Moral authority of juries: A forgotten aspect of citizenship

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MORAL AUTHORITY OF JURIES:
A FORGOTTEN ASPECT OF
CITIZENSHIP

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of

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ABSTRACT

This thesis examines the ethical and historical foundations for a Fully Informed Jury Amendment, legislation that recognizes the "nullification" power of the jury. The ethical discussion focuses on the dual role of the jury deliberation process paralleling the distinction between natural law and legalism. Hobbesian equity is contrasted with Aristotelian equity to further discussion of the ethical rationale for acknowledging a juror's duty to act according to his conscience for the sake of justice. The historical tradition of "trial by jury" as a political process is traced from its inception by Henry II through the present with emphasis on the jury's function as a moral check on government. It is advocated that legal protection be extended to the right of citizens to exercise the "nullification" power in order to maintain a highly regarded system of law based on equity and founded on the moral integrity of its citizens.
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CHAPTER ONE

INTRODUCTION

The purpose of this thesis is to determine if a Fully Informed Jury Amendment would help individual citizens regain their position as a check on the moral authority of government.

A Fully Informed Jury Amendment would require judges to inform juries of their right to determine the law as well as the facts. Legal recognition of this inherent right of jurors will empower the jury to once again be the final authority in determining which government activities are within the law.

In order to make this determination I will: (1) establish that the trial by jury process is an integral part of our political heritage (Chapter 2); (2) prove that it is an unethical practice for the courts to disallow jurors knowledge of their power to act in accordance with their conscience and best sense of justice ("nullification") (Chapter 3); (3) examine arguments for and against allowing the nullification instruction and the political significance of each (Chapter 4); (4) determine if a Fully Informed Jury Amendment could restore the role of the individual citizen as a moral check on government activity (also Chapter 4); and (5) identify the educational stance that hinders the development of citizenship and the
acquisition of the historical foundation of the Fully Informed Jury tradition necessary for citizens to maintain the political order in a free society (Chapter 5).

As for policy recommendations, the results of this investigation will provide me with the research necessary to develop an educational unit on the trial by jury process and the importance of the individual in this process of maintaining a free society. This draft unit can then be recommended to the Clark County School District. On a personal level, this research will provide the proper perspective of my role as a juror the next time I am called to serve.
CHAPTER TWO

HISTORY OF THE INHERENT
POWER OF A TRIAL
BY JURY

The purpose of this chapter is to make clear to the reader that the history of the process of trial by jury indicates that an inherent power exists within the individual jurors to act as a check on the moral authority of the state when it moves to exert the force of law against any individual. In 1852 Lysander Spooner so aptly stated in *An Essay On The Trial By Jury*:

> It is also their [the juror's] 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.

This indirectly incorporates the process of trial by jury into the political process.

The first section of this chapter will trace the development of the jury process from its English inception into the political process by Henry II through the American Revolution. It was during this time period that the ethical foundations based on custom and tradition were laid for a jury process inherently capable of judging the justice of the law as well as the fact.

The second section will examine the American experience of the trial by jury process from the American Revolution to date. This experience illustrates that while this segment of the political process has been manipulated by the
judicial branch of the state, the inherent power of the individual serving as a juror has not yet been eradicated.

English Precedent

The philosophical foundation for the social and economic order that came to be under the Constitution of the United States is found in the "unanimous Declaration of the thirteen united States of America". Commonly known as the Declaration of Independence, this document set before the rest of the world the rationale for the separation of the colonies from Great Britain. Logic dictates that the argument used by the colonies to justify their separation from Britain must also be the argument used to justify any government to be established by these same colonies.

The second paragraph of the Declaration of Independence contains the founding fathers' rationale for the purpose of establishing government. The power delegated to government originates with the citizens' Creator, who endows them with inalienable rights. Amongst these are the three basic rights of life, liberty and the pursuit of happiness—the keys to securing all other rights. In order to secure these rights according to the laws of nature and nature's God, men form into community and institute government. The sole purpose of this government, then, is to secure these inalienable rights of the individuals consenting to be governed. These individuals now have a vested interest in the activities of their government and a duty to participate in the establishment of the order in which they will abide.
The terms of the resulting contract can be inferred through custom and/or tradition or expressed in a constitution. It follows then, that when government voids the social contract and no longer functions as a protector of individual rights--as had the government of George III--those consenting to the established government must declare that breech, abolish the existing government, and institute a new one.

Within this "unanimous Declaration of the thirteen united States of America" is a long list of grievances which the colonists believed to be insufferable to the point that they determined "it is their right, and it is their duty, to throw off such government and to provide new guards for their future security." This list of grievances consisted of violations of the rights of man guaranteed to British subjects (colonist included) by the Magna Carta (1215) and by the English Declaration and Bill of Rights of 1689. The Magna Carta limited the kings authority and was the first document to guarantee a trial by a jury of ones peers. The English Declaration and Bill of Rights of 1689 guaranteed individual rights that were considered to be "true, ancient, and indubitable rights and liberties of the people" of the English kingdom along with limiting the taxation powers of the king and the maintenance of a standing army. The colonists' claim to these rights had been established through many years of custom and tradition as British subjects.

The Declaration also states that "prudence dictates governments long established should not change for light and transient causes". Therefore, the rights and privileges of individuals being abused and usurped by Britain must
have been held in such high esteem by the colonists that to suffer the loss of these rights was considered by them to be unjustifiable, thereby justifying the revolution that was now inevitable. It was inevitable because the relationship between the governed and the governing institution (British monarch through Parliament) was modified by that governing institution, to such an extent that the social contract no longer functioned; Britain had voided the contract.

The issues identified in the list of grievances in the Declaration of Independence acknowledge the three parties involved in establishing the recognized social order of the colonies. One party is the created state (British "King in Parliament", the perpetrators of the abuses), a second party is the community (the colonies, injured through economic hardships suffered by colonial society on the whole), and the third party is the individuals making up that community (citizens being deprived of individual rights without due process because of the abuses). The recognition of these three distinct political components is important because it recognizes the right of the individual to participate in politics, determining limits on government activities, and defines citizenship for the individual as the activity necessary for creating and maintaining these limits. That political role was being violated, among other ways, by taxation without representation, and the deprivation of a trial by a jury of one's peers.

Brought into the political process by Henry II at Clarendon in 1166, trial by jury was quickly assimilated into the standard English justice system. Henry's primary motivation was to wrest power away from the manor courts administered
by the Barons, thereby increasing the power of the king. In order to entice litigants to the king's court Henry initiated what he thought to be the best justice system at the time, a trial by jury—albeit the king's jury. Guinter in his book, The Jury in America, identifies the two singular virtues of Henry's juries.

Although Henry left no writings to explain his reasoning, we can infer from his other political and judicial actions at the time that he must have seen that a jury system would have two singular virtues. First, since it would give people the chance to help decide their own affairs, its presence was likely to add to the popular support he was seeking for his royal courts over the baronial ones: secondly, and at least as importantly, the jury would provide a justice-dispensation method which the church could not readily control.

Henry's justice system came to be so highly regarded that the monarchs of Castile and Navarre chose to have Henry's judges settle a border dispute for them.

By 1215 some two generations later trial by jury was demanded as a basic right of an Englishman when the Barons overpowered the king and forced him to sign the Magna Carta. This document limited the king's power by recognizing the rights of an Englishman. The Magna Carta makes mention of trial by jury several times (chapters 10,40,52 and 39). Chapter 39, written by the Barons in their own self-interest limited the concept of trial by jury to a jury of one's peers. Chapter 39 states:

No freeman, shall be taken or/and imprisoned or disseised or exiled or in any way destroyed, nor will we [the king] go upon him nor send upon him, except by the lawful judgment of his peers or/and by the law of the land.

Though written to provide for themselves a jury made up of barons as a protection from the king, once again, the process of trial by jury was expedient
for political purposes but was argued as an entitlement for all "freemen". For the period of time between the close of the thirteenth century when Edward declared that trial by jury be considered part of the English common law and Bushel's case in 1670, juries continued to operate under fear that the verdict they returned would not be acceptable to the judge who would then issue a "writ of attainnt".

When a judge or some other royal authority disagreed with a jury verdict, a writ of attainnt (i.e., a claim that the verdict was tainted) could be issued and a new jury of 24 summoned to reconsider the case and try the original jurors for perjury rising from their "false" verdict. Should the second jury decide the first had done wrong—which usually meant it decided that bribery had taken place—the punishment meted out to the attainted jurors could be a heavy one. As sir John Fortesque summarized in 1470: "All of the first jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands, their habitations and houses shall be pulled down, their woodland shall be felled, their meadows shall be plowed up and they themselves forever thenceforward be esteemed in the eye of the law infamous."

In addition to the "writ of attainnt", jurors also had to contend with the fear of possible prosecution in a special court of the king known as the Court of Star Chamber. Initiated in 1487 this special court claimed exclusive jurisdiction over felonies such as forgery, perjury, rioting, fraud, libel, conspiracy and political crimes. Jurors who decided against the Crown often found themselves being indicted in the Court of Star Chamber—not under British law, but by methods similar to the Spanish Inquisition.

After losing a bout with the crown as to the superiority of the Common Pleas courts (common law) over the Chancery courts, Sir Edward Coke (1552-1634), the most highly regarded common law jurist, gave up his position on the Common Pleas bench in order to be elected to Parliament. Once elected he
facilitated the elimination of the Court of the Star Chamber. This same Parliament then resurrected the Magna Carta as a guarantor of the rights of all Englishmen, and declared that Parliament be the lawmaking body superior to both common law and Chancery (equity) courts. While Edward Coke championed the Common Law his motive here had more to do with vengeance for the decision made by Sir Francis Bacon to place the Chancery Courts over the Common Pleas Courts rather than building the foundation of individual moral authority through the jury process. However, this later consequence was soon to happen.

The catalyst for the final change in the jury process began with the arrest of a young man by the name of William Penn and his companion Charles Mead under the Conventicle Act. The Conventicle Act (1660) was intended to provide speedy remedies for any seditious action; particularly any action involving what could be construed as insurrection against the Church of England. Penn and Mead, both Quakers, were accused under this law of "seditiously" causing a tumult. Prosecution under statutory law, the Conventicle Act, would result in a fine which both young men could easily afford; prosecution under the "common law" of unlawful assembly could lead to jail sentences. Needless to say the young men were to be tried under common law. However, the way in which the charge was written made it evident that it was the Conventicle Act under which they were being tried.

After hearing the evidence--testimony of three men who claimed to have seen Penn preaching but were too far away to hear what he was saying--the jury
was given their charge. After 90 minutes the jury stood eight to four for conviction. Edward Bushel upon being recognized by an alderman as one of the possible holdouts received this admonishment: "You deserve to be indicted more than any man that hath been brought to the bar this day." The judge then added the threat of branding the recalcitrant jurors.\textsuperscript{10}

When the jury returned from further consideration it returned with one verdict:

William Penn, they said was "guilty of speaking in Gracechurch Street." That was not what the judges wanted to hear. They couldn't send anyone to prison for that. "Was it not an unlawful assembly?" demanded the judge. "You mean he was speaking to a tumult of people there."

The foreman of the jury replied: "My Lord, this was all I had in commission."\textsuperscript{11}

Disregarding further threats of detainment and starvation this jury continued to find Penn and Mead not guilty. Unable to force a verdict the judge returned Penn and Mead to their jail cells and fined each of the twelve jurors 40 marks. When the jurors refused to pay they also were imprisoned. It was 1670 and these twelve jurors were about to put the "writ of attaint" to rest. Cast into Newgate Prison, eight of the twelve jurors eventually paid their fines and were released. The remaining four retained lawyers to argue their case (Bushel's Case). After a year of litigation the fining and imprisonment of this jury was declared illegal. More importantly, however, was the finding by the Chief Justice that no jury can be punished for its verdict.

Bushel and his colleagues—men otherwise anonymous but distinguished in the history of freedom—had made it possible
for all juries that came after them to render their verdicts without fear and as they, not the judge, saw the equities. The jury of one's peers that the barons had provided had at last become what the barons never wanted it to be, a democratic parliament of twelve.\textsuperscript{12}

Bushel's Case is important in itself for the role it played in eliminating the "writ of attaint". When coupled with the litigation which called this jury into being, the importance is magnified. By not rendering the verdict called for by the court this jury took on the moral authority to determine that the law, the Conventicle Act, under which Penn and Mead were being prosecuted did not apply in this case.

As the English colonies were established in North America their charters and governing documents provided for the right to trial by jury. The First Charter of Virginia (1606) extended the rights of an English subject to the colonists. King James I's Instruction for the Government of the Colony of Virginia specifically mentioned the right to a jury trial.\textsuperscript{13}

The American Experience

By the time of the American Revolution the process of trial by jury in the colonies had evolved to enable the jurors to judge the law as well as the facts.\textsuperscript{14} This right was granted to jurors in Massachusetts in 1641, repealed and regranted by enactments in 1642, 1657, and 1660.\textsuperscript{15} The oath administered to jurors in Massachusetts incorporated instructions cautioning them to deliver their verdict "according to law and the evidence given you."\textsuperscript{16}
In cases decided in 1692, 1764, 1767 and 1773 in Pennsylvania, it was held that jurors had this right to determine both law and fact.\textsuperscript{17} A review of cases that were argued in Pennsylvania in 1784 found opposing counsel argued different law and the jury was charged to make up its own mind as to which was correct.\textsuperscript{18} There was only one judge in the United States between 1776 and 1800 that denied juries the right to decide law as well as fact. He was afterward impeached by the House of Representatives of Pennsylvania and removed by the Pennsylvania Senate.\textsuperscript{19} In 1790 Pennsylvania provided by constitutional provision that "in all indictments for libels the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases."\textsuperscript{20} The duty of the jury resulting from this direction to determine the law and the facts is to determine the applicability of the law in light of the facts specific to the case.

Often the jury became aware of their right to determine both law and fact indirectly as was the case in the John Peter Zenger trial (1735). In this case jurors were informed of their right to decide the law as well as the facts through closing arguments. Zenger, a New York newspaper printer, was charged with libel against the royal governor of New York. The judge made it clear that the jurors could only decide the facts; in this case that amounted to whether or not Zenger did in fact print the article. It was to be a simple case with the jury returning a verdict for the king. However, Zenger's attorney argued that if the story was true then the words could not be held libelous. The presiding judge positioned himself by stating that "a libel is not to be justified; for it is nevertheless a libel that it is true"\textsuperscript{21}; reserving the right to decide the law as to
what constitutes libel to himself. In the closing arguments Zenger's lawyer, Andrew Hamilton pressed the jury to determine the truth of the facts presented.

The chief justice interrupted Hamilton's closing argument reminding him that the jury:

"May find that Mr. Zenger printed and published those papers, and leave it to the court to judge whether they are libelous. You know this is very common; it is in the nature of a special verdict, where the jury leave the matter of law to the Court."

Hamilton's reply to the judge at this point informed Zenger's jurors of their right to determine the law.

"I know, may it please your honour, they may do so; but I do likewise know they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact, and where they have no doubt of the law, they ought to do so....

Hamilton continued to the jury:

"A proper confidence in a court is comendable; but the verdict (whatever it is) will be yours, you ought to refer to part of your duty to the discretion of these persons. If you should be of opinion that there is no falsehood in Mr. Zenger's papers, you will, nay (pardon me for the expression) you ought to say so.... It is the best cause; it is the cause of liberty." 22

When the jury returned with a not guilty verdict it was much more than a victory for freedom of the press. Zenger's trial set precedent for the jury's right to nullify law since the judge did not stop Hamilton from arguing the question even though he did not concede to the right.

Thus, trial by jury was recognized by the founding fathers as something more than a mere judicial process. It was understood to be the process by which individuals maintained the public morality through exertion of their moral
authority (the original power of the individual to establish government) in
determining what actions of government were to be considered lawful.

The colonist could not be made to suffer the hardships put on them by
Britain through various legislation as long as they maintained their individual
rights; for no jury would convict anyone tried under those laws. Guinther (1988)
notes the importance of the trial by jury as a political power between 1764 and
1776:

A denial of the right to jury helped force that revolution into
eexistence. The stage was set through the passage by Parliament of the
Stamp Act of 1764, a tax on paper that was considered a form of
censorship by many newspaper publishers. It proved difficult to enforce.
To gain convictions of violators, the British government switched
prosecutions under the statute from the Common Pleas to the Admiralty
courts where, as in Chancery, juries—which would have freed the Stamp
Act protestors—were not permitted. The Stamp Act Congress, held in
New York in 1765, specifically condemned this abrogation of the jury trial,
but Parliament, at least initially, was unimpressed by the complaints.  

According to Scheflin and Van Dyke (1980) juries for much of the
seventeenth, eighteenth, and nineteenth centuries were frequently told that they
had the right and power to reject the judge's view of the law.  
Howe (1939)
observes that in the period soon after the constitutional convention juries had
the right to determine both law and fact. Rules of evidence were either loose or
nonexistent, and the control of the judge over courtroom procedure was
apparently limited to preventing mayhem.  
Provine (1986) provides one
rationale for such jury power; that is, very little distinguished the lay jurors from
the equally lay judge. 
The newly formed U.S. Supreme Court set impressive legal precedents defining the jury's power. Georgia v. Brailsford (1794), a civil case being heard under the original jurisdiction of the Supreme Court, set precedent when Chief Justice John Jay sitting as a trial judge advised the jury that they should take the law from the court:

"But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."  

Bingham v. Cabot (1794) drew a similar opinion of the jury's power from justices James Iredell and James Wilson. This principle of jury justice was adhered to whenever prosecution for seditious libel under the Sedition Law of 1798 came before the courts.

The broad support shown for the juries' right to decide law and fact in the late 1700's continued into the nineteenth century. In Massachusetts as late as 1829, the jury was thought to be a partner in a joint enterprise with the judge, with respect to determinations of law and fact; judge-jury co-operation was the rule in both areas. Succinctly put in Commonwealth v. Childs (1829), "the law presumes intelligence in the jury."

However, as the nineteenth century progressed, the juries' right to consider the equities of the law gradually eroded. Horowitz and Wellging (1991) attribute this to the increasing professionalism of jurists, and the courts' reaction to the muzzling of trial judges at
the turn of the 19th century. The direct and special verdicts as well as the special interrogatories were judicially developed to curtail the juries' power to decide questions of law. Evidence of such development can be found in the Massachusetts cases of Commonwealth v. Porter (1845) and Chase v. Breed (1855), culminating in Commonwealth v. Merrill (1860).

The first attack on the juries' power came in 1845. In Commonwealth v. Porter (1845) Chief Justice Shaw argues that:

"The constitutional guarantee of a trial before an impartial judge under standing laws would be violated if the jury were allowed to decide questions of law."

Chase v. Breed (1855) and Commonwealth v. Packard (1855) both suggest a move toward the directed verdict. Finally, in Commonwealth v. Merrill (1860) "the court held for the first time that a directed verdict is mandatory when the evidence is legally insufficient." The courts decision to uphold the use of directed verdicts led to the Massachusetts legislature adopting a statute that explicitly gave juries the power to determine both the law and fact.

The concept of natural justice which prevailed in the first half of the century was the foundation for the arguments against the directed verdict. The legislature's arguments that the jury had the right to decide law included two positions. The first position being that the jury could respond to a higher law which would allow the jury to reach its conclusion of the basis of natural law considered to be more truly just. The second position being that the jury is qualified to determine the contents of the positive law, using the relatively simple
and understandable common law which is closely related in principle to the natural law.\textsuperscript{37} The state of Indiana also adopted a similar statute at this time.

Scheflin and Van Dyke (1980) attribute the curtailment of jury rights to the notion that leading judges did not think that a jury could be permitted to mitigate the law without also being able to create harsh and vindictive laws.\textsuperscript{38} Scheflin and Van Dyke illustrate their point by citing United States v. Battiste (1835). This case concerns the application of an 1820 statute that provided the death penalty for any American citizen who should "seize any negro or mulatto" with the intent of making the person a slave. The defendant had been a sailor on a ship that transported slaves from Portuguese Africa. Two questions of interpretation of the law had to be resolved: (1) whether the statute applied to sailors who gained no title over slaves and no profit from their sale; and (2) whether it applied to the transportation of slaves between two points within a country practicing slavery. Supreme Court Justice, Joseph Story, sitting as the presiding trial judge answered both questions with a "no". His concern in limiting the jurors to his interpretation of the law and to decide the facts only was that he did not want the jurors to convict the defendant for an act that the legislature did not intend to criminalize. While Justice Story's position runs contrary to the power of juries determining the law, it is in fact congruent with the spirit of the nullification issue; that the nullification power be used whenever the jury has an inclination to show mercy.\textsuperscript{39} The Fugitive Slave Act of 1850 led to direct confrontation in the issue of jury independence. The Fugitive Slave Act was
difficult to enforce because so many people were opposed to the law that juries habitually acquitted in cases of obvious violation. In United States v. Morris (1851) Justice Benjamin R. Curtis, presiding trial judge, disallowed the counsel for the defendant to argue that if the jurors:

Conscientiously believed the Fugitive Slave Act to be unconstitutional then they were bound by their oath to disregard any direction to the contrary which the court might give them. Curtis concluded that:

The jury have the power to go contrary to the law as decided by the court; but that power is not the right, is plain, when we consider that they also have the like power to go contrary to the evidence, which they are sworn not to do.40

Justice Curtis continues by explaining that if jurors were permitted to decide questions of law, then they could overturn decisions of the Supreme Court. The purpose of the 1802 statute (which makes Supreme Court decisions final) would be subverted and uniform interpretation of the law would be impossible.41

The decisions made individually by Justices Story and Curtis were used extensively when the question of what jurors should be told about their power came before the Supreme Court in 1895. The jurors for Sparf and Hansen v. the United States (1895) were trying to discern if they could find the men guilty of manslaughter rather than murder even though there was no evidence to sustain that charge. In response to the jury's request for additional instructions to be given by the judge the court stated that:

In a proper case, the 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. 

The defendants appealed to the Supreme Court arguing that the jury had been improperly instructed. The Supreme Court clearly decided that jurors must take the law from the judge and may not substitute their own beliefs of what the law should be. However, they did not address the specific question whether jurors should be told they can refuse to enforce the law's harshness when justice so requires.

The courts continued to consistently recognize the power the jury held in determining cases according to conscience—nullifying law—but the issue of what to tell the jury concerning this power remained moot until the latter half of the twentieth century. The high acquittal rate in prohibition cases during the 1920's and 1930's was a good indication that prohibition laws could not be enforced. According to Scheflin the repeal of those laws can be traced to the power of the juries to refuse to convict those accused of alcohol traffic even when the defendant appeared to be guilty. In 1949 the U.S. Court of Appeals for the Ninth Circuit noted,

The jury has always exercised the pardoning power, notwithstanding the law, which is their actual prerogative.

Understanding this jury's power to nullify and its decision not to in this case, provided further support for the Ninth Circuit Court of Appeals to uphold the conviction. By the 1960's however, when the Department of Justice decided to move against political activists (Vietnam war protestors) the issue of the jury's right to be informed of their power to decide the case based on conscience was
no longer moot. The forum for the debate was United States v. Dougherty (1972). This case involved nine members of the Catholic clergy who broke into Dow Chemical Company offices and ransacked the premises to protest Dow's manufacture of napalm. The defendants requested a jury nullification instruction at the trial but the request was refused. On appeal, the U.S. Court of Appeals upheld, by a two-to-one vote, the trial judge's refusal to give the nullification instruction.47

Judge Harold Leventhal writing for the majority asserted that jurors know of their prerogative to decide the case based on conscience through "informal communication from the total culture" (sources such as television, literature, newspapers etc.).48 He feared that if jurors were told of their power to nullify, they may react and thereby radically upset an institution that functioned best when functioning informally. Chief Judge David Bazelon wrote the dissenting opinion, condemning the inconsistent view that glorifies nullification as enhancing the "over-all normative effect of the rule of law",49 while requiring that the nullification power be concealed from jurors and perhaps even denounced in their presence--as had been done in Dougherty.50 It is interesting to note that the nullification defense was allowed four years later when twenty-eight Vietnam War protestors went on trial in Camden, New Jersey for destroying draft records. All twenty-eight were acquitted even though the FBI caught them inside the draft offices destroying records. Today the right of the jury to act as a check on the state exists as it did two hundred years ago. The individual juror has the inherent power and duty as an individual to determine the justice of the law as
well as the facts. However, the manipulation of this power by the judicial system, coupled with decreasing knowledge of our unique political heritage has left the citizen ignorant of his status in the political arena with respect to carrying out his duties as a juror.
ENDNOTES


4. Ibid.


6. Ibid., 20

7. Ibid., 16

8. Ibid., 23

9. Ibid., 25

10. Ibid., 26

11. Ibid., 26

12. Ibid., 27


14. Ibid.

15. Josiah Quincy, Jr., "Report of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, (Boston Little, Brown and Company, 1865) 559 as cited in Lloyd E. Moore, 110

16. Moore, 110

18. Quincy, 586 as cited in Moore, 107

19. Ibid., 569

20. Howe, 587 as cited in Moore, 107


22. Ibid., 108

23. Guinther, 30


27. Georgia v. Brailsford, 3 U.S. (3Dall.) 1,4 (1794) as cited in Scheflin and Van Dyke, 55

28. Bingham v. Cabot, 3 U.S. (3 Dall. 32-33 (1795); 2 Wilson Works 371-74 (J. Andrews ed. 1895) as cited in Scheflin and Van Dyke, 58


31. Horowitz and Willging, 174

32. Anonymous, Yale Law Journal, 185

34. Ibid., 176
35. Ibid., 184
36. Ibid.
38. Scheflin and Van Dyke, 59
39. Ibid., 60
41. United States v. Morris as cited in Scheflin and Van Dyke, 60
42. Sparf and Hansen v. United States, 156 U.S. 51 (1895) as cited in Scheflin and Van Dyke, 61
43. Scheflin and Van Dyke, 63
44. Scheflin and Van Dyke, 71
45. Local 36 of International Fisherman and Allied Workers of America v. United States, 177 F.2d 320 (9th Cir.1949) as cited in Scheflin and Van Dyke, 74
46. Scheflin and Van Dyke, 74
47. Scheflin and Van Dyke, 65
49. Ibid.
50. Ibid.
As we traced the history of the trial by jury process in chapter two from its English origins through the American experience we found that the trial by jury process has always played a political function in the administration of the law. Both the U.S. Senate and the U.S. House of Representatives in separate committee reports prior to the approval of the Federal Jury Selection Act of 1968 articulated their recognition of the political function of the trial by jury process: "it must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of injustice in deciding it".1

The goal of this chapter is to determine if it is an ethical practice for the courts, who recognize the political function of the trial by jury process, to disallow jurors knowledge of their power to act as moral agents in checking government activity through the nullification power of the jury, "the right of jurors to refuse to enforce the law against defendants whom they believe in good conscience should be acquitted".2 The nullification power of the jury "empowers jurors to appeal to fundamental principles of justice over and above the written law."3 A juror knowledgeable about this right is referred to as a "fully informed..." 

juror". A "Fully Informed Jury Amendment" (FIJA) would make it mandatory for judges to include information about this jury right in their instructions to the jury.

I plan to meet this goal by examining the dual role of the trial by jury process through Hobbes's use of the terms "justice" and "equity" as the basis of his political arena. A distinction between law and legalism will be made and their relationship to justice and equity will be established. The relationship between the individual citizen and the concepts of law and legalism, equity and justice will be drawn to indicate that the individual citizen bound by the principles of equity and lawfulness, is the originator of the law and therefore the only moral authority capable of determining equity and dispensing justice. The subordinate position of the state in relation to the people within the political order will be the final premise in support of my conclusion, that any state preventing individual citizens from using their inherent capacity to reason and act equitably, acts in an unethical manner. Therefore it is an unethical practice not to acknowledge a juror's right to act according to conscience. Prohibiting the nullification instruction prevents a juror from acting in accordance with his/her moral prerogative.

Dual Function of the Trial by Jury Process

The essence of the dual nature of the trial by jury process is to simultaneously serve both justice and equity. In order to do this the jury simultaneously creates two distinct objectives, one which I shall refer to as the
'justice objective' is maintained on an individual basis and the other, which I shall refer to as the 'equity objective' is maintained on a societal level.

The political function of the jury serving the 'justice objective' is to determine if an individual member of society has maintained the legalities of the law. The specifics of the case as to the truth and probability of evidence are examined and if one or more acts by the accused are found to be outside of the parameters of what the conscience of the community accepts as documented in written law, then, it is the duty of the jury to determine that violation and what degree of punishment should be used against the individual.

The political function of the jury serving the 'equity objective' is to determine if the positive law (law that is established and recognized by governmental authority) as interpreted by the officials of the state, reflects the natural law as interpreted by the citizens of the community. Every time a jury acts upon a specific set of circumstances it evaluates the soundness of the positive law as an expression of the natural law, establishing the parameters of what the community determines to be lawful in that circumstance.

Citizens cannot be released from the political duties of the jury due to the self-legislating nature of equity and lawfulness. Equity and lawfulness are self-legislating in the sense that both equity and lawfulness in and of themselves obligate one to a course of action that must be maintained in order for equity and lawfulness to exists. It is this nature that binds citizens to a course of action that neither judicial policy nor legislation can eliminate. Socrates reminds his jurors
that they have this obligation to determine both law (including the legal) and equity (including justice) when he states:

The jury does not sit to dispense justice as a favour, but to decide where justice lies; and the oath which they have sworn is not to show favour at their own discretion, but to return a just and lawful verdict. It follows that we must not develop in you, nor you allow to grow in yourselves, the habit of perjury; that would be sinful for us both...I leave it to you and to God to judge me as it shall be best for me and for yourselves.4

Socrates' appeal to his jurors to avoid perjuring themselves while deliberating his fate implies that they have a duty to act according to a higher law and that to stray from that course of action that higher law sets out for them compromises their integrity. Socrates entrusts his jurors and God to judge him with equity--"as it shall be best for me and for yourselves."5

The Self-Legislating Nature of Equity, Justice, Lawfulness and Legality

Webster's Ninth New Collegiate Dictionary defines lawfulness as that which is "constituted, authorized, or established by law (natural, divine, common or canon)". It distinguishes lawfulness from legal within its definition, stating that "legal" applies to what is sanctioned by the law or in conformity with the law, especially as it is written or administered by the courts.

Natural law, as defined by Cicero, is what individuals arrive at as a result of the "highest reasoning".

Law (lex) is the highest reason, fixed in nature, which commands what is to be done, and prohibits the opposite. That reason, when it is established and fulfilled in the mind of man, is law. Accordingly they think that law is the wisdom whose force would lie in commanding to act rightly and forbidding to do wrong.
Since nothing is better than reason, and since it is both in man and in God, the fellowship of reason is the first thing man shares with God. But those who share reason also share a common right reason. And since the latter is law, we must suppose that men are associated with the gods also in law. Furthermore, those who have a community of law (lex), have also a community of right (ius); and those who have these things in common, are to be held as of the same State. And it is much more so if in fact they obey the same authority and powers; but they do obey this heavenly order and divine mind of god of superior power; so that this whole world is to be regarded as one common State of gods and men.\footnote{Cicero identifies reason as a divine part of the nature of man; man being subjected to the divine authority then, is also subjected to his reason, which each of us share with others and with the gods.}

Cicero identifies reason as a divine part of the nature of man; man being subjected to the divine authority then, is also subjected to his reason, which each of us share with others and with the gods.

It is, however, in his \textit{De Legibus} that Cicero makes his distinctive contribution. Identifying "right reason" with those qualities of human nature whereby "man is associated with the gods," he there assigns the binding quality of the civil law itself to its being in harmony with such universal attributes of human nature. In the natural endowment of man, and especially his social traits, "is to be found the true source of laws and rights," he asserts, and later says, "We are born for justice and right is not the mere arbitrary construction of opinion, but an institution of nature." Hence justice is not, as the Epicureans claim, mere utility, for "that which is established on account of utility may for utilities sake be overturned." There is, in short, discoverable in the permanent elements of human nature itself a durable justice which transcends expediency, and the positive law must embody this if it is to claim the allegiance of the human conscience.\footnote{Corwin recognized the relationship established between reason and the "supreme power" as the source of "higher law" for American constitutional law (positive law). He credits Cicero for recognizing the self-legislating (directing a course of action necessary to maintain in order for existence) aspect of natural law based not only on its connection to the divine, but also on the divine's reflection in man. This reflection is the essence of justice in human nature. Justice is neither arbitrary nor expendable, it is a permanent natural right of man}

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providing the binding qualities of civil law. In other words, justice requires a
certain course of action be taken by man if justice is to exist.

The translators of Cicero use the term 'positive law' to describe the
embodiment of right reasoning in written form for all to know. Hobbes uses the
term "artificial law" to describe this same concept of written law embodying
"natural law".

As Cicero made a divine connection in order to align positive and natural
law on a moral spectrum for the Hellenistic philosophers, Hobbes does so for the
Renaissance and early modern philosophers. Art to them was "God's way in
nature, and therefore, it [the artificial] is man's way to build within nature so as to
bring natural beginnings to their best possible fruition by admixture of man's
labor and skill." The emphasis on the skill and labor in the making of the
artificial is important. The artificial thing is not made lightly as a substitute for
the natural, but meant to reflect the natural as purely as possible within the
nature of that by which it is made. Artificial law is crafted with language and will
only be as effective as the language allows.

Hobbes, like the classical philosophers, recognizes two types of law,
natural and artificial. Natural laws or lawfulness, are really "theorems" of natural
reason which we seek in order to live in peace and become individuals
(technically they are not law until acted upon in a public manner).

Artificial law or legalism, by comparison, is the result of men coming
together in covenant and creating an artificial entity, the public. This public
requires an artificial person to act as its agent, taking on all the capacities of a
real person including that of right reasoning i.e. public logic.\textsuperscript{10} It is the duty of this public person then, to state what is the public logic i.e., "how we agree to use words in conversation (c) [and] must include agreement about good and evil on those matters which make and dissolve fundamental social bonds. Privileged definitions or usages cannot be allowed in these matters."\textsuperscript{11} Artificial law should reflect the natural law to the extent of the public logic. Artificial law can become obsolete as the public logic develops or it can become broader and more encompassing or narrower and more limiting as the language changes. Therefore a need exists for constant checking to ensure that the artificial does in fact reflect the natural.

Lawfulness and legalism, the real and the artificial are dual guideposts to man's interactions. Lawfulness is based on man's ability to reason that whatever is good for himself is also good for others. He extends to others those rights he wishes to claim for himself when he enters into a social covenant (society): "we demand no right against others we do not grant others against us"\textsuperscript{12}.

Lawfulness according to Hobbes is adhered to because of its equitable nature founded in reason. Hobbes's use of the term "equity" was unique in that it transformed the classical definition of fairness and equality in business dealings resulting from some other moral prerogative to being a moral prerogative in itself. For Hobbes equity was no longer merely a remedy for an injustice; equity became the reason for just actions and subsequently the foundation for lawfulness and legalism.
For Hobbes and Aristotle as for many others equity is that to which appeal is made in the interpretation or "correction" or supplementing of the letter of the law. That to which appeal is made in equity has, however, become a very different thing for Hobbes. As we have seen Aristotelian equity is a correction of the just as the lawful which seeks to do as the lawgiver himself would have done were he faced with the circumstances under which the law he devised now operates.... For Hobbes, on the other hand, equity is at once that to which appeal is made in the interpretation of the laws, a standard for the performance of the sovereign's office, and 'that habit by which we allow equality of nature'. As the interpreter of law is allowed or even required to suppose always that the legislator intended equity, the appeal to equity becomes an appeal to what has been called 'natural public law'. Equity is no mere "complement" or perfection of the just as the lawful; it is rather the very foundation of justice as the lawful.13

Classical Aristotelian equity is "a correction to legal justice" when the "error was not in the law or the legislator but in the nature of the thing".14 Classical equity was called upon when the legal justice system failed in specific situations due to the universality of the law. Equity in the Aristotelian sense is not a standard in itself but a tool allowing for the correction of artificial or legal justice in order to achieve natural justice which is the mandating standard. One classical example of Aristotelian equity is the "grandfather clause", a clause creating an exemption based on circumstances previously existing.

In contrast to Aristotelian equity, Hobbesian equity is a moral standard in itself and becomes the foundation for lawfulness and subsequently legalism. Hobbes saw equity in a way which was inconsistent with common law (which relied on classical equity to repair injustices). But these injustices would never have occurred under law founded upon Hobbesian equity. Mathie summarizes Hobbes's concept of equity in relation to the common law as follows:
As unwritten law can be nothing other than the law of nature as
determined by reason or equity, no custom or presumption in law can
establish as law whatever is contrary to equity. Hobbessian equity generates justice, lawfulness and that which is legal.

Aristotelian equity is something in addition to that which is legal in order to
achieve an equitable result—justice as prescribed by the law.

It [equity] is not better than justice in the sense that it belongs to a
different and better genus than justice. The just thing to which the
equitable thing is superior, is the lawfully just thing, i.e. the equitable thing
is better than that which is just as being in accord with the law.

Legalism is the result of men coming together in equity to institutionalize
through the written word the conditions under which they relinquish their rights
for the sake of living in peace. Legalism establishes the parameters by which
individuals refuse to allow society to infringe upon the liberties they have as
individuals. Written law is expected to be adhered to based on the principles of
justice—that all parties (real and artificial) concerned agree to the terms set forth.

Since both parties, be they real or artificial (such as the state), know the terms
of the written law there is no reason not to abide by the law other than to
perpetrate an injustice:

for 'injustice is no other than the not performance of covenant. And
whatsoever is not unjust is just'.

Taking those qualities which are instinctual, primitive and natural for man and
making them artificial [legal] through the process of right reasoning should make
those qualities better or near perfect. Therefore, that which was made artificial
through the process of public logic should be adhered to by the public since they, the public, are the cause.\(^{18}\)

It was according to Hobbes the mistake of Aristotle to make natural inequality a foundation of his political science; whether men are equal by nature or not they must be acknowledged such, as they are within Hobbes's own political teaching. Equity as the habit of acknowledging this natural equality, or demanding as one's own right only what one will admit to be the right of others, becomes the fundamental moral virtue, a rule for the guidance of public policy, and a powerful instrument for the interpretation of law.\(^{19}\)

Since Aristotle's politics is not based on equality he must constantly remedy the laws and decisions on an as-needed basis according to privilege and rank in the community in order to achieve equity. Hobbes establishes his politics on equality disallowing for rank and privilege therefore his equity is a standard in itself.

The nature of equity and law as well as the origins of legalism and justice provide individual citizens with two political obligations, both of which can be fulfilled as part of the jury deliberations in the trial by jury process. One is to make certain that the written law is adhered to in the name of justice (Aristotle's "distributive justice"). The other is constantly to check that the written law does in fact reflect natural law as it is understood by the community (in the name of Hobbesian equity). Determining both the law and the facts in these ways is what a "Fully Informed Jury Amendment" would require a sitting jury to do, for it allows citizens to exercise their right and fulfill their obligation to perform these two checks on the law. It is the nature of equity and law and the origins of
legalism and justice in that nature that gives man the right to act as the moral authority in guiding the government.

The Final Premise

The United States was established by people who held the moral prerogative of universal equity in the Hobbesian sense: and a belief in the rights of the individual to extend only so far as he grants his neighbor the same rights. In order to ensure their rights the people established an artificial entity, the state, to administer the aspects of living in unity. However, they reserved for themselves the administration of the law through the republican form of government, and the reservation of the right to a trial by jury in order to have the final say in all state activity.

The United States was brought into existence according to this sequence as evidenced in the Preamble to the Constitution. The emphasis of the Preamble is that the state is subordinate to the people.

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.20

Article III, Section II, Paragraph III of the Constitution guaranteed the right of trial by jury to the people. Many people feared losing this right to trial by jury and actively campaigned against the adoption of the Constitution unless a Bill of Rights stating the rights of the individual in the political order being established by the Constitution was included. Patrick Henry, who years earlier spoke
impassionately in favor of independence, spoke candidly about his fears of losing the right to trial by jury.

But, Sir, I have strong cause of apprehension: In some parts of the plan before you, the great rights of freemen are endangered, in other parts absolutely taken away. How does your trial by jury stand? In civil cases gone--not sufficiently secured in criminal--this best privilege is gone: But we are told that we need not fear, because those in power being our Representatives, will not abuse the powers we put in their hands: I am not well versed in history, but I will submit to your recollection, whether liberty had been destroyed most often by the licentiousness of the people, or by the tyranny of rulers.²¹

Henry, along with the many others, demanded that the Constitution be further defined in order to protect this "best privilege". This was accomplished in the Fifth, Sixth, and Seventh Amendments of the Bill of Rights.

What made the right to trial by jury a "best privilege" was the tradition of jurors being allowed to determine the law as well as the facts (exactly what a Fully Informed Jury Act would guarantee)--the right to nullify law in certain circumstances. This power, to check whether state activity was consistent with the law, is what Alexander Hamilton referred to when he called the right to trial by jury "the very palladium of free government".²² This same power is referred to today as the power of "jury nullification".

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."²³

The status of the state as being subordinate to the people in the political order established by the Constitution is critical to the argument in support of FIJA because a state whose existence is subordinate to the people, as the
United States is, has no authority to limit or influence the decision making process of the people as individuals or collectively as “the public”. In a free society based on equity no one individual or state has privilege over another.

The moral prerogative upon which the law of the United States is based is grounded in Hobbesian equity. This is critical to the argument in support of FIJA. Thomas Jefferson, writing for the founding fathers, explains this equity in terms of the universal equality of individuals as to their inalienable rights. These rights are the same ones Hobbes ascertains as the first two laws of nature in *Leviathan* stemming from the basic right “jus naturale”, the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life.

Hobbes first law of nature is:

that every man has right to every thing;

and his second law of nature is:

that a man be willing, when others are so too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself.

These same Hobbesian laws are re-iterated by Jefferson with these words:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

A detailed comparison between John Locke and Thomas Hobbes is outside the scope of this thesis, although an explanation is in order to justify attributing Jefferson's concept of universal equality as stated in the Declaration of Independence to Hobbes rather than Locke. Traditionally we associate
Jefferson's words with Locke rather than Hobbes. As Hartz stated, "a society which begins with Locke, and thus transforms him, stays with Locke, by virtue of an absolute and irrational attachment it develops for him". Jefferson's thoughts on man's moral nature are considered eclectic in that he includes Stoic, Christian, humanist, deist, Epicurean, utilitarian, agrarian, Enlightenment, social contract, and natural rights concepts.

Peter Laslett in his introduction to the 1988 edition of the Two Treatises of Government credits Locke with providing the political policy that Hobbes' Leviathan lacked.

It [Two Treatises of Government] contained just that ingredient which Leviathan lacked--policy; statement of guidance of what men will accept, respond to and pursue, allowance for the limits of their loyalty and for the limits on possible generalization about their behaviour. But Locke "on Government" was also the presentation of a cogitated case, a piece of intellectual persuasion, from a mind with a great deal in common with that of Hobbes, fully aware of the change which Hobbes had wrought.

Laslett further observes that the influence of Locke as a political writer arose, "probably because of his philosophical fame" while Hobbes, whose goal was to write a political program, was read and seen as literature only.

Pangle establishes a similar Hobbes-Locke connection. He attributes to Hobbes a radically transformed concept of the "state of nature" from a state of innocence prior to the Fall (in the Bible) to a "state of warring". From this transformation Hobbes developed his theory of natural rights, social compact, and sovereignty. Locke's amelioration to Hobbes's theory made it "something acceptable to the great body of decent opinion--and something not only acceptable but overwhelming in its appeal".
Pangle continues on to explain Locke's refutation of Filmer's position in *Patriarcha* by directing the reader to one of Filmer's lesser writings, *Observations on Mr. Hob's Leviathan*. In so doing the issue has become a question of whether Filmer's scriptural arguments against the Hobbesian conception of man is valid or invalid. Locke proceeds to answer that Filmer's arguments are invalid, therefore, Hobbes "State of Nature" doctrine stands. Locke has affirmed Hobbes's stand.\footnote{33}

Similarities between Hobbes and Locke are seen by David Held to include:

Their view on the establishment of the political world as preceded by the existence of individuals endowed with natural rights...their concern to derive and explain the very possibility of government... their concern about what form legitimate government should take and about the conditions for security, peace and freedom.\footnote{34}

While there is no documented evidence that Locke drew directly from Hobbes, the philosophy and argument in *Two Treatises* supports Hobbes influence. Locke's writings parallel Hobbes's ideas on natural law and universal equality, the concepts that Thomas Jefferson was to establish as the moral foundations for the United States.

This moral prerogative based on Hobbesian equity is critical to the argument in support of FIJA. The individual will use the same moral prerogative of equity to determine the law as a juror that "the public" (the artificial entity representing private individuals) used when establishing the law. So, if the people go so far as to establish a government based on the moral prerogative that every individual has the same rights to the same extent, then the artificial
entity established to administer the legalities of the law can in no way have more power than the individuals originating that entity when it comes to determining the moral prerogatives upon which law is based. Mathie observes:

   Equity becomes, in the teaching of Hobbes, the basis of a new political order fully realizable in any time and place and even invulnerable against all internal causes of dissolution, because that order is founded on the consent of men who are by nature equal and allows men to pursue a commodious existence through their own industry within a structure recognizing that same equity.35

   The strength of the system lies in the adherence to the moral prerogative by the individual at all times. The entire political order is at stake when individuals are prohibited from acting according to their moral prerogatives at any given time. Any attempt by the state to limit or prohibit the individuals right to adhere to his or her moral prerogative such as prohibiting jurors to act according to conscience puts the state at risk of dissolution--extreme language but the correct appraisal of what happens during the transition from legitimate to non-legitimate government.
ENDNOTES


3. Ibid., 61

4. Plato The Last Days of Socrates Penguin Classics, 68

5. Ibid.


8. Ibid., 71


10. Ibid., 78

11. Ibid.


15. Mathie, 268

16. Ibid., 270


18. Walton, 85

19. Mathie, 274


23. Ibid.


25. Ibid., 103-104


30. Ibid., 90
31. Ibid., 91


33. Ibid., 140


35. Mathie, 274
CHAPTER FOUR
POLITICS OF THE JURY
NULLIFICATION
INSTRUCTION

The focus of the previous chapter was the ethical foundation for establishing and maintaining law in a free society. It was determined that: 1.) citizens implement natural law in their community according to the moral prerogatives dictated by equity; 2.) citizens must constantly check on the moral authority of the law making sure that the artificial entities (the state and its institutions) designated to administer the law capture the essence of the natural law in the written law; historically trial by jury is one means by which this check can be made; 3.) this check is essential to the perpetuation of the free society; and 4.) it is unethical for any person to prevent or cause to prevent citizens from exercising their right to check the moral authority of the law. Therefore, it is an unethical practice for judges and/or the judicial system to prevent the jury nullification instruction or the use of the concept of jury nullification as a defense.

The focus of this chapter will be the general policy of the courts not to inform jurors of their right to determine the law and the political significance of this policy to the political order established by the Constitution. The proposed corrective measure of a "Fully Informed Jury Amendment" (Act) will be examined
to determine if it is a viable solution.

Jury Nullification

While it is possible in a republican form of government to have some influence in the general lawmaking process through the election of representatives and the initiative and referendum process, it is only through jury deliberation that twelve representatives of the community as a whole have a chance to assemble and make a final, binding statement as to what the community considers lawful in specific circumstances. The power to choose not to enforce a law against someone is referred to as the power of 'jury nullification'. It occurs when the jury determines that a law does not apply to the case being tried because of particular circumstances unique to that case and finds a 'not guilty' verdict for the defendant. The jury has in effect checked the state's application of the law to the case and has determined that application to be inconsistent with the conscience of the community, even though the facts may be consistent with the artificial law. Jeffrey Abramson, a professor of politics at Brandeis University, describes jury nullification in his book, *We, the Jury*, in the following manner:

Jury nullification is about the right to set aside the law only to acquit, never to convict. As a doctrine, jury nullification poses no threat to the accused; it is in fact the time-honored way of permitting juries to leaven the law with leniency.¹

The second chapter of this thesis recounted historical use of jury nullification through the 1970's and the political trials of the Vietnam War protest
movement. Abramson cites more recent cases where he believes jury nullification offers the best possible explanation for the verdict.

The 1994 acquittal of Dr. Jack Kevorkian, accused of violating a Michigan law that made it illegal to assist persons to commit suicide, is the first example offered. The law under which he was prosecuted contained an exemption for the acts that were done with the intent of relieving pain and suffering even if the person performing the acts knew they would hasten death. In post-trial interviews jurors indicated a belief that Dr. Kevorkian acted only to relieve the person's pain and suffering even though he continued the action of holding the mask and releasing the carbon monoxide into the patient's (victim's) lungs for twenty minutes. Abramson's explanation of the jury's behavior in the Kevorkian acquittal is that "they nullified the law insofar as it prohibited a physician from assisting a suicide."²

Next Abramson illustrates jury nullification at work in the 1990 jury acquittal and deadlock of Washington D.C. mayor, Marion Barry. In spite of overwhelming evidence in eleven of the thirteen charges--some of which was acquired through an FBI sting operation--the jury acted with relative leniency acquitting or deadlocking on twelve of the thirteen charges, convicting on one minor charge in order not to send the "wrong message" about drugs.³

Analyzing the verdicts Washington columnist William Raspberry speculated that:

The jury behaved as if Washington were a 'federal colony' with a black population and a white power structure. The jury, Raspberry thought, bridled at the year-long vendetta of the U.S. Attorney's Office
and the FBI to bring down a popular black mayor. They refused to convict, beyond that one charge, out of a sense that "occupying forces" had pulled out all the stops to topple a powerful black man for merely personal sins. There may have been no legal basis for some jurors' refusal to convict on the most serious charges, but Raspberry congratulated them for using their nullifying powers to send a powerful message to federal authorities about the nature of life in Washington D.C.

The last case Abramson uses to illustrate jury nullification is the Iran-contra trial of Olive North. Clearly instructed by the judge that following orders did not excuse criminal acts the jury proceeded to acquit North on nine of the twelve charges, on the grounds that he argued his superiors knew of his false statements to Congress and his other steps to cover up illegal Contra-funding activity. The jury did convict him of the three charges where the evidence indicated that North acted alone, without authorization from superiors. Post-trial comments by jurors indicate they:

Believed North was a 'scapegoat blamed unfairly for following the instructions of his superiors and that is why [we] voted to acquit' him of the charges of lying.

Abramson concludes:

The jurors' words, as well as the verdict pattern, suggest that they decided, against the judge's instructions, that it would be unjust to convict someone for carrying out government policies approved at the very top, even if North had to lie to Congress to carry on.

In each of these cases the jury found unique aspects that prevented them from applying the law under which the defendants were prosecuted. The written law did not change, it simply was determined through jury deliberation that the law was not applicable in the situation, so the jury nullified the law in each case.
The Controversy

While jury nullification is not specifically outlawed in any state, only four state constitutions (Maryland, Indiana, Oregon and Georgia) have provided for judges to instruct jurors sitting on criminal juries of their right to determine the law as well as the facts. In Indiana a trial judge may:

Declare the law to the jury but... [it] must not be done in a manner calculated to bind the conscience of jurors and restrict them in their right to determine the law for themselves.

And in Maryland a judge instructs:

Members of the Jury, this is a criminal case and under the constitution and laws of the state of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept it or reject it. And you may apply the law as you apprehend it to be in the case.

Currently twenty-three states include jury nullification provisions in their constitutions under their sections on freedom of speech, especially with respect to libel and sedition cases. However, since no instruction by the judge informing jurors of this right is required, the jurors who are often unfamiliar with the details of their state constitutions are unaware that they have the power to exercise this right.

The power of jury nullification exists today only for those jurors educated about their right to nullify law and confident enough to follow through with non-restrictive deliberations. Uninformed jurors are led to believe that their deliberations must be restricted to coincide with the instructions given by the
judge, disregarding their own conscience and sense of justice. In doing so the jury becomes nothing more than a fact-finding body.

The jury is led to believe they are a fact-finding body only through the rhetoric of jurors' handbooks and courtroom instructions. Exemplified locally, the handbook of the Eighth Judicial District Court of the State of Nevada, "Jurors' Handbook: Jury Service....An American Heritage, A Personal Privilege", requires jurors to swear or affirm to the following oath:

You and each of you do solemnly swear (or affirm) that you will well and truly try the case now pending before this Court and a true verdict render, so help you God?14

This oath is non-restrictive, in that it does not bind the juror to abide by the Court's instructions as to the law or for that matter upon the evidence received into the record by the Court. However, the very next paragraph in the jurors' handbook admonishes the jurors to restrict their deliberations to just that:

This oath is not to be taken lightly or soon forgotten. By taking your oath you have given your word that you will reach your verdict solely upon evidence received into the record by the Court and permitted to remain, and upon the Court's instructions as to the law. You must not consider any other evidence. You must not consider any other instructions. As a juror, your position will be as important as that of the judge in the administration of justice in the case at hand.15

After a discussion on trial procedures the "Jurors' Handbook" once again emphasizes the restrictions placed on jury deliberations by the judge's instructions rather than the jurors' oath:

At the conclusion of the testimony, the next step, and a most important one, is taken by the judge. The judge will instruct you on
the law that applies to the case, and you must apply that law to the facts as you find them in arriving at your verdict.\textsuperscript{16}

The dilemma of the juror in deciding if he or she is to abide by his oath or obey the judge’s instructions is exacerbated as this handbook revisits the great tradition of jury justice—being representative of the community’s standards—a tradition that included the right to nullify law.

The verdict resulting from your deliberations will not only determine the outcome of the particular case, but it will also influence the general caliber of justice rendered in our community. Juries in this court have been doing meritorious service. They have set a worthy standard. It is the responsibility of our judges, of you, and of all future jurors to insure the continuance of jury service at that high level.\textsuperscript{17}

This dilemma is not unique to the Eighth Judicial District Court of the State of Nevada. Abramson finds this same type of instruction in virtually every jurisdiction’s handbook in the country.\textsuperscript{18}

The devastation caused by jurors lacking the nullification instruction can be felt by the defendants as evidenced by convictions rather than hung juries open to retrial; as well as the jurors whose integrity is compromised as they are forced to apply the law regardless of their own sense of justice and good conscience.

In 1980 Scheflin and Van Dyke published “Jury Nullification: The Contours of a Controversy”\textsuperscript{19}, in which they explored the five major arguments against giving the nullification instruction to the jury. The five positions represented by these arguments have been labeled by Scheflin and Van Dyke as: 1.) the "anti-anarchy" position; 2.) the "nullification-is-unnecessary" position;
3.) the "nullification-is-unwise" position; 4.) the "damn-good-reason" position; and 5.) the "responsibility-of-the-juror" position. "Contours of a Controversy" was written in the 1980's; however, proponents for not giving the nullification instruction still propose these same arguments today.

The supporters of the "anti-anarchy" position fear jury sovereignty would lead to anarchy and lawlessness. This fear illustrates a lack of understanding of the dispensing power of the jury--the power to "suspend the application of a particular law in a particular instance to a particular defendant in the interest of conscience and justice". The jury's deliberations are limited to the particular case at hand and no legal precedents are set. However, suppose there were a string of such cases: nullification of the same law under many different circumstances should indicate to legislators that the law is not representative of the conscience of the community.

The "nullification is unnecessary" position is supported by those who believe nullification serves no useful function in our legal system because other avenues are available for resolution of situations often decided through jury nullification. Scheflin and Van Dyke describe these situations as ones "where the exercise of conscience by the jury is particularly important to protect the defendant and to ensure the fairness of the legal system". Such situations might be a prosecution brought on by an overzealous prosecutor bringing prosecution because a prominent or controversial person is involved or because of some personal relationship between the prosecutor and one of the parties, or perhaps a situation in which the trial judge is not able to view the case
objectively, yet does not recuse himself. Cases with unique circumstances such as the government being the victim of the crime in a way that makes it impossible for the prosecutor not to prosecute or for the judge to dismiss the matter (Camden 28 Jury); or a case so highly publicized that prosecution is unavoidable, though undesirable, which could more easily resolve itself through jury nullification than other channels but the argument is that cases such as these can be handled by requests for dismissal or mistrial. Jury nullification, acquitting a defendant, in cases where the government has overstepped legitimate bounds in its efforts to bring the defendant to trial (Ruby Ridge and Waco come to mind) would be appropriate if requests for dismissal were ignored. Hamilton identifies this exact scenario in reference to revenue agents and comments:

And as to the conduct of the officers of the revenue, the provision in favor of trial by jury in criminal cases will afford the security aimed at. Willful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offenses against the government for which the persons who commit them may be indicted and punished according to the circumstances of the case.  

Finally, the situations presented when the defendant has the sympathy of the community because of his sufferings or one who has violated an unpopular law and the community does not condemn his actions are conducive to resolution through jury nullification. In each of these examples alternative channels for resolution may exist but as Scheflin and Van Dyke point out "the jury is the only institution sufficiently free of technical legal constraints to reach a just and reasoned conclusion."
The "nullification-is-unwise" position holds that nullification is inconsistent with democracy since it "allows a single juror the opportunity to overthrow the majority will as expressed in legislative enactments." Supporters of this position believe unjust laws are never enacted. They fail to understand the strength of the message frequent nullification of a law sends to legislators--"laws frequently nullified are probably not reflective of the people's will and the jurors, as representatives of the people, are saying so."25

The "damn-good-reason" position originally presented by Kadish and Kadish in Discretion to Disobey acknowledges the jury's power to nullify is legitimized only by a "damn-good-reason" defined as the attainment of the end for which the jury is committed to serve--justice. Recognizing the value of the nullification power to the legal system, Kadish and Kadish argue that juries should not be told of their power to nullify ensuring use in extreme cases only, and limiting the use of this power overall.

Scheflin's and Van Dyke's opposition to the "damn-good-reason" position is four pronged. First, there is no empirical evidence to support the claim that if told of their right jurors would wield their power indiscriminately. Second, the "damn-good-reason" position relies on deception. There are no political advantages to be gained through a legal system based on deception. Third, this position is internally inconsistent. The proponents of the "damn-good-reason" position want jurors to be informed of their right and power (and even use them on occasion) but they do not want the courts to be the medium by which they are informed of their right and power. Finally, nullification instructions would lead to
more just verdicts because the nullification instruction would establish standards on which to base a verdict. These standards would be justice and good conscience rather than the biases of each juror.

The final argument against giving the nullification instruction is the "responsibility-of-the-juror" position; this position has advocates coming from two very different perspectives.

Professor George Christie advocates not giving the nullification instruction to the jury out of fear that the application of the law in question would be outweighed by the application of a law which required jurors to acquit on the grounds of good conscience. His fear is that jurors would perceive the nullification instruction as an imperative rather than a prerogative. He states:

The nullification instruction would be perceived by jurors as a command that they must acquit "if they feel strongly enough about the matter".\textsuperscript{26}

Scheflin and Van Dyke explain Christie's objection to the perceived imperative in that it removes the responsibility for acquitting from the jurors to the law recognizing the right of nullification.

This is the basis of objection because he believes that the jurors alone bear responsibility for acquitting in these circumstances not the law which permits them to get away with doing so.\textsuperscript{27}

Judge Leventhal arrives at the same conclusion that nullification instructions should not be given to jurors. His reasoning is that the burden of taking responsibility for condemnation may overpower the jurors if they know they also have the power to free the defendant. Leventhal sees the nullification
instruction as a means of personalizing jury deliberations rather than keeping the deliberations in the legal arena.

Scheflin and Van Dyke counter-argue against this position with the obvious. They state:

Jury service is a heavy responsibility and any attempt to make it lighter by passing responsibility to another governmental agency or institution violates the concept of the jury. Jury service should be understood and treated as one of the most solemn and meaningful obligations a citizen can be called upon to perform.\(^\text{28}\)

They conclude:

We do not believe that it is conducive to good citizenship or good character to shift the responsibility elsewhere rather than standing up for what you believe is right. If jurors have reached unpopular verdicts which they feel are nevertheless correct, and if they feel that they have the obligation to explain those verdicts, then their explanations should be based upon their recognition of their own role in attempting to do justice within the law.\(^\text{29}\)

Political Significance of Not Giving a Nullification Instruction

Scheflin's and Van Dyke's counter arguments to the five opposing positions stem from their belief that "failure to inform the jury of their right to nullify seriously weakens the 'concept of jury', thereby impermissibly diluting the defendant's Sixth Amendment rights".\(^\text{30}\) Jury nullification as a right is an enhancement of our judicial and political system.

The right of the jury to nullify applications of the law in a particular case can also be supported on political grounds as an essential aspect of democratic self-government. It serves to remind governments and legal professionals that the people are sovereign. It serves to remind the community that protection of its liberty and freedom rests in the hands of the people.\(^\text{31}\)
Abramson discusses the political restructuring that occurs as a result of the loss of the nullification right. Weak, fact-finding-only juries resulting from the lack of the nullification instruction are a means by which liberty and self-government are redefined, skewing the justice system into an institution foreign to the Constitution upon which our political order was established.

In the chapter, "Juries and Higher Justice", Abramson parallels the decline of the nullification instruction to "basic shifts in the nature of American law and democracy".32

Regarding the nature of law, Abramson identifies two fundamental shifts requiring weaker juries. The first shift was from law "having its source in natural reason"33 to the complex law rooted in "the shifting politics of a legislature, not necessarily rational, and certainly not traceable to eternal laws of nature".34 To quote Abramson:

This basic, overwhelming change in our views about the nature of law has carried with it fundamental changes in the nature of the jury. From an institution that once presumed ordinary citizens were competent to make independent judgements about the law, the jury changed to reflect the assumption that jurors knew precious little about the law. From an institution that valued decentralized justice and local control over law's interpretation, the jury became exclusively a fact-finding body, leaving judges to enforce a more uniform and consistent body of legal rules. These changes were so monumental that it is scarcely an exaggeration to say that the jury praised by America's founders no longer survives today.35

The second "shift" Abramson discusses is the law's relation to the community as a result of the growth of heterogeneity and changing concepts of democracy. He draws from a study by William Nelson36 indicating that the growth of heterogeneity changed the function of the legal system, making it less
an embodiment of shared values and natural justice and more of a profession
designed to referee the compromises and protect the due process of competing
interest groups.\textsuperscript{37} This is evidenced in the redefining of the impartial jury (to be
discussed in more detail later in this chapter) to one that is representational of
minority demographics in the communities, and cross-sectional in that the jury
must now represent the biases within the community.

The changing concept of democracy that Abramson describes is the
geographical shift of the lawmaking process from the decentralized local level to
the centralized national level. This shift occurred with the transfer of power that
comes with deciding the law at the local level, at the hands of the citizens, via
the trial by jury process, to the hands of the judges at the national level. As the
law developed into a complex legal system federal judges complained “that
juries gave local communities too much control over the law”.\textsuperscript{38} Their argument
was that:

\textit{In a Republican form of government, law could not rule unless its
application was uniform. Juries, armed with the right to decide questions
of law, threatened these core legal values by giving too volatile an
expression to popular sovereignty.}\textsuperscript{39}

According to Abramson, in order to retain the control of the lawmaking
power in the central government federal judges changed the political theory of
self-government based on natural law (and embodied in trial by jury) to self-
government based on artificial law (embodied in due process). In effect this
theory:

\textit{Severed the classical connection between liberty and self-government. In
this new theory, too much popular participation in the judiciary was a}
decided threat to freedom. Liberty was a matter of receiving equal protection from the law, not necessarily a matter of making the law in itself.\textsuperscript{40}

The conclusion to this line of reasoning is that judges, not juries, are best suited to determine the law.

Abramson continues, turning his discussion to the two inconsistencies that emerge when juries are limited to fact finding only. The first inconsistency is that this division of labor, fact finding versus determining the law, does not hold up well in practice. It seems that in spite of judicial instruction on the law jurors default to their own common sense and conscience during deliberations for numerous reasons including the lack of understanding of the judges instructions on the law and the frustration they encounter when the judge fails to clarify the instructions upon request.\textsuperscript{41}

Secondly, the questions of the courtroom do not separate nicely into law/fact distinctions. Abramson discusses how determining fact often encompasses complex decisions based on the nature and degree of the defendant’s behavior in relation to community standards. He cites examples of jurors being asked to decide if defendants are guilty of malice, obscenities, negligence or even murder. In each case the jury—as a matter of so called fact-finding—must "in fact" determine the moral standards of the community, which is, in effect determining law! \textsuperscript{42}

Abramson also recognizes the potential which nullification has "for jurors to unleash their prejudices in the name of conscience".\textsuperscript{43} Citing as examples "the all white southern juries failing to convict whites charged with murdering
blacks or civil rights workers of any race during the 1960's, even though the
verdicts "flew in the face of evidence and law". As late as 1979 jury
nullification was the basis of not guilty verdicts for KKK Klansmen accused of
gunning down marchers in an anti-Klan rally in Greensboro, North Carolina.
Again in 1984 these same defendants were acquitted in federal court on charges
of violating federal civil rights laws.

The Greensboro example of jury nullification is devastating at face value
because it illuminates the dangers of unchecked local biases upon minority
groups. The Greensboro case reeked of racism making it incapable of nullifying
law because a morally unjust jury (one that is not lawful or congruent with natural
law--biased) could not determine the moral standards of the community.
Greensboro and similar cases exemplify the results that occur when juries stray
from the standard of justice established through Hobbesian equity (do unto
others as you would have done unto you).

The civil rights movement of the 1960's, which the Greensboro case was
part of, has forced judicial review of jury selection procedures in order to ensure
due process. No longer are local biases allowed to influence jury selection, thus
eliminating discriminatory juries such as the ones responsible for the
Greensboro acquittal. As Abramson points out "juries selected through prejudice
deliberated through prejudice".

The Supreme Court has moved to rectify the jury selection process in
order to prevent the discriminatory juries prevalent in the South between 1935
and 1975. As a result the nature of an impartial jury has changed from being a
deliberative body to one that balances the biases of jurors. This new jury is described by Abramson as:

one that basically fits the pluralist paradigm of democracy and interest group politics...the key to jury verdicts becomes whom the jurors are, not what the evidence shows...and the highest aspiration we can have for the jury democracy is to represent the perspectives of groups in some fair way, to balance the biases of jurors and therefore achieve an overall impartial jury.48

While the courts can provide remedies when the trial by jury process repeatedly fails to dispense justice, it cannot, however, furnish the morality necessary to promote justice where none exists; for morality is the originator of law and subsequently justice.

Recognizing the inherent benefits and dangers embodied in the power of the nullification right, Abramson concludes that "this is a risk we must take to preserve the jury as a forum where ordinary persons gain the power to reconcile law and justice in concrete cases".49 To do anything less than acknowledge the right to jury nullification would "threaten the integrity of the law"50, and "open the chasm between law and the popular beliefs that the jury system exists to prevent".51 The risk of fully informing jurors of their right to nullify must be taken if the political order--based on law not legalities--as originally established in this country is to be restored.

Fully Informed Jury Amendment, A Remedy

The Fully Informed Jury Association (FIJA) was founded in the summer of 1989 as a lobbying interest advocating laws to protect the right of jury
nullification. Membership in FIJA cuts across political lines and represents citizens from all walks of life interested in preserving the trial by jury tradition handed down from our forefathers. The common ground these people share is their connection to, support for or recognition of the power of civil disobedience. Tax protesters, antilogging environmentalists, advocates for the legalization of marijuana, bikers opposed to mandatory helmet laws, those opposed to gun control laws (National Rifle Association), and most recently supporters of citizen militias, along with others who recognize the source of potential government oppression, all turn to the power of jury nullification "as a way of authorizing the jury to determine whether the disobeyed laws ought to be enforced".52

The organization was founded after attempts to use a jury nullification defense by 'Operation Rescue' anti-abortion protesters was foiled by the presiding judges. James Holman, one of the defendants and publisher and editor of the "The San Diego Reader" newspaper, placed an ad in that newspaper that explained the traditional right of jury nullification and urged the jurors to act according to their conscience while deliberating the case. The judges in response to the ad instructed the jurors that their duty required them to apply the law whether they agreed with it or not. The ad warned the jurors that the judges would indeed take this position and informed them that this instruction by the judges was both unjust and illegal because the jurors had a historic right to disregard the law to uphold a higher justice. The question of trespass was not the only issue the protesters wanted to address though their trial. They wanted to address the underlying issue of the morality of abortion by claiming the
immorality of abortion more than justified the trespass. Confused and ill informed about their rights the jurors convicted the defendants. While the attempt to use jury nullification as a defense failed the protesters, the publicity of this little known right--generated through this trial--revived interest in the concept of jury nullification.

FIGA's goal is to have state constitutions amended or other legislation adopted to require that judges include in their instructions to the jurors the knowledge that they, the jurors, have the right to determine the law as well as the facts in their deliberations.

Eighteen states have had or will have FIGA bills introduced in their 1995/96 legislative sessions. The Fully Informed Jury Association provides lobbyists examples of appropriate wording for "Fully Informed Jury" legislation. One such example reads:

Whenever government is one of the parties in a trial by jury, the court shall inform the jurors that each of them has an inherent right to vote on the verdict, in the direction of mercy, according to his own conscience and sense of justice. Exercise of this right may include jury consideration of the defendant's motives and circumstances, degree of harm done, and evaluation of the law itself. Failure to so inform the jury is grounds for mistrial and another trial by jury. (See Appendix)

Scheflin, Van Dyke and Abramson present good evidence to support their positions that the consequences of not fully informing jurors of their right to determine both law and fact are both societal and political--meaning that they affect the manner by which society influences the political processes. Scheflin's and Van Dyke's arguments illustrate that not giving the nullification instruction to the jurors seriously damages the historical concept of jury upon which our
judicial system operates and jeopardizes the protection provided to the
defendant by the Sixth Amendment. Abramson's argument pointedly traces the
erosion of law and justice in our communities to the creation of juries empowered
for fact-finding only, juries limited by the judges instruction to decide the facts
based on the evidence only. The resulting judicial system is no longer centered
in the conscience of the community but in policy manuals removed from the
reach of ordinary citizens. In each case the individuals who once acted as a
moral check on the authority of the written law were removed from the process.

Is it possible to restore the system of law and justice created by our
forefathers and held in such high esteem through the years? I believe such
restoration is possible and that a Fully Informed Jury Amendment is a step in the
right direction.

FIJA legislation would definitely restore the historical concept of trial by
jury in the country. Requiring the courts to charge the jury with the duty of
determining the law and the fact in accordance with a sense of conscience and
justice reinstates the type of deliberations that were at one time customary.
Such an amendment would eliminate for jurors, already knowledgeable about
their right to deliberate without limits, the dilemma presented when the court
limits jury deliberations to fact-finding only.

FIJA legislation would address Scheflin's and Van Dyke's concern about
protecting a defendant's Sixth Amendment rights to an impartial jury by requiring
that the courts enforce due process by informing jurors of their right to vote
according to their conscience and sense of justice and not merely act as a
rubber stamp for the judge. Unless a jury is able to deliberate about the law and its application it cannot be identified as an impartial jury. To leave the decisions about the law and its application to the administrators of the courts compromises the system of justice which trial by jury is supposed to provide—namely, a system of justice in which the originators of the law are also the enforcers of law.

FIJA legislation is consistent with both 'lawfulness' and 'legalism', the natural and artificial aspects of our judicial system. 'Legalists' those who advocate adhering to artificial law, must advocate the nullification instruction if due process, the result of legalism, is to be provided. Nullification is the power by which juries retain their impartiality. Provided for in the Constitution an impartial jury is a requirement that must be rendered so as not to violate the written law. 'Lawyers', those favoring law determined at the local level, must advocate the instruction for jury nullification for it is the premise upon which law based on the conscience of the community is founded. Both 'legalists' and 'lawyers' realize it is the people who originate the law that must give their final approval that this is in fact the situation in which the law in question applies.

FIJA legislation would ensure that all citizens serving as jurors would have a common reference point from which to start their deliberations—that point being the ethical foundation of the established law in their community. The transition of justice based on law to justice based on due process as described by Abramson would be reversed over time. As jury nullification rights are restored, citizens would again be responsible for establishing and maintaining
law in their communities—the original premise upon which law in our communities is founded.

FIJA legislation does not exist without restrictions, however. As implemented in Indiana the following restrictions apply. "The jury's prerogative lies with questions of the application of the law. The question of the law's constitutionality resides with the courts." The Indiana Supreme Court has rejected the jury's power to create new crimes although no jury has ever attempted to do so. Juries cannot find a defendant guilty of a crime not charged; however, they may find a defendant guilty of a lesser crime than charged if all the elements of that lesser offense are present in the greater charge. Trial judges in Indiana cannot mandate a verdict through instructions to jurors (i.e. that the presence of certain evidence mandates a guilty verdict).

As of the writing of Scheflin's and Van Dykes's article there has been no evidence in the Indiana courts indicating that judges there are dissatisfied with giving the nullification instruction. At that time there was also no evidence indicating juries were acquitting more often due to the instruction.

In 1975 Maryland circuit judges were surveyed by Prof. Gary Jacobsohn to determine their views on the Maryland nullification instruction. Out of the 81 justices surveyed 44 responded. The majority of these 44 stated that the nullification instruction had "not been a significant factor in shaping the output of the trial process". Other responses included three claiming the instruction frequently affected the outcome, and another eight who determined the outcome was only occasionally affected by the instruction.
Overall only eight of the 44 judges responding to the survey felt negatively about the nullification instruction. The others responded in a fashion that lead Jacobsohn to believe that they thought the instruction should be retained.

Asked specifically about the jury nullification instruction fourteen of the respondents valued it because it gave them insight into the "conscience of the community". The twenty-two who disapproved of this jury power did so because they felt it infringed on the judicial domain rather than usurping power from the legislative domain.62

Whether pronounced as a right as it is in Indiana, Maryland and several other states, or operating incognito through the guise of educated jurors, jury nullification is alive and well. In light of the ethical and political arguments in favor of jury nullification presented in this chapter I believe FIJA legislation ought to be incorporated into our justice system legally recognizing a part of our unique American heritage that provides the citizens an opportunity to act as moral agents checking the activity of the government upon its citizens.
ENDNOTES


2. Ibid., 65

3. Ibid., 65-66


5. Abramson, 66


7. Abramson, *We, the Jury*, 66

8. Ibid., 67

9. What is “FIJA”? ’FIJA’ Jury Power Information Kit, Fully Informed Jury Association, (P.O. Box 59, Helmville, MT 59843), 2


12. These states are Alabama (Art.I,sec.12); Colorado (Art.II,sec.10); Connecticut (Art.First,sec.7); Delaware (Art.I,sec.5); Georgia (Art.I,sec.II,Para,1); Kentucky (Bill of Rights,sec.9); Louisiana (Art.XIV,sec.9); Maine Art.I,sec.4); Mississippi (Art.3,sec.13); Missouri (Art.I,sec.8); Montana (Art.II,sec.7); New Jersey (Art.I,sec.6); New York (Art.I,sec.8); North Dakota (Art.I,sec.9); Oregon (Art.VI,sec.5); Pennsylvania (Art.I,sec.7); South Carolina (Art.II,sec.21); South Dakota (Art.VI,sec.5) Tennessee(Art. I, sec. 19); Texas (Art.I,sec.7) Utah (Art I, sec. 15); Wisconsin
(Art.I,sec.3); Wyoming (Art.I,sec.20).


15. Ibid.

16. Ibid., 8

17. Ibid., 10

18. Jeffrey Abramson, 90


20. Ibid., 87

21. Ibid., 90


23. Ibid., 91

24. Ibid.

25. Ibid.


27. Scheflin and Van Dyke, 108

28. Ibid., 109

29. Ibid., 109-110

30. Ibid., 55
31. Ibid., 113
32. Abramson, 88
33. Ibid.
34. Ibid.
35. Ibid.
37. Abramson, 89
38. Ibid., 90
39. Ibid.
40. Ibid.
41. Ibid.
42. Ibid., 92
43. Ibid., 93
44. Ibid., 62
45. Ibid.
47. Abramson, 110
48. Ibid., 245
49. Ibid., 248
50. Ibid., 92
51. Ibid.
52. Ibid., 59

53. Ibid., 58

54. Alaska, Arizona, California, Connecticut, Georgia, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Montana, New York, Oklahoma, South Carolina, Texas, Utah, Vermont, Washington; Note: Constitutional authority already exists in some of these states.

55. Twenty States Take Up FIJA Legislative Action", FIJActivist, Winter/Spring, 1995, 2

56. What is 'FIJA'?, 'FIJA' Jury Power Information Kit, Fully Informed Jury Association, 2

57. Scheflin and Van Dyke, 80

58. Ibid., 82

59. Ibid.


61. Ibid.

62. Ibid., 597, 598 n71
CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

In this paper the trial by jury process has been shown to hold a critical position in the political arena as the institution guaranteeing the moral authority of the law and therefore the final check on any activity of the government against its citizens. The jury's right to determine the applicability of law as well as the facts is what empowers the jury to act as the moral check on government activity. This power to determine that the law does not apply in any given case is known as "jury nullification". It has been proven historically (Chapter 2) and contemporary (Chapter 4) that this power of nullification does work as a moral check on government activity keeping it in line with what the conscience of the community determines to be lawful.

Chapter three established individual citizens acting in community as the originators of the law and as such the only moral authority capable of determining equity and dispensing justice. This is established through the use of Hobbes' definition of the concepts "equity" and "justice" as applied to the dual role of the trial by jury process. Disallowing jurors knowledge of their right to exercise their power of jury nullification is shown to be an inequitable and therefore an unethical practice.
Chapter four explains how the integrity of our judicial system is compromised when citizens are not fully informed of their power as jurors to nullify law. The transition from the theory of justice established by our founding fathers to the theory of justice practiced today is paralleled with the decline of jury rights leading to the conclusion that jurors must be informed of their power to nullify if we as citizens are to maintain our positions as originator of the law and moral agents in the political process. The controversial issue is whether the courts should be required to inform jurors of their power through a Fully Informed Jury Amendment or if jurors are to acquire this information from other sources.

This last chapter will state my conclusions, provide a recommendation on how to achieve the goal set forth in the conclusion along with a rationale for the recommendation.

Conclusions

It is the position of this thesis that Fully Informed Jury legislation should be enacted for the following reasons:

1. A Fully Informed Jury Amendment would restore the lawmaking process, designed to check the government's power, to the hands of its (the government's) moral agents, the people.

2. A Fully Informed Jury Amendment would acknowledge as a right a power already held by jurors and used in many cases maintaining integrity within our system of justice.
3. A Fully Informed Jury Amendment would enforce a jury process as guaranteed in Article III of the Constitution and the Sixth, Seventh and Fourteenth Amendments. Quoted respectively:

   The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed...¹

   The accused shall enjoy the right to a speedy and public trial, by an impartial jury...²

   The right to trial by jury shall be preserved...³

   Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.⁴

4. A Fully Informed Jury Amendment would eliminate any assumption that all citizens have acquired the knowledge necessary to be "Fully Informed Jurors" through formal education or informal channels.

Recommendations

The following recommendations are being made in order to promote the enactment of Fully Informed Jury Legislation:

Recommendation I:

The first recommendation is that support for this legislation be provided by members of the major political parties and judicial policy makers.

Rationale I:

Third party support for FIJA legislation has proven to be unsuccessful. To date no FIJA legislation has been introduced in the Nevada legislature.
However, FIJA activists are busy in the state of Nevada distributing literature and discussing the issue of jury nullification as an individual right. Perhaps as citizens become aware of the power being denied them, the demand for this legislation will increase.

Recommendation II:
The second recommendation is educating citizens to be fully informed jurors. Citizenship must be taught as a whole, in its own right, with its own curriculum, and reinforced through history, literature and government. Students must be prepared to accept the responsibility of the moral agency that comes with citizenship. The mainstream media and other informal channels of education through which citizens acquire information and gain knowledge need to acknowledge the nullification power of the jury. This American tradition needs to be discussed over the airwaves, on television, and in print. The media needs to demonstrate jury nullification as a safeguard to liberty and an acceptable means of resolving jury deliberations. Educating for citizenship would require changes in the formal educational system to provide the essential information students need in order to acquire the knowledge necessary to be empowered as "fully informed jurors".

Rationale II:
The need to change the method of educating for citizenship is
evidenced by the declining proficiency scores of our nations youth. "The Civics Report Card" is a product of the National Assessment of Educational Progress (NAEP), a congressionally mandated project established in 1969 to obtain data on the educational achievement of American students. It has surveyed civics education in 1976, 1982 and most recently 1988. The study summarizes findings from two assessments made. The first is an assessment of students age thirteen and seventeen years old. The second is an assessment of students in fourth, eighth, and twelfth grade. Areas of assessment were: their recognition of the existence of civic life; their understanding of the nature of political institutions and the relationship between citizen and government; their understanding of specific government structures and functions; and their understanding of the variety of political institutions and processes. The results indicated a significant decline in civics proficiency over the twelve year period (1979-1988).

Performance results indicative of the decline include: the proficiency level of the seventeen year old students declined significantly from the previous years--interestingly though the proficiency level of the thirteen year olds remained the same; the performance gap between the White, Black and Hispanic thirteen year olds narrowed due to improved performance among the Black and Hispanic students. At age seventeen the narrowing of this gap was the result of a decline in the performance of the White students; decline occurred in both advantaged and
disadvantaged urban schools for the seventeen year old students while economic factors did not influence the performance of the thirteen year olds; gender was a factor in the performance of the thirteen year olds with females improving significantly, although at age seventeen gender was not a significant influence; and proficiency for seventeen year olds in the western United States declined more significantly than in either the Northeast or Central regions and only slightly worse than in the Southeast.  

These trends were determined after identical assessments were administered every fourth year over the twelve year period in order to "allow the NAEP to examine changes across time in the civic knowledge of thirteen and seventeen year olds". The results were analyzed using item response theory (IRT) technology, allowing the performance data to be reported on a single proficiency scale, ranging from 0 to 100. The information was analyzed to determine national trends as well as trends within subpopulations such as race and ethnicity, size and type of community, gender, and geographical region. The study does not postulate about the findings.

Instructional findings indicate that 89% of eighth graders reported having studied civics or government since fifth grade, and 93% of the twelfth graders reported having taken at least one course in this subject in high school. The students reported studying a variety of civic subjects mostly through reading a textbook. It was found that students who
reported some study in the subject area demonstrated a higher proficiency on the average than students who did not study the subject. Less than 8 per cent (7.9) of students reported no American Government or Civics instruction in high school. The average proficiency level for these students was recorded at 277.3 in comparison to the 297.9 average proficiency level the 39.9 per cent of high school students who reported more than one year of American Government or Civics instruction scored. It was also found that the more time spent in the instruction of the social studies curriculum and the more diverse the activities the higher the proficiency level on the assessment.

Perusing the assessment items I found one item referenced to jury responsibility. The item was to determine if the student knew the "duty of the jury is to determine if guilty". Eighty-seven percent of those surveyed responded correctly. My assumption is that those responding did so with an affirmative answer which implies the duty of a jury is limited to fact-finding. If the item was to survey knowledge of the nullification power of the jury, the item should have read "duty of jury to determine justice application of the law" rather than;"determine if guilty".

Considering this decline in civics proficiency, it is evident that the formal educational process in place is not adequately preparing students for their role as citizens and jurors. Understanding the power of the jury is an integral part of citizenship. Since the schools are not adequately preparing students for citizenship, at least not to the degree as in the
past, their status as informed jurors is endangered if not already extinct.

It is also evident from this decline in proficiency that the informal educational channels that opponents of a nullification instruction claim to be the citizens' source of information and knowledge of their power as a juror are not adequate. If these sources were supplementing the information lacking in the formal educational process the decline in proficiency would not be significant.

A civics curriculum which incorporates historical background, philosophical justification, critical thinking and provides for experience in the civics arena needs to be designed as a replacement for what is now offered.

This study reinforces my recommendation that citizenship be taught as whole, in its own right, with its own curriculum, and reinforced through government, history and literature resulting in an understanding of the moral authority citizens have over their government and the means by which this moral authority is accessed through the fully informed trial by jury process.
ENDNOTES


2. Ibid., 55

3. Ibid., 56

4. Ibid., 58


6. Ibid., 8

7. Ibid., 8-9

8. Ibid., 12

9. Ibid., 108
APPENDIX

ALTERNATIVE PROPOSED FIJA AMENDMENT

Whenever government is one of the parties in a trial by jury, the court shall inform the jurors that each of them has an inherent right to vote on the verdict, in the direction of mercy, according to his own conscience and sense of justice.

The court shall therefore allow any party to the trial to present to the jury, for its consideration, evidence and testimony relating to the motives and circumstances of the defendant and the extent to which he actually harmed another person. Any party to the trial may also present to the jury arguments regarding the spirit, intent, merits and constitutionality of the law itself and its applicability to the case at hand.

Trial jurors shall acknowledge by oath that they understand this right, and no potential juror may be disqualified from serving on a jury for expressing a willingness to consider such testimony or evidence, to evaluate the law or its application, or to vote on the verdict according to conscience.

(2) Before the jury hears a case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words:
"As jurors, your first responsibility is to decide whether the defendant has broken the law. If you determine that the evidence will support a finding of guilt or liability as charged, you may so find.

"However, if so finding would violate your conscience or sense of justice, you may exercise your right to consider, in addition to other evidence and testimony presented, (a) the motives and the circumstances of the defendant; (b) the extent to which the defendant's actions actually damaged the rights of another person; and (c) the merits of the law itself, and the wisdom of applying it to the defendant in the case before you.

"Such considerations may be used as a basis for finding a criminal defendant not guilty, or guilty of a lesser offense which is wholly contained in the original charge. In a civil case, such considerations may be used as a basis for finding the defendant not liable, or liable for less than the amount of damages claimed by the plaintiff.

"In no case may you escalate the charges against a criminal defendant, or increase the award to be paid by a civil defendant beyond the value of the damages claimed in the original complaint made by the plaintiff.

"The court cautions that with the exercise of your right to vote according to your own sense of right and wrong, instead of strictly according to the law, comes full personal, moral accountability for the verdict you bring in, both to yourself and to your community."

(3) Failure to so inform the jury, to hear the jurors' acknowledgment by oath that they understand the information given them, or any other infraction of the above rules of procedure is grounds for mistrial and another jury trial.

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Taken from "What is "FIJA"?", "FIJA" Jury Power Information Kit, Fully Informed Jury Association, (Helmville, MT) 2
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