Bill as Introduced

HB 1236 - AS AMENDED BY THE HOUSE

29march00.....3907h

2000 SESSION

00-2213
09/01

HOUSE BILL *1236*

AN ACT relative to an informed jury.

SPONSORS: Rep. Marple, Merr 11; Rep. Welch, Rock 18; Rep. R. Nowe, Rock 3; Rep. Alger, Graf 9; Rep. Rose, Ches 13; Sen. Roberge, Dist 9

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill states that a criminal defendant has a right to make a request that the court instruct the jury of its inherent right to judge the law and the facts in controversy and to nullify.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1236 – AS AMENDED BY THE HOUSE

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand

AN ACT relative to an informed jury.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Findings and Intent. Under the decisions of both the New Hampshire supreme court and the United States supreme court, the jury has an undeniable right to judge both the law and the facts in controversy. The jury system functions at its best when it is fully informed of these prerogatives. The general court wishes to perpetuate and reiterate the rights of the jury, as ordained under common law and recognized in the American jurisprudence, while preserving the rights of a criminal defendant.

2 New Section; Right of Accused; Jury Instruction. Amend RSA 519 by inserting after section 23 the following new section:

519:23-a Right of Accused. In all criminal proceedings, where the defendant has made a timely request, the court shall instruct the jury of its inherent right to judge the law as well as the facts and to nullify.

3 Effective Date. This act shall take effect January 1, 2001.

Committee Minutes

Date: May 3, 2000
Time: 10:05 a.m.
Room: 103 SH

The Senate Committee on Judiciary held a hearing on the following:

HB 1236 relative to an informed jury.

Members of Committee present:

Senator Gordon
Senator Pignatelli
Senator K. Wheeler
Senator Squires
Senator Trombly
Senator Brown
Senator Cohen
Senator Fernald

The Chair, Senator Debora B. Pignatelli, opened the hearing.

I am going to open the hearing on HB 1236 and call on the prime sponsor, Rep. Richard Marple.

Rep. Marple: Thank you Madam Chairman and good morning to the committee. I am happy to have the opportunity to take a moment of your time to express what I feel is perhaps really a reaffirmation of that which already exists and has existed as embodied in the constitutions of over 50% of the states of these United States. It is very particular that New Hampshire's constitution has 3 articles in its inalienable rights, the 39 articles of our bill of rights, are very explicit in what they say. Of course I have great respect for article 8 of our bill of rights which defines me as being a substitute and agent of the people.

As a substitute and agent of the people I am hopefully acting as their agent, under the laws of agency, in expressing what I have to express this morning. And that is this.

Article 15 and Article 20 both address jury trials, guaranteeing both in property rights in article 20 and criminal and any other "offense" in article 15.

These are specifically reserved as rights of the people. But one that is even more particular is article 4. And article 4 is the right of conscience. And that cannot be compromised in any way, shape or fashion by any of the servants of the people.

That right of conscience has been by virtue of 3 little words, deprivation of information. And those three little words have unfortunately permitted some of the things to happen in that 1/3 of our government, being the judiciary, whereby the uninformed citizens, who are the ultimate arbiters of not only the law, but the guilt or innocence of those who have been brought before the bar, they have not been informed of their rights. And that is what this piece of legislation attempts to do.

It is a reaffirmation of something that already exists, however the wisdom of our Judiciary Committee in the House saw fit to, shall we say, boil the fat out of the original proposal, and reduce it to the very concise language that you see before you now. And that concise language really says it all. And there is no way to change the syntax of the language that was used there, and I think they did an excellent job, and I commend the House Judiciary Committee for doing what they have done.

I don't know that there is much more that I can say that is not already covered in the written testimony that I have submitted.

(See Attachment 1)

I hope that you will all read what is there because it is of extreme interest and value and hopefully after you have read that you will have hopefully the same support that I am giving to this proposed piece. I hope it will be enthusiastic and I look forward to your agreement with the principles that are embodied in my written testimony. And I want to thank you very much

for the opportunity to be here, express these comments, and submit my written testimony. And I will be happy if anybody has a question, I will try to answer it, let's put in that way. And I thank you Madam Chairman.

Senator Debora B. Pignatelli, D. 13: Your Welcome. Senator Wheeler.

Senator Katherine W. Wheeler, D. 21: Thank you Madam Chairman. Rep. Marple I am always impressed by your in depth study of the Constitution and the bill of rights, but in effect would this mean that the jury could say we don't agree with the law and therefor this person isn't guilty.

Rep. Marple: Let me put it this way. As history informs us, now I may give you a little background on Dick Marple, who he is.

I was an employee of the state. I am a representative of the people now. As an employee of the state I worked for this state, and I am **resigned** from the New Hampshire State Police, along with about 58 other troopers. We resigned because of what took place in this state back in 1961, when the New Hampshire legislature adopted what is called the Uniform Commercial Code. The Uniform Commercial Code changed, and there were only 90 in the entire personnel of the state police at the time. We were an elite group.

I took an oath to protect and support, and to help, aid and assist the citizens of the state of New Hampshire, not become extortion artists, shoot radar guns and bears in the air, and all this stuff, and creating a revenue stream. That's another issue.

But that was something which I could not countenance because I took an oath to protect the people, not become, or use them as a source of revenue. Unfortunately that is exactly what the Uniform Commercial Code did, because it changed the character of the courts in the state of New Hampshire from being Constitutional common law courts into what is now nothing more than administrative tribunals. And those tribunals – the judges really are enforcement agents. They are not judges, they are enforcing the terms of the contract that has come before them. And that's their job.

So the courts really have shelved the common law. The common law is what I as a trooper operated under. There was no state law in New Hampshire when I was a trooper. If I stopped you for speeding I had to take you before a common law judge and I had to prove that you were…And I'll

give you what the speed law was. "Prove that you were traveling at a speed greater than reasonable and prudent under the conditions and having regard for the actual and potential hazards then and there existing." That was New Hampshire's speed law.

So the police acted as the protectors of the people. And there has been this very insidious reversal and now the police have become the adversaries of the citizens in many instances, particularly when it comes to the enforcement of commercial contracts.

But I am digressing and I promised that I would not take more than two minutes. I didn't. Senator Wheeler of course, she lit my fuse, so to speak, but I hope I subdued my passion but that is really what we have.

The character of the courts have changed. And this is nothing more than a reaffirmation of something that already exists. And as I said in my written testimony, exists in the constitutions of most of the states.

When you read the documentation, plus we have the Supreme Court decisions, and of course you will see the decisions that are appended to the back. I have supported it.

Now the Supreme Court, when The United States Supreme Court makes a decision I think that you will find that comity requires, and that is something that perhaps is one of the reasons that our judiciary is now being investigated by my colleagues on the House Judiciary Committee, is because the judiciary of this state has ignored article 4, section 1 and 2 of the United States Constitution. Article 4 states very clearly that "judicial proceedings will be recognized by all of the states that are a party to the contract called the United States Constitution."

And so when we have by virtue of silent omission, the mandates of the constitution which defines itself very clearly in article 6, paragraph 2 as the "Supreme law of the land," and when that supreme law of the land which we all take an oath to, is being ignored by those who take an oath to it, then I think we do have to address it and perhaps the language which the Judiciary Committee has done, and the proposed legislation that you have before you.

Senator Wheeler, have I expounded too much or did I confuse you?

Senator Katherine W. Wheeler, D. 21: Actually, well, listening to you and also looking quickly at your testimony, I think I understand that this bill would make it clear that the jury can say that the law is wrong and the person is not guilty.

Rep. Marple: They have that prerogative now. It's because they are not being informed of that prerogative that this legislation attempts to clarify that which is already there.

And Article 15, of course, provides for that. Article 20 of our Bill of Rights provides for that. And of course Article 4, the right of conscience. In other words, there is nothing that the legislature can enact, or, we are only talking about one third of our legislature which is the judicial branch.

The judicial branch does not have either the constitutional authority nor any other authority to require you, a potential juror, to hang you r conscience on the coat rack at the courtroom. In other words if you are hanging your conscience on the coat rack at the courtroom, under the dictates of that one third of our branch of government, it would appear to me that article 4 is being violated. Your right of conscience is being violated any more than using the analogy. Hey your are going to park your conscience of the courtroom while you go in to do jury duty? So I am using analogies to try and show you the importance of what we have here. Article 4 is your right of conscience.

And we also as jurors have Article 10, which is the right of revolution. The right of revolution, I think, instead of using arms and munitions can more appropriately be done in a peaceable manner by virtue of the jury. Saying hey, wait a minute, the law is wrong.

That's what was done in all of the cases involving those who had the underground railroad and were transferring those of color to the... They refused to find them guilty. And the question is, were they wrong? Any more than Peter Zenga.

Peter Zenga is a notable individual. He was involved in, shall we say, the distribution of pamphlets and other written material in New York during the origins of this great republic. Peter Zenga was very critical of the, shall we say, the corruption that he perceived existed in New York at that time. And of course that's what he was printing in all his pamphlets that he was

distributing to the people, being critical. And he was ultimately arrested for seditious libel. And I believe the gentleman's name, Andrew Hamilton, an attorney, who was recognized by the American Bar Association, and in fact they erected, I believe you'll find it in lower Manhattan, a statue of Andrew Hamilton, the lawyer who used jury nullification as a means of finding Peter Zenga innocent of seditious libel, which was the foundation of all of the court cases providing for freedom of the press.

So Peter Zenga, really, and his case as tried was...Jury nullification is what gives the press the right of their freedom of speech.

I hope that the AP representative will take note of that. Peter Zenga. Because that's why you are here. Peter Zenga, excellent case. And the American Bar Association did erect a statue to his attorney, Andrew Hamilton, yes, Andrew Hamilton, I believe it is. So if you are in the southern part of Manhattan, take a look at the little statue to that great attorney.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony.

Rep. Marple: I thank you all.

Senator Debora B. Pignatelli, D. 13: Senator Roberge, did you have a question?

Senator Sheila Roberge, D. 9: I just wanted to show my support and I think Rep. Marple has done a magnificent job of explaining it.

Senator Debora B. Pignatelli, D. 13: Rep. Loren Jean?

And while you are coming up, I will note that Rep. Lyman is in support of the bill and does not wish to speak.

Rep. Loren Jean, Hills. 17: What I have passed out are some notable quotes.

(See Attachment #2)

I don't know if the genesis of this was covered but it has a long genesis dating back to early times, pre colonial times where actually William Penn

was put on trial for preaching a certain religion which was against the law in Britain at the time and some of the people found him not guilty were jailed and held without sustenance for days until finally they were released by a courageous who said that juries have a right of conscience and therefore what they say, goes.

And so we adopted that in our law. Now some pretty notable people have supported this concept. John Adams, our second president, says it is not only his right but his duty to find the verdict according to his own best understanding, judgment, conscious to go in direct opposition to the direction of the court. Noah Webster in his very first dictionary published, defined the jury as the small person that decides both law and fact.

And U. S. Supreme Court Justice Oliver Wendell Homes acknowledged in 1920 a decision. In the 1920 decision that, "The jury has the power to bring a verdict in the teeth of both law and the fact."

I won't bother reading these because I just gave you this print out. And we don't have to go back all the way to 1920. In the 1972 decision it was written *"the unrefutable and irreversible power"*, speaking of jury's, to acquit and disregard the instruction as are brought in by the trial judge.

"The pages of history shine upon incidents of the jury's exercise of its prerogative to disregard instructions of the judge..."

Now when we had the floor fight, which by the way won quite handily, some research that was done by those who are opposed to this, and said well, we are the only state which would enact this in its statute. Actually it doesn't have to be enacted in statute. Our constitution, I'll take that back, our constitution gives us the right of conscience, but when you research that he was correct, absolutely correct. No other state has it in statute, for very good reason, because most other states have it in their constitutions. It's enshrined in their constitutions.

Now, in this state people hang their hats, I suppose on the Wentworth charge and when it was challenged one of the courts said, well, the court does not abuse it's discretion in refusing to give specific instructions where the court informed the jury that it should convict, but not that it must. Now a few paragraphs up in that decision, *" the fact that a jury has a prerogative to disregard the instructions of the court,...into matters of law."*

So they address, this is the NH Supreme Court decision, they address the fact that the trial (jury) does have this power, this prerogative, but yet down a couple of paragraphs down, it says well, we are not actually telling them that. We are telling them they should.

Now, you get your average juror in a jury box looking up at that individual in the black robe and there is a certain amount of power, and they are kind of overwhelmed by this power in the jury box.

Now I mentioned some of the cases, Maryland, Indiana, Oregon and Georgia currently have provisions guaranteeing the right of the jury to judge or determine the law. And I named these, and I probably shouldn't, you have Alabama, Colorado, Connecticut, Delaware Kentucky, Maine, Montana, New Jersey, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin, on and on. That these are enshrined in their Constitutions.

Now you'll probably hear the argument that, oh, the jury is going to nullify law. The jury cannot nullify law. The jury can nullify the law in a case, only in a case. Do any of you recall that girl from Charlestown.

Sen. Rick Trombly, D.7: Which one?

Rep. Loren Jean, Hills. 17: That was found guilty of negligent homicide. She gave birth to a baby. She was scared to death, she wrapped the baby up but she didn't know that she had to clear the passages.

Now, I'm 62 years old and I did not know until that case broke that that was a requisite in childbirth. So I would have made a lousy midwife because the baby would have died if I happened to be in an emergency situation. Because I didn't know that either. And so here is this young girl that did what she thought. She did the umbilical thing fine, and wrapped it in a blanket and everything else, but she didn't do that because she didn't know. She was found guilty of negligent homicide.

Now if I was on that jury there is no way in hell that I would have found that girl guilty of negligent homicide. The state did prove the facts. I as a juror, and I agree with Rep. Marple, I do not leave my right of conscience outside

the jury box. I bring it in the jury box with me. And that's what our constitution and that's what case law thru our history says we can do.

What will happen obviously I suppose, is if there is enough of this then we, as legislators will change the law. But the laws on negligent homicide still apply. But if that jury was courageous, in my view, they would have nullified that particular incident and that girl would not be in jail or whatever she's punished with now wouldn't have occurred.

I think I just about covered what I came up to say. Other than it is a right the juries have had since old English common law and it has been recognized right up to this day even up to recent NH Supreme Court decisions, that the jury does have the right to do that.

However, for some reason or another the courts have chosen to leave the juries in the dark and offer them this prerogative. Why, I don't know, but this is not going to change law other than the fact that you are just going to tell the juries that you have this right. I see no reason to keep them deprived of that knowledge. You have the right, but we are not going to tell you. That's not square with them.

I am going to end right there.

Senator Debora B. Pignatelli, D. 13: Thank you for your testimony. Senator Fernald?

Senator Mark Fernald, D. 11: Questions. You said that they have the right to nullify and I can't remember what case. Can you tell me what case that is?

Rep. Loren Jean, Hills. 17: Yep. Well, it says "in a decision" and I will probably have to find it. It was a 1902 decision by Oliver Wendell Holmes. It probably will take a little research. It says *"The jury has the power to bring a verdict in the teeth of both the law and the fact."*

Let's see it says, Harlan Stone, *"The law itself is on trial quite as much as the cause which is to be decided."*

Okay, I have it right here. Oliver Wendell Holmes. Horning vs. DC. I think you have this. You all have this. **(see attachment #1)**

It's the last page I guess.

Senator Mark Fernald, D. 11: The last page?

Rep. Loren Jean, Hills. 17: Horning vs. D.C., 254 U.S. 135 and on, and on. 1920.

It's quite a bit of it. Starting with John Jay. John Jay was on our first Supreme Court. And when they had jury trials, a lot of people don't realize that at one time the Supreme Court of the United States at one time heard jury trials.

His instructions to the jury was exactly that. You have absolute power in that jury box to render a decision to your conscience on both the facts and the law. And even our own state court can recognize saying and live juries, I mean judges, refuse or in some cases just it just doesn't come up. Some do and some absolutely refuse to tell the jury of this problem.

I'm not changing anything I am just letting them know that they have this right.

Senator Debora B. Pignatelli, D. 13: Senator Fernald?

Senator Mark Fernald, D. 11: Are there any NH Supreme Court cases that hold that juries can nullify the law?

Rep. Loren Jean, Hills. 17: Yes. I just read one.

All right. **State of New Hampshire v. Alfred Cody**, paragraph 13, trial instructions.

In fact, I'll read it right from the decision.

"The fact that a jury has the prerogative to disregard the instructions of a court even as to matters of law."

Now, they recognize that fact but it doesn't tell them. Now it also says that it's not imperative that the jury be informed of that.

Senator Mark Fernald, D. 11: Do you have the book and page reference?

Rep. Loren Jean, Hills. 17: The Supreme Court of New Hampshire 86 178, whatever that means, 129 NH 358 53 a. 2d 775. I don't know how to read these things.

Senator Mark Fernald, D. 11: 129 NH is good.

Rep. Loren Jean, Hills. 17: June 3, 1987. And that is a direct quote recognizing that they had this prerogative. And the whole thing just says that they don't necessarily, it's not an imperative that the jury be informed of that right. What we are trying to do is make it an imperative that the jury be informed of that right.

Senator Debora B. Pignatelli, D. 13: Senator Fernald

Senator Mark Fernald, D. 11: Do you know why this is called jury nullification since we are not nullifying the jury. Why don't we call it, law...

Rep. Loren Jean, Hills. 17: Because you don't nullify the law. What you do is in that one instance you find contrary to the law. If you were sitting in the jury and the case against me was egregious even though the state proved its case, the facts were there, but the case against me were egregious, the circumstances were egregious against me. In most cases the judges won't tell you that no matter what, you have the right of conscience and you have absolute power on the jury to find whichever way you please. And we just want to tell the people that.

Senator Debora B. Pignatelli, D. 13: Senator Fernald.

Senator Mark Fernald, D. 11: Do judges have the same power, or should they?

Rep. Loren Jean, Hills. 17: I don't know. I know they can direct a verdict for innocence or something like that if the -- you're the lawyer, I'm not. If there's not enough evidence in the judges mind to substantiate a charge, a guilty verdict, or something like that. they can vacate a verdict but I don't think they can direct a guilty verdict. That they cannot do.

Senator Mark Fernald, D. 11: We're talking about jury nullification. Aren't we talking about a situation where; based on the facts and the law the person is guilty, but the jury thinks it's wrong to convict and so we are going to disregard the law and define the medicine.

Rep. Loren Jean, Hills. 17: They have that right now. We're just telling them that..

Senator Mark Fernald, D. 11: You were talking about a judge who felt on the facts there wasn't guilt and that's a different situation. We're talking about where on the law and the facts, the person is guilty but the jury decides they don't want to convict.

Rep. Loren Jean, Hills. 17: I am going to give you another example then, and the answer to that is yes. The last couple of days in the paper, a fellow got fined $280 something bucks I think. On a one cent underpayment to the IRS. Anybody pick that up? Did you read it?

One cent underpayment. He is being fined $280. Go into tax court. The facts are the facts. He underpaid by one cent, whether it was inadvertent, rounding up, I don't now why. One cent underpayment. The facts are there. He did underpay by a penny but I would be loath to find guilt in that instance, and have him incur court costs and the $280 something fine.

I mean this is what it is all about.

Yes. *Man Discovers IRS Counts Every Penny.* I mean we do have absurdities in law some times and that's why Oliver Wendell Homes and John Jay and all the rest of our learned forebears were quite aware of that. It does not nullify IRS law. If we find in this instance it does not nullify IRS law. This we've got to realize.

Even municipal law. It's about we are going to nullify the town council? No. in one particular case, if the person was treated egregiously then it would apply. It applies now, but a lot of people don't know about it.

This is just an informational thing, you know. The law is not going to change other than we've got to let them know this is the law and they've got the right.

Senator Mark Fernald, D. 11: I believe one of the quotes here says that *"the jury has the right to determine both the law and the facts."* And I guess my question to you is, isn't it awful that there are two interpretations to that sentence? That on e interpretation could be that the jury has the right to interpret the law and the other interpretation is that the jury has the right to disregard the law.

Rep. Loren Jean, Hills. 17: I suppose it could be dual interpretations. I don't know what that particular individual had in mind when he said it. Which one is that?

Senator Mark Fernald, D. 11: This is Samuel Chase.

Rep. Loren Jean, Hills. 17: Samuel B. Chase. I don't know why Sammy said that but probably will after.

Senator Debora B. Pignatelli, D. 13: Any questions? Thank you Rep. Jean.

(Tape change)

Senator Debora B. Pignatelli, D. 13: Rep. Alger is not present. He is in favor of the bill.

John Loder from Moultonboro.

John Loder: Madam Chair, members of the committee. John Loder from Moultonboro. I am a rank amateur at this, but I do track such things in such works as this: The History of American Constitutional or Common Law.

Actually not long ago before I knew of this meeting, I landed on that section of this. So when I got this copy of the HB 1236 this morning at the Sergeant-At-Arms office, I immediately saw on the second page, the reverse of it, line 9, where the defendant has made a timely request. And I think it's already been said here but I would like to see that it would be automatically read to the jury by the judge in every case. That it wouldn't be a question of discretion but it would be the jury's and the defendant's right that the jury be read this provision that they may void the law, or whatever the verb is, if justice requires.

And I've long, I've considered the matter of the Nurmeburg Accords where Hitler's people in his government were obeying the laws, the Nazi laws, the laws of the nationalist socialist state. And they plead this at the Nuremburg trials. But the finding was that justice stood over law. And as in the case that was provided today, it seems that justice is sometimes indefinable or it lacks a precise definition, but the heart is involved. Everybody's heart is present when they say, but we demand justice in spite of what the law may say. It may be a good law but it doesn't always apply in this or that case. We would like to void it.

So essentially that is all I have to say.

Senator Debora B. Pignatelli, D. 13: Thank you very much for your testimony. Patrick Barnett from Derry? Welcome.

Patrick Barnett: I put a question mark there because I wasn't sure I wanted to speak. But I think I do now. I appreciate the opportunity.

I'd just like to clarify a couple of things that have come up, really. I am sure they came out but I just want to reiterate.

One, that the highest authority on earth is a human's conscience. Regardless of what anything, your highest authority is your conscience. You can't take that away no matter what you do. All we were asking is that jurors be reminded of that.

And then there was a question, would this allow then a jury to vote against the law in contravening a law in a particular case. And the answer is yes, absolutely, that is the whole idea. That is the reason for this because the law as enacted by the representatives of the people makes sense in the whole. It seems to make sense, it **seems** to make sense, or as they thought they were doing the right thing, but it doesn't always make sense.

An example of that might be with these mandatory minimums. You know, we are enacting more and more of these because we think that is the answer to the crime problem and yet the example they brought up of the tax problem.

I just want to mention the William Penn case. There was a mandatory sentence of death. If they had found him guilty, they had no choice, he had to die. And his co-defendants. They knew that he had his Sunday meeting. He testified in the trial, yeah we met on Sunday because that is what my conscience told me to do, in contravention of the law. And the jury knew the facts, knew the law, and the judge ordered them to find him guilty three times. Sent them in a room and locked them up on bread and water, for I don't know how many days. Ordered them to find him guilty and they would not do it. And their conscience wouldn't allow them to do it.

And there are beaucoups cases of the same thing. So that is the idea, to contravene the law if in the jurors conscience that makes sense. It's the only thing to do in that case.

The other thing that was brought up that I wanted to make a point on was that New Hampshire would become the first state to have a statute for this, whereas other states have it in there constitutions explicitly. Well I think enacting this statute is important because even though it is in the state constitution of other states, it's not followed.

I've been on a jury in Texas and I have been instructed by the judge, you shall not judge the law, interpret the law. I do that. You only vote on the facts of the case. And he told us that not in so many words, excuse me, not roundabout but in exactly those words. And so that is in contradiction to the constitution of that state and in contradiction to what common law has brought us to at this pint, and of course, your own conscience.

So really those are the only points I wanted to make and I appreciate the opportunity.

Senator Debora B. Pignatelli, D. 13: Senator Trombly has a question for you.

Senator Rick Trombly, D. 7: The state of New Hampshire has said that if you commit a crime based on hate, then if you are convicted, you can receive a harsher sentence.

What if someone sitting in the jury believes that the victim deserves what they got and that is a matter of conscience to them. Wouldn't that be a

greater harm to society by having that one person instructed that that is okay?

Patrick Barnett: I guess I would have to say, answer your question with a sort of an analogy or something. It has been said numerous times and I don't know where it all started, but I would rather let a thousand guilty men go than convict an innocent man.

So, and that was the idea of putting in the explicit protections in the constitution and the bill of rights. There were actually people and Alexander Hamilton explicitly said, it is a bad idea to do this because we are giving the government implied powers. But people thought we want these powers to show that the government is restricted, simply to what is stated here. And it might let some guilty people go, but it's worth it because it's going to protect the innocent from ...

And our protections, and protections like this legislation we are trying to get passed here or in the bill of rights, is not to protect us from criminals, it's to protect us from a state who might run amok. It is to put a final check, allow the jury to be the final check on tyranny.

I'm a bad one talk to about hate crimes because I think that there is no such thing. That if you harm someone... I think hate crimes diminish the crime. They diminish the respect for human life and that it's worse to kill somebody because you hate, than it is to kill because you wanted to steal his money or something.

Senator Debora B. Pignatelli, D. 13: Senator Fernald.

Senator Mark Fernald, D. 11: What kind of case were you on a jury on in Texas.

Patrick Barnett: It was a, I was on two. And the case where the judge instructed that was actually a civil trial. No, that's not true. The judge instructed us on the runaway from bail trial, too. They told me that, and in fact they told me that in New Hampshire on a case, that was in Portsmouth. I forget what you call it – it was a restraining order violation trial.

So I've heard it three times. I've been fortunate to be on a jury three times.

Senator Mark Fernald, D. 11: The reason why I ask is the handout from Rep. Marple indicates that there are 4 states that have some kind of Jury nullification that applies to all cases but in Texas it only applies to the libel cases. I was just curious whether you were involved in a libel case.

Patrick Barnett: No. I was not. So I'm not sure. I thought. I've read the Texas constitution and in Texas history class, but I don't remember. I thought it applied to all cases but regardless, those were the judges instructions in both the times I sat in the courtroom.

Senator Debora B. Pignatelli, D. 13: Thank you very much for your testimony.

Patrick Barnett: Thank you.

Rep. John Alger, Graf. 9: Senator I do want to correct. I wasn't here earlier and ...

Senator Debora B. Pignatelli, D. 13: Did you want to testify, Rep. Alger? All right.

Rep. John Alger, Graf. 9: Thank you very much for allowing me to testify. I apologize for not being here. I was trying to do two bills at once and that is always a very difficult task. As you well know.

Senator Debora B. Pignatelli, D. 13: We understand that.

Rep. John Alger, Graf. 9: Thank you for the opportunity to testify briefly. I am John Alger from Grafton 9, Representing Rumney, Wentworth, Groton and Dorchester.

I don't come at this from a constitutional law point of view at all. I don't have any expertise in that other than what I studied up in being a Representative and swearing allegiance to the constitution. But my view is that if you come to the conclusion that the jury does have the right under our constitution to have this knowledge of judging the law as well as the situation, then I think you must pass the bill. And from what I've seen, so called jury nullification is a practical reality in our situation and so I would endorse it.

In the house when the debate was held in the house I was interested to hear a lawyer bring up the fact, he stated he was, that it was true, but why would you want to tell the jury members that it was there right? Why would you want to do that?

That shocked me. Of course I would want to tell them their right if it is their right, it seems to me. And that's why I come to you and say I think this bill rests completely, it seems to me on whether or not the jury does have the right in our constitution to so declare as Rep. Marple talked. And so it seems to me that we should be informing the jury members as the bill allows.

That is basically the sum and substance of what I have to say and I appreciate the chance to come late and say that. Thank you.

Senator Debora B. Pignatelli, D. 13: No problem. Thank you very much. H. Bernard Waugh, Jr.?

H. Bernard Waugh, Jr.: Madam Chair, members of the committee. I am Bernie Waugh and I represent the New Hampshire Municipal Association, and I am testifying in opposition to the bill.

I do so with great trepidation because of course the judiciary and lawyers in general are not held in terribly high esteem right at the moment. Please remember the answer to the joke about why it is that you bury lawyers 10 ft deep, instead of 6, and that's because deep down they are really good people.

(laughter)

My interest and this and this is not, I have to say, I have to clarify for the sake of the record that the Municipal Association Executive Committee has not taken a formal position on this bill. I am representing the group in my capacity as a legal representative. And since I have been with the Municipal Association which is almost 15 years now, one of my consistent efforts has been to improve local ordinance enforcement.

My view is that a lot of towns and cities, particularly some of the small ones, have a plethora of regulations on the book, none of which are enforced. And

that there ought to be a closure of that gap. Perhaps by getting rid of some of those, but certainly by enforcing the ones that you do have.

I am aware of the cases on jury nullification and I am certainly not here to speak against the right of conscience. It seems to me there is a big difference between my going into a jury and knowing that there are limits to what the judge can tell me.

There is a difference between that and having that very same judge tell me that. That is to say, the whole idea of this bill is that the judge is going to spend an hour instructing the jury as to what the law is and then immediately turn around and say, you can' just disregard everything I just said.

I think I have confidence enough, certainly if I was to serve on a jury, that I know that, you know, my own conscience and morality, basic human rights and so forth is going to come, is at the basis of everything, and I don't have to be told that by a judge. And I have confidence that most other people believe the same.

What I am afraid of though, and the reason that I am speaking in opposition to this bill, is that there is a difference between jury nullification, which is that in the – and everybody here has said this – that jury nullification is that in the specific circumstances of the case it is unjust to apply this law to this person.

There is a difference between that and deciding that I simply disagree with what the legislative body of the town or city or the state of New Hampshire, has done. And I don't think that the language here, "*The court shall instruct the jury of its inherent right to judge the law as well as the facts,*" makes that distinction.

There are a lot of local ordinances that get passed which are not terribly popular. There are a lot of local ordinances that are perfectly constitutional that get passed that are nevertheless unpopular. If the jury has the right to decide that they just don't like that ordinance, that they disagree with it, that if they were sitting on the city council they wouldn't have voted for it. And if that is a valid reason for finding a person not guilty, then I think our democratic system is in trouble, of elected representatives.

That is not what jury nullification is about. Jury nullification is about deciding that in the facts of a particular situation, applying a particular law is unjust. It is not about second guessing the general policy judgments of the legislative body, including this body here.

So I think that this bill fails to make that distinction. Obviously not too many local ordinance enforcement issues go to the jury because most of them are punishable by fines that are less than a jury trial amount as stated in our state constitution. But there are some that do. Building codes for example talk about under 676:17 a violation is subject to a civil fine of $270 a day or something like that. And obviously more than 6 or 7 days, you get right up there to your right to a jury trial.

So at any rate I am certainly not speaking against the right of jury nullification. I am speaking in opposition to the bill which would require judges to say that in a way that really doesn't set out what it is. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you. Eugene Van ... what is your last name?

Eugene Van Loan: Van Loan.

Senator Debora B. Pignatelli, D. 13: Loan.

Eugene Van Loan: Senators, my name is Eugene Van Loan. I am a practicing attorney in Manchester and I speak in opposition to this bill. There is no right of jury nullification in the state of New Hampshire.

And actually I wish Sen. Fernald were still here because he was particularly interested in some of the references to the law which had been sighted by other parties. But I am here among other things to tell you that the New Hampshire Supreme Court had quite explicitly stated in several cases that there is no right of jury nullification in this state. And that there is no right of the jury in a criminal case to judge the law as well as the facts.

To being with the Supreme Court has, in some recent cases that were mentioned to you by the supporters of this bill stated and acknowledged what we all know. And that is that the jury does have the *power* to bring a not guilty verdict, even though they know that under the law as provided to them by the court that the defendant is guilty. For whatever reason, good or

bad, they do have that power. And I don't know how one defines good or bad by the way, in this context. References to justice being served seems to me to be very much based on what is in the eye of the beholder.

As Ralph Waldo Emmerson said, "One man's justice is another's injustice". So the point is the jury does have the power to nullify for whatever reasons the individuals on that jury may decide to bring in a not guilty verdict. Some of which may be based upon things such as the disagreement with the law and some of which may be based upon the fact that they may just want to get home for dinner. But the point is they can bring in a not guilty verdict if they so choose. However, to jump from that which is simply a feature of our system that we acknowledge, and we acknowledge its existence; that the jury does have that power.

Once that happens a defendant who has been acquitted cannot be tried again. That is because our constitution provides that one cannot be subjected to double jeopardy. That's a fact of life. That's a fact of our system. But to jump from that and suggest that the jury therefor has a right to nullify the law is a significant jump in logic, and I can assure it is also an historical jump which is not warranted.

What the Supreme Court has said in some recent cases:
Number 1, it has acknowledged the jury's power to bring in a not guilty verdict in disregard of the law. However, the Supreme Court has quite explicitly stated this is not a right of the defendant. This is **not** a **right** of the defendant. And I am quoting from the New Hampshire Supreme Court.

So if it is a right of anybody, it must be a right of the jury itself, assuming it were a right.

The Supreme Court has also very carefully described in recent cases that the jury's power to nullify and to bring in a not guilty verdict, even in the face of the law, is the jury's *prerogative*. The Supreme Court does not call it a right.

Now you can say that these are linguistic differences which don't make any difference but those words are chosen carefully. It's simply another way of the Supreme Court acknowledging that a juror or juries in general do have the power under our system to do what they do. However, the Court has not indicated and very carefully not indicated that they have any such rights.

More important, in 1843 in the case of Pierce v State, 13 NH, 554 (1843) the state of New Hampshire was, by the way the first state in the post colonial era to expressly hold that the jury in a criminal case does not have the power to judge the facts, excuse me, the **right** to judge the facts and the law. And I quote from the law.

> It is the opinion of the court, that it is inconsistent with the spirit of the constitution that questions of law, and still less, questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the court.

So where all this notion that the jury in New Hampshire has a right to disregard the law, comes from, I don't know. There is no provision in our constitution which expressly says so, nor is there any provision which implies such. And the Supreme Court, as I have indicated, expressly states that that is not the law of New Hampshire. The jurors do not have that power, excuse me, do not have that **right** (falling into the same trap).

I might this was reiterated by perhaps our most famous jurist in New Hampshire, Chief Justice Doe in the case of State v Hodge in 1869, as follows:

> We (must) take it as settled principal of Constitutional law that the court are the judges of the law, and the jury judges the facts involved in the issue...The trial by jury established but the constitution is a trial in which the duties of the court and jury are divided in that manner. That was the true meaning of trial by jury at common law(as was held in Pierce v. State), and that was the meaning in which the constitution adopted and guaranteed it.

So, when proponents of this legislation such as Rep. Alger suggests to you , well, if it's a right of the jury, why don't we tell them about it, I am simply suggesting to you, at least in the first instance that the basic premise has no substance in New Hampshire. There is no ***right*** of a jury in New Hampshire to nullify the law.

I further suggest to you that I can't for the life of me think of any good reason why we would want to create one, and why we would want to encourage juries to nullify. They do have the power, as I have indicated.

And they will do whatever they will do. And sometimes you will agree with it and sometimes you won't, because in some cases you may think that their sense of justice was appropriate. And in other cases such as occurred in numerous instances in the south where white juries convicted in ignorance of the law, black defendants, or refused to convict white defendants involved in a case involving blacks, they were exercising their acknowledged "power" of nullification, but not for a reason that any of us would accept as being appropriate.

The point is that what is appropriate is in the eye of the beholder. And there is no way, once you let this genie out of the bottle that you can control it. And if you are going to tell juries that they not only have the power, but they have the right to nullify the law, you can't restrict their thinking about it to whatever cases you might think are appropriate, or some presumably objective party might think is appropriate.

Just because the jury has the power, doesn't provide any good reason that we should ask them to exercise it. And by instructing them in this manner I am suggesting to you that we are doing more than just informing the jury about the existence of their "power," we're sending them a message that perhaps they ought to exercise it. And quite frankly I don't see any reason for them to be exercising it.

We have the most democratic nation in the world. New Hampshire, with the size of our legislature, one of the most democratic states in the country. Presumably when we pass laws in this state, people have the ability to participate in that process. We don't need to create a system that suggests to juries that they ought to participate in that by taking the law into their own hands.

Senator Debora B. Pignatelli, D. 13: Senator Brown?

Senator Mary E. Brown, D. 17: Thank you, Madam Chairman. Attorney Van Loan, I have never been on a jury. No one's ever asked me but, I am wondering, in the process of being on a jury, if we instruct them with this right or law or power, whatever, are people going to have a tendency to say, well first we need to debate the law and then debate...In other words do we agree with the law and then debate our view on this particular case?

Eugene Van Loan: Well that's one possibility. I think quite frankly in the real world, more likely what it's going to do, is it's going to encourage the Johny Cockrans to make their O.J. Simpson arguments out in the open rather than surreptitiously.

Johnny Cochran was permitted in the O.J. Simpson case to skirt this issue and suggest to the jury that they should acquit Mr. Simpson because of some perceived misconduct upon the part of the L. A. Police, or some racial issue that was interjected into the case.

He didn't come right out and say it because he wasn't permitted to say it. But I guarantee you if you instruct the jury in this regard, that probably the most likely affect of it besides alerting the jurors to it and suggesting to them that they might go ahead and do it is that you will change the entire dynamics of a criminal trial in this state because now the defense counsel will make use of that in ways that will make you very uncomfortable.

Senator Mary E. Brown, D. 17: Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you very much for your testimony. Is there anyone else who would like to testify on this bill? Yes. In the back. And then ...no, I am calling on you first.

Joe Haas: Good morning. I will only take about two minutes.

Senator Debora B. Pignatelli, D. 13: Why don't you start by telling us who you are.

Joe Haas: My name is Joe Haas, PO Box 218, Ashland, New Hampshire. And my attorney did bring up this jury nullification in my case. I will give you an example.

This was back in 1991. I was charged with simple assault in the Grafton County Superior Court, and the facts came out. I won't...

Senator Debora B. Pignatelli, D. 13: Excuse me, just a minute. Do you want to take your conversation outside? Thanks. Joe.

Joe Haas: The facts came out in my case where the jury asked the judge, can we find him not guilty if he was set up by an arrogant cop. And the word set up, I saw John Settle after the trial. He was with New Hampshire Civil Rights Association. These are the New Hampshire reports too. And by the way, my case is in volume 134 NH, I think. I forget the page number – 1991.

And he said the word "set up" is like an inducement, you look in the dictionary and it means entrapment. And there is an entrapment defense.

I've got the simple assault statute and there is a jury instruction at 3.10. And the only way you find these numbers is you go to the county attorney who has those questions which are really hard to find unless you dig for them..

The point I am trying to make is that the judge was instructed by that instruction number to tell the jury, yes, you must find him not guilty if you find that condition occurred. Which the judge did not do in my case.

So what I am saying is that those jury instruction numbers are acting like jury nullifications. And if they are not being used, if these judges are abusing that system, then the legislature has to put something on the books to make sure that they do their job. And this bill will do that, will elevate those jury instruction numbers up to a higher level to instruct them, let's say, that if a question comes out of the jury they have to answer, correctly. Maybe you could work that into the bill, I don't know. Or just deal with the facts of the case, rather than the law.

I don't want to get into any amendments, I just wanted to say my case. My case was appealed to the New Hampshire Supreme Court. Unfortunately my attorney, David Bells from Laconia, forgot to ask for the closing arguments where he made this jury nullification, and according to the Supreme Court rule, you cannot argue that at the Supreme Court because you didn't ask for that specific part of the case, which I found appalling because I was entitled by my article 14, NH Constitution to complete legal remedies. And here, a member of the court, my attorney, failed to get that information and I was denied a case law dealing with nullification that would nip this in the bud. That would have established this jury nullification by case law.

So this statute, I am glad that it's coming at this time. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you.

Joe Haas: That's it.

Senator Debora B. Pignatelli, D. 13: That's it. Okay.

Valerie Rudolph: I am sorry, I came late or I would have given you my name earlier.

Senator Debora B. Pignatelli, D. 13: That's all right. Come on up and just tell us who you are so we have it for the record and we'd be happy to hear what you have to say.

Valerie Rudolph: My name is Valerie Rudolph and I am Vice Chairman with the New Hampshire Center for Constitutional Studies. We deal mostly in original intent and the history behind why things were written in the constitution, the state's first, and then the United States.

And a lot of what Rep. Marple has already said, is very true, going back to William Penn and all the other precedents that were set either before the national constitution or in the common law of England.

But Article IV. of the US Constitution, section 1, says,

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and the congress may by general laws may prescribe the manor in which such acts, records and proceedings shall be proved and the effect thereof."

Section 2, of Article IV,

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

And then if you go to articles, amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

But as I was listening to the gentleman who is a lawyer here earlier, I sort of felt that maybe New Hampshire wasn't part of the United States or that perhaps New Hampshire Citizens were not entitled to the same laws granted under the bill of rights – which of course is ridiculous. And these laws were written, they were with great wisdom and with experience from the mistakes of the world, but we were also a smaller nation with fewer people.

And when they spoke of a jury of ones peers they were discussing neighbors who would know you and could perhaps say if someone stole a loaf of bread, they may have otherwise been honest people but otherwise their neighbors new them well enough to know that they weren't law breakers and would say well in this case, you know, the person was desperate.

I find that as the courts become more powerful and we pass so many laws for, I would say, not the rule, not the rule of society, because those of us who live in small towns, we don't see much of the things that perhaps Manchester would. And when something happens the legislature's tendency is to immediately pass a law for whatever has just happened, which is in the minority of cases.

And when you get down to the public and the actual day to day living. They are already peaceful citizens who are impinged upon by some of these rules and regulations which are actually violating their constitutional rights.

Land rights are one of those right now as this hearing comes up on May 6, in northern New Hampshire. And also since we are not paying so much attention to the 10th amendment anymore, when the federal government is now trying to federalize all crime and take it out of the state's and local town's hands, we are going to have a conflict here. And perhaps when these cases come into the courts people locally may feel a need for instance of one with the hate crimes legislation. To stand up and say no. Our neighbor doesn't feel this hatred. There motives aren't this and that. They are not that kind of person.

I just see a conflict coming. I see a conflict coming between the states and the federal government. And if we don't make sure that this is written into law, and the jury does know it's power...

I don't agree with the lawyer when he said that if we do this that the people on a jury will just simply ignore the law. Because after all we do live under the rule of law. They would never have the power to actually go against the law, if it were right or wrong. But there are cases where right isn't always done. And I just find that this is a check and a balance. I think it's always been meant to be a check and a balance. As our system is filled with checks and balances. And there has to be something left. Where the people who are the ones who give the power to their elected officials, are able to exercise some veto power.

Senator Debora B. Pignatelli, D. 13: Thank you very much. Is there anyone else who would like to testify? Rep. Bickford?

Rep. David A. Bickford, Straf. 1: Thank you Senator. I came in a little late. If you could sign me in or I'll do it a little later if you wish.

Senator Debora B. Pignatelli, D. 13: I'll be happy to sign you in.

Rep. David A. Bickford, Straf. 1: A very short statement. I am favorable to the idea of a fully informed jury, of all of their options. That's it. If there is any way this bill could be made to do that, I'm all for it. Thank you.

Senator Debora B. Pignatelli, D. 13: Thank you, Representative. Is there anyone else who would like to testify in favor or against this bill? I don't see anyone. I am going to close the hearing on this bill.

The hearing on HB 1236 was closed at 11:16 a.m.

This verbatim transcript submitted by
Jennifer Ruffing, Senate Secretary.

(#1)

5/3/2000 Rep. Marple (prime sponsor)

Written Testimony of
Rep. Richard Marple
Merrimack County, District 11

HB 1236
Re: (New Title) relative to an informed jury

Senate Judiciary Committee Hearing
May 3, 2000 10:00am

The following is a compellation of information obtained from several resources[1] via the internet in regards to Jury Nullification, positions to which I ally myself and have added to for the sake of concordance of HB 1236. Please review the attachment as well.

Jury Nullification

- Jurors do not always follow the instructions of judges
- In some jury trials, evidence allowed by the judges, indicating that the defendant broke the law, jurors look at the facts differently than the way the judge instructed them, resulting in statements such as "On the basis of these facts the law is wrong" versus "On the basis of these facts the defendant is guilty".
- Some jury trials result in acquittal that government conduct in the case has been flawed or that the law is unjustly applied, therefore, a conviction is not an option.

The trend has become a "passion for justice" in the jury room with jurors judging the law and the government, as well as the facts, rendering a verdict according to conscience. This is called jury nullification, which is explicitly authorized in the constitutions of 24 states.

State Constitutions: All Criminal Cases

State Constitutions containing jury nullification provisions, having endured hostile judicial interpretation.

Maryland Constitution: Article 23

> 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

[1] The Washington Post "In Jury Rooms, a Form of Civil Protest Grows" & Article "Rebellion In the Jury", Tom Stahl

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.

Indiana Constitution: Article 1, Sec. 19

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

Oregon Constitution: Article 1, Sec. 16

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.

Oregon Constitution: Article 1, Sec. 16

The right to trial by jury shall remain inviolate, except that the court shall render judgement 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 laws and fact.

State Constitutions: Libel Cases

Twenty other state constitutions also contain jury nullification provisions under the sections on freedom of speech, in respect to libel cases, using the terminology "... in all indictments for libel, the jury shall have the right to determine law and the facts under the direction of the court."

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).

New Jersey, New York, South Carolina, Utah and Wisconsin do not use the terminology "under the direction of the court".

Delaware, Kentucky, North Dakota, Pennsylvania and Texas add the phrase "as in other 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 Consti tution 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.

It would only prove a matter of great sense if New Hampshire possesses the Right to Revolution, that a lesser and more "gentle right" of jury nullification, would be appropriately and correctly applied, so that liberties may be protected.

The Right of Conscience is among the natural rights, which in nature are unalienable, because no equivalent can be given or received for them. Article 4 of the New Hampshire State Constitution states the unalienable Right of Conscience, which can not be taken away, it is not as if you "check" this right at the door, upon entering a courtroom to perform jury duties.

Legal historian Lawrence Friedman wrote:

> In American legal theory, jury power was enormous, and subject to few controls. There was a maxim of the 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.

In doctrine and composition, the Bill of Rights wholeheartedly embraced the notion of jury nullification. In absolute understanding and retention of unalienable and natural rights, the authors relied heavily on those principles when penning and adopting that great document.

The Ninth Amendment reflects jury nullification as "rights... retained by the people" and "powers ... reserved... to the people" in our Tenth Amendment. Therefore, a jury vote can be considered a vital part of our constitutional system, an application of "real law in real life", and should therefore remain as a mechanism to decentralize political power.

Rep. Richard Marple
Attachment

Jury Nullification

"...there can be no doubt that the jury has an `unreviewable and unreversible power...to acquit in disregard of the instructions on the law given by the trial judge....'"
U.S. v Dougherty, 473 F.2d 1113, 1139 (1972).
Other info related to Dougherty case: 16 Am Jur 2d, Sec. 177.

"In criminal cases juries remained the judges of both law and fact for approximately fifty years after the Revolution. However, the judges in America, just as in England after the Revolution of 1688, gradually asserted themselves increasingly through their instructions on the law.
"We recognize, as applellants 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."
U.S. v Moylan, 417 F.2d 1002,1006 (1969)

"It may not be amiss...to remind you of the good old rule, that on the question of fact, it is the province of the jury, and on the question of law, it is the province of the court to decide. But, it must be observed that by law...you have nevertheless a right to take it upon yourselves to judge both, in controversey...both objects are lawfully within your power of decision." Justice John Jay to the jury, Georgia v. Brailsford, 3 Dall. 1, 4 (1794), 1 L.Ed. 483. "...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 court are the best judges of law. But still, both objects are lawfully within your power of decision."

...the jury has "...the power to bring in a verdict in the teeth of both law and facts."
Oliver Wendell Holmes, Horning v D.C., 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920)

"...no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." U.S. Constitution, 7th Amendment. Only another common law jury can review a decision of a jury. There is no other appeal. Not even the Supreme Court can review a jury's decision.

[See also:] U.S. v. Moylan, 417 F.2d 1002 (1969)

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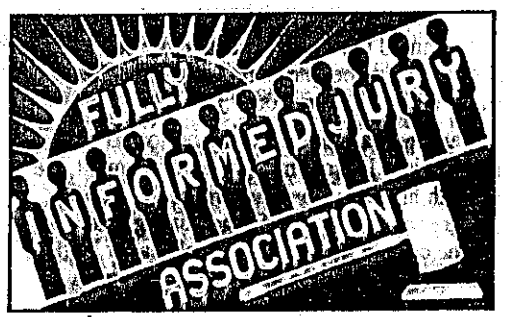
SUPREME COURT DECISIONS, MANDATES, PURSUANT TO ARTICLE FOUR, SECTION ONE & TWO U.S. CONSTITUTION GUARANTEES, FULL FAITH AND CREDIT FOR "JUDICIAL PROCEEDINGS" IN SUPPORT FOR PASSAGE OF HB1236 AND INCLUDED WITH, AND A PART OF REP. RICHARD MARPLES WRITTEN TESTIMONY, MAY 3 2000 SENATE JUDICIARY PUBLIC HEARING 10 AM.

Richard Marples #11
Movement

WHY #1a

DID OUR FOUNDING FATHERS EXPECT CITIZEN JURIES TO JUDGE OUR LAWS AS WELL AS THE GUILT OF THE INDIVIDUAL

?



MAY BE PHOTOCOPIED

Because: ***"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." (1788)***

(2 ELLIOTS DEBATES, 94, Bancroft, HISTORY OF THE CONSTITUTION, 267)

"Jury nullification of law," as it is sometimes called, is a traditional American right defended by the Founding Fathers. Those Patriots intended the jury serve as one of the tests a law must pass before it assumes enough popular authority to be enforced. Thus the Constitution provides five separate tribunals with veto power—representatives, senate, executive, judges and jury—that each enactment of law must pass before it gains the authority to punish those who choose to violate it. Thomas Jefferson said, "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."

The power of the jury to judge the justice of the law and to hold laws invalid by a finding of "not guilty" for any law a juror felt was unjust or oppressive dates back to the Magna Carta, in 1215. At the time King John could pass any laws any time he pleased. Judges and executive officers, appointed and removed at his whim, were no more than servants of the king. The oppression became so great that the nation rose against the ruler and the barons of England compelled their king to pledge that no freeman would be punished for a violation of any laws without the consent of his peers.

King John violently protested when the Magna Carta was shown to him, "and with a solemn oath protested, that he would never grant such liberties as would make himself a slave." Afterwards, fearing seizure of his castle and the loss of his throne, he granted the Magna Carta to the people, placing the liberties of the people in their own safe-keeping. (*Echard's History of England*, p. 106-7.)

The Magna Carta was a gift reluctantly bestowed upon his subjects by the king. Its sole means of enforcement, the jury, often met with hostility from the Crown. By 1664 English juries were routinely fined for acquitting a defendant. Such was the case in the 1670 political trial of William Penn for preaching Quakerism to an unlawful assembly. Four of the twelve jurors voted to acquit and continued to acquit even after being imprisoned and starved for four days. The jurors were fined and imprisoned until they paid the fines. One juror, Edward Bushell, refused to pay the fine and brought his case before the Court of Common Pleas. Chief Justice Vaughan held that jurors could not be punished for their verdicts. *Bushell's Case* (1670) was one of the most important developments in the common law history of the jury.

Jurors exercised their power of nullification in 18th century England in trials of defendants charged with sedition and in mitigating death penalty cases. In the American Colonies jurors refused to enforce forfeitures under the English Navigation Acts. The Colonial jurors' veto power prompted England to extend the jurisdiction of the non-jury admiralty courts in America beyond their ancient limits of sea-going vessels. Depriving "the defendant of the right to be tried by a jury which was almost certain not to convict him [became] ... the most effective, and therefore most disliked" of all the methods used to enforce the acts of trade. (Holdsworth, *A History of English Law* (1938) XI, 110)

John Hancock, "the wealthy Massachusetts patriot and smuggler who as President of the Continental Congress affixed the familiar bold signature which adorns the parchment Declaration of Independence" (United States Court of Appeals, 1980, 618 F.2d 453), was prosecuted through this admiralty jurisdiction in 1768 for a fine of 9,000 pounds—triple the value of the goods aboard his sloop "Liberty" which had been previously forfeited. John Adams eloquently argued the case chastising Parliament for depriving Americans of their right to trial by jury. Adams later said of the juror, "it is not only his right, but his duty ... to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." (*Yale Law Journal*, 1964:173.)

Earlier in America jury nullification had decided the celebrated seditious libel trial of John Peter Zenger. (*Zenger's Case*, 1735.) His newspaper had criticized the royal governor of New York. The law made it a crime to publish any statement, true or false, criticizing public officials, laws or government. The jury was only to decide if the material in question had been published; the judge was to decide if the material was in violation of the statute. The defense asked the jury to make use of their own consciences and although the judge ruled that the truth was no defense, the jury acquitted Zenger. The jury's nullification in this case is praised in history textbooks as a hallmark of freedom of the press in the United States.

At the time of the American revolution, the jury was considered the judge of both law and fact. In a case involving the civil forfeiture of private property by the state of Georgia, first Supreme Court Chief Justice John Jay, instructed jurors that the jury has "a right ... to determine the law as well as the fact in controversy." (*Georgia vs. Brailsford*, 1794:4.)

Until the middle of the 1800s federal and state judges often instructed juries they had the right to disregard the court's view of the law. (Barkan, Steven, *Jury Nullification in Political Trials*, citing *52 Harvard Law Review*, 582-616) Then northern jurors refused to convict abolitionists who had violated the 1850 Fugitive Slave Law. In response judges began questioning jurors to find out if they were prejudiced against the government, dismissing any who were. In 1852 Lysander Spooner, a Massachusetts lawyer and champion of individual liberties, complained, "that courts have repeatedly questioned jurors to ascertain whether they were prejudiced against the government ... [The reason] was, that 'the Fugitive Slave Law, so called,' was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people." Modern treatments of abolitionism praise these jury nullification verdicts for helping the anti-slavery cause—rather than condemn them for undermining the rule of law and the uniformity of justice.

In 1895, the Supreme Court, under pressure from large corporations, ruled in a bitter split decision that courts no longer had to inform juries they could veto an unjust law. The giant corporations had lost numerous trials pressed against labor leaders trying to organize unions. Striking was against the law at that time. "Juries also ruled against corporations in damage suits and other cases, prompting influential members of the American Bar Association to fear that jurors were becoming too hostile to *their clients* and too sympathetic to the poor. As the American Law Review wrote in 1892, jurors had 'developed agrarian tendencies of an alarming character'" (Barkan, 1983, *emphasis added.*)

Despite the courts' refusal to inform jurors of their historical veto power, jury nullification in liquor law trials was a major contributing factor in ending alcohol prohibition. (Today in Kentucky jurors often refuse to convict under the marijuana prohibition laws.)

Fewer incidences of jury veto actions occurred as time increased after the courts began concealing jurors' rights from American citizens and falsely instructing them that they may consider only the facts as admitted by the court. Researchers in 1966 found that jury nullification occurred only 8.8 percent of the time between 1954 and 1958, and suggested that "one reason why the jury exercises its very real power [to nullify] so sparingly is because it is officially told it has none." (California's charge to the jury in criminal cases is typical: "It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you. ... You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me.") Today no officer of the court is allowed to tell the jury of their veto power.

Counsels for Vietnam war protest defendants tried to introduce moral and political arguments on the war to gain jury sympathy. Most often the jury was given instructions

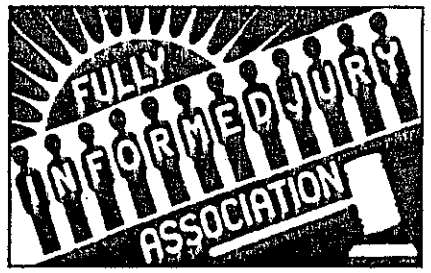
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such as "You must apply the law that I lay down." (Conspiracy trial of Benjamin Spock *et al.*, 1969.) Jurors receiving such instructions usually convicted while feeling the pang of conscience expressed by the typical responses from Spock trial jurors: "I had great difficulty sleeping that night ... I detest the Vietnam war. ... But it was so clearly put by the judge." And "I'm convinced the Vietnam war is no good. But we've got a Constitution to uphold. ... Technically speaking, they were guilty according to the judge's charge." But in the few anti-Vietnam war trials where juries were allowed to hear of their power they acquitted.

Jury acquittals in the colonial, abolitionist and post-Civil War eras helped advance political activist causes and restrained government efforts at social control. Steven Barkan suggests that the refusal of judges during the Vietnam war to inform juries of their power to disregard the law frustrated the anti-war goals. As Lysander Spooner pointed out regarding the questioning of jurors to eliminate those who would bring in a verdict according to conscience (a practice effectively accomplished today through the jurors' oaths) "The only principal upon which these questions are asked, is this—that no man shall be allowed to serve as juror unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be. ... A jury like that is palpably nothing but a mere tool of oppression in the hands of the government."

Authoritarians may argue that the Constitution without jury veto power provides the necessary protection of liberties. But legislatures will always confirm the constitutionality of their own acts. And the oaths sworn to uphold the Constitution by judges and public servants have historically been only as good as the power to enforce such oaths. Nor are free elections adequate to prevent tyranny without jury veto power, because elections come only periodically and give no guarantee of repealing the damage done. Additionally, the second body of legislators are likely to be as bad as the first since they are exposed to the same temptations and use the same tactics to gain office.

Further, the jury's veto power protects minorities from "the body of the people, operating by the majority against the minority." (James Madison, June 8, 1789.) Twelve men taken randomly from the population will represent both friends and opponents of the party in power. With fully informed juries the government can exercise no powers over the people without the consent of the people. Trial by jury is trial by the people. When juries are not allowed to judge law it becomes trial by the government. "In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of government; for there are no oppressions which the government may not authorize by law." (Spooner, 1852) *(Excerpted from "Jury Power" by L.&J.Osburn)*



"FIJA" means Fully Informed Jury Amendment, Act, or Association.

As law, FIJA would require that judges resume the practice of informing jurors of their inherent right to bring in a verdict according to conscience and their judgment as to whether the law itself is unjust or unfairly applied in any trial by jury where government is one of the parties. FIJA would also provide that defendant's motives be admissible as evidence.

You Can Help Guarantee Every Potential Juror Knows the Truth!

As an association, FIJA publishes and distributes educational materials, but depends upon grass roots activists to inform jurors of their rights and to undertake state-level lobbying and/or ballot-issue efforts.

Reinstate the Jury as the Citizen's Safeguard of Liberty!

Informed juries are essential for justice, control of government by the people, and rebuilding respect for the law.

FOR MORE INFORMATION PLEASE CONTACT:

FULLY INFORMED JURY ASSOCIATION
POB 59, HELMVILLE, MONTANA 59843
[TOLL-FREE] 1-800-TEL-JURY
OR YOUR STATE COORDINATOR:
You can help! Locally, contact:
FAX 603-627-1837 (24 hrs.)

DICK MARPLE
21 DARTMOUTH ST.
HOOKSETT, N.H. 03106
603 627-1837

#2 Rep. Doreen Jean 5/3/2000

The only power the judge has over the JURY is their ignorance!

"WE THE PEOPLE," must relearn a desperately needed lesson in civics.

The truth of this question has been answered by many testimonies and historical events. Consider the following:

JURY RIGHTS

"The jury has a right to judge both the law as well as the fact in controversy."

John Jay, 1st Chief Justice
U.S. Supreme Court, 1789

"The jury has the right to determine both the law and the facts."

Samuel Chase, U.S. Supreme Court Justice, 1796, Signer of the Unanimous Declaration

"The jury has the power to bring a verdict in the teeth of both law and fact."

Oliver Wendell Holmes
U.S. Supreme Court Justice, 1902

"The law itself is on trial quite as much as the cause which is to be decided."

Harlan F. Stone, 12th Chief Justice
U.S. Supreme Court, 1941

"The pages of history shine on instances of the jury's exercise of its prerogative to disregard instructions of the judge..."

U.S. vs. Dougherty, 473 F 2nd 1113, 1139, (1972)

5/3/2007 Attorney Gene Van Loan #3

Testimony of Eugene M. Van Loan III In Opposition to HB 1236

JURY NULLIFICATION

Jury nullification is the proposition that a jury, especially in criminal cases, has the right to disregard or "nullify" the law as applied to the case before it on the grounds of the jury's conscientious objection to the law.

As a matter of historical fact, jury nullification has often occurred in the United States. Witness, for example, the notable failures to obtain successful prosecutions in the mid-19th century of persons charged with harboring runaway slaves in violation of the Fugitive Slave Act and of the widespread refusal of early 20th century juries to convict people charged with violations of the Volstead Act prohibiting the manufacture, sale and transportation of intoxicating liquors. On the other side of the coin, we are all aware of the all-too-numerous instances in our history of Southern white juries convicting innocent blacks and kangaroo courts in the Wild West convicting first and holding the trial second. By virtue of their ability to render a so-called "general verdict" (by which is meant that the jury simply returns a verdict of guilty or not guilty), jurors in such cases were able to "take the law into their own hands" with impunity. Shielded by the secrecy of jury deliberations and the absence of any requirement that jurors individually or collectively explain their verdict, jurors do indeed have the *power* to ignore the law.

The case for jury nullification, however, rests upon a profound confusion of rights with powers. This confusion is exemplified in the preamble to HB 1236, where it is asserted that "the jury has an undeniable right to judge ... the law." The mere fact that the jury has the power to nullify does not mean that it has any corresponding *right* to do so. To begin with, whether or not the existence of a power leads to the finding of a right may well depend upon the nature of the power. If the power is simply the raw physical ability to do something, it has nothing to do with the existence or non-existence of a right to do the act. For example, you may have the power to kill another human being, but unless you are a police officer or some other individual authorized by the law to use deadly force, you have no right to commit a homicide.

Presumably, however, the supposed right of jury nullification does not rely upon the naked *physical* power of the jury, i.e., the fact that it physically can utter the words "we acquit" even if the defendant is clearly guilty. On the contrary, the starting proposition of the argument that where there is a power, there is a right, is that the jury has a *legal* power to nullify the law. As noted by the New Hampshire Supreme Court, "We recognize 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." State v. Mayo, 125 N.H. 200, 203 (1984). By this, the Court means that when the jury says "we acquit", its act is legally effective to acquit the defendant - even if the jury knowingly refused to follow the law. This is because under the so-called double jeopardy clause of our Constitution (and of the Federal Constitution), a person who has been acquitted may not be tried again for the same offense - regardless of why he was acquitted.[1]

On the other hand, the jury's legal power of nullification is not absolute. When the jury *convicts* rather than acquits, the rules of the game are quite different. A defendant who is convicted can appeal. And if the defendant can show that the jury disregarded the law, the conviction is wiped out. While it may technically be true that the jury *can* convict a defendant who the jury actually believes is innocent of the offense charged, the jury can only make such a conviction stick if no one finds out what it has done. Thus, unlike the situation in the case of an acquittal, the jury has the physical power to bring in an unlawful conviction, but it does not have the legal authority to do so.[2]

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[1] This is the difference between the power of a jury to nullify and the power of other participants in the criminal process such as prosecutors and grand juries to nullify. When a prosecutor refuses to prosecute or a grand jury refuses to indict because they disagree with a law, the criminal only gets a temporary reprieve; another prosecutor or grand jury can still bring the defendant to justice. On the other hand, when a trial jury acquits because it chooses not to enforce the law, the defendant is free forever.

[2] On the other hand, because of the secrecy of jury deliberations, we can seldom really know why a jury reached its decision. Thus, we must make some assumptions about its behavior. In this regard, the whole notion of a criminal defendant's right to appeal his conviction rests upon the assumption that the jury does in fact follow the court's instructions on the law. Consequently, the primary

In addition to having no authority to convict in violation of the law, the jury quite clearly has no *right* to do so. Most of us are familiar with the fact that prospective jurors are questioned by the court (and, in some instances, by the lawyers) before they are declared competent to sit on a given case. This process is known as the voir dire and is designed to determine whether jurors have any preconceived opinions about the case or are otherwise unable to render an impartial verdict. See generally, RSA 500-A:12. Suffice it to say that a juror who reported that he or she could not accept some proposition of law which established a defense to a crime or which exonerated otherwise criminal conduct would be excused from the panel. For example, in the 1984 case of State v. Cere, 125 N.H. 421, the Supreme Court disqualified a juror who stated that "she could not follow the law on the burden of proof and believed that the defendant must do something to prove his innocence because he must have done something to get him there." As the Court put it, such a person "whose beliefs are so subversive of such a fundamental safeguard of our freedoms is not qualified for jury service." Cere at 423 (1984).[3]

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issue in a criminal appeal is whether the trial judge correctly instructed the jury on the law. The point is that if the jury had the legal power to determine the law for itself and to render a guilty verdict based solely upon its own view of the law, the correctness of the judge's instructions would be irrelevant.

[3] Indeed, one of the dangers of the type of instruction championed by HB 1236 by which the jury is informed of its supposed "right" to nullify the law is that the jury could erroneously assume that it has the right to convict someone who has committed no crime. This issue was actually presented to the court in the case of State v. Preston, 122 N.H. 153 (1982), where a defendant who had been convicted in a trial by jury objected to the trial court's charge to the jury that they could act on their "conscientious feeling about what is a fair result in the case". 122 N.H. at 160. The defendant argued that this was an instruction which could have led the jury to nullify the law requiring the State to prove its case beyond a reasonable doubt. The Supreme Court did not reverse the defendant's conviction, but that was only because it concluded that the trial judge's instructions to the jury, as a whole, made it clear that the State *was* required to prove its case beyond a reasonable doubt and that the nullification instruction, viewed in context, could only have been understood by the jury as relating to its power to disregard the law in order to *acquit* the defendant.

In summary, the jury has the legal power to ignore the law in order to acquit, but it has neither the legal power nor the legal right to do so in order to convict. The question, then, is whether the jury's legal *power* to acquit in defiance of the law gives the jury the legal *right* to do so. To begin with, it must be acknowledged that a jury's acquittal of a criminal defendant in disregard of the law does not itself constitute a criminal offense in New Hampshire.[4] But the fact that a person has the legal power to do an act without being punished for it under the criminal law does not necessarily mean that the act will have no adverse legal consequences. For example, a party to a contract may breach that contract without committing any criminal offense, but he or she is still subject to liability for the damages caused by the breach. Indeed, there are even circumstances where an actor may do something which is neither a crime nor an act which creates liability for damages, but which still could have untoward legal effects. For example, it is no crime to breach one's marriage vows and, subject to a few exceptions, a spouse has no civil liability for such a breach. Nevertheless, a breach of one's marital vows may well bring about a divorce.

In neither of the above examples, therefore, would we suggest that the party in question had a "right" to do what he or she did - even though we may acknowledge that he or she has the "power" to do it. Indeed, the New

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[4] There are several theoretical possibilities that juror nullification could constitute criminal conduct, but (at least to my knowledge) no prosecutions have ever been based upon these theories in New Hampshire. The first is contempt of court for affirmatively lying or failing to be candid in the voir dire. On rare occasions, such actions have been brought and have been sustained in other jurisdictions. See United States v. Clark, 289 U.S.1 (1933) and Colorado v. Kriko, Case No. 96-CR-91, Division 1, Gilpin County, Colorado (Feb. 10, 1997). Another possibility is a charge for false swearing for violating the oath which jurors are required to take that they will try the case "according to law and the evidence given [them]." RSA 606:2. See United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); and United States v. Thomas, 116 F.3d 606, 608 (2d Cir. 1997). On the other hand, even in New Hampshire, if a jurors' vote for acquittal was not on account of a conscientious disagreement with the law, but because the juror's vote had been purchased, the offender clearly could be (and presumably would be) charged with bribery. See RSA 640:2I(b).

Hampshire Supreme Court has recognized this dichotomy with respect to the issue of jury nullification. While acknowledging the jury's power to nullify the law, the Supreme Court has refused to characterize it as a right; instead, the Court has preferred to describe it as a "prerogative" of the jury. State v. Weitzman, 121 N.H. 83, 89 (1981); State v. Preston, 122 N.H. 153, 160 (1982); State v. Mayo, 125 N.H. 200, 203 (1984).

Moreover, the Court has repeatedly held that jury nullification is not a "right of the *defendant.*" *E.g.*, State v. Weitzman, 121 N.H. 83, 89 (1981); State v. Mayo, 125 N.H. 200, 203 (1984) (emphasis supplied). Accordingly, in 1987, the Court specifically ruled that a criminal defendant's rights were not violated in a case where the trial judge refused his request to advise the jury of its nullification prerogative. State v. Cote, 129 N.H. 358, 368 (1987) .

HB 1236 would change this rule. Under the bill, a trial court would be required to honor the defendant's request for such an instruction. HB 1236, however, attempts to avoid the Supreme Court decisions denying that criminal defendants have any personal right to jury nullification by asserting that the right of nullification is a right of the jury itself.[5]

This makes no sense at all. In the first place, if the *jury* truly had a right to nullify the law, the jury would presumably be able to enforce its own rights and not have to rely upon a defendant to assert them. From a practical point of view, however, I can assure you that any prospective juror who announced his or her general intent to acquit all criminal defendants would not be permitted by the court to sit on any case. Likewise, any juror who acknowledged a conscientious inability to convict whenever a particular law with which he or she disagreed was at issue would be subject to a challenge for cause by the prosecution in any case presenting such an issue - whether it be on account of a disagreement with capital punishment in a first degree murder case, a refusal to accept the criminality of marijuana possession or a belief in

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[5] Under this theory, the criminal defendant is presumably only acting as the jury's proxy when he or she requests that the Court instruct the jury as to its nullification prerogative. On the other hand, even HB 1236 is somewhat schizophrenic about this issue. While expressly describing nullification as a right of the jury, the title to proposed new RSA 519:23-a is "Right of Accused".

the acceptability of murder as a punishment for spousal abuse. See, e.g., United States v. Thomas, 116 F.3d 606 (2d Cir. 1997).[6]

Secondly, if the jury really does have a right to nullify the law by acquitting a guilty defendant, why is it that no one can identify the source of this right? HB 1236 merely *asserts* that it exists. However, you can search the new Hampshire Constitution ad infinitum and you will not find any provision which either expressly or impliedly guarantees any right of jury nullification.

The advocates of nullification are thus relegated to an argument based upon the supposed nature of the jury at common law. This is what HB 1236 is referring to when it states that the jury has historically had the right at common law to judge not only the facts, but also the law. Assuming that this were true, one could argue that this right of the jury was incorporated into New Hampshire law in 1784 by virtue of Part II, Article 90 of the Constitution which provides that, "all the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New Hampshire, and usually practiced on in the courts of law, shall remain and be in full force, until altered and repealed by the Legislature, such parts thereof only excepted as are repugnant to the rights and liberties contained in this constitution". On the other hand, the Supreme Court had frequently held that the common law is deemed incorporated into the law of New Hampshire only so long as it is not "incompatible with our institutions, or not adapted to our circumstances." E.g., Heath v. Heath, 85 N.H. 419, 422 (1932).

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[6] It is true that jurors are not generally examined by the court about their personal beliefs or about their willingness to follow the judge's instructions on the law. This is not, however, because such questioning would infringe upon any right of theirs to nullify the *law*, but because it would threaten the jury's independence in judging the *facts*. Excessive judicial prying into the private beliefs of jurors about the law carries with it the threat that jurors who acquit because they believe that the defendant "didn't do it" might be punished because the state could assume that they really acquitted the defendant because of their disagreement with the law. To put it another way, when Big Brother exhibits an inordinate interest in the political beliefs of his subjects, one can usually take this as a message that things would go better if one gave Big Brother what he wanted.

But it is not really necessary for us to explore the labyrinth of the pre-constitutional common law on this subject. The unsurmountable obstacle to HB 1236 is the fact that our Supreme Court has expressly held that juries in New Hampshire do NOT have the power to judge the law. Indeed, the statement in HB 1236 to the contrary is not only untrue, but is apparently also made in ignorance of the fact that the New Hampshire Supreme Court was the very first of the post-colonial courts to rule this way on the issue. Dierdre A. Harris, Jury Nullification in Historical Perspective: Massachusetts as a Case Study, 12 Suff. L. Rev. 968, 973 n. 29 (1978).

I direct your attention initially to the case of Pierce v. State, 13 N.H. 554 (1843). That case involved the refusal of the trial court to comply with the defendant's request to advise the jury of its supposed right to judge the law and to acquit the defendant on conscientious grounds of a violation of the law requiring importers of spirituous liquors to be licensed. In words of unmistakable conflict with HB 1236, the Court held as follows:

> It is the opinion of the court, that it is inconsistent with the spirit of the constitution that questions of law, and still less, questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the court.

Similarly, twenty-five years later, in the case of State v. Hodge, 50 N.H. 510, 522 (1869), Chief Justice Doe reiterated the proposition:

> We must take it as a settled principle of constitutional law, that the court are the judges of the law, and the jury judges of the facts involved in the issue .... The trial by jury established by the constitution is a trial in which the duties of the court and jury are divided in that manner. That was the true meaning of trial by jury at common law (as was held in *Pierce* v. *State*), and that was the meaning in which the constitution adopted and guaranteed it.

In view of these pronouncements, it is a mystery to me how anyone could ask the Legislature to approve a statute which so completely mistakes the constitutional law of this State. However, the error is not limited to the law of New Hampshire. HB 1236 claims that the federal courts have also interpreted

the U.S. Constitution to establish a right of juries to judge the law. Again, the statement is dead wrong! In the case of Sparf, et al v. United States, 156 U.S. 51, 101-102 (1895), the Supreme Court held exactly the *opposite* from what is stated in HB 1236:

> Any other rule than that [binding the jury to follow the instructions of the court] would bring confusion and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts, - if the function of the court be only advisory as to the law, - why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law?
>
> Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty or property according to such legal principles as, in their judgment, were applicable to the particular case being tried .... And if it be true that a jury in a criminal case may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases, and the views of elementary writers .... Upon principle, where the matter is not controlled by expressed constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court.

Based upon the foregoing, it is evident that HB 1236 has no basis in either jurisprudence or precedent. So what about plain old good policy? If we acknowledge that jurors have the power to acquit in defiance of the law, don't we want them to be - as HB 1236 puts it - "fully informed" of their power? I, for one, say no - we do not want to *encourage* juries to exercise their acknowledged power to acquit in defiance of the law.

The advocates of jury nullification, however, suggest that the jury has a role to play in the democratic process by refusing to enforce laws which do not command the support of the citizenry. Even assuming that the concept of nullification had some validity in 17th century England or in colonial America where juries arguably represented the conscience of a community which had little or no input into the law-making process, modern America is one of the most democratic societies in all of history. And if anyone today has a right to complain about being left out of the process, it is certainly not a citizen of New Hampshire, the state with one of the largest legislative assemblies in the world.

In my opinion, the notion that the jury is an agency of democracy which should act as a "safety valve" for the community when it is confronted with the responsibility of enforcing a purportedly "unjust law", is nothing more than a misguided libertarianism which threatens the rule of law. Indeed, advocating the right of a jury of twelve unelected citizens chosen at random from a list of registered voters to disregard a law passed by our elected representatives and signed by our elected governor is almost as anti-democratic as one can get. This is the reverse of the classic problem of the tyranny of the majority; it is the tyranny of a minority.

A juror who would refuse to enforce the law has no greater claim to knowledge of what is moral or just than our elected legislators or our appointed judges. As Ralph Waldo Emerson pointed out, one man's justice is another's injustice. Accordingly, there is no way to assure that the power to nullify will only be exercised in "appropriate" cases.[7] So why should we grant jurors the "*right*" to override the law? At best, they can exercise their rights of conscience by engaging in personal civil disobedience and suffering the legal consequences of doing so. But if they want to foist their views upon others, let them enter the political thicket and, if they get elected, they are free to pass any law that their consciences may dictate. In the meantime, the jury's power to nullify the law is nothing more than a price that we must pay for an imperfect system that prefers to err in favor of letting ten guilty persons go free rather than convicting a single innocent one.

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[7] As the Court said in Pierce v. State, 13 N.H. at 571: "The proposition [that the power of nullification proves the right] is certainly not commended to us by its law, its logic, or its morality. And it proves quite too much. If it were true that the legal power to do the act, without legal accountability for it, established a right to do the act, the jury might rightfully acquit the accused in all cases, without regard to the law or the evidence, for their power so to do is undoubted, and their exemption from accountability equally clear."

Judiciary Committee

HB 1236 Hearing Report

TO: Members of the Senate

FROM: Susan Duncan
Legislative Assistant

RE: Hearing report on **HB 1236** – ***AN ACT relative to an informed jury.***

HEARING DATE: May 3, 2000

Sponsor: Rep. Marple, PRIME
Representatives Welch, Ron Nowe, Alger, Rose
Senator Roberge

What the bill does: This bill states that a criminal defendant has a right to make a request that the court instruct the jury of its inherent right to judge the law and the facts in controversy and to nullify.

Who supports the bill:
Representative Marple
Senator Roberge
Representative Lyman
Representative Loren Jean
Representative John Alger
Patrick Barnett, Derry
Joseph Haas, Ashland
Valerie Rudolph, Vice Chair, NH
Center for Constitutional Studies

Who opposes the bill:
Attorney Bernie Waugh, NHMA
Attorney Eugene Van Loan

Summary of testimony received in support:

- This legislation was introduced to ensure that juries are instructed that they have the right to nullify the law in a specific case.
- Our US Constitution gives us the right of conscience.
- We have had this right since Old English Common Law.
- Judges have chosen to leave the juries in the dark.
- HB 1236 tries to make it an imperative that the jury be notified of their rights.
- The "bottom line" is when a jury must find a defendant guilty on the facts of law, but that the law is dumb.
- Sometimes there are absurdities in the law.
- In the William Penn case, the law stated a mandatory death penalty, but the jury's consciences would not allow them to do it.
- New Hampshire would be the first state to have a statute – it's in the other Constitutions. However, it is not followed.
- This is another check and balance in the system.
- A jury should be informed as to all of their options.

Summary of testimony received in opposition:

- There is a difference between deciding that one disagrees with what the Legislature has done.
- There are a lot of things that are Constitutional, but unpopular.
- The bill fails to make the distinction between disagreements with policy.
- There is no right of jury nullification in New Hampshire.
- The NH Supreme Court has explicitly stated in several cases that there is no right.
- The jury does have the right to bring in a not guilty verdict, even though they may have felt the defendant was guilty.
- This is not the right of the defendant.
- The Supreme Court has very carefully clarified that the Jury's right is, in fact, a jury's prerogative. The court has not indicated any such right.
- This would encourage the "Johnny Cochoran's" to air their trash in public instead of privately.

Funding: Not applicable.

Future Action: The committee took the legislation under advisement.

sfd
[file: HB 1236 report]

Speakers

HB 1236 Senate Judiciary Hearing Sign In

APPEARING: IN FAVOR	APPEARING: TO OPPOSE	DATE: MAY 3, 2000 TIME: 10:00 AM NAME / REPRESENTING	WISH TO SPEAK?
	X	H. Bernard Waugh, Jr. NH Municipal Assn.	✓
X		Richard Marple, Merrimack #11	✓
X		John Loder / Moultonboro	✓
X		Patrick J Barnett - Derry	?
X		Rep R Lyman Carr 5	NO
X		Rep Loren Jean	✓
X		Rep. John Alger	✓
	X	Eugene Van Loan	✓
X		Valerie Rubolph	✓
X		Rep. Bickford	✓

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Date: **MAY 11, 2000**

THE COMMITTEE ON **Judiciary**

to which was referred **House Bill 1236**

AN ACT ***(New Title) relative to an informed jury.***

// file copy

VOTE: **5 / 0**

Having considered the same, report the same with the following resolution:
Resolved, that it is: **INEXPEDIENT TO LEGISLATE.**

Senator Mark Fernald
For the Committee

HB1236 Docket

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Bill Title: (New Title) relative to an informed jury.

Date	Body	Description
1/5/2000	H	Introduced and ref to Judiciary; HJ5, p92
1/5/2000	H	Copy to Chairman on 12/22/1999
1/5/2000	H	Hearing Jan 26 11:15 RM208,LOB
3/22/2000	H	Maj Report OTP/AM for Mar 29 (vote 8-6;Reg)
3/22/2000	H	Min Report ITL
3/22/2000	H	Prop Maj Am{3907}(New Title); HC24, p718
3/29/2000	H	Comm Maj Am, AA VV; Passed with Am RC(189-138); HJ28, p922-924 + 928
4/6/2000	S	Introduced and Ref. to Judiciary; SJ 9, Pg.284
4/19/2000	S	Hearing May 3, Room 103, SH, 10:00 a.m.; SC24
5/10/2000	S	Committee Report Inexpedient to Legislate, 05/11/2000, SC28
5/11/2000	S	Committee Report Inexpedient to Legislate; MA, VV ==KILLED==; SJ 14, Pg.381

Next|Prev|Results List|Main|Bill Status

Docket Abbreviations