Jury Nullification Does Not Work

thelastbastille.wordpress.com /2014/09/12/jury-nullification-does-not-work/

Since time immemorial, juries have been what some have referred to as the "palladium of liberty" against tyrannical government. Long before the ratification of the United States Constitution in the late 1780s, jurors had the ability to not only be finders of fact, but also as judges of the law itself, especially as applied to a particular defendant on trial; it was the intention of the Founders that such jury nullification would act as a legal method with which to bloodlessly resist tyrants. Unfortunately, this peculiarly unique veto suffers not only from the government's secrecy about its very existence as a recognized legal doctrine, but also from the human frailty in the willingness to exercise it, both of which deeply challenge its modern efficacy in short-circuiting the cyclical theory of history.

When learning about the historicity of jury nullification, you must consider not only the verification of its deontological virtues, but also the debunking of its utilitarian value as a check and balance against the enforcement of bad government laws. Lysander Spooner wrote at length, in 1852, about how it was the right, and more importantly, the *duty* of jurors to judge the justice of the law; that is, it was the prerogative of the jury to judge the law itself by voting their conscience. Yet, Spooner also mentioned that the United States Congress had abrogated the responsibility of preserving jury trials over to the several state governments, thus arguing that had the federal courts preserved jury trials, as well as the citizenry remaining knowledgeable about their juror veto, then the Congress would not have been so prolific in their rampant passage of legislation, or at the very least, that such enforcement would have been greatly hampered. Although I doubt that had federal judges informed juries in their instructions to them about their power to nullify that would have *somehow* hindered the passage of congressional legislation, I do think that Spooner was correct about the ignorance of Americans on their ability to nullify unjust government edicts.

Constitutionally speaking, jury nullification is implied by the right of trial by jury itself. Article III § 2 clause 3, the Fifth Amendment, the Sixth Amendment, the Seventh Amendment, and even the Ninth Amendment of the United States Constitution all say in turn, respectively, that:

> *"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 Crime shall have been committed…"*
>
> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…"*
>
> *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,*

> *by an impartial jury of the State and district wherein the crime shall have been committed…"*
>
> *"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, then according to the rules of the common law."*
>
> *"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."*

Explicitly mentioned no less than five times, considering also the scope of the unenumerated rights, really demonstrates the point of commonality between the Federalists and Anti-Federalists during the ratification period. According to the current Texas Constitution of 1876, Article I §§ 10, 8, and 2 say, respectively, that:

> *"In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury."*
>
> *"And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."*
>
> *"The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform, or abolish their government in such manner as they may think expedient."*

Obviously, a government that recognizes the right of revolution should also recognize, to paraphrase Tom Stahl, jury nullification as an expression of such alteration and reformation of the government.

Statutorily, however, the federal government mandates jury duty from the American citizenry in Title 28, United States Code §§ 1861 – 1869; the Texan government similarly requires jury duty from its citizens pursuant to Chapter 62 of the Texas Government Code, as well as from Article 19 within the Texas Code of Criminal Procedure. Qualified jurors are defined by the federal government in 28 USC § 1865, and by the Texan government in Article 19.08; in brief, both governments define law-abiding adult citizens of sound mind who comprehend English to be, more or less, potential jurors. Failure to respond to a jury summons, however, is punishable by 28 USC § 1866(g) and §§ 62.0141 & 62.111 of the Texas Government Code, respectively, as:

> *"Any person summoned for jury service who fails to appear as directed may be ordered by the district court to appear forthwith and show cause for failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than $1,000, imprisoned not more than three days, ordered to perform community service, or any combination thereof."*

> *"In addition to any criminal penalty prescribed by law, a person summoned for jury service who does not comply with the summons as required by law or who knowingly provides false information in a request for an exemption or to be excused from jury service is subject to a contempt action punishable by a fine of not less than $100 nor more than $1,000."*
>
> *"A juror lawfully notified shall be fined not less than $100 nor more than $500 if the juror: (1) fails to attend court in obedience to the notice without reasonable excuse; or (2) files a false claim of exemption from jury service."*

Although the right of trial by jury, and jury nullification by implication, are constitutionally guaranteed by both governments, the cost of that enjoyment is the statutory threat of punishment against brazenly disobedient citizens ranging anywhere from a minimum $100 fine to a maximum penalty of three days incarceration, a $1,000 fine, and a unknown number of hours of unpaid labor, depending on which government you're dealing with; needless to say, civilly disobeying a jury summons is not without the risk of potential jail time.

Does a citizens' grand jury enjoy any nullification abilities? Perhaps, but if any citizens' grand jury were to be convened, I doubt it would be respected or even tolerated by the government. Consider the ramifications of the 1996 Tampa Common Law Court Trial had on the lives of Philip Marsh, Emilio Ippolito, and especially, Larry Myers. Although the *Under One Banner* petition I signed last year does demand that the United States Congress pass legislation to empanel a federal Citizens' Grand Jury with the explicit purpose of hearing charges on violations of the United States Constitution (pursuant to Art. III §§ 1 & 8, as an "inferior court"), this was intended more as an olive branch to demonstrate that the federal government cares absolutely nothing for you, as further evidenced by the standard form letter I received from U.S. Senator John Cornyn.

In light of the two classes of American citizenship, what would constitute a jury of your peers? If the jury pool is nearly composed entirely of 14th Amendment citizens, by what right does a United States citizen have to sit in judgement of a Citizen of a State? The Handbook for Federal Grand Jurors neglects to address this pivotal question, and neither does the Handbook for Trial Jurors Serving in the United States District Courts; as can be expected, the Texas Uniform Jury Handbook says nothing about this either.

What the governments' jury handbooks do say is more blandly procedural than anything else. Namely, that there are citizens who are eligible for jury duty, and that these **qualified potential jurors** are placed in the **jury wheel**, which randomly selects whom may be summoned. Those citizens who receive a **jury summons** must appear at the specified courthouse for *voir dire* (that is, **jury selection**), and that those citizens who pass muster through *voir dire* are sworn in as jurors. During their time as a juror, the judge will give **jury instructions** as to how the jurors are supposed to judge the merits of the prosecution's case against the defendant. Towards the latter end of their service, the jurors retire for **jury deliberation**, where they privately discuss behind closed doors what happened in the courtroom, and ultimately decide the defendant's fate. When the jury has finished deliberating by voting, they reappear in the courtroom to deliver their verdict, assuming, of course, that they avoid becoming a hung jury.

Jury nullification happens when the jurors are deliberating. By either causing a hung jury or an outright acquittal, even a single juror who votes his conscience can set the accused free, or at least cause the prosecutor some grief by the judge declaring a mistrial. This is all assuming, of course, that a fully informed juror has survived the aforementioned stages in the jury process without incident, with the hardest one being *voir dire*, which has been used by the government to intentionally weed out anyone who is even aware of the jury's historic power to nullify unjust government laws.

World-renowned for being the most recognizable advocates of jury nullification, libertarians have garnered a reputation that has become nearly synonymous to them just as much as they are popularly recognized for being the most vocal opponents to the entire concept of the government's so-called "victimless crimes." Unfortunately, to paraphrase St. Bernard of Clairvaux, the path to hell is paved with good intentions, and the typical libertarian intention to educate potential jurors about their historic veto power, more often than not, increases their opportunity costs. Despite adhering to the same political philosophy myself, I most vehemently disagree with the faith most libertarians place in the educational outreach of jury rights.

Case in point, the mission of the Fully Informed Jury Association (FIJA) is to teach jurors about their historic, and current, legal ability to nullify tyrannical laws. Granted, they have a terrific selection of free downloadable leaflets and other educational material with which to spread the good message of jury nullification, yet I was dismayed at the email I received back from Kirsten Tynan as to the effectiveness of jury nullification in rolling back the power of government. She stuck with the two frequently cited examples of the 1850 Fugitive Slave Act and the 18th Amendment's prohibition of alcohol as unjust laws that jury nullification was effective in overturning; these examples, as well as the Whiskey rebels of 1794 and the Vietnam era draft dodgers, are the typical ones used by FIJA (as well as by most libertarians) to demonstrate the alleged effectiveness of jury nullification. Seldom has any FIJA or libertarian source used cannabis as a modern example; even then, there are rarely any specific cases that are cited where any bad law was successfully nullified by the jury since Ronald Reagan's presidency.

Oddly enough, some of the most vocal advocates of jury nullification are anarchists. Larken Rose and Josie Wales are but just two of the numerous contemporary voluntaryists who wholeheartedly endorse jury nullification. Initially, this may seem strange given that jury nullification is simply little more than a negation of government law, but then again, so is anarchism, which is simply little more than a negation of the State; in that regard, the appeal of jury nullification to anarchists makes a strange sort of sense. Unless, of course, you take Murray Rothbard's position on jury duty:

> *"Finally, there is another cornerstone of the judicial system which has unaccountably gone unchallenged, even by libertarians, for far too long. This is **compulsory jury service**. There is little difference in kind, though obviously a great difference in degree, between compulsory jury duty and conscription; both are enslavement, both compel the individual to perform tasks on the State's behalf and at the State's bidding. And both are a function of pay at slave wages. Just as the shortage of voluntary enlistees in the army is a function of a pay scale far below the market wage, so the abysmally low pay for jury service insures that, even if jury 'enlistments' were possible, not many would be forthcoming. Furthermore, not only are jurors coerced into attending and serving on juries, but sometimes they are locked behind closed doors for many weeks, and prohibited from reading newspapers. What is this but prison and involuntary servitude for noncriminals?"*

Although I have pointed out before that Mr. Libertarian might as well be thought of as Mr. Voting, I believe Rothbard has hit the nail squarely on the head here. He goes on to say that:

> *"It will be objected that jury service is a highly important civic function, and insures a fair trial which a defendant may not obtain from the judge, especially since the judge is part of the State system and therefore liable to be partial to the prosecutor's case. Very true, but precisely because the service is vital, it is particularly important that it be performed by people who do it gladly, and voluntarily. Have we forgotten that free labor is happier and more efficient than slave labor? The abolition of jury-slavery should be a vital plank in any libertarian platform. The judges are not conscripted; neither are the opposing lawyers; and neither should the jurors."*

Keeping in mind Gustave de Molinari's thesis that the free market produces better quality security services than the government, is it really that far fetched to contemplate the idea that perhaps the private production of arbitration and/or adjudication services would be preferable to what the judiciary's government-enforced monopoly on the law can provide? If so, then advocating for the use of jury nullification would be, at best, a rearguard action, at least until such time that the agorists can reliably sell private dispute resolution services to their clientele.

Why isn't jury nullification explained in school, or more often in the corporate media? As Erick Haynie remarked back in 1997:

> *"The great distinction in American jury nullification doctrine, however, is that while juries enjoy an unrestrained **power** to nullify the law, courts almost universally forbid this power to be **explained** to juries. The prevailing view among jurisdictions is that affirmative instruction on the ability to nullify would lead to lawlessness in the jury decision-making process… [t]hus, whatever may have been the practice of common law England or the courts of the early American Republic, modern American juries are not instructed to determine or weigh the utility or validity of the law. Although the great majority of American courts recognize the **power** of the jury to nullify, neither the defendant's attorney, nor the court, is typically allowed to **inform** the jury of that power. Judges are to instruct juries on the applicable law; juries are to apply that law to the facts of the case."*

In other words, jury nullification is treated essentially as an "open secret" by the bar attorneys, much like how these lawyers have been creating their unconstitutional bureaucratic Administrative Agencies since 1946, or have conveniently ignored the existence of the Titles of Nobility Amendment. Put another way, those silly American people cannot be trusted with the awesome power of jury nullification, yet these gracious bar attorneys are oh-so-responsible in their systematic violations of the U.S. Constitution. So, unless a juror is *somehow* told about their (mostly) unenumerated right to judge the law as well as the facts of a case by voting their conscience *before* they are summoned for jury duty, jury nullification will never happen.

Unlike their failure to officially recognize the Titles of Nobility Amendment last year, the New Hampshire legislature did successfully pass a bill in June of 2012 that adds a sentence to their Revised Statutes Annotated, which is cited at RSA 519:23-a, as saying that:

> *"In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy."*

Thankfully, the New Hampshire legislature decided to rebuke the institutional secrecy about jury nullification, at least to the degree that the defense is allowed to inform the jury of their unique veto without risking a contempt of court charge. I must ask though, does a statute like RSA 519:23-a actually make any significant difference in increasing the probability that a juror will nullify a bad law? Answering that question necessarily requires pointing out the fact that 97% of federal cases, and 94% of state cases, never arrive at trial, mainly because the defendants plea bargain out in exchange for a perceived lesser sentence.

How has FIJA's track record been over the past 20 – 30 years in educating citizens who may soon find themselves in a position to use jury nullification? Other than Julian Heicklen getting arrested by the Standing Army numerous times for simply handing out FIJA leaflets, not too much; in fact, one could argue, quite easily, that juries are all too quick to convict defendants. Consider Rich Paul, Larken Rose, or many of the defendants Harvey Silverglate wrote about; regarding Kate Ager's conviction, none other than Ian Bernard remarked:

> *"So, the cops were just being ludicrous, but [the] fact is, people trust the cops, and this jury came back after 45 minutes of deliberations with a guilty verdict. They had called, I guess, to ask for the videos, so they could watch them…. as usual, whomever the holdouts were decided to flip over to 'guilty'…. they already had lunch, but they wanted to get out, and didn't want to come back the next day, but it's just so disappointing. People are so likely to go along with the group. You could still say 'not guilty'…if you find yourself on a jury, and you find yourself in the position where you could nullify a bad law, because there's plenty of juries being selected across the country for people who have never harmed another person… then go ahead and hold out. If you know the law is bad, vote 'not guilty.' You, your one vote, could cause that mistrial, and make the state have to go through the process all over again…now, I have a friend in Florida who told me he got on a jury once recently, and he found himself in a position where he was pressured, where he broke…it's groupthink, it's peer pressure, and somebody who* ***knew*** *better, broke."*

Even when Bernard tried on two different occasions to get a 5 minute interview with jurors by paying them $20 each, only one former juror, from what became known as the "Trespassive Three" trial, took him up on his offer. Not for attribution, she said regarding being told about jury nullification in the courtroom that:

> *"I do believe they [the defendants] have the right to be there [in a public park past 11 pm],*

> *but I also believe that we need to have rules in our society, and if we don't follow those rules – I was telling the people there in the jury with me, I come from a country where there are not a lot of rules, and my country is not doing very well, so I choose to follow those rules so I can leave a better country."*

In terms of whether she thought constitutions can be superseded by municipal ordinances, she said it's hard to answer because (allegedly) constitutions "give us" rights, yet, those freedoms have to applied in the "right way." So, whether informed by FIJA, or the government itself, what can be extrapolated from her responses (as well as from the minimal responses from Rich Paul's jury) is that ultimately the reason why jurors do not nullify is either because they believe that, despite constitutional law, the lawyers should make the "rules" we all must obey, *or*, because they are incentivized to convict.

Remember what Rothbard said earlier in this article about jury duty being a form of indentured servitude? I revisit that here in order to provide a likely explanation for why jurors appear all too quick to convict defendants. The jury is just as captive as the defendant is, because both are being threatened by the government, albeit in different ways; the former via criminal charges hanging over his head, and the latter via 28 USC § 1866(g) or §§ 62.0141 & 62.111 of the Texas Government Code, as applicable. Ergo, you literally have this version on a theme of the prisoner's dilemma game, with the noticeable difference that the jury has much more power than the defendant does in determining how quickly they can escape. Should it be a surprise to anyone that the jury would choose to save themselves rather than spend one more minute than they think they have to in acquitting a defendant who may have harmed no one?

Jury nullification, if anything were to be objectively said about it, works just as well as state nullification, which is to say, not at all. The numerous barriers to entry the American governments throw up to obstruct fully informed jurors from judging the law itself by voting their conscience makes it nearly impossible for such jurors to nullify unjust government edicts. As if that wasn't bad enough, most defendants muck up their own case by plea bargaining out; and even when they don't, jurors are more likely than not to just rubber-stamp whomever the lawyers wanted railroaded straight into prison. Even if a juror successfully managed to nullify a bad law, despite everything I've just mentioned, he is still liable to be punished by the judge, as Laura Kriho was back in 1996. This inherently reformist method of telling the government where to step off, when examined in the light of hard experience, portrays a very different face of unnecessarily increased opportunity costs.

Given the aforementioned details, what should your attitude and actions be towards jury duty? Your options, as I see it, are a sliding scale in shades of grey. One option would be to follow FIJA's advice by becoming what some have called a "stealth juror" by answering the lawyers' questions during *voir dire* as honestly, yet vaguely, as you can. Another option would be to go ahead and obey their law by appearing in court, but then deliberately sabotaging it by saying during *voir dire* that you are knowledgeable about jury nullification; this would be done in order to increase the probability that you'll be dismissed from jury duty (and thus, getting back to your own life as soon as possible). As an unknown libertarian has advised:

> *"If you are called to serve as a juror, stating that you are a libertarian or are familiar with the Fully Informed Juror movement will likely get you dismissed, because government wants convictions regardless of bad law or the applicability of good law. Convictions make it appear as if they are justifying their cost. Convictions are a warning to anyone who would oppose the government or its agents."*

I guess that is as good advice as any when it comes to handling jury duty. Yet another route would be to unregister from the voter rolls (as I did last year) *and* allow your driver's license to lapse in order to avoid being put on the jury wheel. The reason you would have to do both is because the several state governments, including Texas, more often than not draw the jury pool from *both* the voter registration and driver's license databases; by contrast, the federal government *only* considers the voter registration databases maintained by the state governments for their jury wheels. Of course, there is always the civil disobedience approach whereby you would remain a registered voter and/or licensed driver, yet when summoned for jury duty, you choose to just not show up for court. Naturally, since such an act would be a ***brazen*** act of civil disobedience since you'd already be identified by law enforcement, it would only make sense to prepare yourself to suffer the punishment when the *gendarmerie* are sent after you.

Attempting to reclaim the jury box is long past. Sure, one could point to the successes of Pastor Stephen Anderson or Vernice Kuglin, but seriously, aren't disobeying a police officer and tax evasion still illegal? If so, then how effective were those jury acquittals in "nullifying" unjust laws, anyway? Regardless, what about Donald Scott, Michael Hill, Vicki Weaver, David Koresh, Jose Guerena, or Oscar Grant? Oh, wait, that's right…none of them ever got a chance to "have their day in court," did they? Maybe, just *maybe*, shouldn't Americans rely less on the State and more on their own native intuition for creatively securing their liberties, *without* the government's permission?