JURY NULLIFICATION: EMPOWERING THE JURY AS THE FOURTH BRANCH OF GOVERNMENT

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Of all the great trials in history tried at Old Bailey in London only one is commemorated by a plaque. Located near Courtroom Number Five it reads:

> "Near this site William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Gracechurch Street.
>
> This tablet commemorates the courage and endurance of the Jury, Thomas Vere, Edward Bushell and ten others, who refused to give a verdict against them although they were locked up without food for two nights and were fined for their final verdict of Not Guilty.
>
> The case of these jurymen was reviewed on a writ of Habeas Corpus and Chief Justice Vaughan delivered the opinion of the court which established the Right of Juries to give their Verdict according to their conviction."

The case commemorated is *Bushell's Case*, 6 Howell's State Trials 999 (1670). This case is a good beginning for tracing the roots of a legal doctrine known as jury nullification.

The year was 1670 and the case Bushell sat on was that of William Penn and William Mead, both Quakers, who were on trial for preaching an unlawful religion to an unlawful assembly in violation of the Conventicle Act. This was an elaborate act which made the Church of England the only legal church. The facts clearly showed that the defendants had violated the Act by preaching a Quaker sermon. And yet the jury acquitted them against the judge's instruction. The Conventicle Act was nullified by the jury's not guilty verdict and the infuriated judge fined the jurors and jailed them until such time as their fines should be paid.

Edward Bushell and three others refused to pay the fines. As a consequence they were imprisoned for nine weeks and Bushell filed a writ of habeas corpus. He and the other recalcitrant jurors prevailed in the Court of Common Pleas, and the practice of punishing juries for verdicts unacceptable to the courts was abolished. Thus was re-established the right of jury nullification, an ancient right expressed in Magna Carta and dating from Greek and Roman times. And the jury's nullification verdict in this case, the trial of William Penn, established freedom of religion, freedom of speech, and the right to peacefully assemble. These rights became part of the English Bill of Rights, and later, part of the First Amendment to the United States Constitution. The man whom the courageous jurors had saved, William Penn, later founded Pennsylvania and the city of

Philadelphia in which the Declaration of Independence and the United States Constitution were written.

DEFINITION

According to the doctrine of jury nullification, jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences. As abolitionist lawyer Lysander Spooner explained the doctrine in *Trial By Jury* in 1852, page one:

> "For more than six hundred years - that is, since Magna Carta, in 1215 - there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws."

HISTORY OF JURY NULLIFICATION

News of the rule in *Bushell's Case* traveled across the seas and had a profound impact in the New World.

In 1735 in the colony of New York, John Peter Zenger, publisher of the New York Weekly Journal, was tried for seditious libel for printing articles exposing the corruption of the royal governor. This is perhaps the most important trial in American history because the jury in this case established the rights of freedom of speech and of the press in America by nullifying the seditious libel law which made it a crime to criticize public officials regardless of whether the criticism was true. The *Zenger* case has been cited by newspapers and history books across the land as the 'great case' which laid the foundation for freedom of the press in the First Amendment to the United States Constitution. Although this case is often referred to, the substance or hinge upon which the case turned, jury nullification, is less well known.

Andrew Hamilton, Zenger's attorney, argued jury nullification directly to the jury and gave his opinion of the law to the jury in direct opposition to the instruction of the trial judge. The *Zenger* case, and the jury's nullification of the law in that case, established freedom of the press and was within living memory of some of the Founding Fathers and within common knowledge of all of them.

After *Zenger*, American colonial common law gave the major role in law to the jury. For example, judges in Rhode Island held office "not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see

that the parties had a fair chance with the jury." Similar practices were followed in other New England colonies. See Eaton, *The Development of the Judicial System in Rhode Island*, 14 Yale Law Journal 148, 153 (1905) as quoted in Howe, *Juries As Judges Of Criminal Law*, 52 Harvard Law Review 582, 591 (1939).

The Navigation Acts and the Declaration Of Independence

The Declaration of Independence, America's birth certificate, lists the reasons compelling us to separate from England. One of the reasons listed against the King and Parliament is - "For depriving us in many cases of the benefits of Trial by Jury." There is an important story here.

To raise taxes Parliament had passed the Navigation Acts requiring all trade with the colonies to be routed through England so that England could collect duties. Smugglers, such as John Hancock and other Founders, defied the Navigation Acts and brought tax-free goods into the colonies. The colonists viewed the smugglers as heroes so that when the British Navy captured smugglers and they were tried before colonial juries, the jurors acquitted the smugglers and their ships were returned to them. Thus, colonial juries nullified the Navigation Acts. In response, the King abolished trial by jury in smuggling cases and established vice-admiralty courts to hear smuggling cases without juries. See Scheflin, *Jury Nullification: The Right To Say No*, 45 Southern California Law Review 168, 174 (1972). The colonists were so incensed at having their right to trial by jury, and their right to jury nullification, taken away from them that they listed this as one of the reasons in the Declaration of Independence for separation from England. The American Revolution was fought, in part, to preserve the right of jury nullification.

The Constitution

The Founders view of the jury as being of paramount importance in defending liberty is easily seen when examining the words of the Constitution. There are only 14 words describing freedom of speech and of the press in the Constitution. But there are 186 words describing trial by jury in the Constitution. It is guaranteed in the main body in Article 3, Section 2, Paragraph 3, and in two amendments, the Sixth and the Seventh. No other right is mentioned so frequently, three times, or has as many words devoted to it. It is plain that the Founders viewed the jury trial right as the most important right since it gave birth to, and defended, all other rights. It should also be noted that trial by jury and jury nullification were common law rights at the time of the drafting of the Constitution and so are also included as rights retained by the people under the Ninth Amendment.

For anyone to assert after *Zenger*, the Navigation Act cases, the Declaration of Independence, and the great volume of language about the jury in the Constitution that the Founders would intend the jury to be a mere factfinder that must blindly follow the law as dictated by a judge is to fly directly in the face of logic and history. It is also to fly directly against the explicit words of the Founders about the jury's role.

"I consider trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution."

Thomas Jefferson, drafter of the Declaration of Independence and Third President, in a letter to Thomas Paine, 1789, *The Papers of Thomas Jefferson*, Vol. 15, p. 269, Princeton University Press, 1958

"It is not only his right [the juror's], but his duty ... to find the verdict according to his own best understanding, judgment, and conscience even though in direct opposition to the direction of the court."

John Adams, first proponent of the Declaration of Independence and Second President, 1771
2 *Life And Works of John Adams* 253-255 (C.F. Adams ed. 1856)

"You [the jurors] have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."

John Jay, first Chief Justice of the United States Supreme Court, charging the jury in *Georgia v. Brailsford*, 3 Dallas 1, 4 (U.S. 1794)

"That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, is intrusted with the power of deciding both law and fact."

Alexander Hamilton, first Secretary of the Treasury
People v. Croswell, 3 Johns Cas. 361, 362 (1804)
as reprinted in *Sparf and Hansen v. United States*, 156 U.S. at 147-148, dissenting opinion, (1895)

Arguing Nullification to the Jury

In the *Zenger* case, defense attorney Andrew Hamilton argued to the jury in contradiction of the judge that truth is or should be a defense to a charge of seditious libel, that the jury has the power and right to judge the law, that the jury should take as the strongest evidence for Zenger the fact that Zenger's proposed evidence of truth had been suppressed by the judge, and that *Bushell's Case* established the right of the jury to vote its conscience.

"The right of the Jury, to find such a verdict as they in their conscience do think is agreeable to their evidence, is supported by the authority of Bushell's case."

defense attorney Andrew Hamilton, arguing to the jury

A Brief Narrative Of The Case And Trial Of John Peter Zenger, J.P. Zenger, 1736, pp. 39, 40

And further:

> "... it is established for law, That the Judges, how great soever they be, have no right to fine, imprison or punish a Jury for not finding a verdict according to the direction of the Court. And this I hope is sufficient to prove, that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects."
>
> Andrew Hamilton, arguing to the jury, ibid. at 41

The trial judge gave the jury opposite instructions on all these issues, including the instruction that truth is no defense in a seditious libel case. The judge had even suppressed the evidence of the truth of the accusations against the royal governor published in the defendant's New York Weekly Journal. Andrew Hamilton vigorously argued to the jury against this suppression of the evidence.

> "And as we are denied the liberty of giving evidence, to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, That the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you."
>
> Andrew Hamilton, arguing to the jury, ibid. at 27, 28

The jury deliberated for fifteen minutes before returning with a verdict of acquittal.

Zenger illustrates that the real power of the doctrine of jury nullification, lies not in a monotone instruction from the judge buried in a mountain of other instructions, but in forceful argument to the jury by the parties. Andrew Hamilton made jury nullification the central theme of the *Zenger* trial and the jury could not deliberate without dealing with it.

Likewise, the proposed jury nullification amendment in Washington State, HJR 4205, contains nothing about a judicial instruction on nullification but instead insures to the defendant the right to argue nullification to the jury and forbids any jury selection practice that would exclude jurors who have expressed a willingness to use their power of nullification. HJR 4205 will insure a true trial by a jury of one's peers who are a fair cross section of the community by making the jury more representative of the community. The main challenge to jurors for cause, challenging jurors who are opposed to the law at issue, will be abolished by HJR 4205 and the jury will be more representative of the general community with its varied views on the laws.

An Embargo Act case in the early Republic argued by Samuel Dexter in Massachusetts in 1808 also illustrates the power of arguing nullification as the persuasive

way for the jury to consider it. England and France were at war and Congress had passed the Embargo Act forbidding American ships from trading with either of the combatants in an attempt to keep us out of war. Dexter argued to the jury that the Embargo Act passed by Congress was unconstitutional while the judge instructed the jury in opposite fashion that the Act was constitutional. The judge even threatened Dexter with contempt if he continued his nullification argument. Dexter stood his ground, continued his nullification argument and the jury acquitted.

> "Judge Davis, of the federal district court, had instructed the jury that the law was constitutional. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the Bench. At length, Judge Davis, under some excitement, and after repeated admonitions, said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it his duty to commit him for contempt of Court. A solemn pause ensued, and all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The judge assented ... On the following morning ... Mr. Dexter arose, and facing the Bench, commenced his remarks by stating that he had slept poorly and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday ... No man cherished a higher respect for the legitimate authority of those tribunals before which he was called to practice his profession; but he entertained no less respect for his moral obligations to his client ... He had arrived at the clear conviction that it was his duty to argue the constitutional question to the jury ..., and that he should proceed to do so, regardless of any consequences. Dexter made his argument and secured an acquittal despite the very obvious fact that the defendant had violated the terms of the statute."
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> *Reminiscences of Samuel Dexter* (1857) pp. 60-61
> as quoted in Howe, *Juries As Judges of Criminal Law*,
> 52 Harvard Law Review 582, 606 (1939) and in Scheflin,
> *Jury Nullification: The Right To Say No*, 45 Southern
> California Law Review 168, 176 (1972)

In the early Republic a prominent judge was impeached for stopping attorneys from arguing nullification. So important was the right of jury nullification in the early Republic that Supreme Court Justice Samuel Chase was impeached by the House of Representatives in 1804 for "open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people." Justice Chase was accused of stopping attorneys from arguing the unconstitutionality of the Alien and Sedition Acts to the jury. See Third and Fourth Articles of Impeachment from *Report of the Trial of the Honorable Samuel Chase* (Evans ed. 1805) 16, appendix at 4 and 12, and see Howe, *Juries As Judges of Criminal Law*, 52 Harvard Law Review 582, 588 n. 20 (1939). Justice Chase defended himself by appending to his answer to the charges a case, the trial of John Fries, where he had instructed the jury that they were to judge both law and fact. See *Case of Fries*, 9 F. Cas. 924 (No. 5127) (C.C.D. Pa. 1800) and see Scheflin, *Jury Nullification: The Right To Say No*, 45 Southern California Law Review 168, 176 (1972).

Judicial Attempts to Control the Jury

As the Revolution and the Founders receded into history, judges began trying to limit the power of the jury in order to control the outcome of verdicts. In *United States v. Battiste*, 24 F. Cas. 1042 (No. 14, 545) (C.C.D. Mass. 1835), in the trial of a sailor who had served on a slave ship, Justice Story conceded the power of the jury to nullify his instructions but denied their moral right to do so. Justice Story had ruled as a matter of law that a statute imposing the death penalty for enslaving black people should not apply to mere sailors and he wanted the jury to follow his instruction. It should be noted that under modern rules of procedure jury nullification can work only in the direction of mercy so that Justice Story's concern in *Battiste* is avoided.

In 1850 Congress passed the Fugitive Slave Act making it a crime for anyone to help a fugitive slave. In one of the cases tried under this act, *United States v. Morris*, 26 F. Cas. 1323 (No. 15, 815) (C.C.D. Mass 1851) Supreme Court Justice Benjamin Curtis sitting as a trial judge in the case, interrupted the defendant's closing argument to reject the defendant's assertion that the jury could determine matters of law and acquit if they viewed the Fugitive Slave Act as unconstitutional. Despite judicial instructions upholding the Act, northern juries massively resisted the Fugitive Slave Act and defeated it by nullification verdicts of acquittal.

Throughout much of our history for the past 150 years there has been a tug of war in the courts over informing the jury of its power of nullification. For example in Pennsylvania in 1845 in *Sherry's Case* (See Wharton, Homicide, 2d ed. 1875, pp. 721 - 722), Judge Rogers instructed the jury that their duty was "to receive the law for purposes of this trial from the court." But later in 1879 in *Kane v. Commonwealth*, 89 Pa. 522, 527 the Pennsylvania Supreme Court stated that "The power of the jury to judge of the law in criminal cases is one of the most valuable securities guaranteed by the Bill of Rights." But then still later in *Commonwealth v. Bryson*, 276 Pa. 566; 120 A. 552, 554 (1923) the Pennsylvania court stated oppositely that "It is the duty of the jury to take the law from the court, to the same extent in a criminal case as in any other, and a trial judge can properly so instruct ."

The tug of war over jury nullification has also involved statutes and constitutional provisions. For example, in response against Massachusetts Chief Justice Shaw's opinion in *Commonwealth v. Porter*, 10 Metc. 263 (Mass. 1845) that the jury could not determine questions of law, a statute was passed by the legislature in 1855 to overrule *Porter*. The statute read in relevant part "in all trials for criminal offenses, it shall be the duty of the jury ... to decide at their discretion, by a general verdict, both the fact and the law involved in the issue." Massachusetts Laws of 1855, c. 152. Justice Shaw ignored the obvious legislative intent of the statute and interpreted it in *Commonwealth v. Anthes*, 5 Gray 185 (1855) to mean only that the jury has the right to bring in a general verdict.

In Louisiana the early cases emphatically reiterated that in criminal cases the jury had not only the power but the right to disregard the judge's instructions. See *State v. Saliba*, 18 La. Ann. 35 (1866). Then in 1878 in *State v. Johnson*, 30 La. Ann. 904, 905 - 906 the court stated that "the exercise of this power is itself a moral wrong." In defense of jury rights the Louisiana Constitution, adopted in 1879, provided in Article 168 that "The jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge." But the court in *Ford v. State*, 37 La. Ann. 443, 465 (1885) interpreted this constitutional provision to mean that the jury was bound to follow the law as given by the court.

One of the most influential cases concerning informing the jury about its nullification power in federal courts has been *Sparf and Hansen v. United States*, 156 U.S. 51 (1895). This was a murder case on the high seas. Applicable federal law gave the jury the power to find the defendants guilty of any lesser included offense than the one charged in the indictment. But the judge instructed the jury that there was no evidence in the case to support a lesser charge and if they found a felonious killing, they must find it to be murder.

> Court: "I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."
>
> *Sparf*, 156 U.S. at 60

The jury interrupted its deliberations to get further instructions from the judge.

> Juror: "Your honor, I would like to know in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty."

The Court then read the statute on murder on the high seas but did not answer the question about manslaughter. After further dialogue the juror asked again:

> Juror: "A crime committed on the high seas must have been murder, or can it be manslaughter?"
>
> Court: "In a proper case, it may be murder, or it may be manslaughter; but in this case it cannot be properly manslaughter ..."

After further discussion including objection and comment by the attorneys the juror asked the following:

> Juror: "If we bring in a verdict of guilty, that is capital punishment?"

Court: "Yes."

Juror: "Then there is no other verdict we can bring in except guilty or not guilty?"

Court: "In a proper case, a verdict for manslaughter may be rendered ... ; and even in this case you have the physical power to do so; but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court."

Juror: "There has been a misunderstanding amongst us. Now it is clearly interpreted to us, and no doubt we can now agree on certain facts."

Sparf, 156 U.S.at 61 - 62, n. 1

The trial judge invaded the exclusive province of the jury to determine the facts by instructing the jurors that there was no evidence to support a lesser charge than murder. This alone should have been reversible error. Then the judge actually did tell the jury, in the dialogue with the single juror, about its power to bring in a more merciful verdict for manslaughter, but denied its right to do so, and insisted that the jury had a duty to follow his instruction to bring in a verdict for murder or nothing. Justice Harlan in writing the Supreme Court opinion upholding this instruction stated:

> "Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principle function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as in their judgment were applicable to the particular case being tried."
>
> *Sparf,* 156 U.S. at 101

In *Sparf* the evidence was somewhat stronger against a codefendant, St. Clair, who had been tried separately by another jury, see *St. Clair v. United States*, 154 U.S. 134 (1894), than it was against Sparf and Hansen. That may explain why some of the jurors were interested in a manslaughter verdict. It is ironic that the inclinations of the "jurymen untrained in the law" toward a lesser verdict than murder, if they had not been fenced off by the trial judge, might have produced a more just result than the execution that followed the Supreme Court decision.

Justices Gray and Shiras wrote in dissent:

> "Within six years after the constitution was established, the right of the jury, upon the general issue, to determine the law as well as the fact in controversy, was

> unhesitatingly and unqualifiedly affirmed by this court, in the first of the very few trials by jury ever had at its bar [referring to the case of *Georgia v. Brailsford*], under the original jurisdiction conferred upon it by the constitution."
>
> *Sparf*, dissenting opinion, 156 U.S. at 154

> "There may be less danger of prejudice or oppression from judges appointed by the president elected by the people than from judges appointed by an hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield, - from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law, - of amplifying their own jurisdiction and powers at the expense of those entrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy."
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> *Sparf*, dissenting opinion, 156 U.S. at 176

And also:

> "... it is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused."
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> *Sparf*, dissenting opinion, 156 U.S. at 174

The effect of *Sparf* has been to give a federal trial judge control over what the jury hears about the law inside the courtroom in federal cases. It does not diminish the actual power of the jury to nullify in federal cases nor does it affect state trials. States are free as a matter of state constitutional or statutory law to give their citizens greater civil liberties protections than what the Supreme Court protects in federal cases. It should be noted that according to *U.S. v. Grace*, 461 U.S. 171 (1983) a federal judge can not control what the jurors may hear about the law outside the courtroom.

Sparf and Hansen is not the Supreme Court's last word on the jury's role. In 1968 the Court ruled in *Duncan v. Louisiana*, 391 U.S. 145, that the Constitution requires states to provide jury trials for all defendants facing a possible punishment of two years or more, and the Court strongly implied that it would later extend the jury trial right in state trials to all defendants facing a possible punishment of six months or more. Justice White, writing for the majority, gives some of the fundamental reasons why trial by jury is essential to liberty.

> "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government ... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge ... Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."
>
> *Duncan*, 391 U.S. at 155-156

The community can hardly make an effective participation in the determination of guilt or innocence if the jury is told that it must disregard its conscience and follow the law as dictated by a judge. The very word "guilt" requires the finding of a guilty mind, *mens rea*, the evil intent to do harm, and the jury can not determine this without consulting its own sense of right and wrong.

Modern Day Authority for Jury Nullification

Jury nullification remains the law of the land in every American jurisdiction. The ruling of Chief Justice Vaughan in *Bushell's Case* that the jury can not be punished for its verdict stands today in every jurisdiction, state and federal. This, coupled with the rule that verdicts of acquittal are final, is the substance of the power of jury nullification. Unless either or both of these two pillars of freedom are eroded away, the power of jury nullification is and will always be the law of the land. If the original intent of the Founders is our guide to the Constitution, then there is no doubt that jury nullification is a Constitutional right of both the defendant and of the jurors themselves, an unalienable part of the jurors' identity as sovereign citizens with the power to judge laws.

As the court has stated in *U.S. v. Moylan*, 417 F.2d 1002, 1006 (4th Circuit Court of Appeals, 1969):

> "We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence ... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision."

In addition, the state Constitutions of Maryland (Art. 23), Indiana (Art. I, Sec. 19), Oregon (Art. I, Sec. 16), and Georgia (Art. I, Sec. I, Para. XI) expressly guarantee the right of the jury to judge the law in criminal cases. Also, 20 state Constitutions currently guarantee the right of the jury to determine the law under their provisions on freedom of speech with regard to criminal or seditious libel cases. This is a tribute to the enduring impact of jury nullification in the trial of John Peter Zenger.

And it should be remembered that our own Washington State Constitution begins with the words "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Article 1, Section 1. Moreover, the Washington State Court of Appeals, Division Two, has ruled that a judge can not direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." *State v. Primrose*, 32 Wash. App. 1, 4 (1982). See also *State v. Salazar*, 59 Wash. App. 202, 211 (Division One, 1990).

The power of jury nullification is a fundamental and integral part of our legal system. The debate today is not about whether juries have the power to nullify, but whether they should be told about their power. For example, in a Vietnam War protest case, *U.S. v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Circuit Court of Appeals, 1972), the court praises jury nullification:

> "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law."

And yet the majority on the court chose not to let the jury hear this praise in the courtroom.

ANSWERING COMMON OBJECTIONS

Some common objections to informing the jury about its power of nullification are that chaos and anarchy will result from inconsistent jury verdicts, that the jury will unjustly convict, and that it is the function of the legislature, and not the jury, to repeal laws. All of these objections are unfounded.

Jury nullification has not produced anarchy or social disintegration in history, but rather, it has given us our most important rights. Obviously, juries which are representative of the community will not want to render verdicts which will cause anarchy and chaos in the very communities in which the jurors reside.

Hung juries and inconsistent jury verdicts arising because of jury nullification are actually performing a service for society. They are sending messages to lawmakers in a peaceful, routine and institutionalized way that it is time for changes in the law. Jury nullification is an antidote for the kind of anarchy caused by the victimless crime laws. America now leads the world in the percentage of its population behind bars largely because of victimless crime laws and the ancillary crime that such laws generate. A long series of jury refusals to apply such laws will advise legislatures to repeal or modify them. As Scheflin and Van Dyke have noted: "Because of the high acquittal rate in

prohibition cases during the 1920s and early 1930s, prohibition laws could not be enforced. The repeal of these laws is traceable to the refusal of juries to convict those accused of alcohol traffic." Scheflin and Van Dyke, *Jury Nullification: The Contours of a Controversy*, Law and Contemporary Problems, Vol. 43, No. 4, 71 (1980).

As to the possibility of unjust convictions, jury nullification poses no threat that juries will punish a defendant beyond what the law allows because modern day court procedures insure that this doctrine acts in the direction of mercy only. Juries have no power or mechanism to invent new charges or increase the severity of what the prosecutor has already charged. Moreover, a judge is free to direct a verdict of acquittal, but not a verdict of conviction, if the court determines at the end of the trial that the evidence is insufficient to warrant jury deliberations. And further, the court as a matter of law can set aside a conviction or grant a new trial where the verdict is unsupported by the evidence. The defendant can appeal a verdict of guilty but a verdict of acquittal is final.

Further, jury nullification poses no threat to the reasonable doubt standard. It is clear from the language in early court opinions that the early Americans intended jury nullification to work only in the defense of liberty and not to the aid of the government. "The purpose of the rule [is] the preservation of civil liberties against the undue bias of judges." Mark Howe, examining early American cases in *Juries As Judges Of Criminal Law*, 52 Harvard Law Review 582, 592 (1939). The recent jury nullification bills introduced in other states and the one introduced in Washington State, HJR 4205, follow early American intent about jury nullification by expressing it in terms of a citizen's right to introduce the doctrine to the jury whenever the government is an opposing party.

That means that if HJR 4205 is passed, jury nullification will only be raised as an argument to the jury if the citizen chooses to raise and argue it. Obviously, a defendant in a criminal case will not raise nullification to attack the reasonable doubt standard since this standard benefits him. And the kind of case where a defendant will raise the issue of jury nullification is the kind of case where reasonable doubt is seldom an issue.

In the classic jury nullification case, such as the trials of William Penn and John Peter Zenger, the facts are not in dispute and so reasonable doubt is of no consequence in such a case. The Quaker who helped a fugitive slave in violation of the Fugitive Slave Act did not rely upon the reasonable doubt standard, but relied instead upon the jury's power to rise above the law to reach justice. O. J. Simpson would not have raised jury nullification since he was relying upon the reasonable doubt standard and he would have appeared both ridiculous and guilty if he had tried to argue to the jury that the laws against murder should be nullified.

As to the repeal of unjust or unpopular laws, legislators seldom go back and correct their mistakes without some prompting. While it is within the proper role of the legislature and electorate to pass laws, it is within the proper role of the jury to veto laws which the jury finds to be oppressive. If the governor has a veto, and the senate has a veto, and the house has a veto, and the judges have the veto of judicial review, then the

citizens who are asked to live under the laws and apply them must also have a veto when they serve on juries.

Occasionally a critic will concede the power of the jury to nullify the law but deny its right to do so. This is mere semantics because there is no practical difference between an unreviewable power and a right. Moreover, the *Zenger* case and the Founders refer to jury nullification as a "right." Our Constitution clearly states that "We the People" created the Constitution and therefore it follows that the people are sovereign. A sovereign people have the inherent right to judge the law when they come together on juries to decide cases. "All political power is inherent in the people ..." Art. 1, Sec. 1 Washington Constitution.

THE FULLY INFORMED JURY ASSOCIATION

The Fully Informed Jury Association (FIJA) is the moving force behind the restoration of popular knowledge about jury nullification. Founded in 1989 by Don Doig and Larry Dodge, FIJA is based in Helmville, Montana and has over 2,500 dues paying members nationwide including lawyers, writers, law school professors, activists, and retired judges. State chapters have been formed in most states including Washington. The national organization publishes and disseminates various informational materials - a quarterly newspaper, books, tapes, computer disks, leaflets and taped telephone messages and has a toll-free number, 1-800-TEL-JURY.

FIJA exists to rekindle people's knowledge of their common law and constitutional right to judge the law as well as the facts and to render the verdict according to conscience when they serve as jurors. FIJA is accomplishing this by public education and by supporting legislation to enable citizens to freely argue jury nullification in court. National officers make media appearances and FIJA supporters periodically testify at legislative hearings. FIJA has received considerable publicity in over 1,500 newspaper and magazine articles, including the ABA Journal and ABA Litigation News and various law reviews. FIJA bills have been introduced in 25 state legislatures and have twice passed an upper or lower legislative house in 2 states - Arizona and Oklahoma.

CONCLUSION

Most of the historical discussion of jury nullification has been in the context of criminal cases. That is because the policy behind jury nullification is the protection of civil liberties and in the past the contest between the individual and government took place largely in the arena of the criminal trial. Though in the early years of the federal courts it was not unusual even in civil cases to instruct the jurors that they were to judge the law. See *Georgia v. Brailsford*, 3 Dallas 1, 4 (U.S. 1794), *Van Horne v. Dorrance*, 2 Dallas 304, 307, 315 (C.C.D. Pa. 1795), and *Bingham v. Cabbot*, 3 Dallas 19, 28, 33 (U.S. 1795). Now, with the rise of civil asset forfeiture, jury nullification applies with equal validity to civil cases where the government is in contest against the individual, and therefore the proposed jury rights amendment, HJR 4205, includes such civil cases within its reach.

The jury is an unsettling institution to government because it possesses the power to stop government coercion. The jury's true function is to examine the law and to judge the morality of the law in its application to a particular case. It is the safety valve of the system that tempers, through mercy, the mechanical application of rigid rules.

If legislators are disturbed by those occasions when jurors hold in abeyance or refuse to apply a particular law it is well to recall the words of Thomas Jefferson:

> "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making of them."
>
> Thomas Jefferson, letter to the Abbe Arnoux, 1789
> *The Papers of Thomas Jefferson*, Vol. 15, p. 283,
> Princeton University Press, 1958

Jury nullification encourages participation in the judicial process, which in turn furthers the legitimization of the legal system. However, jury nullification also serves to inject community values and standards into the administration of the laws. Jury nullification permits the community an opportunity to say of a law that it is too harsh, or in a particular case that it is too punitive or of a particular defendant that his conduct is too justified to warrant criminal sanctions. Ordinary citizens are given the chance to infuse community values into the judicial process in the interest of fairness and justice and at the same time signal to the lawmakers that perhaps they have drifted too far afield of the democratic will. Some have argued that criminal statutes are more likely to embody the collective will and conscience than a random selection of 12 men and women, but this is not necessarily so. History is replete with examples that jury nullification serves as a final corrective over both tyranny and judicial rigidity.

As one writer has observed:

> "The fundamental safeguards have been established, not so much by lawyers as by the common people of England, by the unknown juryman who in 1367 said he would rather die in prison than give a verdict against his conscience, by Richard Chambers who in 1629 declared that never till death would he acknowledge the sentence of the Star Chamber, by Edward Bushell and his eleven fellow-jurors who in 1670 went to prison rather than find the quakers guilty, by the jurors who acquitted the printer of the Letters of Junius, and by a host of others. These are the men who have bequeathed to us the heritage of freedom."
>
> A. Denning, *Freedom Under Law*, 63-64 (1949)
> as reprinted in Scheflin and Van Dyke, *Jury Nullification: Contours of a Controversy*, Law and Contemporary Problems, Vol. 43, No.4, p. 111 n. 248

Jury nullification is an idea that libertarians instantly love, authoritarians instantly hate, and that liberals and conservatives walk around warily because they know that it will help them on some issues but that it may also dismantle the coercive parts of their political agendas. Regardless of our particular political views, no one can deny that our freedom has been won for us with the power of jury nullification, and that it may be lost without it.

A right concealed is a right denied.

_____ _____, 1996

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