent to act if such quorum be present; they are then sworn and charged on their duties by the court or State's attorney, a foreman is appointed by the court, and the grand jury thereupon proceed to consider presentments, having appointed one of their body as clerk.

The indictment or rather the accusation may be preferred by the State's attorney, any person aggrieved, or by a grand juror. The grand jury may, on being informed of the offense, proceed to take testimony, and this when taken, with a list of the witnesses' names, are handed to the State's attorney, who prepares the necessary indictment, and presents it to the foreman for final approval and indorsement—or the State's attorney may prepare it, indorse the witnesses' names thereon and present it to the

foreman; the witnesses are called in the order of their names as indorsed, who are sworn or affirmed by the foreman, and examined by the grand jury, but witnesses for the prosecution only are called; the grand jury have power to compel the attendance of witnesses. The grand jury then consider the case, if satisfied by good and sufficient evidence (one witness being sufficient, except in treason and perjury, where two are required,) that a crime or misdemeanor has been committed, and a quorum of the grand jury, that is sixteen being present, and if twelve of them concur, the bill is found a "true bill." If twelve do not concur, sixteen being present, it is "not a true bill." The foreman in the former case indorses on the back of the indictment "a true bill," and in the latter case "not a true bill;" he also indorses on the former the witnesses' names, and at foot of the indorsement signs his name as foreman, and in like manner the latter.

A bill may be presented to the grand jury on the information of two grand jurors, except in treason or perjury, when at least two witnesses to the same fact are necessary. In this case sixteen jurors must be present, and twelve of them must concur to find the bill; where the charge is preferred by two grand jurors, if one of them give the evidence and was sworn as a witness, and the evidence be sufiicient, the indictment may be found thereon, as in case of evidence by another witness not of the grand jury; as to this kind of indictment, the rule as to indorsement obtains, and the indorsement by the foreman above stated is essential.

This indorsement is essential to every indictment; it has been held, that an indictment is a nullity, unless indorsed "a true bill," and it be signed by the foreman. This indorsement and signature, it has been held, are the evidence of the finding of the jury; without them, the court should never permit an indictment to be entered on the record as a true bill, but the name of the foreman need not be copied into the record. The names of the witnesses must be indorsed on the indictment. It seems that the words "a true bill" may be printed, but at foot, the foreman must sign his name as foreman, or it is a nullity.

It is provided, that no bill of indictment for false imprisonment, or willful or malicious mischief, shall be found "a true bill" unless a prosecutor be indorsed thereon by the foreman of the grand jury, with consent of the prosecutor, except such indictment be found on the information and knowledge of two or more of the grand jury, or on the information of some public officer in the necessary discharge of his office; in which case, it shall be stated at the end of the indictment how the same was found, and then no prosecutor shall be required. In stating the name of the prosecutor, his usual name is sufficient, without stating his residence or addition; certainty to a common intent only is required in this respect.

When the indictment is thus found indorsed, whether as a true bill or not a true bill, and in the former case the State's attorney having signed the indictment at foot, it must be presented to the court. The foreman accompanied by the grand jury, comes into court, the court judicially sitting in *open court*. The clerk of the court calls their names; if sixteen be present, the court inquires if the grand jury have any presentments. The foreman then presents the indictment, or such indictments as have been passed upon, to the court, whether they be *true bills* or *not true bills*. The court enters them – that is, the true bills — on the record, and fixes the amount of bail, in bailable cases, stating it on the record. It is the duty of the clerk of the court to docket and file them. The record of the court must show the fact, that the grand jury returned the indictment into open court, as a "true bill," though the indictment itself be indorsed "a true bill," and though the foreman's name be indorsed thereon. It is error to put the

defendant on his trial on an indictment, unless it is so returned in open court, and the only evidence of the fact must be found in the record itself of the case; the indorsement on the back of the indictment is not evidence.

We have seen, that the grand jury can only hear evidence for the prosecution, but they may require the same evidence, written or parol, as may be necessary to support the indictment at the trial. Generally the grand jury is not very strict as to documents, yet, it is better to have ready the same evidence intended to be used at the trial. The grand jury being at liberty to find the indictment on their own knowledge, an improper mode of swearing the witnesses before the grand jury will not vitiate the indictment.

It may be proper to state, that if an indictment be thrown out, it can be again preferred to the same grand jury, during the same term, it may be preferred and found at the next term, by another grand jury, if no time be limited for preferring it, or if the time limited has not elapsed.

Section 10. When an indictment will be quashed.

The proper time for motions to quash an indictment is before trial. In former parts of this chapter, several special grounds for quashing an indictment are stated; in addition, we may state, that where the indictment is so defective, that no judgment can be given on it, even should the defendant be convicted, the court will, on application, quash it. So also, where all the allegations can be admitted without necessarily showing the defendant to be guilty, it is bad, and will be quashed. There are several cases where indictments have been quashed, because the facts stated did not amount to an offense punishable by law; for instance, where an indictment for contemptuous words spoken to a justice of the peace, did not state that they were spoken to him while executing his ofiice.

Where the alleged defect was, that the indictment did not conclude *contra formam statuti*, the court refused to quash. The court will quash an indictment, where the recovery can only be had on a statutory offense, and there is no statute creating the offense, if it concludes contrary to the statute. If any of the words used in the statute to characterize the offense are omitted, it is good ground to quash.

Section 11. Indictment, when and where tried.

Felonies are generally tried at the same term as the indictment is preferred, and found by the grand jury, if the defendant be in custody, or on bail. The prosecution may have it postponed to the next term; so may the defendant, on sufficient cause shown by affidavit, as the absence of a material witness, or a prejudice on part of the judge, jury, or the like, when a change of the venue for trial is ordered. When such application is made by the defendant the court remands him to custody, if the offense is not bailable; when bailable, he is admitted to bail. Misdemeanors follow the same course. Felonies and misdemeanors are tried within the jurisdiction where the offense is committed, or in which the statute lays the venue, and before the court in which the indictment is preferred—this is the general rule. Where, by order of the court, the venue for trial is changed, the offense is tried in the county to which it is changed, and by the Circuit Court of such latter county.

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