"Jury nullification of law," as it is sometimes called, is a traditional right that was rigorously defended by America's Founding Fathers. Those great men, Patriots all, intended the jury to serve as a final safeguard – a test that laws must pass before gaining sufficient popular authority for enforcement. Thus the Constitution provides five separate tribunals with veto power – representatives, senate, executive, judges – and finally juries. Each enactment of law must pass all these hurdles before it gains the authority to punish those who may 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 law any time he pleased. Judges and executive officers, appointed and removed at his whim, were little more than servants of the King. The oppression became so great that the nation rose up against the ruler, and the barons of England compelled their king to pledge that he would not punish a freeman for a violation of the law 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 reluctantly signed the Magna Carta – thus 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 great step forward in the control of tyrannical leaders. But its sole means of enforcement, the jury, was often met with hostility. By 1664 English juries were routinely being fined for acquitting defendants. Such was the case in the 1670 political trial of William Penn, who was charged with 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. Under such duress, most jurors paid the fines. However, one juror, Edward Bushell, refused to pay and brought his case before the Court of Common Pleas. As a result, Chief Justice Vaughan issued an historically-important ruling: 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 continued to exercise their power of nullification in 18th-century England in the 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 his familiar bold signature to the Declaration of Independence" was prosecuted via this admiralty jurisdiction in 1768 and fined £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, judgment, 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 decided the celebrated seditious libel trial of John Peter Zenger. *(Zenger's Case, 1735)* His newspaper had openly criticized the royal governor of New York. The current law made it a crime to publish any statement (true or false) criticizing public officials, laws or the government in general. 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.

Zenger's defense asked the jury to make use of their own consciences and, even though the judge ruled that the truth was no defense, they acquitted him. 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 known to have the power to be 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, when northern jurors began to refuse to convict abolitionists who had violated the 1850 Fugitive Slave Law, judges began questioning jurors to find out if they were prejudiced against the government's position and dismissed 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 the role they played in helping the anti-slavery cause – rather than condemning 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, rendered in a bitter split decision that courts no longer had to inform juries they had the power to veto an unjust law. The giant corporations had lost numerous trials 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.)

As time went on fewer incidences of jury-veto actions occurred as 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 people taken randomly from the population will represent both friends and opponents of the party in power. With fully-informed juries, the government cannot exercise its 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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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 Elliots Debates, 94, Bancroft, History of the Constitution, 267)

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