

New Hope for Freedom: Fully Informed Juries

Written by Don Doig
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*(**Editor's note:** A feature article on jury nullification -- "'A Law Unto Themselves': Jury Nullification and the Deck Stacked Against It" -- can be found [here](#) .)*

With the resurgence of the ideals of free markets and individual liberty throughout the world, an English and American common-law tradition is being resurrected in the United States that has profound implications for emerging democracies. This idea, incorporated into the constitutions of nations, can provide a lasting barrier against the assumption of arbitrary power by government.

The founders of the United States were worried that the government might someday grow too powerful, and pass laws that would violate the rights of the very people the government was created to protect: ordinary, peaceful citizens. They knew there was one institution that might hold the government in check: the right to a trial by a jury of one's peers.

How can a jury protect people from arbitrary and unjust prosecution, or from bad laws? The legislature creates laws. Aren't citizens supposed to obey them, and lobby their legislators for any changes that need to be made?

Traditionally, U.S. citizens have had a more substantial and direct means by which to protect themselves from oppressive laws. The founders of the United States realized that the temptations of power were too great to leave it to the legislature, executive, and judicial branches of government to define citizens' rights. Ultimately, citizens acting in accordance with

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the dictates of individual conscience were to have final say. The people would have a veto power over bad laws.

The U.S. founding fathers provided a veto in the right to a common-law jury trial. This is a centuries-old common-law tradition, carried over from England. It means that jurors can judge whether a law is a good law -- a law that does not violate the rights of free men and women. If, according to the dictates of conscience, jurors did not think that a law was just, or if they thought that a law had been misapplied, they could refuse to convict an otherwise "guilty" defendant.

A single juror could prevent a conviction, by voting "not guilty."

If the jury acquitted the defendant, that decision was final. In the English and American common-law tradition, a not-guilty verdict cannot be overturned, nor can a judge harass jurors for voting for acquittal. Jurors cannot be punished for voting according to conscience.

These principles date back to the Magna Carta in 1215. However, since this time, they have been under attack by government. In 1670, William Penn was arrested for breaking the law of England by preaching a Quaker sermon. English law decreed that the Church of England was the only legal church. Jurors refused to convict him, and were held without food, water, tobacco, or toilet facilities. Four were put in prison for nine weeks. When they were finally released by court order, the decision established that jurors could no longer be punished for their verdicts. This helped establish freedom of religion, the right to a trial by a jury of one's peers, and a jury free from government coercion.

The trial of John Peter Zenger in the American colonies was another landmark case. Zenger had been arrested for publishing accusations that the royal governor of New York colony and his cronies were corrupt. While Zenger's allegations were true, under the law truth was no defense. Zenger's attorney, Andrew Hamilton, argued to the jury that they were the judges of the merits of the law, and should not convict Zenger for violating such a bad law. The jury agreed. Zenger was acquitted, and this case helped establish the right to freedom of speech.

The founders of the United States were clear where they stood on the rights of jurors.

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As the *Yale Law Journal* summarized in 1964: "The right of the jury to decide questions of law was widely recognized in the colonies. In 1771, John Adams stated unequivocally that a juror should ignore a judge's instruction on the law if it violates fundamental principles: 'It is not only ... [the juror's] 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.' There is much evidence of the general acceptance of this principle in the period immediately after the Constitution was adopted."

Thomas Jefferson said in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

During the debates over the ratification of the U.S. constitution, one participant noted: "If a juror accepts as the law that which the judge states then that juror has accepted the exercise of absolute authority of a government employee and has surrendered a power and right that once was the citizen's safeguard of liberty. For the saddest epitaph which can be carved in the memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Yet another authority put it this way: "For more than 600 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."

During the 19th Century, American judges attacked this fundamental right of free citizens, transferring more and more power to themselves and contending that jury review of law was no longer necessary, now that democratic elections had replaced monarchy. By the end of the century, the U.S. Supreme Court decided to let the judge decide if the jury should be told of its right to judge the law as well as fact.

Today, jurors are generally told that they must accept the law as the judge explains it, and may not acquit a defendant if their consciences are bothered by an unjust law. Judges falsely tell them that their only role is to decide if the "facts" are sufficient to convict the defendant. Defense

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attorneys are not allowed to encourage jurors to vote to acquit a defendant if they believe the law is unjust or unconstitutional. And defendants are generally not allowed even to discuss their motives.

In plain words, it is a power struggle between the people and the judicial system -- one that the people have been losing.

Jurors still have the right to veto, or "nullify," bad laws. They are just not told this by the courts. Judges and prosecutors exclude people from serving on juries who indicate a willingness to nullify the law. This violates the right of jurors to protect their fellow citizens against unjust prosecutions. A jury is properly a cross-section of the community as a whole. Laws that endure should be those that are supported by the community. Jury veto power guarantees that majorities cannot use the force of law to violate the rights of minorities.

Judges and other court officers have long been waging a campaign of disinformation to prevent jurors from knowing their rights. The people must now demand that their rights as jurors be respected. It's not just jurors whose rights are being denied. Defendants have the right to a fair trial by a jury of their peers. They have not been getting fair trials because judges have been systematically misinforming jurors. This campaign to deny jurors' rights has been going on for so long now that many attorneys (and probably some judges) in the U.S. are not even aware that these rights exist.

We need to re-establish the ultimate safeguard of rights. People everywhere should be informed of their rights as jurors. Join us in restoring the rights of juries so governments may no longer abrogate individual liberty with impunity.

Who determines the rights of the people: the government, or the people themselves? I contend that individual jurors rightfully determine which laws are just and which laws violate their rights as free citizens.

For more information, visit the Fully Informed Jury Association Web site at FIJA.org

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Don Doig is one of the founders and a board member of the Fully Informed Jury Association; P.O. Box 5570; Helena, Montana 59604; (406)442-7800. FIJA's mission is inform jurors that they must vote according to conscience and have the authority to refuse to convict defendants "guilty" of violating unjust laws. FIJA headquarters is prepared to assist people from nations worldwide to educate fully informed jurors everywhere.