Jury Trial: A Shield Against Arbitrary Death Penalty

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Death Penalty Seminar, 2009
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I. INTRODUCTION

Jury trials were instituted to protect the rights and freedoms of the people and to prevent the unjust application of the force of law by sovereign authority. This right is so fundamental to preservation of freedom and to binding government to be answerable to the governed that the States insisted on incorporating it into the Constitution in the Sixth Amendment. Intrinsic to the right to jury trial in the common law tradition is the power of jury nullification. "Jury nullification occurs when a jury or juror finds a criminal defendant not guilty despite their belief that there is no reasonable doubt that a violation of a criminal statute has occurred." [1] The nature of jury trials has changed over time through judicial and legislative rules aimed at eliminating perceived flaws related to the power of nullification.

Two of the most important repairs that have adversely affected death penalty jurisprudence are the attempted overt and total elimination of jury nullification, and the attempted covert elimination of jury nullification in death penalty cases by restricting the jury pool to death qualified jurors. Jury nullification, however, is not a flaw in the system, but a shield which reduces the likelihood of excessive application of the death penalty without the need for categorical exclusion.

This paper suggests that the best solution to the question of whether the death penalty is constitutional and should be applied in any particular situation is to leave the question to a jury that has been properly informed of the power of nullification. A jury consisting of laypersons from the community is uniquely suited to act as the conscience of the community in determining whether death in any given circumstance can be considered cruel and unusual punishment. The war the court has waged on the jury nullification for more than a century has only yielded more

litigation that continues to threaten the rights of the people by reducing the effectiveness of their constitutionally guaranteed shield against oppression.

Section II discusses the origins of the right to trial by jury, and the essential relationship between jury trials and the power of jury nullification in the common law system dating back beyond the *Magna Carta*. Subsection A focuses on the right and responsibility of the common law jury to judge the law created by governmental powers. Section B discusses how the jury acts as a voice of consent from the governed without which governmental action has no force of legitimacy. Section III shifts and discusses how modern rules of jury decision-making and jury-selection impede the jury's proper function. Subsection A of Section III(?) addresses how courts seeking to remove the nullification power trade the one of the jury's most important functions—protecting individual rights—for something much less valuable—judicial economy. Subsection B of Section III addresses the reduction of the jury's ability to protect individual rights arising from elimination of jurors for cause if they are unwilling to inflict the death penalty. Section IV addresses how a classical jury with nullification power protects against unjust application of the death penalty. Subsection A of Section IV argues that the classical common law jury promotes community acceptance of responsibility. Subsection B of Section IV focuses on the ability of the classical jury to protects the rights of citizens. Subsection C of Section IV discussesthe unique capacity of the classical common law jury for providing proper consideration in sentencing to those who may be deemed less culpable. Section V concludes that the goal of preventing imposition of the death penalty unjustly can best be accomplished by a full return to the proper principles of jury trial including nullification.

In *An Essay on Trial By Jury*, Lysander Spooner traced the history of trial by jury, and

presented a solid foundation from which the rest of this paper draws.

II. Origins and Devolution of the Right to Trial by Jury

Trial by jury in the United States traces its origins back to the common law jury of England that predated the *Magna Carta*. The *Magna Carta* officially created the jury in response to similar complaints against the king as the founders of the United States levied against King George, namely that the laws of the king oppressed the people.[2] Mandating that the king allow all trials to be by the people in the form of a jury created a system wherein no law had force without the actual consent of the people.[3] The jury trial, essentially, gave voice to the governed by means of the power of nullifying the law.[4]

Lysander Spooner, a pre-civil war activist, wrote extensively on the power of the jury to nullify any law.[5] Spooner's advocacy largely focused on using the nullification power to undermine the run-away slave laws enacted by congress and the states, but his reasoning that the jury alone can represent the conscience of the community extends readily to application to the death penalty.[6] This section provides an overview of his ideas regarding the necessity of jury nullification as part of the democratic process.

A. Because Juries Act as a Constraint on Government Power in Common Law Jurisdictions, they Should Try Cases on the Merits Independent of the Law.

> *"...jurors 'shall swear, with their hands upon a holy thing, that they will condemn no man that is innocent, nor acquit any that is guilty.'*[7]

Historically juries were charged with the duty to judge the case before them according to their oath as jurors.[8] The oath obligated the jurors to "try all cases on their intrinsic merits, independently of any laws that they deem unjust or oppressive."[9] The jury's judgment focused on one question for criminal trials: whether the defendant was guilty or not guilty.[10] This

determination of guilt, argues Spooner, "is an intrinsic quality of actions," and thus beyond the power of any legislation to define.[11] The issue of guilt could only be determined by the peers of the court—jury—and the judge usually only had a ministerial role.[12]

The common law jury as found in England was by no means the only historical jury. Spooner distinguishes the common law jury from the civil law jury.[13] The civil law required the jury to follow the maxim *Ad questionem juris non respondent Juratores*—To the question of law the jurors do not answer.[14] However the common law jury did not follow this maxim. Instead the common law jury were "the judges as well of the matter of law, as of fact" and the judge is merely to answer the juries questions as to matters of the law. "And this is the province of the judge on the bench, namely, to show, or teach the law, but not to take upon him the trial of the delinquent, either in matter of fact or in matter of law. … the sole purport of his [the judge's] office is to teach the secular or worldly law."[15]

The jury under the common law acted as mechanism for confining the power of government.[16] The specific boundary the jury protected was the same as that announced in the Declaration of Independence and enshrined in the Fifth Amendment to the U.S. Constitution: life, liberty and property.[17] Specifically, government was not to "touch the property, person, or natural or civil rights of an individual, against his consent, except for the purpose of bringing them before a jury for trial, unless in pursuance and execution of a judgment, or decree, rendered by a jury...."[18]

Spooner assrets that the duty of the jury in criminal matters to evaluate not only the facts, but also the the law and the culpability of the defendant is essential to curbing governmental excess.[19] In fact, in order to check government power, the jury must not only be able to strike

down unjust or oppressive laws, but must be encouraged "to hold all laws invalid, ... and all persons guiltless in violating, or resisting the execution of, such laws."[20] Spooner further asserts that if juries do not have the right and duty to strike down the law, they will not only fail as "a barrier against tyranny and oppression" but they reduce themselves to "mere tools in its [government's] hands, for carrying into execution any injustice and oppression it may desire to have executed."[21]

The power of the jury to judge the law is not limited to determining what shall or shall not be punishable, but also extends to determination of what punishments shall be applied.[22] Without the power to determine sentencing, the government would then be left with a powerful tool of oppression.[23] The objective of the *Magna Carta*, taking "all discretionary or arbitrary power over individuals entirely out of the hands of the king, and his laws, and entrust[ing] it only to the common law, and … the jury that is, the people," would be entirely undone if the law could fix punishments.[24]

Thus, jury trials are "mere courts of conscience … ."[25] This is not a weakness of jury trials, but rather their greatest strength, for "the consciences of a jury are a safer and purer tribunal than the consciences of individuals specially appointed, and holding permanent offices."[26] It is because the jury is the conscience of the community that the jury, not the judge, must determine guilt or innocence.[27] The jury, thus, is uniquely situated to protect individual rights against the government.[28]

Therefore, the proper role of a jury is to determine the facts of the case before it, determine if the law as written should apply to the facts of the case, then answer the question of whether the defendant is guilty, and finally determine the punishment that is appropriate in light

of how culpable they find the defendant. The same proper role of the jury equally applies to civil trials. Such was the form of jury trial when adopted by the United States in the Constitution and Bill of Rights.

B. The United States Adopted the Principle that Legitimate Government Power Derives from a Mandate from the Masses: The Power to Execute Exists only where Permission to Execute Has Been Granted by the Jury.

> *"Without the suffrage of the yeoman, the burgess, and the churl, the sovereign could not exercise the most important and most essential function of royalty; from them he received the power of life and death; he could not wield the sword of justice until the humblest of his subjects placed the weapon in his hands*."[29]

From the dark ages when the principles of the common law of the land first evolved, common people have demonstrated the capability to identify and apply justice in such a way to preserve the rights of individuals.[30] This power is preserved in the U.S. Constitution which states, "The Trial of *all Crimes*, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed… ."[31] In order to enforce this guarantee the founders of this nation took the tradition of requiring the king to swear an oath to uphold the common law of the land and integrated it in the oath required of all "Senators and Representatives … and the Members of the several State Legislatures, and all executive and judicial Officers" to uphold the Constitution—the supreme law of the land.[32] "[U]ntil recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. . . . [but] this right--one of the most valuable in a free country--is preserved to everyone accused of a crime . . . . The sixth amendment . . . language [is] broad enough to embrace all persons and cases."[33]

Every human being has an inalienable right to self-defense, even if the only force they must defend themselves from is injustice from the government.[34] This right is reaffirmed by the

mere existence of the bill of rights, the purpose of which is to "assert the rights of individuals and the people, as against the government … ."[35] It is through the tool of the jury—which from ancient times provided the means of determining when one's rights were infringed, and when government action accorded with justice—that government is bound to "the principles of natural equity."[36] To this end, the jury has always been more than a mechanism for protecting the rights of the accused.[37] It is also "an incorruptible fact finder . . . embodying popular sovereignty and republican self-government."[38]

For a government to remain limited, the power to execute any law must be constrained and determined by the people. This determination finds itself not in popular election of representatives, but in the trial by jury. For it is in the trial by jury that the willingness of the people to be governed by the law in question is truly tested. Modern rules dictating jury decision making and jury selection sabotage this function of juries.

III. Modern Rules Governing Jury Decision Making and Jury Selection Enhance Problems with Death Penalty Jurisprudence by Skewing Jury Returns, and Interfering with the Jury's Role of Protecting the Rights of the People.

The courts of this nation bear a heavy burden in the form of protecting the rights of individuals while simultaneously enforcing laws. Traditionally, the jury shared in that responsibility, and the court served merely to inform the jury as to the present state of the law and to announce the verdict of the jury. Justice was well served by the common sense ability of the jury to appropriately determine guilt despite illiteracy and lack of education. Modern courts have access to more educated jurors, yet trust the discretion of the juror less when it comes to death penalty cases. Modern court value efficiency more than individual rights, thus endangering the institution of the jury.

A. Attempting to Remove Nullification Power Greatly Hinders the Jury in Protecting Rights in the Name of the Illegitimate Pursuit of Efficiency.

> *"If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, legally speaking are slaves."*[39]

Over the years the courts have slowly whittled away at the rights and powers of juries to the point that the modern view is not that the jury exists to protect the citizens from government, but now is seen only as "an instrument of fair, efficient, and effective administration of justice."[40] While fairness may be an intrinsic value of jury trials, "The framers never intended for the Constitution and the Bill of Rights to be efficient documents." [41] Concerns of judicial economy, however, have driven courts to attack the power of jury nullification through jury instructions that specifically preclude nullification, eliminating jurors who are aware of—let alone in favor of—nullification, threatening to remove jurors who if the jury seemed poised to nullify, and even arresting people who advocate nullification near the court house.[42]

The process of how the court has gone about attacking the nullification power is extensively laid out by Andrew J. Parmenter in his article *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification.*[43] To summarize Parmeter's article, first the court denied that a jury had a right to nullify; then the court began restricting counsel from making nullification arguments, and continued by eliminating jurors who new about nullification; then finally finished off by denying admission of evidence that "might motivate a jury to exercise their nullification power *sua sponte*."[44] In fact, attorneys who seek jury nullification are now being accused of ethical violations.[45] "[O]ne judge even [declared] that arguing for jury nullification is illegal."[46] Essentially, the courts have ceased viewing nullification power as the rare but necessary remedy, and "now treat it like an ever-threatening pestilence to be eradicated

at all costs."[47] Despite their power to nullify, courts usually mislead jurors with instructions that preclude the exercise of this essential power.[48] "Jurors usually are instructed that they are obligated to follow the charge of the judge presiding over the trial."[49]

Despite the open attacks courts have levied against the nullification power, the Supreme Court continues to affirm that the jury is to function as "the conscience of the community."[50] The jury, therefore, is still "entrusted to determine in individual cases that the ultimate punishment [a death sentence] is warranted."[51]

Jury nullification has been under attack by the courts of the United States for over one hundred years. Though eliminating nullification may serve the purpose of efficiency, efficiency as a value pales in comparison to individual liberty or limited government—two goals for which a jury must have nullification power. But to truly eradicate nullification requires an attack on the covert nullification inherent to a system that allows all citizens, despite personal sensibilities, to sit on a jury.

B. Allowing Any Juror to Be Removed for Cause because of an Unwillingness to Inflict the Death Penalty Reduces the Effectiveness of Juries at Protecting Constitutional Rights.

> *"But all this 'trial by the country' would be not trial at all 'by the country,' but only a trial by the government, if the government could either declare who may, and who may not, be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial."*[52]

For a jury to function as the "conscience of the community," the jury must be selected from a "cross-section of the community."[53] This cross-section requirement "is necessary to protect the jury's function as a check on government oppression."[54] The Supreme Court, nevertheless, held that the state has an interest in having the law applied that must be balanced against the interest of the defendant in having a jury drawn from a cross-section of society.[55] This

means that the judge may remove a juror based on whether the juror would apply the law as written—essentially approving removal if the juror would be willing to nullify.[56] Even awareness that a jury has the power to acquit against the law is enough for some courts to justify dismissal of a juror.[57] The importance of jurors as the conscience of the community is further enhanced by examining the Supreme Court's death penalty jurisprudence since *Furman v. Georgia*, which bases so much of the "objective criteria" regarding acceptance of the death penalty on jury returns.[58]

Rather than being justified, removal of jurors because they pose a threat of nullification in death penalty cases creates an appalling situation in which the institutions designed to defend the people's rights become "ready weapons for government oppression."[59] Such direct elimination of jurors who are willing to nullify impedes the jury from performing their role of safeguarding against government oppression.[60] This selective elimination of jurors is only made more egregious by the realization that, "[j]uries nullify rarely and tend to do so either when the law involved lacks a broad consensus of popular support, or the community believes that a popular law is being misapplied."[61]

The practice of eliminating jurors opposed to the death penalty is not new. Spooner finds evidence of this practice in Massachusetts

> It has also been an habitual practice with the Supreme Court of Massachusetts, in empanelling [sic] juries for the trial of capital offences [sic], to inquire of the persons drawn as jurors whether they had any conscientious scruples against finding verdicts of guilty in such eases; that is, whether they had any conscientious scruples against sustaining the law prescribing death as the punishment of the crime to be trick; and to

> exclude from the panel all who answered in the affirmative. The only principle upon which these questions [about opinions as to a particular law] 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.[62]

The danger associated with government being able to select who can serve on a jury is, of course, that only people who will support the law and will of those in power will be selected.[63]

The requirement that jurors be selected from a cross-section of society in order to render a decision in harmony with the conscience of society is completely at odds with any selection criteria that would eliminate potential nullifiers. Removal of jurors opposed to the death penalty affects jury returns. Jury returns are a key criteria that the Court relies on to determine whether death is "Cruel and Unusual Punishment" under the Eighth Amendment. The court has essentially created the current quandary by trying to eliminate jury nullification in the first place. Furthermore, courts have obliterated one of the key protections originally granted in the Constitution to curb governmental power. Death may not be a per se "cruel and unusual punishment," however, application of the death penalty absent the shields for life and liberty provided by a jury fully conscious of its nullification power—as the court presently demands—raises serious questions as to whether any death sentence is legitimate.

IV. Spooner's Jury Protects against Unjust Application of the Death Penalty in Three Ways: by Promoting Responsibility, Protecting Rights, and Allowing Full Consideration of the Facts for the Less Culpable.

> *"Where the written law cannot be construed consistently with the natural, there is no reason why it should ever be enacted at all."*[64]

When society acts collectively, it can only do so through government or through juries. If through juries, it will lead to a greater responsibility on the part of society for collective actions.

Jury actions have the added benefit of truly protecting the rights of people as against the government. Only a jury can have enough flexibility to apply proper justice in a personal way to those who may be less culpable.

A. Juries Possess the Unique Capacity to Act as Agents for the Rest of Society in Convicting or Acquitting a Criminal Defendant, and thus Taking Responsibility for the Actions of the Criminal Justice System.

One much overlooked role of the jury is that of taking responsibility for the judgments society imposes upon those convicted, as proposed by Sherman J. Clark in his article *Courage of Our Convictions*.[65] The jury allows for ordinary citizens to participate as part of the conscience of the community, but the courts do not inform the venire or the jury of this important role they are to play.[66] This is partly because to do so would require the courts to acknowledge nullification as both a power and a right.

However, to fully bring their conscience to bear on a case, juries must be aware of their responsibility.[67] The jury must act as the agent of society—acting on our behalf to condemn or exonerate—and not the agent of the government if it is to fulfill the responsibility taking role.[68] Their ability to do so "depends upon an awareness of choice."[69] Choice requires that the jury have the power to acquit.[70] If the jury merely follows the orders given them by the court without awareness that they do not have to, they lose the capacity to take responsibility.[71]

To serve on a jury that takes responsibility for societies judgment requires more than merely rendering a decision. "If jurors' consciences are to be fully implicated, they must understand themselves to be acting, rather than merely deciding. For this to be the case, they must understand that no one—no higher authority—stands between them and the fate of the defendant." [72] To illustrate how modern courts act upon the principle of jury responsibility, even

if not directly acknowledging it, Clark refers to *Caldwell v. Mississippi.*[73]

In *Caldwell*, defense counsel made a closing argument urging that the jury "confront both the gravity and the responsibility of calling for another's death."[74] To counter this argument that the jury take responsibility, the prosecutor "forcefully argued that the defense had done something wholly illegitimate in trying to force the jury to feel a sense of responsibility for its decision."[75] The prosecutor continued:

> Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . [are] insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court.[76]

The court rendered a decision that leans towards implying jury responsibility, declaring that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[77] It is the power to refuse to convict that gives the jury enough control of the outcome of a case to make the members feel responsible for their choices.[78] This is not to say that nullification is a desirable outcome for trials. If the criminal justice system is functioning properly, and the government is not pushing oppressive laws that the people disapprove of, nullification should never happen. The possibility, power, and right of nullification, however, is essential to keeping the punishments doled out by the courts within the realm of acceptability for the people**.** "The clearer it is that a law has the support of the people, the fairer it is to ask the people to take responsibility for that law's consequences."[79]

Integral to Clark's ultimate conclusion is the idea that all of us, and not just those who

actually serve on juries, will feel the responsibility of conviction.[80] Ideally everyone would serve on a jury and directly participate in taking responsibility at some time. So long as juries are not instructed as to their nullification power, they cannot act as the conscience of the community.

B. Courts Should Not Only Stop Interfering with The Primary Role of the Jury, but should Return the Jury's Ability to Protect Rights Against Cruel and Unusual Punishment According to the Conscience of the Community.

> *"... no government knows any limits to its power, except the endurance of the people."*[81]

Spooner asserted that "Constitutions are utterly worthless to restrain the tyranny of governments unless it be understood that the people will . . . compel the government to keep within the constitutional limits . . .."[82] The purpose of the constitution is to guarantee fundamental rights no matter what other interests—especially efficiency—the government might try to pursue.[83] Liberties are, at their core, "a way to check against governmental power."[84] The mechanism for protecting rights, and therefore the proper method for determining what punishment is appropriate—even death—is the jury.

If a jury submits a result the judge disagrees with, "it is usually because they [the jury] are serving some of the very purposes for which they were created and for which they are now employed."[85] Nullification by a jury is more palatable because the common sense judgment of members of the community is much less likely to be oppressive than the determination of a government official.[86] Juries, given the proper instruction as to nullification powers, likely will still enforce good laws.[87]

It is not enough that the jury have the power to determine the question of guilt. "As it was the object of the trial by jury to protect the people against all possible oppression from the king [government], it was necessary that the jury, and not the king [government], should fix the

punishments."[88]

In recent times the Supreme Court has struggled with the question of whether the death penalty amounts to cruel and unusual punishment.[89] Since the Eighth Amendment protects the rights of the people against cruel and unusual punishment inflicted by the government,[90] juries, not courts, are the proper decision makers. The courts have spent so much time trying to control when the death penalty would apply with *Furman*, *Gregg*, and their progeny, that they have undermined the ability of juries to truly fulfill their role of protecting against government oppression. The proper solution to the problem the court has struggled with regarding the constitutionality of the death penalty is "cruel and unusual punishment" should be left to the jury to determine in every case individually. If the law is oppressive, then the jury, properly informed of the power of nullification, would not convict. So long as court keep juries ignorant of their ability to act in defiance of the government, juries will be powerless to protect those whom society deems less culpable.

C. Juries Properly Educated as to the Duty to Protect Against the Government Will Be Empowered to Defend the Less Culpable from Inappropriate Application of the Death Penalty.

> *"...the amount of punishment proper to be inflicted on any particular case, is a matter requireing the exercise of discretion at the time, in order to adapt it to the moral quality of the offence, which is different in each case, varying with the mental and moral constitutions of the offenders, and the circumstances of temptation or provocation."* [91]

The role of the jury as nullifier also allows for greater protection of those who actually are less culpable for their crimes. Absolute justice is cold and harsh. Under principles such as Equal Protection, the law can yield disparate results where those to whom the law is applied are actually unequal. *Atkins v. Virginia* presents a perfect example of a situation where the court

stepped in to prevent a possible injustice despite the finding of a jury to the contrary.[92]

A mildly mentally retarded person who participates in a felony murder may be culpable enough to warrant the death penalty, or may not. The jury in such a case, acting under the common law, could better determine the right outcome than a modern jury under the restrictions of court rules.

First, the common law jury would know of the power to acquit against the law. Simply being tried by a jury that knows of its nullification power is a great boon to the defendant merely by the fact that the jury will know that it has a choice of whether to apply the law to the facts.

Second, the jury equipped with nullification power will not be satisfied with the evidence that the government through its agent the judge decides to admit. Because the facts brought before the common law jury could not be filtered by the rules of evidence it becomes easier for the defendant to put on a case which will allow the jury a fuller understanding of the potential culpability of the defendant. As the law now stands the jury must make a determination of guilt based on one set of evidence before they have access to mitigating evidence that might have justified a nullification, or some other lesser determination of guilt.[93] This would allow the jury to evaluate, as Spooner advocates, the facts, the law, and the person.

And finally, "allowing the common sense and logic of the jury to play a significant role in developing just results in individual cases provides the flexibility necessary for the criminal justice system to function effectively." [94] Criminal justice is based on two competing principles: punish the guilty, and do not punish the innocent. Juries need more leeway to excuse charges through nullification than they presently have in order to assure that the innocent are not convicted, and that the guilty are.

V. CONCLUSION

Rules restricting jury discretion in death penalty trials represent one of several problems rooted in the perversion of the jury trial that riddle the criminal justice system. The Supreme Court uses the voice of the people in the form of jury verdict returns to determine the current status of the "evolving standard of decency." However, the Court also has tampered with the jury's ability to properly function as the conscience of the community by attacking the power of nullification. This has created a cycle of decreasing confidence in death penalty verdicts in which the Court essentially declared that jury nullification was creating a problem and made attempts to eliminate it, then found that eliminating nullification created problems in other areas of the law by skewing jury verdict returns in death penalty cases. To correct this, the Court created more rules to limit the problem. I propose the the best answer to the death penalty issues of this country it not more rules, but fewer. I suggest a return to a true common law jury system where the jury is informed of its role as the conscience of the community, and of its nullification power, and then is left to judge the facts, the law, and the defendant to determine the proper sentence.

1 Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 Washburn. L.J. 379 (2007)
2 See generally Lysander Spooner, *An Essay on the Trial by Jury* (Project Gutenberg 1998) (1852), *available at* http://www.gutenberg.org/etext/1201; see also *The Declaration of Independence* (1776).
3 See generally Spooner.
4 *Id.*
5 *Id.*
6 *Id.*
7 Spooner at ch. 3, sec. 3, pg. 42 citing 4 Blackstone, 302, 2 Turner's History of the Anglo-Saxons, 155 Wilkins' Laws of the Anglo-Saxons 117, Spelman's Glossary, word Jurata.
8 Spooner at ch. 3, sec. 3
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.* (citing 1 Millar's Hist. View of Eng. Gov., ch. 12, p. 329)
13 Spooner at ch. 3, sec. 2, pg 33 – 34, *citing Gilbert's History of the Common Pleas* p. 57
14 *Id.*
15 *Id.*
16 Spooner at ch.1 sec. 2
17 *Id.*; U.S. Const. Amend. IV; Declaration of Independence ¶ 2.
18 Spooner at ch.1 sec. 2
19 *Id.* at ch. 1 sec. 1
20 *Id.*
21 *Id.*
22 *Id.* at ch. 2 sec. 2
23 *Id.*
24 *Id.*
25 *Id.* at ch. 3, sec. 2
26 *Id.*
27 Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. Cin. L. Rev. 1377 n. 20, 1386 (1994).
28 *Id.*
29 Spooner, ch. 3, sec. 2 (*citing* Plagrave's Rise and Progress of the English Constitution, 274 – 7).
30 *Id.*
31 U.S. Const. Art. III § 2 ¶ 3 (emphasis added).
32 *Id.*; U.S. Const. Art. VI, ¶ 2, 3;
33 *Ex parte Milligan*, 71 U.S. 2 (1866).
34 *Id.* at ch.1 sec. 2.
35 *Id.*
36 *Id.* at ch. 3, sec 2
37 Art Thibault, *The Erosion of the Right to Trial by Jury: United States v. Soderna*, 2 TMCJPLC 285, 289 – 290 (1998)

38 Akhil Reed Amar, *Forward: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 682, 684.
39 Spooner, ch. 1 sec. 2 pg. 8.
40 Art Thibault, *The Erosion of the Right to Trial by Jury: United States v. Soderna*, 2 TMCJPLC 285, 306 (1998).
41 Thibault at 308 – 310.
42 *See* Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 Washburn. L.J. 379, 402 (2007); *People v. Kriho*, 996 P.2d 158, 163-64 (Colo. Ct. App. 1999); *People v. Sanchez*, 69 Cal. Rptr. 2d 16, 21 (Cal. Ct. App. 1997).
43 Parmenter at 402.
44 See generally Parmenter; *United States v. Pabon-Cruz*, 391 F.3d 86, 91 (2d Cir. 2004).
45 Parmenter at 407.
46 *State v. Waters*, No. 48611-0-I, 2002 Wash. App. LEXIS 1722, at *3 (Wash. Ct. App. July 22, 2002).
47 Parmenter at 411.
48 Symposium, *Juries: Arbiter or Arbitrary? Redefining the Role of the Jury*, Clay S. Conrad, *Scapegoating the Jury*, 7 Cornell J.L. & Pub. Pol'y 7, 11 – 12 (1997).
49 *Id.*
50 *Furman v. Georgia*, 408 U.S. 238, 388 (1972).
51 *Id.*
52 Spooner, ch. 1 sec. 1.
53 *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).
54 Parmenter at 412; *citing Batson v. Kentucky*, 476 U.S. 79, 87 n.8 (1986)
55 *Witherspoon v. Illinois*, 391 U.S. 510, 519, 522 (1968).
56 G. Ben Cohen, *The Death of Death-Qualification*, 59 Case W. Res. L. Rev. 87, 105 – 106 (2008).
57 Parmenter at 412.
58 408 U.S. 238 (1972); *see also Gregg v. Georgia*, 428 U.S. 153 (1976).
59 Parmenter at 412; *citing Batson* 476 U.S. at 87 n.8 (internal quotations omitted) (*quoting Akins v. Texas*, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting).
60 Parmenter at 412; *citing United States v. James*, No. 98-1479, 2000 U.S. App. LEXIS 1738, at *5 (10th Cir. Feb. 7, 2000).
61 Symposium, *Juries: Arbiter or Arbitrary? Redefining the Role of the Jury,* Clay S. Conrad, *Scapegoating the Jury,* 7 Cornell J.L. & Pub. Pol'y 7, 12 (1997).
62 Spooner, ch. 1 sec. 1, n. 1
63 *Id.* at ch. 1 sec. 1.
64 Spooner at ch. 5.
65 Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich. L. Rev. 2381 (1999).
66 *Id.*
67 *Id.* at 2434.
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.* at 2427.

73 72 U.S. 320 (1985).
74 *Id.* at 324.
75 *Id.*
76 Clark at 2427 – 2428; *Caldwell* 72 U.S. at 325 – 326.
77 *Caldwell* 72 U.S. at 328 – 329.
78 Clark at 2437.
79 *Id.* at 2439.
80 *Id.* at 2438.
81 Spooner at ch. 1 sec. 2.
82 *Id.*
83 Thibault at 310 – 311.
84 *Id.* at 310.
85 *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).
86 *Id.* at 155 – 156.
87 Spooner ch. 3, sec. 2.
88 *Id.* at ch. 2, sec. 2
89 *See generally Furman* 408 U.S. 238; *Gregg* 428 U.S. 153; *Lockett v. Ohio*, 438 U.S. 586 (1978); *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting).
90 U.S. Const. Amend. VIII.
91 Spooner, ch. 2, sec. 2.
92 536 U.S. 304 (2002).
93 *See generally Penry v. Lynaugh*, 482 U.S. 302 (1989).
94 Conrad at 10.