



PAPERS

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I consider trial by jury as the only anchor yet imagined by man
by which a government can be held to the principles of its constitution.

~ Thomas Jefferson, 1789



Fully Informed Jury Association

Thank you for your interest in these materials published by the American Jury Institute/Fully Informed Jury Association (AJI/FIJA). These papers provide a wealth of information on jury authority and persuasion of the jury. These papers were delivered at our CLE and conference held in Fort Lauderdale in November of 2003. We were fortunate to have an excellent group of presenters, and I am sure that you will benefit from reading their views, studies and strategies.

As I am sure you know, the highest and best function of the jury is not, as many think, to dispense punishment to fellow citizens accused of breaking government-authored law, *but rather to protect fellow citizens from tyrannical laws imposed by a power-hungry government.*

Jurors have a duty and responsibility to render a just verdict. They must take into account the facts of the case, mitigating circumstances, and the merits of the law and its application in each case. The authority and right of jurors to weigh the merits of the law dates from before the writing of our Constitution, in cases such as those of William Penn and Peter Zenger. Should this right ever be repealed, the people will retain the unalienable right to nullify oppressive laws, and in fact then would be compelled to do so.

Jurors, as the representatives of the people, hold no agenda during any trial and most certainly not the government's agenda. Let us not forget that the prosecutors, judges, arresting officers - and the forensic investigators in most cases - are all a part of and paid by government, with personal power bases to build and personal careers to protect through the "productivity" of successful prosecutions resulting in convictions. Jurors have no such stake in the outcome.

The first and foremost function of our jurors is to protect private citizens from a tyrannical and intrusive government when tyranny is expressed through laws usurping the rights of the people. Jurors protect against tyranny by refusing to convict, and our Founding Fathers planned and expected jurors would exercise this power without question. Juries are our last line of defense of our civil liberties.

We sponsor educational seminars for attorneys and judges, publish commentary, develop and present *amicus* briefs when jury function is an issue in a case, provide interviews to the media, speak at functions and in classrooms, and of course distribute educational literature.

If you have suggestions or comments on this or any of our work, I would appreciate hearing from you. For more information on AJI/FIJA, please visit our web sites at www.americanjuryinstitute and www.fija.org or contact the office at any time. Thank you again for your interest in AJI/FIJA, and I hope, if you are not already a member, that you will join with us in our work.

For Liberty and Justice for All,

A handwritten signature in black ink, appearing to read "Iloilo M. Jones", is written over a horizontal line.

Iloilo Marguerité Jones
Executive Director

Current Constitutional Authority For Jury Nullification

Jury nullification, which is the right and power of the jury to judge the law, as well as the facts, and to render the verdict according to conscience, is explicitly authorized in the Constitutions of twenty four states.

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 on new trial, as in civil cases."

Oregon Constitution, Article 1 Section 16

"(a) 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 on 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.

Twenty other states currently include jury nullification provisions in their Constitutions under their sections on freedom of speech, specifically with respect to libel cases.

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."*

Alabama (Article 1 Section 12); **Colorado** (Article II Section 10); **Connecticut** (Article First Section 6); **Delaware** (Article 1 Section 5); **Kentucky** (Bill of Rights Section 9); **Maine** (Article I Section 4); **Mississippi** (Article 3 Section 13); **Missouri** (Article 1 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 I 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."*

"...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

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.

The Maine Constitution affirms these roles 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)

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. 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, 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.

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

"[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 right of revolution to protect their liberties, then they certainly also have the lesser-included and gentler right of jury nullification to protect their liberties.

Jury nullification is also 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. Therefore, it is one of the *"rights ... retained by the people"* under the Ninth Amendment, and it is one of the *"powers ... reserved ... to the people"* under the Tenth Amendment.

Jury Nullification is decentralization of political power; it is the people's 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.

The only reason that these jury nullification provisions are not given full force and effect today with proper jury instructions is that judges do not like to share their power with the citizens.

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]

