Restore Jury Nullification in South Carolina

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In 1735, in what was then the British colony of New York, John Peter Zenger, publisher of the *New York Weekly Journal*, was arrested and tried for seditious libel. His offense was printing articles exposing the corruption of the royal governor, and it was a crime to criticize public officials whether or not that criticism was true. There was no doubt as to Zenger's guilt: he clearly published the objectionable articles. Nonetheless, in what is one of the most significant trials in American history, he was acquitted. This trial is of seminal importance not merely because it established in the New World the rights of freedom of speech and of the press, as well as the legal principle that truth is an absolute defense to a libel charge, but also because it imported to these shores the concept of *jury nullification*.

Jury nullification is the ancient common-law principle that jurors have the inherent right to set aside the instructions of the judge and reach a verdict of acquittal based upon their own consciences. It says that juries exist not merely to decide questions of fact, but also to pass upon the inherent fairness of the law, either of itself or in its application. The jury in effect *nullifies* a law which it believes to be immoral, unjust or wrongly applied.

Although jury nullification has its roots in the *Magna Carta*, the first clear judicial recognition of the principle occurred in England in 1670, when a jury refused to convict William Penn and a co-defendant of "preaching to an unlawful assembly." (Penn was a Quaker at a time when the Church of England was the only lawful religion.) The facts show that the defendants were clearly guilty, yet the jury refused to convict them in direct contravention of the court's instructions. The judge, angered by such disobedience, fined the *jurors* and ordered them jailed. After languishing in prison for nine weeks (and even being starved for days at a time) the four holdout jurors prevailed in the appellate court[1], and the practice of punishing juries for verdicts unacceptable to the court was thereby abolished. This case established not only the freedoms of religion, speech, and peaceful assembly which were later to become enshrined in our own First Amendment, but also firmly established the right of jury nullification.

Abolitionist lawyer Lysander Spooner explained the doctrine in his 1852 booklet "*Essay on the Trial by Jury"*:

> "For more than six hundred years -- that is, since Magna Carta, in 1215 -- there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such laws.
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> "Unless such be the right and duty of jurors, it is plain that, instead of juries being a 'palladium of liberty' -- a barrier against the tyranny and oppression of the government -- they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed."

In 1794, less than ten years after ratification of the U.S. Constitution and only five years after the adoption of the Sixth Amendment (which guarantees jury trials in criminal cases), John Jay, the first U.S. Supreme Court Chief Justice, in one of the rare jury trials conducted by that Court instructed the jury:

> "It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the

[1] *Bushell's Case*, 6 Howell's State Trials 999 (1670). A tablet commemorating "the courage and endurance" of those jurors now hangs in the Old Bailey.

> court to decide. 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."[2]

His sentiments were echoed by many of the great legal scholars of the time, most of whom were personally involved in the drafting or ratification of the Constitution and the Bill of Rights. And indeed the concept found common expression in the practices of many states during (and even before) the nation's earliest years. Judges in early Rhode Island held office "not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury." Similar practices were followed in other New England colonies.[3]

As late as 1879 John Sharswood, Chief Justice of the Pennsylvania Supreme Court, noted that

> "The power of the jury to judge of the law in a criminal case is one of the most valuable securities guaranteed by the Bill of Rights. Judges may still be partial and oppressive, as well from political as personal prejudice, and when a jury are satisfied of such prejudice, it is not only their right but their duty to interpose the shield of their protection to the accused."[4]

And as recently as 1969 a federal appellate court conceded the validity of jury nullification, noting:

> "We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence . . . . If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision."[5]

The concept of jury nullification was so ingrained in our early jurisprudence that one Supreme Court associate justice, Samuel Chase, was impeached in part for allegedly preventing attorneys from arguing for it. The Articles of Impeachment charged him with "open contempt of the rights of juries, on which, ultimately, rest the liberty and safety of the American people." His acquittal was partially based on the demonstration that in the trial of one John Fries he had specifically instructed the jury that they were to judge both law and fact.

Jury nullification serves to inject community values and standards into the administration of the laws. It has played a major role in some of the most important and divisive issues over the course of (and even preceding) the nation's history. It accounts for the frequent acquittals of smugglers and others accused of violating the oppressive British taxes which ultimately helped lead to independence. (The colonists were so incensed at having their right to trial by jury, including their right to jury nullification, taken away from them that they included it among "the repeated injuries and usurpations" listed in the Declaration of Independence.) It has resulted in acquittals under such diverse statutes as the Alien and Sedition Acts, the fugitive slave laws (rendering them all but unenforceable in many parts of the country), alcohol prohibition while the 18th Amendment was in effect and drug prohibition under today's laws, civil disobedience during the heyday of the civil rights movement, and even murder charges in the Jack Kevorkian assisted-suicide trials. Nullification is the citizens' final bulwark against an oppressive state, whether that oppression takes the form of unfair or unduly harsh laws, a biased or vindictive judge, or abusive or politically motivated prosecution. In a very real sense it is the *only* reason juries even exist. Jury nullification arose as protection against the whims of the king, but there is no less need of it today. In

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[2] *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

[3] *See* Eaton, *The Development of the Judicial System in Rhode Island*, 14 Yale Law Journal 148, 153 (1905) as quoted in Howe, *Juries As Judges Of Criminal Law*, 52 Harvard Law Review 582, 591 (1939).

[4] *Kane v. Commonwealth,* 89 Pa. 552, 557 (1879).

[5] *U.S. v. Moylan*, 417 F.2d 1002, 1006 (4th Cir., 1969).

fact, if anything it has now become even *more* important. Preventing nullification is like bypassing a fuse: it removes a critical check on the abuse of the powerless.

But judges (and prosecutors) *hate* nullification. They view it (with reason) as a threat to their power.[6] For centuries there has been a constant push to discredit it, eliminate it, and most of all to conceal its very existence from public knowledge. And they go to extraordinary lengths to prevent jurors from learning about it. Defense counsel are prohibited from mentioning, or even hinting at, the power of nullification. Persons attempting to educate prospective jurors by distributing leaflets outside of courthouses are routinely harassed and even occasionally arrested on patently ridiculous bases, such as "jury tampering", "obstruction of justice" or "disorderly conduct." (To my knowledge none has ever been convicted, or even formally charged; the process itself is the punishment.) The Fully Informed Jury Association[7] is doing great work in educating the public, but much more remains to be done.

Voir dire (the technical term for the jury selection process) has become an egregious form of prosecutorial jury tampering. Juror questionnaires (both federal and state) contain questions specifically designed to identify persons knowledgeable about nullification, in order to facilitate their exclusion from juries. For example, the standard Juror Summons Questionnaire used in the South Carolina federal courts contains the following question: "Regardless of any opinion you may have concerning a particular law, would you be able to set aside your feelings and follow the law *as stated by the judge*?" The federal Trial Juror Handbook states: "*The law is what the judge declares the law to be."* The South Carolina Juror Information Form contains a similar instruction: "After the lawyers have concluded their final arguments, 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. You are bound under your oath to give full effect to the law *as the judge states it to you*."[8] (All emphases added.)

Jury nullification is presently enshrined in the constitutions of Georgia, Indiana, Maryland and Oregon (although it is rarely invoked). It also appears in the South Carolina Constitution, but only with regard to libel cases.[9] This principle should be specifically extended, at least by statute if not by constitutional amendment, to *all* criminal trials. In 2012 New Hampshire enacted just such a law.[10] That statute correctly notes in its "Findings" that "the jury system functions at its best when it is fully informed of the jury's prerogatives", and it affirmatively provides "In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy."[11] It is time that South Carolina adopted a similar statute, and restored jury nullification to its proper and historical place among our fundamental rights as citizens.

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[6] Of course, ignored is the fact that prosecutors themselves possess an inherent power of nullification, exercised when they choose not to indict, as do judges when they dismiss a case or direct an acquittal. Even the executive branch possesses a type of nullification in its powers of clemency and pardon. It is only juries which today are being denied a functional veto over an inappropriate criminal charge.

[7] http://fija.org/

[8] It is interesting to note that the South Carolina juror oath actually contains no such requirement; this claim is completely false. That oath merely says "You shall well and truly try, and true deliverance make, between the State of South Carolina, and the defendant at bar, whom you shall have in charge, and a true verdict give, according to the law and evidence. SO HELP YOU GOD." This is yet another illustration of the lengths to which the state will go in concealing from jurors the true scope of their rightful powers.

[9] Article I, Sec. 16, states that "In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of *the law* and facts." (Emphasis added.)

[10] NH House Bill 146 (2012). *See*, http://www.gencourt.state.nh.us/legislation/2012/HB0146.html.

[11] Unfortunately, in the following year the NH Supreme Court saw fit to read the language of that bill in such a manner as to eviscerate its meaning. The state legislature has been attempting to enact another, stronger such bill since then, but without success. The last effort, HB 133 in 2017, died in the Senate after passing the House.