

AN ESSAY

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

By Justice William Goodloe,
Washington State Supreme
Court, retired

With new section
Voir Dire (Jury Selection) Exposed



An Essay
on the right of the jury
to judge the law, as well as the facts,
and to render the verdict according to conscience.

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

by Justice William Goodloe, Washington
State Supreme Court, retired, with
gratitude for the research of
Professors Alan Schefflin, Jon Van Dyke,
and Mark Howe, and for the citation
verification by Tom Stahl

Copyright ©1996
Fully Informed Jury Association
Fourth Edition 2001

— Preface —

Current Constitutional Authority For Jury Nullification

On February 8, 1999 the *Washington Post* published a front page story entitled, “In Jury Rooms, A Form Of Civil Protest Grows.” According to the *Post* article, jurors are not always following judges’ instructions to the letter.

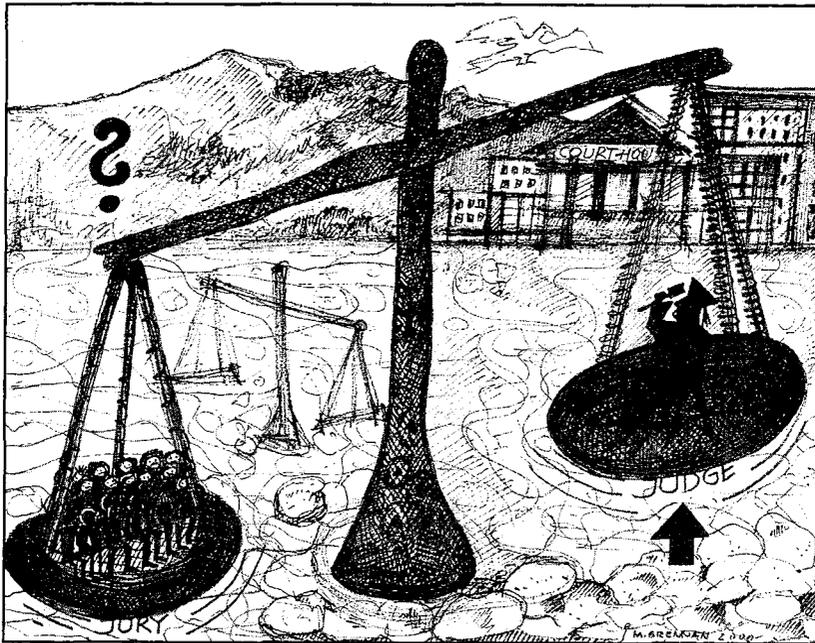
The article recounted that sometimes in jury trials, when those facts which the judge chooses to allow into evidence indicate that the defendant broke the law, jurors look at the facts quite differently from the way the judge instructed them to. The jurors do not say — “On the basis of these facts the defendant is guilty.”

Instead, the jurors say — “On the basis of these facts the law is wrong,” and they vote to acquit.

Or, they may vote to acquit because they believe that the law is being unjustly applied, or because some government conduct in the case has been so egregious that they can not reward it with a conviction. In short, a passion for justice invades the jury room. The jurors begin judging the law and the government, as well as the facts, and they render their verdict according to conscience. This is called jury nullification.

Dr. Jack Kevorkian, the euthanasia doctor, recently convicted, was acquitted several times in the past despite his admission of the government’s facts, of assisting the suicide of terminally ill patients who wanted to die in violation of Michigan law. Those acquittals were probably due to jury nullification. And Dr. Kevorkian might have been acquitted again if the trial judge had allowed him to present his evidence, testimony of the deceased’s relatives that the deceased was in pain and wanted to die, to the jury. A corollary of jury nullification is greater latitude for the jury to hear all of the evidence.

If the practice of jury nullification continues to grow, it will mean that, in criminal cases, everything will be on the table in every case. Whenever a defendant is on trial, the government



and its laws will be on trial also. With most criminal laws this will make no difference. But with controversial laws, like drug prohibition, it may make an enormous difference.

The *Washington Post* took a dim view of this and suggested that jury nullification is an aberration. A kind of unintended and unwanted side-effect of our constitutional system of letting juries decide cases. But the *Post* couldn't be more wrong. Far from being an unintended side-effect, jury nullification is explicitly authorized in the Constitutions of twenty four states.

All Criminal Cases

The Constitutions of Maryland, Indiana, Oregon, and Georgia currently have provisions guaranteeing the right of jurors to "judge" or "determine" the law in "all criminal cases."

"In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction. The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved. (Maryland Constitution, Declaration of Rights, Article 23)

"In all criminal cases whatever, the jury shall have the right to determine the law and the facts." (Indiana Constitution, Article 1 Section 19)

"Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases." (Oregon Constitution, Article 1 Section 16)

"The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be judges of the law and the facts." (Georgia Constitution, Article 1 Section 1 Paragraph XI)

These Constitutional jury nullification provisions endure despite decades of hostile judicial interpretation.

Libel Cases

Twenty other states currently include jury nullification provisions in their Constitutions under their sections on freedom of speech, specifically with respect to libel cases. Laws attempting to stop criticism of the government were called libel laws in previous times, and that is why libel law cases rose to constitutional dimension.

These provisions, listed below, typically state: "... in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court."

But New Jersey, New York, South Carolina, Utah, and Wisconsin, omit the phrase "under the direction of the court." South Carolina states: *"In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and facts."*

The provisions: Alabama (Article I Section 12); Colorado (Article II Section 10); Connecticut (Article First Section 6); Delaware (Article I Section 5); Kentucky (Bill of Rights Section 9); Maine (Article I Section 4); Mississippi (Article 3 Section 13); Missouri (Article I Section 8); Montana (Article II Section 7); New Jersey (Article I Section 6); New York (Article I Section 8); North Dakota (Article I Section 4); Pennsylvania (Article I Section 7); South Carolina (Article I Section 16); South Dakota

(Article VI Section 5); Tennessee (Article I Section 19); Texas (Article 1 Section 8); Utah (Article I Section 15); Wisconsin (Article I Section 3); Wyoming (Article 1 Section 20)

Delaware, Kentucky, North Dakota, Pennsylvania, and Texas add the phrase "*as in other cases.*" Tennessee adds the phrase "*as in other criminal cases.*" These phrases suggest that the jury has a right to determine the law in more than just libel cases.

"... *and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.*" (Tennessee Constitution, Article I Section 19)

The phrase "*under the direction of the court,*" omitted by five states, provides for the trial judge to give directions, like road directions which the jury may or may not choose to follow, to assist the jury in its deliberations. Our forefathers did not intend by this phrase for the trial judge to infringe in any way upon the sole discretion of the jury in rendering its verdict.

Although later courts have held otherwise, the Tennessee Supreme Court in *Nelson v. State*, 2 Swan 482 (1852), described the proper roles of the judge and jury as follows: The judge is a witness who testifies as to what the law is, and the jury is free to accept or reject his testimony like any other.

"*It is urged that there is an error in that part of the charge of the court which is in these words: 'The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them, as to what the law is; after the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court. If the judge is against the defendant, his judgment can be reversed by the supreme court; if the jury errs in favor of the defendant, their judgment is final, and cannot be reversed in the supreme court.'*"

... "*We can see no impropriety in this remark, as it was a correct declaration of the law, and only tended to put the jury on their guard, in exercising their right as judges of the law, against doing wrong either way.*" (*Nelson v. State*, 2 Swan at 486)

The Maine Constitution affirms these roles of judge and jury in its section on libels.

"... *and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.*" (Maine Constitution, Article I Section 4 [emphasis added])

All Political Power Is Inherent In The People

In addition, forty state Constitutions, like the Washington State Constitution in Article 1 Section 1, declare that "*All political power is inherent in the people,*" or words to similar effect.

And thirty four state Constitutions expound on the principle of all political power being inherent in the people by saying that "*the people ... have at all times ... a right to alter, reform, or abolish their government in such manner as they may think proper,*" or words to similar effect. For example, the Pennsylvania Constitution declares that:

"*All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.*" (Pennsylvania Constitution, Article 1 Section 2)

If the people have all power, and have at all times a right to alter, reform, or abolish their government in such manner as they may think proper, then they certainly have the right of jury nullification, which is tantamount to altering or reforming their government when they come together on juries to decide cases.

A single nullification verdict against a particular law may or may not alter or reform the government, but hundreds of such verdicts certainly do. Witness the decisive role of jury nullification in establishing freedom of speech and press in the American Colonies, defeating the Fugitive Slave Act, and ending Alcohol Prohibition.

Right of Revolution

Of special note, is the Right of Revolution in the New Hampshire Constitution.

[Art.] 10. [Right of Revolution.] *“Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”* (New Hampshire Constitution, Bill of Rights, Article 10)

If the people have the ultimate right of revolution to protect their liberties, then they certainly also have the lesser included and more gentle right of jury nullification to protect their liberties.

It should also be noted that New Hampshire declares an unalienable Right of Conscience.

[Art.] 4. [Rights of Conscience Unalienable] *“Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.”* (New Hampshire Constitution, Bill of Rights, Article 4)

If the right of conscience is unalienable, then it can not be taken away from people when they enter the courthouse door to serve on juries. The people have an inherent and unalienable right to vote their conscience when rendering jury verdicts.

Ninth and Tenth Amendments

There is no doubt that jury nullification was one of the rights and powers that the people were exercising in 1791 when the Bill of Rights of the United States Constitution was adopted. As legal historian Lawrence Friedman has written:

“In American legal theory, jury power was enormous, and subject to few controls. There was a maxim of law that the jury was judge both of law and of fact in criminal cases. This idea was particularly strong in the first Revolutionary generation when memories of royal justice were fresh.” (A History Of American Law, Simon & Schuster, 1973 p. 251)

Jury nullification is therefore one of the “rights ... retained by the people” in the Ninth Amendment.

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (United States Constitution, Bill of Rights, Article IX)

And jury nullification is one of the “powers ... reserved ... to the people” in the Tenth 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.” (United States Constitution, Bill of Rights, Article X)

Jury nullification is decentralization of political power. It is the people’s most important veto in our constitutional system. The jury vote is the only time the people ever vote on the application of a real law in real life. All other votes are for hypotheticals.

As Jefferson put it:

“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)

One wonders why these jury nullification provisions are not given full force and effect today with proper jury instructions? Perhaps judges, who charge juries to follow the law, do not follow it themselves when they disagree with it.

List Source: Alan W. Schefflin, *Jury Nullification: The Right To Say No*, 45 *Southern California Law Review* 168, 204 (1972)
[list has been updated to 1999]

—This preface originally appeared as a letter by Tom Stahl in the July 1999 *Washington State Bar News*

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

by Justice William Goodloe, Washington State Supreme Court, retired

Of all the 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, William Cosby. 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 Schefflin, *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. And since jury nullification is both a right and a power that the people were exercising at the time the Bill of Rights was adopted it is therefore also a power reserved to the people by the Tenth Amendment.

Empowering the Jury as the Fourth Branch of Government

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.

For anyone to assert after *Zenger*, the Navigation Acts 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 and striking them off the jury, will be abolished by HJR 4205 and the jury will be more representative of the general community with its varied views on the laws. (*the Washington State Legislature re-uses bill numbers so the present HJR 4205 may concern a different subject. - Editors note*)

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.”

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 Schefflin, *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.” 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.

In those days Supreme Court Justices were sometimes called upon to preside over jury trials. Justice Chase was accused of stopping attorneys from arguing the unconstitutionality of the Alien and Sedition Acts to the jury at trials he had presided over as a Supreme Court Justice. See Howe, *Juries As Judges of Criminal Law*, 52 *Harvard Law Review* 582, 588 n. 20 (1939) and Schefflin, *Jury Nullification: The Right To Say No*, 45 *Southern California Law Review* 168, 176 (1972).

Justice Chase was also accused in the First Article of Impeachment (there were 8 articles in all) of conducting himself

while presiding over the treason trial of John Fries “in a manner highly arbitrary, oppressive, and unjust ... In debarring the prisoner from his constitutional privilege of addressing the jury (through his counsel) on the law, as well as on the fact, which was to determine his guilt or innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear argument, and determine upon the question of law, as well as the question of fact, involved in the verdict which they were required to give.” *Case of Fries*, 9. F. Cas. 924, 934 [note 1 added in 1805], (No. 5127) (C.C.D. Pa. 1800)

Justice Chase defended himself against the charges by asserting in his answer that he had told the defendant’s attorneys in *Fries* that he would allow them to argue to the jury that the court was mistaken in its opinion on the law of treason since the legal definition of treason, rather than any dispute on the facts, was the decisive issue in the trial. *Case of Fries*, 9 F. Cas. at 939. He appended to his answer to the charges the entire *Case of Fries* including his instruction to the jury that they were to judge both law and fact.

United States Supreme Court Justice Samuel Chase charging the jury in *Case of Fries*, 9 F. Cas. at 930:

“It is the duty of the court in this case, and in all criminal cases, to state to the jury their opinion of the law arising on the facts; but the jury are to decide on the present, and in all criminal cases, both the law and facts, on their consideration of the whole case.”

This jury nullification instruction may have helped to save the day for Justice Chase as the Senate failed to convict him and he remained on the bench.

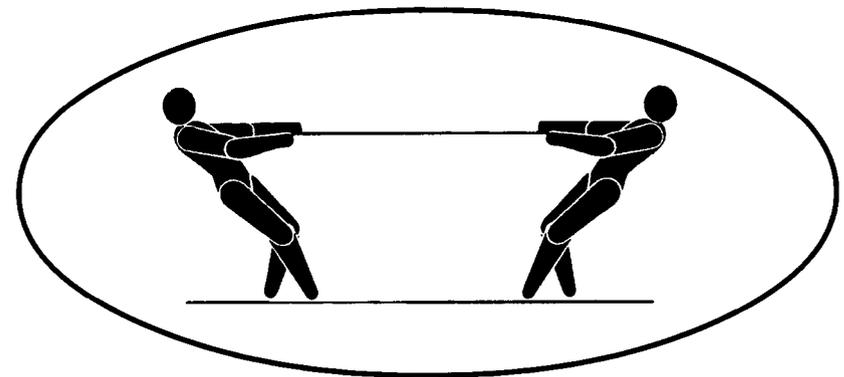
Judicial Attempts to Control the Jury

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.

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...Th(is) tug of war over jury nullification has also involved statutes and constitutional provisions.

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."

Empowering the Jury as the Fourth Branch

“...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.”

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.”

Sparf, dissenting opinion, 156 U.S. at 174

Something should be said about the historical context of *Sparf and Hansen*. The 1890s were a time of strife between labor and industry. Most judges came from the upper classes and they often sided with the wealthy owners of industry by using their injunction powers to break labor strikes. The juries, on the other hand, were often working class people and they often used jury nullification to defeat anti-labor union laws by acquitting striking workers and labor union organizers who were being tried under criminal conspiracy laws that had been enacted to stop unions. Juries acquitted in spite of evidence that labor union organizers were “guilty” of the “crime” of organizing a labor union. See Barkan, *Jury Nullification In Political Trials*, Social Problems, Vol. 31, No. 1, p. 33, October 1983.

Empowering the Jury as the Fourth Branch

The argument of judges that the rule of law requires juries to blindly follow the law as dictated by a judge ignores the uncomfortable reality that laws are not always just, and that the juries who are asked to apply these laws may have a better sense of this than the politicians who make the laws or the judges who interpret them.

The majority opinion in *Sparf and Hanson* in 1895 attempted to curb the jury’s knowledge of the right of jury nullification. The Court could hardly have been unaware that this opinion would help wealthy industrialists and harm the labor movement. The argument of judges that the rule of law requires juries to blindly follow the law as dictated by a judge ignores the uncomfortable reality that laws are not always just, and that the juries who are asked to apply these laws may have a better sense of this than the politicians who make the laws or the judges who interpret them.

Some would still argue that the jury should always defer to the legislature in the matter of repealing unjust laws. But unjust laws supported by powerful special interests are not always easy to repeal. And in any event, the future repeal of a bad law does nothing to help a present defendant.

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. And furthermore, the jury can do little “to prevent oppression by the Government” if it is told that it must blindly follow the government’s laws that are dictated to it by a judge. The jury must be independent of both the legislature and the judge if it is to fulfill its historic role of preserving freedom.

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 inherent 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

Empowering the Jury as the Fourth Branch of Govern- ment

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.

advise legislatures to repeal or modify them. As Schefflin 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.” Schefflin 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

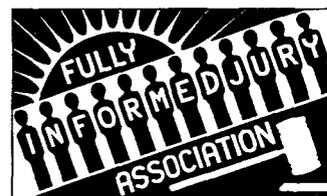
that the early Americans intended jury nullification to work only in the defense of liberty and not to the aid of the government. "The purpose of the rule [is] the preservation of civil liberties against the undue bias of judges." Mark Howe, examining early American cases in *Juries As Judges Of Criminal 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 news-paper, books, tapes, computer disks, leaflets and taped telephone messages and has a toll-free number, 1-800-TEL-JURY (835-5879).

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. Randomly selected juries, especially when one considers their numbers, may be far more representative than politicians. And history is replete with examples that jury nullification serves as a final corrective over both legislative 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 jurymen 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 Schefflin 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.

*Proposed Fully Informed Jury Association
Amendment in Washington State*

HJR 4205

BE IT RESOLVED, BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF WASHINGTON, IN LEGISLATIVE SESSION ASSEMBLED:

THAT, At the next general election to be held in this state there shall be submitted to the qualified voters of the state for their approval and ratification, or rejection, an amendment to Article IV, section 16 of the Constitution of the state of Washington to read as follows:

Article IV, section 16.(1) Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law, except as provided in subsection (2) of this section.

(2) An accused or aggrieved party's right to trial by jury, in all instances where the government or any of its agencies is an opposing party, includes the right to inform the jurors of their power to judge the law as well as the evidence, and to vote on the verdict according to conscience.

This right shall not be infringed by any statute, juror oath, court order or procedure or practice of the court, including the use of any method of jury selection that could preclude or limit the empanelment of jurors willing to exercise this power. This right shall not be infringed by preventing any party to the trial, once the jurors have been informed of their powers, from presenting arguments to the jury that may pertain to issues of law and conscience, including (a) the merit, intent, constitutionality, or applicability of the law in the instant case: (b) the motives, moral perspective, or circumstances of the accused or aggrieved party: (c) the degree and direction of guilt or actual harm done: or (d) the sanctions that may be applied to the losing party.

Failure to allow the accused or aggrieved party or counsel for that party to so inform the jury shall be grounds for mistrial and another trial by jury.

BE IT FURTHER RESOLVED, That the secretary of state shall

cause notice of the foregoing constitutional amendment to be published at least four times during the four weeks next preceding the election in every legal newspaper in the state.

*Justice Goodloe's Proposed Jury Nullification
Instruction for Trial Judges to Give to the Jury*

JURY INSTRUCTION (NULLIFICATION)

No. 7, Given on Court's Own Motion

You are instructed that this being a criminal case you are the exclusive judges of the evidence, the credibility of the witnesses and the weight to be given to their testimony, and you have a right also to determine the law in the case. The court does not intend to express any opinion concerning the weight of the evidence, but it is the duty of the court to advise you as to the law, and it is your duty to consider the instructions of the court; yet in your decision upon the merits of the case you have a right to determine for yourselves the law as well as the facts by which your verdict shall be governed.

It is your duty to reconcile the statements of witnesses so as to give credence to all of the testimony, if you can, on the theory that the defendant is innocent; but if you can not do this on account of contradictions, then upon you rests the responsibility of determining whom you will or will not believe.

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given any witness you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.

From all of the evidence, you will determine the guilt or innocence of the defendant, and make your verdict accordingly.

Justice William C. Goodloe

Elected in 1984 to the Washington State Supreme Court, Justice William C. Goodloe came to the Supreme Court after 12 years on the trial court bench of King County Superior Court, preceded by 24 years of law practice and public service.



Justice Goodloe was born in Lexington, Kentucky, September 19, 1919, and was raised in Pasadena, California. After two years of college in California, he came to Seattle intending to complete his education at the University of Washington. But the high non-resident tuition sent him instead to an interim job, then Pearl Harbor intervened, and Goodloe joined the Navy.

It was also in 1941 that Justice Goodloe married Phyllis Ruth Clarke of Seattle, a graduate of the UW School of Nursing. They have seven children and twenty-one grandchildren.

During World War II, Goodloe put in five years aboard the destroyer escort USS Breeman and the aircraft carrier USS Bon Homme Richard, and was commissioned at sea.

Back home, he resumed his education, earning a Bachelor of Science in law and in 1948 was graduated with a Doctor of Law degree from the University of Washington School of Law.

There followed 24 years of legal practice with the firm of Todd & Goodloe, including a variety of public and community service. In 1951 he was elected to the State Senate, and served until 1959. Senator Goodloe sponsored the legislation creating King County METRO and legislation creating the Century 21 Seattle World Fair, chaired the site commission and served on the fair commission.

In other areas of activity, Justice Goodloe has been state president of the Sons of the American Revolution, served on the board and as state governor of the Society of Mayflower Descendants and on the board of the Seattle Downtown YMCA and is a licensed ham radio operator. He served a term as president of Northwest Opera Co., a forerunner of Seattle Opera.

As a public service, Justice Goodloe has presented more than 300 color-slide lectures on great Americans, from George Washington to Theodore Roosevelt, and has received the Valley Forge Honor Certificate and, from the Family Foundation of America, the In God We Trust medal.

In matters legal and judicial, Justice Goodloe has chaired Law Day of Seattle-King County and is a graduate of the National College of the State Judiciary and has served it as a faculty advisor. Numerous local and state committees handling judicial and criminal justice concerns have been served by Justice Goodloe. He is the author of articles on the Bill of Rights and the Mayflower Compact, and in 1983 was guest speaker for the Nottinghamshire Law Society of England on "Jury Trials in America."

On January 18, 1997, Justice Goodloe passed away. He was 77. For the past several years before his death, Justice Goodloe was the honorary chair of the Fully Informed Jury Association (FIJA) of Washington State. When Justice Goodloe was serving as a trial judge he became disturbed by instances where the jury had told him after the trial that his instructions on the law had changed their verdict from innocent to guilty. So he began researching the true rights and powers of the jury to judge the law, as well as the facts, and to render the verdict according to conscience.

After he was elected to the Washington State Supreme Court, Justice Goodloe made a trip to England and viewed the courtroom where the Quakers, William Penn and William Mead, had been tried in 1670 for preaching an illegal religion. He was especially moved upon reading the plaque which commemorates the courage of the Penn jurors for their jury nullification verdict of acquittal which established freedom of religion. This experience convinced Justice Goodloe that jury nullification is of paramount importance for the preservation of freedom and the Constitution.

VOIR DIRE (JURY SELECTION) EXPOSED

by Patricia Michl

1. WHAT IS VOIR DIRE?

“Voir dire” (pronounced vwar deer) is a French term meaning “to speak the truth.” Voir dire consists of questions asked of prospective jurors by the prosecuting attorney, defense attorney, and judge. The purpose of voir dire questioning is to identify and exclude partisans from serving on the jury. Partisans who may be in the jury pool (the group of prospective jurors from which the trial jury is drawn), could be people such as the defendant’s relatives or the detective who investigated the case.

These partisans are identified by voir dire questioning and then challenged and removed. Also, jurors whose questioning reveals bias or prior knowledge of the case are challenged and excluded.

2. WHAT TYPES OF CHALLENGES CAN BE MADE DURING VOIR DIRE?

There are two types of challenges that can be made to a potential juror: the Peremptory Challenge and the Challenge For Cause.

3. WHAT IS THE DIFFERENCE BETWEEN A PEREMPTORY CHALLENGE AND A CHALLENGE FOR CAUSE?

The Peremptory Challenge

The peremptory challenge is an objection, made by a party, to a potential juror for which there is no reason given, but upon which the court shall exclude the juror from serving on the jury. No reason or “cause” is necessary for this type of challenge. EXCEPT that peremptory challenges may not be used to exclude women or minorities merely because of their gender or race. *Batson v. Kentucky*, 476 U.S. 79 (1986).

The number of peremptory challenges per side is limited by statute or court rule and varies from state to state. For example, in the State of Washington in prosecutions for capital offenses the defense and state may challenge peremptorily 12 jurors each; in prosecutions punishable by imprisonment in a penitentiary, 6 jurors each; and in all other prosecutions and in civil cases, 3 jurors each. *Washington State Superior Court Criminal Rule 6.4(e)(1)*.

The Challenge For Cause

The challenge for cause is also an objection to a potential juror. However, this type of challenge must have some reason or “cause” given. Some of these reasons may be that the person: is less than 18 years of age; is mentally or physically unable to serve as a juror; is related to one of the parties in the case; has a financial interest in the outcome of the trial; or has an opinion against the law in the case. Challenges for cause are unlimited in number. The attorneys will raise the challenge for cause, and the trial judge will rule on that challenge.

Also, the trial judge may, on his own motion, exercise challenge for cause to remove a juror without any action from any of the attorneys. *Washington State Superior Court Criminal Rule 6.4(c)(1)*.

[see the Washington State statute, RCW 4.44.140 – 4.44.190 which defines peremptory challenges and challenges for cause at the end of this article]

4. DOES VOIR DIRE QUESTIONING AND CHALLENGES FOR CAUSE DECREASE THE LIKELIHOOD THAT THE JURY WILL NULLIFY THE LAW?

Yes. Voir dire questioning is used to identify the prospective jurors who are opposed to the law at issue in the case, and then unlimited challenges for cause are routinely used to strike them off the jury because they are deemed by the judge to be “biased”. The specific statute in Washington State that is used to do

this is Revised Code of Washington (RCW) 4.44.170(2), see below. Because all dissenters against the law have been removed from the panel, the jury is less likely to nullify the law at issue.

The court (trial judge) may exclude prospective jurors -

“For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.” RCW 4.44.170(2) [underlining added]

Representative statutes and court rules follow from other states which are also used to strike off prospective jurors who may be opposed to the law at issue:

“Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror.” Oregon Rules of Civil Procedure 57 D(1)(g)

“That the person has opinions or conscientious scruples which would improperly influence the person’s verdict.”
Alaska Rule of Criminal Procedure 24(c)(4)

“For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality, and which is known in the code as actual bias.” Idaho Rule of Criminal Procedure 19-2019 (2)

These examples are representative only; every state’s voir dire statutes and/or court rules will contain similar language which allows the court to strike from the panel all those citizens opposed to the law at issue in the case.

A common method that trial judges use to exercise challenge for cause against a juror is to ask the question, “*Can you follow my instructions about the law as I dictate*”? If the answer is “*No*” then the juror is removed. And sometimes the juror is removed even when the answer is “*Yes*” because the judge earlier elicited opinions from the juror critical of the law.

5. DOES JURY SELECTION (VOIR DIRE) = JURY STACKING?

Yes. When the jury panel is sifted and molded through relentless voir dire questioning with unlimited challenges for cause the result is a stacked jury. The jury is no longer a randomly selected cross-section of the community.

6. WHO WINS IN THIS STACKING PROCESS?

The government wins. The challenges for cause assure that the jury will be stacked with government partisans who have expressed their propensity to uphold the law at issue. This is particularly true when the law is unpopular and there is significant community opposition to the law at issue (victimless crime laws). The panel will be purged of all dissenters against the law, regardless of how much the community may be opposed to the particular law at issue in the trial. The lawyers and the judge will keep challenging and replacing jurors until an unrepresentative jury is chosen.

These challenges for cause, although worded in a neutral fashion (“impartial”), only work one way in actual practice. It is always a successful challenge for cause against a juror that he opposes the law, but never a challenge for cause that the juror supports the law.

However, the effects of voir dire are less egregious when the law has the support of the community (crimes with true victims). There are usually no dissenters to the laws against murder, robbery, forcible rape, burglary, etc. In a case involving these laws, the voir dire stacking process does not so severely distort the make-up of the jury.

7. DOES VOIR DIRE RESULT IN UNBIASED JURIES?

No. Voir dire results in juries biased in favor of the government's laws. These laws may not even enjoy the support of the community. But voir dire assures that only jurors who support the law will be seated on the jury. Only those who support the law are found by the trial judge to be "unbiased" in the voir dire questioning and challenge for cause process. Washington State's RCW 4.44.170 (2) and the voir dire statutes of other states give the trial judge broad powers to probe the "state of mind" of the juror and to determine who is biased and who is unbiased.

*"For the existence of a **state of mind** on the part of the juror in reference to the action, or to either party, which **satisfies the court** that the challenged person cannot try the issue **impartially** and without prejudice to the substantial rights of the party challenging, and which is known in this code as **actual bias**."* RCW 4.44.170(2) [emphas is added]

Judges routinely deem jurors who are opposed to the law at issue to be "biased" and "partial", while deeming jurors who support the law to be "unbiased" and "impartial".

This is a gross distortion of the term "unbiased." In the context of jury trials, "unbiased" should mean that the juror is not prejudiced against nor predisposed towards this particular defendant. It should not mean that the juror holds no opinion about the law or other factors that will impact the trial. Every juror holds countless opinions, and these opinions should not be cause for exclusion from the jury. Many decent, upstanding citizens are excluded from jury service through the voir dire process just because they hold opinions critical of the law. This is political discrimination and a violation of the First Amendment.

It should be noted that *Batson v. Kentucky*, 476 U.S. 79 (1986) forbids racial discrimination in jury selection and encourages a rainbow of skin colors on the jury. But what good does it

do to have a rainbow of skin colors on the jury, only to have the voir dire process stack all of the minds on the jury with the same shade of government gray?

8. DOES VOIR DIRE RESULT IN CROSS-SECTIONAL JURIES?

No. After all the sifting by the prosecutor and judge to purge the jury of those who are opposed to the law at issue, the only remaining jurors will be government partisans, hardly a cross-sectional jury; i.e. no dissidents or independent thinkers will remain on the jury.

9. CAN THE DEFENSE ATTORNEY OVERCOME THE CHALLENGES FOR CAUSE BY USING PEREMPTORY CHALLENGES?

No. There is no way for the defense attorney to "catch up" with the prosecution in jury selection. Because the defendant's peremptory challenges are limited in number, the defense attorney can not undo the rigging process performed by the judge and prosecutor through the limitless challenges for cause. The jury will always be biased in favor of the law. Remember, it is never a challenge for cause that the juror supports the law at issue; hence, the defense attorney can never use a challenge for cause to remove a juror who supports the law, and he is stuck with a panel of government partisans.

10. HOW CAN A CROSS-SECTIONAL BALANCE BE ACHIEVED?

Draw jurors totally at random from the widest possible pool of community members and, except for the reasons mentioned in the privacy rule below, include all jurors. No probing questions. No jury consultants. No questionnaires. No purging. No sifting. No manipulating. No political discrimination. Just seat the jury.

11. COULD LEGISLATION CORRECT THE PROBLEMS OF VOIR DIRE?

Yes. See the Fully Informed Jury Association's proposed juror privacy rule at the end of this article. This rule would assure that voir dire questions are limited to legitimate questions about a juror's bias for or against a particular defendant. The juror's privacy would not be violated by questioning about the juror's political or religious beliefs.

12. WHAT ARE LEGITIMATE QUESTIONS TO ASK JURORS?

Only the following types of questions should be asked of potential jurors:

name, age, address, occupation, and citizenship (identification questions);

whether the juror knows, is related to, or has business relationships with any of the parties, attorneys, or witnesses in the case (bias to the person);

whether the juror has a direct financial stake in the outcome of the case (financial stake);

and whether the juror has a medical or physical condition that would interfere with his or her ability to serve as a juror (medical or physical condition).

FULLY INFORMED JURY ASSOCIATION'S PROPOSED JUROR PRIVACY RULE

"The questioning of prospective jurors during jury selection in all cases shall be limited to the following four areas of inquiry:

The name, age, address, occupation, and citizenship of the prospective juror;

Whether or not the prospective juror knows or is related to, or has any financial, business, or employment relationship with, any of the attorneys, witnesses, or parties in the case;

Whether or not the prospective juror has a direct financial interest in the outcome of the case;

Whether or not the prospective juror has a medical or physical condition that would interfere with his or her ability to hear and examine the evidence or interfere with his or her ability to participate in jury deliberations.

No other kinds of questions shall be allowed to be asked of prospective jurors during jury selection, and they may properly refuse to answer any question put to them that is outside of these four listed areas."

CONCLUSION

It is time that citizens realized the jury's power to sit in judgment of the law when the jury decides cases. If the people come to view some of the laws intruding upon their lives as tyranny, then the people, chosen at random from a fair cross-section of the community, must be allowed to serve on juries to undo those laws. Freedom and justice are not served by seating skewed juries which have been stacked to favor the government. The true purpose of juries is "to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968).

The jury can not prevent government oppression if its members and their political beliefs are being sifted by the government during voir dire. Only by seating conscientious, independent jurors, citizens who are willing to challenge the law at issue in the case, will immoral and unjust laws be struck down — first on a case-by-case basis, and then systematically when the prosecution realizes the futility of even charging certain crimes and stops prosecuting them. Ultimately the politicians will heed the jury's message against unjust laws and move to repeal those laws.

Alcohol Prohibition was repealed only after a massive jury revolt of hung verdicts and verdicts of acquittal against it. If the voir dire stacking process had been used to prevent large numbers of independent juries from rendering jury nullification verdicts against Prohibition in the 1920s and 30s, we would still have the ugly Alcohol Civil War raging today.

Voir dire reforms that encourage more independent juries will initially benefit the defendant, who now consistently emerges the loser in the current voir dire debacle. But ultimately, with voir dire reforms in place and with the jury nullifying unjust laws and leading the way to their eventual repeal, voir dire will favor neither defendant nor prosecution. Justice will be the only winner.

(Patricia Michl is a practicing attorney in Pierce County, Washington and is a member of the Board of the Fully Informed Jury Association)

WASHINGTON STATE VOIR DIRE COURT RULES AND STATUTE

[The following court rules and statute are examples of the laws which control voir dire. Each state's voir dire statute will have its own unique language, but the result – eliminating from the jury persons who oppose the law – will most always be the same. Fully Informed Jury Association supporters should familiarize themselves with the voir dire statutes in their own states.]

WASHINGTON STATE SUPERIOR COURT CRIMINAL RULE 6.3 SELECTING THE JURY

When the action is called for trial, the jurors shall be selected at random from the jurors summoned who have appeared and have not been excused.

WASHINGTON STATE SUPERIOR COURT CRIMINAL RULE 6.4 CHALLENGES

(a) Challenges to the Entire Panel. Challenges to the entire panel shall only be sustained for a material departure from the procedure prescribed by law for their selection.

(b) Voir Dire. A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

(c) Challenges for Cause.

(1) If the judge after examination of any juror is of the opinion that grounds for challenge are present, he shall excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause.

(2) RCW 4.44.150 through 4.44.200 shall govern challenges for cause. [editor's note — underlining added, see RCW sections 4.44.150 through 4.44.190 following, section 4.44.200 was repealed in 1979]

(d) Exceptions to Challenge.

(1) *Determination.* The challenge may be excepted to by the adverse party for insufficiency and, if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party and, if so, the court shall try the issue and determine the law and the facts.

(2) *Trial of Challenge.* Upon trial of a challenge, the Rules of Evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or if found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if not so determined or found otherwise, it shall be disallowed.

(e) Peremptory Challenges.

(1) *Peremptory Challenges Defined.* A peremptory challenge is an objection to a juror for which there is no reason given, but upon which the court shall exclude him. In prosecutions for capital offenses the defense and the state may challenge peremptorily 12 jurors each; in prosecution for offenses punishable by imprisonment in a penitentiary 6 jurors each; in all other prosecutions, 3 jurors each. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the number of challenges provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstance warrant.

(2) *Peremptory Challenges – How Taken.* After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

**REVISED CODE OF WASHINGTON
(RCW) 4.44.140 – 4.44.190**

RCW 4.44.140 Peremptory challenges defined. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

RCW 4.44.150 Challenges for cause defined. A challenge for cause is an objection to a juror, and may be either:

- (1) General; that the juror is disqualified from serving in any action; or
- (2) Particular; that he is disqualified from serving in the action on trial.

RCW 4.44.160 General causes of challenge.

General causes of challenge are:

(1) A want of any of the qualifications prescribed for a juror, as set out in RCW 2.36.070. [is less than eighteen years of age; is not a citizen of the United States; is not a resident of the county in which he or she has been summoned to serve; is not able to communicate in the English language; or has been convicted of a felony and has not had his or her civil rights restored – editor's note]

(2) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him or her incapable of performing the duties of a juror in any action.

RCW 4.44.170 Particular causes of challenge. Particular causes of challenge are of three kinds:

(1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

(2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

(3) For the existence of a defect in the functions or organs of the body which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the party challenging.

RCW 4.44.180 Implied bias defined. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

- (1) Consanguinity or affinity within the fourth degree to either party.
- (2) Standing in relation of guardian or ward, attorney and client, master

and servant or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages, of the adverse party, or being surety or bail in the action called for trial, or otherwise, for the adverse party.

(3) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party, upon substantially the same facts or transaction.

(4) Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

RCW 4.44.190 Challenge for actual bias. A challenge for actual bias may be taken for the cause mentioned in RCW 4.44.170(2). But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

For more information about the jury's power to defend liberty by rendering the verdict according to conscience, the following books are available from the:

Fully Informed Jury Association

P.O. Box 59

Helmville, Montana 59843

(406) 793-5550

<http://www.fija.org>

Jury Nullification: The Evolution of a Doctrine, by Clay Conrad, 1998 Carolina Academic Press, 303 pages.

We the Jury . . . The Impact of Jurors on Our Basic Freedoms, by Godfrey Lehman, 1997 Prometheus Books, 353 pages.

Trial By Jury, by Lysander Spooner, 1852, Fox & Wilkes edition 1992, 183 pages.

The Political History of Jury Nullification, by Godfrey Lehman, 1997 Fully Informed Jury Association, 83 pages.

If you are interested in becoming a supporter of the movement to restore freedom through the jury system, you may want to contact one or more of the following organizations:

Fully Informed Jury Association (FIJA)
P.O. Box 59
Helmville, Montana 59843
Phone/fax (406) 793-5550
<http://www.fija.org>

International Society for Individual Liberty (ISIL)
PMB 299
836-B Southampton Road
Benicia, CA 94510-1960 USA
Phone (707) 746-8796
Fax (707) 746-8797
www.isil.org
e-mail: isil@isil.org

Libertarian Party
2600 Virginia Ave. NW, Suite 100
Washington, D.C. 20037
Phone (202) 333-0008
1-800-ELECT-US
Fax (202) 333-0072
www.LP.org

Copyright 1996

THE FULLY INFORMED JURY ASSOCIATION

F.I.J.A.

The **Fully Informed Jury Association** was founded in 1989 in Helmville, Montana by Don Doig and Larry Dodge. FIJA is a 501(c)3 non-profit association dedicated to restoration of our traditional system of trial by jury, and seeks to protect it from further incursions. FIJA believes that the jury is a crucial check and balance in our system of government, and that the power of the jury to judge not only the evidence, but also the merits of the law itself is central to its historic role.

For more information, contact: FIJA, P.O Box 59,
Helmville, MT 59843. Phone/Fax (406) 793-5550.

DOWNLOADED FROM:

Family Guardian Website

<http://familyguardian.tzo.com>

Download our free book:

[*The Great IRS Hoax: Why We Don't Owe Income Tax*](#)