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Jurors Rise Up Over Principle

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The justice system sends jurors conflicting messages about power: They are trusted to decide questions of life and death, but not to take their notebooks home at night -- assuming their judge lets them have notebooks.

But the great unspoken truth about jurors is that in fact, they do have the inherent power to take control of the legal process through concerted action.

But in just two states can jurors expressly be told of this power.

While it is taken for granted that jurors will put up with almost anything, it hasn't always been so.

"The greatest legend about a jury is a juror mutiny," says political science Prof. Jeffrey Abramson of Brandeis University, an ex-prosecutor and author of the 1994 book "We, the Jury," a historical survey of the jury system. British jurors defied a trial judge's instruction to convict William Penn of unlawful assembly 300 years ago. They were jailed and denied food, but stood by their acquittal and prevailed. Bushnell's Case, 124 Eng. Rep. 1006 (P.C. 1670).

That was an example of jury nullification, and Professor Abramson and others point to it as the ultimate empowerment of independent-minded jurors. Nullification occurs when a jury, following its own moral compass, refuses to conflict, although facts seem to permit only guilt. Technically, nullification can go the other way when jurors convict in violation of the letter of the law -- say, a jury refuses to follow a mens rea requirement -- but legally insupportable convictions can be reversed on appeal.

"Along with its sibling, civil disobedience, jury nullification was an integral feature of the birth of our nation," says U.S. District Judge Jack B. Weinstein, of the Eastern District of New York, who has written and spoken on the topic. "The Boston Tea Party and the acquittal of dissident John Peter Zenger on charges of libel both might be called founding acts of civil disobedience and nullification."

The tradition was ratified by the Supreme Court in Sparf v. U.S., 156 U.S. 51 (1895), which conceded a court's lack of recourse if jurors acquit in spite of overwhelming inculpatory evidence.

Proponents of nullification include in that heritage the Northern juries who refused to enforce fugitive slave laws during the 19th century. The darker potential, however, shows up in this century in the refusals to white jurors to convict white defendants who murdered blacks.

It was nullification's service to racism that "stripped it of its moral statute," as Professor Abramson puts it, leaving the doctrine "in virtual eclipse." Currently the constitutions of just Indiana and Maryland require judges, at the defendant's request, to tell juror that although the instruction they will hear on the law is meant to guide the, it should not be regarded as binding their consciences. (In the

1970s, Kansas experimented briefly with such instructions.)

Today, the debate centers on whether other states' jurors should be told they have the power to nullify. At one extreme, the Fully Informed Jury Association, a group claiming some 3,000 dues-paying members, with headquarters in Montana and a sizable presence in Southern California, wants the doctrine incorporated into the U.S. Constitution.

FIJA members are a stew of libertarians, anti-abortion activists, marijuana legalization advocates, income tax protesters and gun control opponents who share a belief that the government has grown tyrannical. They share with many on the far right a belief the legal system is a tool of that tyranny.

In some five years of existence, the FIJA has made no headway with its prime goal: getting state legislatures to pass laws requiring judges to inform jurors they have an inherent, right to judge the law itself. Earlier this year, a classic FIJA bill to amend the Oregon constitution was introduced in that state's Legislature, only to die in committee. (The sponsor, Rep. Steve Fuhrman, admitted to reporters that the idea of jurors picking which laws to follow sometimes gives him "a twinge" of fear but added, "I don't trust big government.")

At the other end of the spectrum are those who reject the concept of nullification as an invitation to anarchy. Among them are some San Diego judges who had FIJA members arrested for jury tampering when they passed out informational pamphlets in from the courthouse during the trespass trials of abortion protesters in the early 1990s.

Taking a middle course, Judge Weinstein says that although juries should not be instructed that they have the power to nullify, judges should allow evidence bearing on moral values. A nullification instruction "is like telling children not to put beans in their noses," the judge observes. "Most of them wouldn't have thought if it had it not been suggested."

Sometimes what looks like juror defiance has a more lawful explanation. IN May 1994, the Los Angeles Times states that "the most celebrated recent case of jury nullification in California" was a San Diego jury's 1993 acquittal of Samuel C. Skipper on felony counts of growing marijuana. He admitted he did it, but he said he needed pot to counter AIDS-induced nausea. When the jury quickly agreed, FIJA announced that jurors as subordinated the law to the higher moral value of medical necessity. In fact, explains his attorney, San Diego Deputy Public Defender Julian Humphrey, the standard instructions given the jurors allow acquittal in such cases, where medical necessity is present. People v. Skipper, 140065 (Super. Ct., San Diego Co.).

More often, observers can only speculate that jurors hijacked a case, as U.S. District Judge Thomas Penfield Jackson of Washington, D.C., said after presiding over the 1990 drug trial of Mayor Marion S. Barry. Some jurors "had their own agendas" and "would not convict under any circumstances," the judge tols a Harvard Law School audience a week after sentencing the mayor to six months in jail for one misdemeanor count of cocaine possession. According to the judge, the evidence conclusively proved that the mayor was guilty of at least 11 of the 13 counts charged.

Most recently in California, the tough "three-strikes" sentencing law has jurors telling judges that they will and won't do. In January, a San Francisco jury revolted after it returned a guilty verdict on assault and attempted carjacking charges, only to learn that it had just decided the first half of a bifurcated trial; next they were to decide the validity of two prior burglary convictions. The three-strikes law

requires prosecutors to "plead" and "prove" prior convictions if they intend to use them to enhance a sentence. So as not to color the initial deliberations, the jurors had not been told that the defendant, Eugene Jones, was a repeat offender.

When they got to the second stage -- when they learned that as a three-time loser, Mr.

Jones faced a 25-years-to-life sentence -- it was irrelevant that the state's standard jury instruction orders jurors not to take penalty or punishment into consideration. Bailiffs reported that one man announced he felt "violated." In one account, a woman juror began sobbing. When they refused to return to their deliberations, Superior Court Judge Anne E. Bouliane declared a mistrial. People v. Jones, 157934.

Our third president, Thomas Jefferson, put it like this: "I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution."

John Adams, our second president, had this to say about the juror: "It is not only his right, but his duty ... to find the verdict according to his own best understanding, judgement, and conscience, though in direct opposition to the direction of the court."

Yes. Only decades had passed since the freedom of the press was established in the colonies when a jury decided John Peter Zenger was "not guilty" of seditious libel. He was charged with this crime for printing true, but damaging, news stories about the Royal Governor of New York Colony.

"Truth is no defense", the court told the jury! But the jury decided to reject bad law, and acquitted.

Why? Because defense attorney Andrew Hamilton informed the jury of its rights: he told the story of William Penn's trial - of the courageous London jury which refused to find him guilty of preaching what was then an illegal religion (Quakerism). His jurors stood by their verdict even though they were held without food, water, or toilet facilities for four days.

They were then fined and imprisoned for acquitting Penn - until England's highest court acknowledged their right to reject both law and fact, and to find a verdict according to conscience. It was exercise of that right in the Penn trial which eventually led to recognition of free speech, religious freedom, and peaceable assembly as individual rights.

American colonists regularly depended on juries to thwart bad law sent over from England. The British then restricted trial by jury and. other rights which juries had helped secure. Result? The Declaration of Independence and the American Revolution!

Afterwards, to protect the rights they'd fought for from future attack, the Founders of the new nation placed trial by jury - meaning tough, fully informed juries - in both the Constitution and the Bill of Rights.

Bad law - special-interest legislation which tramples our rights - is no longer sent here from Britain. But our own legislatures keep us well supplied ... Now, more than ever, we need juries to protect us!

In the 1890's, powerful special-interest pressures inspired a series of judicial decisions which tried to limit jury rights. While no court has yet dared to deny that juries can "nullify" or "veto" a law, or

"bring in a general verdict", some - hypocritically - have held that jurors need not be told their rights!

That is why it is nowadays a rare and courageous attorney who will risk being cited for contempt of court for informing the jury of its rights without obtaining the judge's prior approval. It's also why the idea of jury rights is not taught in (government) schools.

Jury Course