

“Jury nullification of law,” as it is sometimes called, is a traditional American right defended by the Founding Fathers. Those Patriots intended the jury to serve as one of the tests a law must pass before it assumes enough popular authority to be enforced. Thus the Constitution provides five separate tribunals with veto power – representatives, senate, executive, judges and jury – that each enactment of law must pass before it gains the authority to punish those who choose to violate it. Thomas Jefferson said, “I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.”

From Magna Carta to Edward Bushell

The power of the jury to judge the justice of the law and to hold laws invalid by a finding of “not guilty” for any law a juror felt was unjust or oppressive, dates back to the Magna Carta, in 1215. At the time of the Magna Carta King John could pass any laws any time he pleased. Judges and executive officers, appointed and removed at his whim, were no more than servants of the King. The oppression became so great that the nation rose against the ruler and the barons of England compelled their king to pledge that he would punish no freeman for a violation of any laws without the consent of his peers.

King John violently protested when the Magna Carta was shown to him, “and with a solemn oath protested, that he would never grant such liberties as would make himself a slave.” Afterwards, fearing seizure of his castle and the loss of his throne, he granted the Magna Carta to the people, placing the liberties of the people in their own safe-keeping. (Echard's History of England, p. 106-107 [Spooner])

The Magna Carta was a gift reluctantly bestowed upon his subjects by the King. Its sole means of enforcement, the jury, often met with hostility from the Crown. By 1664 English juries were routinely fined for acquitting a defendant. Such was the case in the 1670 political trial of William Penn for preaching Quakerism to an unlawful assembly. Four of the twelve jurors voted to acquit and continued to acquit even after being imprisoned and starved for four days. The jurors were fined and imprisoned until they paid the fines. One juror, Edward Bushell, refused to pay the fine and brought his case before the Court of Common Pleas. Chief Justice Vaughan held that jurors could not be punished for their verdicts. *Bushell's Case* (1670) was one of the most important developments in the common law history of the jury.

Jurors exercised their power of nullification in 18th century England in trials of defendants charged

with sedition and in mitigating death penalty cases. In the American Colonies jurors refused to enforce forfeitures under the English Navigation Acts. The Colonial jurors' veto power prompted England to extend the jurisdiction of the non-jury admiralty courts in America beyond their ancient limits of sea-going vessels. Depriving “the defendant of the right to be tried by a jury which was almost certain not to convict him [became] . . . the most effective, and therefore most disliked” of all the methods used to enforce the acts of trade. (Holdsworth, A History of English Law (1938) XI, 110)

John Hancock, “the wealthy Massachusetts patriot and smuggler who as President of the Continental Congress affixed the familiar bold signature which adorns the parchment Declaration of Independence” was prosecuted through this admiralty jurisdiction in 1768 for a fine of £9,000 – triple the value of the goods aboard his sloop Liberty which had been previously forfeited. (U.S. v One 1976 Mercedes Benz 280S 618 F2d 453 [1980]) John Adams eloquently argued the case chastising Parliament for depriving Americans of their right to trial by jury. Adams later said of the juror, “it is not only his right, but his duty . . . to find the verdict according to his own best understanding, judgement, and conscience, though in direct opposition to the direction of the court.” (Yale Law Journal, 1964:173)

The Zenger Trial

Earlier in America, jury nullification had decided the celebrated seditious libel trial of John Peter Zenger. (Zenger's Case, 1735) His newspaper had criticized the royal governor of New York. The law made it a crime to publish any statement, true or false, criticizing public officials, laws or government. The jury was only to decide if the material in question had been published; the judge was to decide if the material was in violation of the statute. The defense asked the jury to make use of their own consciences and, although the judge ruled that the truth was no defense, the jury acquitted Zenger. The jury's nullification in this case is praised in history textbooks as a hallmark of freedom of the press in the United States.

At the time of the American Revolution, the jury was considered the judge of both law and fact. In a case involving the civil forfeiture of private property by the state of Georgia, first Supreme Court Justice John Jay, instructed jurors that the jury has “a right to determine the law as well as the fact in controversy.”

(Georgia vs. Brailsford, 1794:4)

The Fugitive Slave Law

Until the middle of the 1800s, federal and state judges often instructed the juries they had the right to disregard the court's view of the law. (Barkan, citing 52 Harvard Law Review, 682-616) Then northern jurors refused to convict abolitionists who had violated the 1850 Fugitive Slave Law. In response judges began questioning jurors to find out if they were prejudiced against the government, dismissing any who were. In 1852 Lysander Spooner, a Massachusetts lawyer and champion of individual liberties, complained “that courts have repeatedly questioned jurors to ascertain whether they were prejudiced against the government. . . . The reason of this . . . was that ‘the Fugitive Slave Law, so called’ was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people.” Modern treatments of abolitionism praise these jury nullification verdicts for helping the anti-slavery cause – rather than condemn them for undermining the rule of law and the uniformity of justice.

Labor Versus Big Business

In 1895, the Supreme Court, under pressure from large corporations, ruled in a bitter split decision that courts no longer had to inform juries they could veto an unjust law. The giant corporations had lost numerous trials pressed against labor leaders trying to organize unions. Striking was against the law at that time. “Juries also ruled against corporations in damage suits and other cases, prompting influential members of the American Bar Association to fear that jurors were becoming too hostile to *their clients* and too sympathetic to the poor. As the American Law Review wrote in 1892, jurors had ‘developed agrarian tendencies of an alarming character.’ . . .” (Barkan, Jury Nullification in Political Trials, 1983) [emphasis added]

Prohibition

Despite the courts' refusal to inform jurors of their historical veto power, jury nullification in liquor law trials was a major contributing factor in ending alcohol prohibition. (Today in Kentucky jurors often refuse to convict under the marijuana prohibition laws.)

Fewer incidences of jury veto actions occurred as time increased after the courts began concealing jurors' rights from American citizens and falsely instructing them that they may consider only the facts as admitted by the court. Researchers in 1966 found that jury nullification occurred only 8.8 percent of the time between 1954 and 1958, and suggested that “one

reason why the jury exercises its very real power [to nullify] so sparingly is because it is officially told it has none." (California's charge to the jury in criminal cases is typical: "It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you . . . You are to be governed solely by the evidence introduced in this trial as the law as stated to you by me.") Today no officer of the court is allowed to tell the jury of their veto power.

The Vietnam War

Counsels for Vietnam War protest defendants tried to introduce moral and political arguments on the war to gain jury sympathy. Most often the jury was given instructions such as "You must apply the law that I lay down." (*Conspiracy trial of Benjamin Spock et al., 1969*) Jurors receiving such instructions usually convicted while feeling the pang of conscience expressed by the typical responses from Spock trial jurors: "I had great difficulty sleeping that night . . . I detest the Vietnam War. . . . But it was so clearly put by the judge." And "I'm convinced the Vietnam War is no good. But we've got a Constitution to uphold. . . . Technically speaking, they were guilty according to the judge's charge." But in the few anti-Vietnam war trials where juries were allowed to hear of their power they acquitted.

Jury acquittals in the colonial, abolitionist and post-Civil War eras helped advance political activist causes and restrained government efforts at social control. Legal scholar Steven Barkan suggests that the refusal of judges during the Vietnam War to inform juries of their power to disregard the law frustrated the anti-war goals. As Lysander Spooner pointed out regarding the questioning of jurors to eliminate those who would bring in a verdict according to conscience (a practice effectively accomplished today through the juror's oaths and *voir dire*) "The only principle upon which these questions are asked, is this - that no man shall be allowed to serve as juror unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be. . . . A jury like that is palpably nothing but a mere tool of oppression in the hands of the government."

Those whose interests lie in maintaining government control of social behavior may argue that the Constitution provides the necessary protection of liberties. But legislative bodies will always confirm the constitutionality of their own acts. And the oaths sworn to uphold the Constitution by judges and public servants have historically been only as good as the power to enforce such oaths.

Nor are free elections adequate to prevent tyranny without jury veto power, because elections come only periodically and give no guarantee of repealing the damage done. Additionally, the second body of legislators are likely to be as bad as the first since they are exposed to the same temptations and use the same tactics to gain office.

Protecting Minorities from the Majority

Further, the jury's veto power protects minorities from "the body of the people, operating by the majority against the minority." (*James Madison, June 8, 1789*) Twelve men taken randomly from the population will represent both friends and opponents of the party in power. With fully informed juries the government can exercise no powers over the people without the consent of the people. Trial by jury is trial by the people. When juries are not allowed to judge law it becomes trial by the government. "In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of government; for there are no oppressions which the government may not authorize by law." (*Lysander Spooner, "Jury Power" by L. & J. Osburn*)

For more information on the Fully Informed Jury Association contact:

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Copies of this pamphlet are available at 5¢ apiece (add \$2.00 shipping on orders under 500 pieces).

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A History of Jury Nullification



"If a juror accepts as the law that which the judge states, then that juror has accepted the exercise of absolute authority of a government employee and has surrendered a power and right that once was the citizen's safeguard of liberty." (1788)

(2 Elliotts Debates, 94, Bancroft, History of the Constitution, 267)