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THE RISE AND FALL OF JURY NULLIFICATION

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Nay, all the ordinary power is rather the people's, who determine all controversies themselves by juries of twelve men. And hence it is that when a malefactor is asked at his arraignment, "How will you be tried?" he answers always, according to law and custom, "By God and my country; not by God and the king, or the king's deputy."
— John Milton

The United States Constitution guarantees the right to trial by jury in both civil and criminal cases.[1] This article will discuss the history of trial by jury as an aid to revealing what the framers and ratifiers of the Constitution meant when they guaranteed that right. In the process, it will also address the following questions:

1. Did the Constitution give juries the right to judge the law as well as the facts?
2. If so, to what extent is this right still recognized?
3. What is the constitutional basis of judicial decisions nullifying that right?
4. Why has the right been denied or limited?
5. What are the ramifications for the future of jury trials?

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[1]U.S. Constitution, art. 3, amend. 6, and amend. 7.

Long after the Constitution was ratified, the courts declared that juries do not have the right to judge the law. We will examine those cases and their many permutations to show that the battles raging today over jury nullification are eerily similar to those which raged in England long ago.

Nullification may seem like a dead letter of historical interest only. However, the term "jury nullification" appears in many state and federal cases that are only recently decided. Even though mainstream jurisprudence has often condemned the doctrine, it is impossible to completely obliterate the doctrine and practice of jury nullification without completely eliminating the jury system itself. In many ways, that appears to be exactly where we are headed. In response to a grassroots jury nullification movement,[2] courts and prosecutors are becoming increasingly aggressive in combating jury nullifiers. Their concerns are not imaginary; the traditional five percent rate of hung juries has increased to fifteen or twenty percent in some locales, according to one report.[3]

TRIAL BY JURY IN ENGLAND

Trial by jury was the norm well before the U.S. Constitution was ratified in 1788. Colonial legal practice was modeled on English law, where jury trials had been in use since the thirteenth century. Initially, jurors were subject to legal action, fine, torture, and imprisonment if they brought in a verdict which the court thought contrary to law. Jurors were originally chosen from the ranks of persons who had some degree of knowledge about the issue in dispute. In civil cases, as "witnesses," they were subject to being punished for perjury, known as "attaint." In criminal cases, the Star Chamber could punish them for bringing a "false verdict." In the case of Sir Nicholas Throckmorton, tried for treason in 1554, the jury acquitted. For their service, they were imprisoned by the Star Chamber for six months.[4]

By the sixteenth century, however, juries had virtually unlimited discretion in reaching a verdict:

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[2]This grassroots movement is spearheaded by the Fully Informed Jury Association (FIJA), which sponsors a proposed Constitutional amendment called the Fully Informed Jury Amendment.

[3]J. Biskupic, "In Jury Rooms, A Form of Civil Protest Grows," *Washington Post* (Feb. 8, 1999), p. A01.

[4]Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999), pp. 47–48.

> [J]urors were responsible only to their own consciences. They were completely free to return a verdict of their pleasure in accordance with what they thought right. The evidence was not binding upon them; the judge's charge was not binding; nothing was. The law did not concern itself with the question of how they reached their verdict . . . . If a jury, moved by whim, mercy, sympathy, or pigheadedness, refused to convict against all law and evidence, the prisoner was freed, and that was that.[5]

Jury discretion was given judicial protection in *Bushell's Case*.[6] Edward Bushell had served on a jury in a case in which William Penn and William Mead were charged with practicing the Quaker religion. At the trial, the judges demanded that the jury find the defendants guilty if the jury found that the defendants had merely taken part in a Quaker meeting, apparently an illegal act. There was no real dispute that Penn and Mead had engaged in such behavior, and the court instructed the jury that the charge had been proved.[7] The jury withstood several days of badgering from the court, and ultimately refused to return a verdict of guilty. Bushell, their leader, was fined and imprisoned. He filed for *habeas corpus* relief, and was released by decision of the Chief Judge of England. Legal historian Leonard W. Levy explained the ruling:

> Allowing a court to imprison a juror for contempt on the ground that he had voted for an acquittal against the court's instructions on the law of the case subverted the functions of the jury. Indeed, the jury became a useless institution . . . if the judge controlled its understanding of the meaning of the law, which it was obligated to decide for itself. The jury could discharge its functions . . . only if it was exempt from the judge's power to fine and jail its members. By such reasoning, the King's Bench emancipated juries, allowing them ever after to return verdicts based on their grasp of the law as well as of the facts.[8]

TRIAL BY JURY IN THE COLONIES

The early colonists considered themselves Englishmen protected by the common law of England. Sixty-five years after *Bushell's*

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[5]Levy, *The Palladium of Justice*, pp. 45–46.

[6]125 Eng Rep 1006, 1013 [PC 1670]

[7]Levy, *The Palladium of Justice*, p. 59.

[8]Levy, *The Palladium of Justice*, pp. 61–62.

Case liberated juries in England, colonists continued to assert the rights of jurors to reach a verdict against the direction of court. When Peter Zenger, a New York printer, was charged with criminal libel for criticizing the royal governor, Zenger wished to argue at his trial that his remarks were true. The court instructed the jury that truth was no defense. Defense counsel Andrew Hamilton, however, urged the jury to reach their own conclusions about this legal issue. They did so, acquitted Zenger, and struck a blow for free speech that was critical to the struggle for independence a few decades later.[9]

To understand the plausibility of the argument that the ratifiers of the Constitution held an expansive view of the rights of trial jurors, it is necessary only to examine the context of the enactment of the Constitution and Bill of Rights. The colonists were heavily influenced by a series of pamphlets known as *Cato's Letters*, which circulated throughout the colonies in the decades preceding the Revolution. The political philosophy of the colonists can be glimpsed in the following excerpts from *Cato's Letters*:

> All men are born free; Liberty is a gift which they receive from God himself; nor can they alienate the same by consent, though possibly they may forfeit it by crimes. . . . The right of the magistrate arises only from the right of private men to defend themselves, to repel injuries, and to punish those who commit them: that right being conveyed by the society to their public representative, he can execute the same no further than the benefit and security of that society requires he should. When he exceeds his commission, his acts are as extrajudicial as are those of any private officer usurping an unlawful authority; that is, they are void; and every man is answerable for the wrong which he does. A power to do good can never become a warrant for doing evil.[10]
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> Only the checks put upon magistrates make nations free; and only the want of such checks makes them slaves.

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[9]Todd Barnet, "New York Considers Jury Nullification: Informing the Jury of its Common Law Right to Decide Both Facts and Law," *New York State Bar Journal* 65 (1993), p. 44.

[10]John Trenchard and Thomas Gordon, *Cato's Letters*, in *The English Libertarian Heritage*, ed. D.L. Jacobson (Indianapolis, Ind.: Bobbs-Merrill, 1965), pp. 108–9. See also Bernard Bailyn, *The Origins of American Politics* (New York: Random House, 1969), pp. 35–44, 54; and Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967), pp. 35–37, 43–45.

> They are free, where their magistrates are confined within certain bounds set them by the people. . . . And they are slaves, where the magistrates choose their own rules, and follow their lust and humours . . . those nations only who bridle their governors do not wear chains.[11]

These passages can be read to sanction the right of juries to nullify actions of judges, prosecutors, or even legislatures which exceed their "commissions."

Suspicious of government power, even the power of republican government, the citizenry would eventually insist on the Second Amendment, which guaranteed that "the right of the people to keep and bear arms shall not be infringed." The right to bear arms and the right to trial by jury have each been described as "the palladium of liberty." The Second Amendment is widely misunderstood, and has been given a self-serving, *post hoc* interpretation by judges, who have said that while the amendment states that "the right of the people to keep and bear arms, shall not be infringed," it really means that the right of the people to keep and bear arms *shall* be infringed.

In reality, the purpose of the right to bear arms was to allow citizens to defend themselves against governmental tyranny. Madison stated this explicitly in Federalist No. 46:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, *with the people on their side*, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed *a militia amounting to near half a million of citizens with arms in their hands*, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against

[11]Trenchard and Gordon, *Cato's Letters*, pp. 256–57.

> the British arms, will be most inclined to deny the possibility of it.[12]

Refuting in one sentence the prevailing myth that the Second Amendment did not create a personal right to bear arms, Madison goes on to note "the advantage of being armed, which the Americans possess over the people of almost every other nation."

Given the fact that the framers were so suspicious of the federal government that they anticipated the people having to fight a shooting war against it, it is easy to accept the notion that the framers gave jurors substantial decision-making power. After all, the colonists had been warned by "Cato":

> Alas! Power encroaches daily upon Liberty, with a success too evident; and the balance between them is almost lost. Tyranny has engrossed almost the whole earth, and striking at mankind root and branch, makes the world a slaughterhouse; and will certainly go on to destroy, till it is either destroyed itself, or, which is most likely, has left nothing else to destroy.[13]

The key concept in understanding the political thought of the founders was popular sovereignty. The founders were *republicans*. They held a view of government, championed by John Locke, Algernon Sidney, Richard Overton,[14] and "Cato," founded on the idea that individuals had natural rights, including the natural right of self-defense. The government, in this view, was the agent of the individual; its purpose was to secure the individual's inalienable natural rights to life, liberty, and property—*not* to instill virtue, redistribute wealth, stimulate the economy, or protect people from themselves. The government had strictly limited powers—only those delegated to it by the people. Finally, and most critically, if those were exceeded or abused, they were subject to revocation by the people. The ultimate right to rule— which is inalienable—resides with the people. Thomas Jefferson was merely expressing the common view of the subject when he wrote the *Declaration of Independence*:

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[12]James Madison, *The Federalist Papers*, no. 46, ed. Jacob E. Cohen (Middletown, Conn.: Wesleyan University Press, 1961), p. 321, emphasis mine.

[13]Trenchard and Gordon, *Cato's Letters*, p. 196.

[14]For a discussion of Richard Overton and the Levelers, see Peter Kurrild-Klitgaard, "Self-Ownership and Consent: The Contractarian Liberalism of Richard Overton," *Journal of Libertarian Studies* 15, no. 1 (Fall 2000), pp. 43–96.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable 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 —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

It is no accident that one of the causes of revolution listed in the Declaration was the King's "history of repeated injuries and usurpations," including "depriving us in many cases, of the benefits of Trial by Jury." The right to bear arms, the right of juries to nullify the law, and the right of revolution all have the same root: the inalienable right of the people to control the government when they believe it has become destructive of their liberties. It is no surprise to learn that Jefferson championed all three rights explicitly.

The Ninth and Tenth Amendments also express republican philosophy:

> IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Naturally, these amendments have been cited as a possible source for the right of jury nullification.[15] However, modern judges ask not if the Ninth and Tenth Amendments reserve a right to the people, but, contrary to these amendments, they ask if the Constitution "enumerated" such a right at all.[16]

THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY

What the Constitution meant by the right to trial by jury may easily be seen in the context of what trial by jury meant immediately before the Constitution was ratified. John Adams, our second president, and before that chief justice of Massachusetts, wrote in 1771:

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[15] Barnet, "New York Considers Jury Nullification," p. 44 n. 11.

[16] See *Hawaii v Hatori*, Court of Appeals of Hawaii, Nov. 17, 1999.

> Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life or limb or property or reputation without the concurrence of the voice of the people. . . . Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the court in point of law, was a legal determination of the issue. Therefore, the jury have a power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience? . . . Should the melancholy case arise that the judges should give their opinions to the jury against . . . fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, "No." It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.[17]

Theophilus Parsons, also a chief justice of Massachusetts, wrote in 1788:

> The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms.[18] An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; yet only his fellow-citizens can convict him. They are his jury, and, if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they certainly will pronounce him if the supposed law he resisted was an act of usurpation.[19]

Thomas Jefferson, in his *Notes on the State of Virginia*, written between 1781 and 1782, described the division of labor between juries and judges:

> These magistrates have jurisdiction both criminal and civil. If the question before them be a question of law

[17] John Adams, *The Works of John Adams, Second President of the United States*, quoted in *Sparf v United States*, 156 US 51, 143–44.

[18] Note that Parsons puts both the right to trial by jury and the right to bear arms in the category of means of resisting usurpation.

[19] Quoted in *Sparf v United States*, p. 144.

> only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertakes to decide both law and fact. If they be mistaken, a decision against right, which is casual only, is less dangerous to the state, and less afflicting to the loser, than one which makes part of a regular and uniform system. In truth, it is better to toss up cross and pile[20] in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.[21]

Initially, the Constitution protected only the right to trial by jury in criminal cases. However, contrary to the popular image of universal approval, the document, when it was presented to the public in 1787, engendered great opposition from what we now call the Anti-Federalists. In addition to their belief that life under the Articles of Confederation was not all that bad, the Anti-Federalists' main objection was that the new Constitution lacked sufficient guarantees of individual rights. What would prevent this powerful new government from turning tyrannical, an event which Benjamin Franklin predicted on the floor of the Constitutional Convention?

A bitter struggle between the Federalists and Anti-Federalists ensued in various state conventions called to consider the new Constitution. The Constitution was barely ratified in several states; the vote in New York, for instance, was 30 to 27 in favor. Many other states insisted that the price of their ratification was that a Bill of Rights be added. The Bill of Rights became the price the Federalists had to pay to get the Constitution approved. Thus, the Bill of Rights is best understood as the practical expression of the philosophy of individual natural rights that dominated American political thought in the eighteenth century. The right to trial by jury owes much to the Anti-Federalists:

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[20]"Cross and pile" is game of chance.

[21]Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill: University of North Carolina Press, 1955), p. 130.

> The Anti-Federalists insisted that the Constitution should explicitly recognize the traditional procedural rights: to be safe from general search and seizure, to be indicted by grand jury, to trial by jury, to confront witnesses, and to be protected against cruel and unusual punishments. The most important of these was the trial by jury, and one of the most widely uttered objections against the Constitution was that it did not provide for (and thus effectively abolished) trial by jury in civil cases.[22]

After the Constitution was ratified, most judges and lawyers continued to hold that juries had the power to judge the law. In 1794, the first Chief Judge, John Jay, instructed a jury in a civil case as follows:

> [O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be recognized 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. On this, and on every other occasion, we have no doubt, you [the jury] will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts it is, on the other hand, presumable, that the courts are the best judge of the law. But still both objects are lawfully, within your power of decision.[23]

Alexander Hamilton, one of the great lawyers of that era, argued:

> [I]n the general system of powers in our system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive. . . . That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature . . . is entrusted with the power of deciding both law and fact.[24]

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[22]Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), p. 64.

[23]*State v Brialsford*, 3 Dall. 1, 4.

[24]Alexander Hamilton, *The Works of Alexander Hamilton*, quoted in *Sparf v United States*, 156 US 51, 175.

THE HIGH-WATER MARK OF JURY NULLIFICATION: 1852

In the nineteenth century, Lysander Spooner was the foremost exponent of the right of juries to decide issues of law. Spooner, who wrote *An Essay on Trial by Jury* in 1852, is one of the most interesting characters in the history of American law. He was a lawyer, constitutional scholar, abolitionist, entrepreneur, legal theorist, and political radical. Spooner summarized the case for jury discretion as follows:

> The object of this trial "by the country," or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or "the country," judge and determine their own liberties against the government instead of the government's judging of and determining its own powers over the people. How is it possible that juries can do anything to protect the liberties of the people against the government, if they are not allowed to determine what those liberties are? Any government, that is its own judge of, and determines authoritatively for the people, what are its own powers over the people, is an absolute government of course. It has all the powers that it chooses to exercise.[25]

Spooner cogently counters the main philosophical objection to jury discretion: that juries do not have the right to ignore or nullify laws enacted by democratically elected authorities. To Spooner, the jury is merely one of five "tribunals" created by the Constitution. In order for a citizen to be deprived of liberty, all five tribunals—the House of Representatives, the Senate, the executive, judiciary, and the jury—must agree. All five entities "represent the people"; thus, it is absurd to say that juries which exercise legal discretion are not "representing the people."[26] Judges may be selected *demo*cratically, but jurors are the *demos*.

Spooner saw "criminal intent" as the hallmark of crime, believing that no one can have criminal intent to commit an act which is "intrinsically innocent, though forbidden by the government." That is, Spooner, like Jefferson, Locke, "Cato," and the majority of the

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[25]Lysander Spooner, *An Essay on Trial by Jury* (Boston: John P. Jewett, 1852), p. 6.

[26]Spooner, *An Essay on Trial by Jury*, pp. 11–12.

founders, believed in natural law, which prohibits only intrinsically evil acts, such as murder, assault, and robbery. In Spooner's words, "The safety of society, which is the only object of the criminal law, requires only that those acts which are understood by mankind at large to be intrinsically criminal, should be punished as crimes."[27] According to Spooner, a state which can criminalize virtually any behavior is a tyranny, and juries may rightfully acquit persons who are charged with such offenses:

> [N]o man can be convicted unless the jury find, not only that the statute is law—that it does not infringe the rights and liberties of the people—but also that it was so clearly law, so clearly consistent with the rights and liberties of the people, as that the individual himself, who transgressed it, knew to be so, and therefore had no moral excuse for transgressing it.[28]

Spooner saw jury nullification of majoritarian laws not as a flaw of nullification but as its main purpose, as "the crowning merit of the trial by jury."[29] It is best to let Spooner, not one to mince words, speak for himself:

> It is this power of vetoing all partial and oppressive legislation, and of restricting the government to the maintenance of such laws as the whole, or substantially the whole, people are agreed in, that makes the trial by jury "the palladium of liberty." Without this power it would never have deserved that name. *The will, or the pretended will, of the majority, is the last lurking place of tyranny of the present day*. The dogma, that certain individuals and families have a divine appointment to govern the rest of mankind, is fast giving place to the one that the larger number have a right to govern the smaller; a dogma which may, or may not, be less oppressive in its practical operation, but which certainly is no less false or tyrannical in principle, than the one it is so rapidly supplanting. Obviously there is nothing in the nature of majorities, that insures justice at their hands. . . . The relative numbers of the opposing parties have nothing to do with

[27] Spooner, *An Essay on Trial by Jury*, p. 186.

[28] Spooner, *An Essay on Trial by Jury*, p. 181. Spooner also wrote an essay called *Vices are Not Crimes*, so it is fair to say that gambling, to Spooner, is an example of the type of criminal statute that a jury could well nullify. Since state governments and the church both operate gambling enterprises, it is difficult to argue that gambling is intrinsically evil.

[29] Spooner, *An Essay on Trial by Jury*, p. 206.

> the question of right. And no more tyrannical principle was ever avowed, than that the will of the majority ought to have the force of law, without regard to its justice; or, what is the same thing, that the will of the majority ought always to be presumed to be in accordance with justice. *Such a doctrine is only another form of the doctrine that might makes right.*[30]

THE COUNTER-REVOLUTION

Spooner's case for jury nullification rested ultimately on the distinction between republican and democratic government. (These terms should not be confused with the "Democratic" and "Republican" political parties, neither of which is republican and both of which are democratic.) Republican government, which is what the founders thought they were creating, is small and limited to a short list of functions derived from the individual's natural right of self-defense, such as courts, police, and national defense. In a republican government, officials are elected by majorities, but the principle of majority rule does not sanction the violation of individual rights or the expansion of government powers beyond those defined by republican theory. Starting with an essentially minimal state *republic*, we have, in 225 years, metamorphosed into a *democracy*, a very different form of government. The predominant belief today, whether of citizens or legislators, judges or law professors, is that, with few exceptions, what the majority says goes. If officials elected by the majority want to ban guns, tell farmers how much wheat they can grow each year, or regulate the color people can paint their houses, they should be free to do so.

In a true republic, such as that the founders attempted to create, jury nullification would be welcome and considered necessary, as it was for a time. In a democracy, it cannot be tolerated. Thus, the New York Court of Appeals in 1863 and the U.S. Supreme Court in 1895 rejected the doctrine. Given the radical implications of Spooner's view of the constitutional right to trial by jury, it is no surprise that judges, part of the very government whose powers would be reined in by that doctrine, rejected it.

In the early years of New York state,

> the doctrine that in criminal cases the jury had the right as well as the power to determine both the law and the

[30] Spooner, *An Essay on Trial by Jury*, pp. 206–7, emphasis added.

> facts, if not universally accepted, prevailed to a very great extent. That seems to have been the view of Chancellor Kent. (See *People v Croswell*, 3 Johnson's Cases, 336).[31]

However, the New York Court of Appeals ruled in 1863 that juries must be "governed by the instructions of the court upon legal questions as it is in civil cases."[32] The court did not discuss the New York Constitution, its guarantee of trial by jury, or what that guarantee meant at the time it was ratified. The court did note that juries "have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of fact or law, or of ascertaining upon which their verdicts are based."[33]

The Supreme Court was finally heard on the present controversy in 1895. In *Sparf v United States*, a divided court in a 132-page opinion held that juries do not have the right to determine the law. The issue in the case was whether the jury could find the defendant guilty of the lesser included offense of manslaughter even though the trial judge saw no evidence to support that charge.

It will be instructive to first discuss the dissent, written by Justice Gray and joined by Justice Shiras. Gray had a reputation for detailed historical analysis and used this skill to great effect in his lengthy dissent. The most significant fact about Justice Gray's opinion is that he squarely frames the issue as whether "the case, involving the question of life or death to the prisoners, was . . . submitted to the decision of the jury as required by the Constitution and laws of the United States."

Gray discussed *Bushell's Case* exhaustively. In that case, the essence of Chief Justice Vaughan's argument was that since, in a criminal case, the jury issues a *general verdict* of guilty or not guilty, "they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, *yet they determine the law in all matters*." Justice Gray explained Justice Vaughan's reasoning as follows:

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[31] *People v Sherlock*, 166 NY 180, 184 (1901). Citation to *Croswell* is included in the original.

[32] *Duffy v The People*, 26 NY 588, 591; see also *People v Tirado*, 192 AD2d 755 (3rd Dept. 1993).

[33] *Duffy v The People* at 593.

> If the jury, especially in criminal trials, were obliged to follow the directions of the court in matter of law, no necessary or convenient use could be found of juries or to continue trials by them at all; that though the verdict of the jury be right according to the law as laid down by the court, yet, [they must be] assured by their own understanding that it is so. . . . [U]pon general issues of fact, involving matter of law, the jury resolve both law and fact complicately, *and so determine the law*.[34]

Justice Gray quoted with approval Lord Camden, debating in the House of Lords in 1792:

> If the opposite doctrine were to obtain, trial by jury would be a nominal trial, a mere form; for in fact, the judge, and not the jury would try the man. . . . It was [the judge's] undoubted duty [to state the law]; but, having done so, the jury were to take both law and fact into their consideration, and to exercise their discretion and discharge their consciences.

Justice Gray proceeded to discuss American authorities, noting that American views were more in accord with Lords Camden and Vaughan than with their British opponents on the issue. Justice Gray noted that Messrs. Adams, Parsons, Hamilton, and Kent—previously cited in this article—all believed that juries judge the law and the fact. After discussing the predominant view of state court cases in favor of jury discretion, Gray summarized his findings, which are worth quoting at length:

> Until nearly 40 years after the adoption of the Constitution of the United States, not a single decision of the highest court of any state, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue, except the two or three cases, above mentioned, concerning the constitutionality of a statute. And it cannot have escaped attention that many of the utterances above quoted, maintaining the right of the jury, were by some of the most eminent and steadfast supporters of the Constitution of the United States, and of the authority of the national judiciary.
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> [U]pon the question of the true meaning and effect of the Constitution of the United States in this respect,

[34]Emphasis added.

opinions expressed more than a generation after the adoption of the Constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage.

The principal grounds which have been assigned for denying the right of a jury, upon the general issue in a criminal case, to determine the law against the instructions of the court, have been that . . . judges are more competent than juries to determine questions of law; and that decisions upon such questions in one case become precedents to guide the decision of subsequent cases. *But the question, what are the rights, in this respect, of persons accused of crime, and of juries summoned and impaneled to try them, under the Constitution of the United States, is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature; but what, in the light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument.*

The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by willfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But, if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.

The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. . . . On the other hand, it is a matter of common observation that judges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

The purpose of establishing trial by jury was not to obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose.

There may be less danger of prejudice or oppression from judges appointed by the president elected by the

> people than from judges appointed by a hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield, —from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law,—of amplifying their own jurisdiction and powers at the expense of those intrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a *republic* than in a monarchy.[35]

The most significant fact about Judge Harlan's majority opinion is what it does not discuss. It is completely silent about the constitutional right to trial by jury, expressed in Article 3 and the Sixth Amendment. It proceeds as if the issue were a matter of judicial policy only. Justice Harlan, apparently oblivious to the constitutional issues involved, does not mention the views of founders John Adams, Theophilus Parsons, and Alexander Hamilton. In discussing the opinion of Chief Judge John Jay, Justice Harlan concludes that Justice Jay's remarks must have been misreported, although he offers no evidence to support the conclusion.

The opinion next discusses the views of Chief Justice John Marshall. It should be noted, however, that Marshall was not a founder or framer, and, thus, his authority as to the meaning of the Constitution when ratified does not resemble that of Messrs. Adams, Jefferson, Hamilton, or Jay. Nevertheless, Marshall's comments, made while presiding at the treason trial of Aaron Burr, though viewed favorably by Justice Harlan, are not of much comfort to today's anti-nullifiers:

> Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as *compounded of fact and law*. . . . The jury have now heard the *opinion* of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty *as their own consciences may direct*.[36]

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[35] All emphases have been added.

[36] Quoted in *Sparf v United States*, 156 US 51, 61.

The above passage places Marshall roughly in the middle of the controversy. By conceding that juries decided questions "compounded of fact and law," he supports the nullifiers' view that general verdicts necessarily imply some degree of judgment as to the law. The last clause—"as their consciences may direct"—would be unacceptable in today's courts. Jurors are now instructed that they "must" convict if the evidence is there.[37] Juries today are not supposed to exercise their collective conscience, only their information-processing abilities as fact-finders.

Harlan next relies on the remarks of Justice Samuel Chase in the Case of Fries. Justice Chase, however, does not discuss the meaning of the Constitution, but rather, makes a policy argument against giving juries discretion over the law. Essentially, Chase speculates that juries will abuse the right and destroy the uniformity of the law. The implied premise of his argument is that jurors, the people, are stupid and irresponsible. If that is the case, one wonders why they should be deciding issues of fact either. In fact, the premise is thoroughly consistent with the utter elimination of self-government, and its replacement by the rule of self-appointed dictators. Chase also makes a hidden assumption, challenged by Justice Gray, that judges will at all times act flawlessly in dictating the law to juries.

The only reference in the entire majority opinion to the circumstances leading to the Revolution and the ratification of the Constitution is as follows:

> The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is perhaps to be explained by the fact that "in many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury, in law as well as in fact, of much popular importance."[38]

Here, Justice Harlan arbitrarily disregards the views of those most intimately involved in drafting the Constitution, and erroneously concludes that the founders' distrust of government extended

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[37]In *People v Goetz*, 73 NY2d 751 (1988), the New York Court of Appeals, in a half-page opinion, approved of an instruction to the jury that they "must" find the defendant guilty if they find there is evidence establishing the elements of the offense beyond a reasonable doubt.

[38]Case of Fries, Fed. Cas. No. 5, 126 (1800).

only to colonial rule. The Constitution and Bill of Rights argue to the contrary.

Though *Sparf v United States* is the leading case cited by modern opponents of jury nullification, the actual trial instructions in that case—never repudiated by Justice Harlan—would horrify such opponents. The trial court instructed the jury that the defendants would be executed if found guilty of murder. The trial court instructed the jury that it had the "power" to find the defendants guilty of manslaughter, but only against the instruction of the court. The trial court even stated a proposition which lies at the heart of nullification doctrine: "I cannot direct you what *conclusion* to come to from the facts."[39] This statement essentially means that the jury must reach a general verdict, combining both facts and law.

Modern federal cases do not emphasize the particular facts of *Sparf v United States* but only apply its general principles to a variety of issues concerning the rights and powers of juries. In *United States v Anthony Edwards*, the Second Circuit Court of Appeals held that the trial court did not err in denying the following request to charge:

> if collectively you decide that despite the acts of the [defendant] which you may find the government proved beyond a reasonable doubt, you believe that the actions should not be considered to be criminal by society, you may find him not guilty.

Instead, the court approved the charge actually given:

> There was talk here of motive by the defendant. The motive that defendant had or claimed to have had for committing a crime charged is irrelevant to his guilt or non-guilt. Whether this defendant committed acts in order to further a political goal or for a similar reason, for his personal gain or for the gain of somebody else, doesn't excuse his acts if he committed them and violated the law.[40]

The court noted that the trial judge's instructions did not "suggest that the jury could not nullify the law but quite properly implies only that it should not."[41] The court stated that "[w]hile juries have the

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[39]Emphasis added.

[40]*United States v Anthony Edwards*, 101 F3d 17 (2d Cir 1996).

[41]See *United States v Sepulveda*, 15 F3d 1161, 1190 (1st Cir 1993).

power to ignore the law in their verdicts, courts have no obligation to tell them they may do so. It appears that every United States Circuit Court that has considered this issue agrees."[42]

CRACKING DOWN

Not only may today's juries not "lawfully" nullify the law, but lawyers who argue defenses interpreted by the court as appeals to nullification risk imprisonment. In *Zal v Steppe*, the court refused to grant *habeas corpus* relief to an attorney who had argued various defenses, on behalf of an anti-abortion protester, which had been excluded by the trial judge. The concurring opinion described introduction of evidence explaining the defendant's actions—ruled irrelevant by the trial court—as a "fundamentally lawless act."[43]

Even a jury's "power" to nullify the law is eroding. Since jurors are usually sworn when they are questioned in *voir dire*, and are now being questioned about their views on nullification, this raises the prospect of prosecutions for perjury, criminal contempt, or perhaps obstruction of justice if a juror falsely testifies, or even fails to speak in response to a question to the panel. In 1997, Laura Kriho, a juror in Colorado who was sympathetic to nullification, was convicted of criminal contempt, in part because she failed to disclose her pro-nullification views in *voir dire*.

In *United States v Thomas*, 116 F3d 606 (2nd Cir 1997), the court held that a juror who intends to nullify the applicable law is subject to dismissal. Moreover, a trial court may investigate whether such conduct occurred during jury deliberations by interrogating the jury. Since it has been held proper to inquire of jurors on *voir dire* whether

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[42]The court cited the following cases in support of its holding: *United States v Sepulveda*, 15 F3d 1161, 1190 (1st Cir 1993) at 1189–90; *United States v Moylan*, 417 F2d 1002, 1006–7 (4th Cir 1969); *United States v Krzyske*, 836 F2d 1013 (6th Cir 1988); *United States v Perez*, 86 F3d 735 (7th Cir 1996); *United States v Drefke*, 707 F2d 978, 982 (8th Cir 1983); *United States v Powell*, 955 F2d 1206, 1213 (9th Cir 1992); *United States v Mason*, 85 F3d 471, 473 (10th Cir 1996); *United States v Trujillo*, 714 F2d 102, 105–6 (11th Cir 1983); *United States v Dougherty*, 473 F2d 1113, 1130–37 (DC 1972); see also *Skidmore v Baltimore & O.R. Co*., 167 F2d 54, 57 and n.13 (2d Cir 1948); *United States v Desmond*, 670 F2d 414, 417 (3d Cir 1982); and *Washington v Watkins*, 655 F2d 1346, 1374 n.54 (5th Cir 1981).

[43]*Zal v Steppe*, 968 F2d 924 (9th Cir 1992).

they intend to nullify the applicable law, if such investigation reveals that a juror who denied such intent in *voir dire* subsequently urged fellow jurors to nullify, then that juror is subject to being prosecuted for perjury or perhaps obstruction of justice.

Not only are judges taking steps inside the courtroom to combat jury nullification, but prosecutors are extending the war against nullification outside the courtroom. In 1997, the Supreme Court of Alaska held that a citizen who distributed pro-nullification literature to trial jurors inside a courthouse could be charged with jury tampering and criminal trespass.[44] California courts now advise jurors that they must advise the court if another juror expresses an intention to disregard the law in reaching a verdict.[45] They are also authorized to dismiss jurors who, during deliberations, insist on deciding cases based on their conscience.[46] So much for John Marshall's charge in Aaron Burr's case.

It is apparent that courts are no longer prepared to accept nullification as an inevitable fact about the jury system or even praise it as a way for the justice system to deal with hard cases. Rather, courts and prosecutors are aggressively combating nullification, even at the cost of the ancient and venerable tradition of the secrecy of jury deliberations.

A REPUBLICAN CRITIQUE

In *People v Douglas*, Justice Dominic R. Massaro, a sympathetic opponent of jury nullification, mirrored the analysis stated above in explaining the decline of the doctrine:

> [T]he right of the jury independently to decide questions of law was widely recognized until well into the nineteenth century. Not only did juries have the right to judge the law, "counsel had the right to argue the law—its interpretation and its validity—to the jury." (Note, "Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy," 85 *Geo. L. J.* 191, 198 [1996]). . . . As time passed, the idea that juries were competent to interpret the laws began to recede, reflecting the sentiments of an established nation rather than the spirit of a *revolutionary* one. This inaugurated a progressive constitutional revolution

[44] *Turney v State*, 936 P 2d 533.

[45] *People v Engelman*, Cal Ct App (Feb. 1, 2000).

[46] *People v Odam*, Cal Ct App (Feb. 10, 1999).

> that has changed the entire landscape of American law and life, elevating the moral fundamentality of the *democratic* order. . . . And while, as a practical matter, juries have, and continue to exercise the power to engage in nullification, its exercise implicates a fundamental conflict between the rule of law and the jury's historic role as a restraint on the arbitrary power to oppress. Indeed, the democratic purposes initially served by such juries have since come to be better served by other democratic institutions.[47]

If we read "revolutionary" to mean "republican"—for republicanism was and still is revolutionary—there is little disagreement between this author and Justice Massaro about the passing of nullification from the scene. Nullification was a proper policy for juries when we had a republic. To pave the way for the democracy we now have, nullification had to be vanquished. This was accomplished not by proper constitutional amendment, but by a judicial counter-"revolution."

Recently, a judge in Illinois called nullification "vacuous and intellectually bankrupt," and "pernicious."[48] This charge, leveled against a doctrine accepted by the two greatest legal minds of the revolutionary period—Thomas Jefferson and Alexander Hamilton—shows how far we have strayed from our republican roots. Judge Steigman, clearly no republican, complained that jurors are "unelected and unaccountable to a constituency." Though jurors are not elected, they are the people who do the electing. They are therefore the *electorate;* they are the *constituents*. Judge Steigman's comments inadvertently reveal the elitism that lies at the core of anti-nullification sentiment, an elitism alluded to by Justice Gray in *Sparf v United States*.

The rule against discussing penalties before the jury is another example of judicial elitism. Criminal trial lawyers have heard this instruction given so many times that they hardly give it a passing thought. Upon reflection, however, the principle seems absurd. The jury is not allowed to consider the consequence of its actions, even though when responsible people make serious decisions in everyday life, they invariably consider the consequences. Democratically

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[47] *People v Douglas,* 178 Misc. 2d 918 (Sup Ct Bronx Co.), emphasis added, citation included in original.

[48] *People v Smith,* Illinois Appellate Ct, No. 4-97-0079 (May 4, 1998), Judge Steigman, concurring.

chosen judges refuse to tell the jury, *the people*, what is a matter of public record, the sentences that legislators chosen by the people have in store for those the people find guilty of crimes. The hidden assumption is that the people are largely ignorant of what their legislators are doing, and that, if they ever found out, they would recoil in horror and acquit otherwise guilty persons. This jury charge is a Freudian slip, an inadvertent confession by judges of a lack of trust in those who hired them.

Jurors, though not entirely free of general biases and prejudice, are generally free of axes to grind and oxen to gore with respect to the *specific* parties, lawyers, and issues before the court. Jurors have personal biases and prejudices, but so do judges. Judges, however, unlike jurors, frequently *do* have biases about the specific parties, lawyers, and issues before them. Further, judicial bias is not ameliorated by the presence of eleven other, quite different people. Thus, both judges and juries are biased; however, the institution of the jury makes juries *less likely* than judges to let personal bias taint their decisions.

Judge Steigman's comments also inadvertently reveal one of the highest virtues of jurors as compared to government officials. Jurors did not seek the job; judges, prosecutors, and legislators did. They sought their positions of power by seeking the support of the various parties, factions, and special interests which exercise influence over the political process. Once in office, those officials are, therefore, naturally inclined to favor certain points of view, ideologies, factions, and special constituencies. Thus, while judges, for example, have a superior knowledge of the law, that knowledge, in and of itself, does *not* guarantee that they will *not* issue legal instructions at trial, or ratify the same on appeal, which reflect their own personal, political, or philosophical biases or hidden agendas.

If I were a judge, my republican political and philosophical views would have an impact on my legal rulings. I also know that no one who held firm to Jeffersonian republican views could presently be elected to public office in Buffalo, New York. But does it not also follow that judges who hold contrary views—views approved of by the majority of the minority of citizens who actively participate in the political process—are going to issue legal rulings and instructions that reflect those views and philosophies? It follows, then, that modern judges generally hold views favorable to majoritarian democracy, hostile to classic small-government republicanism, and

favorable to the type of gradual expansion of government power that they have ratified for the last one hundred years. Thus, judges largely responsive to majoritarian concerns have been gradually whittling away the rights of juries, whose anti-democratic unanimity principle is the ultimate guardian of minority and individual rights.

Though judges cringe at the prospect of jury nullification, they themselves exercise the power of judicial nullification. Nearly every federal and state judge who has considered the matter has ruled, contrary to the words of the Second Amendment and its commonly understood meaning when it was ratified, that it does not guarantee a personal right to bear arms.[49] Such a judiciary cannot be trusted to properly advise jurors of the law when, in Jefferson's words, "the question relate[s] to any point of public liberty." Judge Steigman argued that judges are responsible to "reviewing courts," but did not say to whom the reviewing courts are responsible. Since no appellate judge in memory has been removed from office for misinterpreting the Constitution, we can conclude that such judges are ultimately responsible to no one. That is why they can issue rulings which say:

- The right of the people to bear arms means the people do not have the right to bear arms.[50]
- Probable cause does not mean probable cause.[51]
- The Tenth Amendment is a "truism," empty of meaning.[52]
- Americans of Japanese descent may be held in concentration camps.[53]
- "[T]he enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment."[54]

Thus, anti-nullifiers who argue that there would be no way to stop juries from abusing their right to decide the law have proven

[49]E.g., *Hickman v Block*, 81 F3d 98 (9th Cir 1996).

[50]*Hickman v Block*.

[51]*Illinois v Gates*, 462 US 213, 238 (1983).

[52]*United States v Darby*, 312 US 100, 124 (1940).

[53]*Korematsu v United States*, 323 US 214 (1944).

[54]*Plessy v Ferguson*, 163 US 537 (1896).

far too much. There is already no way to stop *judges* from doing likewise. Worse yet, juries decide only the cases before them, while judges' errors become precedent for numerous other cases.

The founders were extraordinarily well-schooled in history and political philosophy. Jefferson, for example, read the classics—Homer, Plato, Cicero, and Virgil—in the original Greek and Latin.[55] Jefferson and his colleagues understood what we, even after witnessing the slaughterhouse of the twentieth century, have yet to learn: that history shows that government officials abuse their power for their own interests and that, to avoid the endless tyrannies of the past, they had to construct a political system which *diffused power*—not only among branches and levels of government, but between the government and the people. The right of juries to decide the law and the right to bear arms were manifestations of this insight. Both rights are being eviscerated, however, since the framers left the "judicial power" solely in the hands of the government. The republican founders' ingenious diffusal of power has been defused.

THE FINAL BLOW?

Jury nullification, once a right, then a power, then a secret power, now a "lawless act," has become a "pernicious" vestige of colonial times and revolutionary republicanism. Modern doctrine holds that nullification is a wrong to be combated by all lawful means. If it yet exists, it is only the result of "the requirement for a general verdict in criminal cases."[56] But such an assertion merely begs the question. If nullification is "vacuous" and "pernicious," and is based on the so-called "requirement" of a general verdict, why not eliminate the general verdict? Here we meet the inner contradiction of anti-nullification thought.

Though nullification is the natural and inescapable result of our use of general verdicts, anti-nullifiers aim all their vituperation at nullification, and none at general verdicts. In doing so, they aim at the wrong target. If we take them at their word that the court is the sole judge of the law, it logically follows that jurors should make no legal determinations such as those implied in today's general verdicts, which require judgments that take both law and fact into account.

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[55]Willard Sterne Randall, *Thomas Jefferson: A Life* (New York: HarperCollins 1994), pp. 3, 16, and 26.

[56]*United States v Moylan*, 417 F2d 1002, 1006 (4th Cir 1969).

Instead, judges should give the jury a special verdict sheet with as many detailed interrogatories as are needed to determine the factual issues in the case. Upon receipt of the special verdict, judges can then make the *legal* judgment of guilty or not guilty.

The general verdict is a vestigial remnant from the past, when jurors were given the right to judge the whole case, including fact and law. It once had the function of allowing juries to check the power of oppressive governments. Since those powers and rights have been stripped away, the useless and dying organ need only be excised by appropriate legislation, and ratified by the same judges who have condemned nullification.

SUMMARY AND CONCLUSION

Jury nullification has gone through the following transformations over the last several hundred years:

- A practice which subjects jurors to punishment by the court—England, circa 1500.
- A right which may not be punished—England, circa 1670.
- A power subject to no judicial review—U.S., 1895.
- A power about which the court and the lawyers may not inform jurors—U.S., circa, 1980.
- A practice which subjects jurors to punishment by the court—U.S., 2000.

Modern, sophisticated legal analysis has succeeded in taking our jury system back to medieval England.

Modern judges commonly say that juries have the power but not the right to nullify the law. However, an understanding of the history and purposes of the right to trial by jury lead one to the inescapable conclusion that judges have the power but not the right to nullify jury nullification.

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