

## REPRINT

# State Language on Jury Nullification

Citizens Must Claim Rights: Founders Gave Juries the Right to Determine Law

Spotlight March 20, 2000

Some say jury nullification is the most practical way to stop the juggernaut police state.

By Tom Stahl

The "Washington Post published a front page story entitled, "In Jury Rooms, a Form of Civil Protest Grows," last year. According to the Post article, jurors are not always following judges' instructions to the letter.

The article recounted that sometimes in jury trials, when those facts which the judge chooses to allow into evidence indicate that the defendant broke the law, jurors look at the facts quite differently from the way the judge instructed them to. The jurors do not say, "On the basis of these facts the defendant is guilty."

Instead, the jurors say, "On the basis of these facts the law is wrong," and they vote to acquit. Or, they may vote to acquit because they believe that the law is being unjustly applied, or because some government conduct in the case has been so egregious that they cannot reward it with a conviction.

In short, a passion for justice invades the jury room. The jurors begin judging the law and the government, as well as the facts, and they render their verdict according to conscience. This is called jury nullification.

Dr. Jack Kevorkian, recently convicted, was acquitted several times in the past, despite his admission of the government's facts, of assisting the suicide of terminally ill patients who wanted to die. Those acquittals were probably due to jury nullification. And Kevorkian might have been acquitted again if the trial judge had allowed him to present his evidence, testimony of the deceased's relatives, to the jury. A corollary of jury nullification is greater latitude for the jury to hear all of the evidence.

The Post took a dim view of this and suggested that jury nullification is an aberration, a kind of unintended and unwanted side-effect of our constitutional system of letting juries decide cases. But the Post couldn't be more wrong. Far from being an unintended side-effect, jury nullification is explicitly authorized in the constitutions of 24 states.

### ALL CRIMINAL CASES

The constitutions of Maryland, Indiana, Oregon, and Georgia currently have provisions guaranteeing the right of jurors to "judge" or "determine" the law in "all criminal cases."

Article 23 of Maryland's Constitution states:

In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction. The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.

Art. 1, Sec. 19, of Indiana's Constitution says:

In all criminal cases whatever, the jury shall have the right to determine the law and the facts.

Oregon's Constitution, Art. 1, Sec. 16, states:

Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense. In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.

Art. 1, Sec. 1 of Georgia's Constitution says:

The right to trial by jury shall remain inviolate, except that the court shall render judgment without the verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be judges of the law and the facts.

These constitutional jury nullification provisions endure despite decades of hostile judicial interpretation.

## LIBEL CASES

Twenty other states currently include jury nullification provisions in their constitutions under their sections on freedom of speech, specifically with respect to libel cases. These provisions, listed below, typically state:

... in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court.

But New Jersey, New York, South Carolina, Utah and Wisconsin omit the phrase "under the direction of the court." South Carolina states:

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.

Alabama (Article I, Sec. 12); Colorado (Article II, Sec. 10); Connecticut (Article First, Sec. 6); Delaware (Article I, Sec. 5); Kentucky (Bill of Rights, Sec. 9); Maine (Article I, Sec. 4); Mississippi (Article 3, Sec. 13); Missouri (Article I, Sec. 8); Montana (Article II, Sec. 7); New Jersey (Article I, Sec. 6); New York (Article I, Sec. 8); North Dakota (Article I, Sec. 4); Pennsylvania (Article I, Sec. 7); South Carolina (Article I, Sec. 16); South Dakota (Article VI, Sec. 5); Tennessee (Article I, Sec. 19); Texas (Article 1, Sec. 8); Utah (Article I, Sec. 15); Wisconsin (Article I, Sec. 3); Wyoming (Article 1, Sec. 20).

Delaware, Kentucky, North Dakota, Pennsylvania and Texas add the phrase "as in other cases." Tennessee adds the phrase "as in other criminal cases."

These phrases suggest that the jury has a right to determine the law in more than just libel cases.

The Tennessee Constitution, Art. I, Sec. 19, says:

... and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

The phrase "under the direction of the court," omitted by five states, provides for the trial judge to give directions, like road directions which the jury may or may not choose to follow, to assist the jury in its deliberations.

Our forefathers did not intend by this phrase for the trial judge to infringe in any way upon the sole discretion of the jury in rendering its verdict. Although later courts have held otherwise, the Tennessee Supreme Court in *Nelson v. State*, 2 Swan 482 (1852), described the proper roles of the judge and jury as follows: The judge is a witness who testifies as to what the law is, and the jury is free to accept or reject his testimony like any other.

The Maine Constitution affirms these roles in its section on libel:

... and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.

In addition, 40 state constitutions, like the Washington state Constitution in Article I, Section 1, declare that "All political power is inherent in the people," or words to similar effect.

And 34 state constitutions expound on the principle of all political power being inherent in the people by saying that "the people ... have at all times ... a right to alter, reform, or abolish their government in such manner as they may think proper," or words to similar effect.

For example, the Pennsylvania Constitution declares that:

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.

If the people have all power, and have at all times a right to alter, reform or abolish their government in such manner as they may think proper, then they certainly have the right of jury nullification, which is tantamount to altering or reforming their government when they come together on juries to decide cases.

A single nullification verdict against a particular law may or may not alter or reform the government, but thousands of such verdicts certainly do. Witness the decisive role of jury nullification in establishing freedom of speech and press in the American Colonies, defeating the Fugitive Slave Act and ending alcohol prohibition.

Of special note is the right of revolution in the New Hampshire Constitution.

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

If the people have the ultimate right of revolution to protect their liberties, then they certainly also have the lesser included and more gentle right of jury nullification to protect their liberties.

It should also be noted that New Hampshire declares an unalienable "Right of Conscience":

Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.

If the right of conscience is unalienable, then it can not be taken away from people when they enter the courthouse door to serve on juries. The people have an inherent and unalienable right to vote their conscience when rendering jury verdicts.

There is no doubt that jury nullification was one of the rights and powers that the people were exercising in 1791 when the Bill of Rights of the United States Constitution was adopted. As legal historian Lawrence Friedman has written:

In American legal theory, jury-power was enormous, and subject to few controls. There was a maxim of law that the jury was judge both of law and of fact in criminal cases. This idea was particularly strong in the first Revolutionary generation when memories of royal justice were fresh.

Jury nullification is therefore one of the "rights ... retained by the people" in the Ninth Amendment. And it is one of the "powers ... reserved ... to the people" in the Tenth Amendment.

Jury nullification is decentralization of political power. It is the people's most important veto in our constitutional system. The jury vote is the only time the people ever vote on the application of a real law in real life. All other votes are for hypotheticals.

Tom Stahl is a former FIJA Board member and practicing attorney from Waterville, Washington