

DOING YOUR BEST AS A TRIAL JUROR: SURVIVING VOIR DIRE

by Clay S. Conrad

There should be no happier day in the life of an American than the day he opens his mail and finds a summons for jury duty. While he may not be called to serve on a politically important case, the number of unjust and politically motivated prosecutions clogging our courts make it very likely. The opportunity to serve on a jury is one of the most important attributes of citizenship, and should not be wasted. It is the job of jurors to ensure our courts dispense justice - and being a conscientious juror is an important part of what good citizenship is all about.

What's a Juror to Do?

The law is not always just, and even the best laws can be unjustly applied. How can jurors dispense justice, when applying the law would lead to injustice? The answer is simple: by voting their conscience. In every criminal case jurors have a prerogative to acquit, whatever the evidence. Jurors cannot be ordered to convict or be punished for acquitting. And when jurors do acquit, the government cannot retry the Accused, or appeal the conviction. A jury verdict of Not Guilty is final. The case is over - the Accused has been vindicated by a jury of his peers. When a jury acquits because the law is unconscionable, it is called jury nullification of the law - or, in short, jury nullification. Jury nullification occurs in 3.4% of all criminal trials.

An Abbreviated History of Jury Nullification

Jury independence is well established in American law. In 1804, Supreme Court Justice Samuel Chase was impeached for denying a jury's right to judge law. He holds the dubious distinction of being the only Supreme Court Justice ever impeached. Why did the Founders give juries such awesome power? Theophilus Parsons, first Chief Justice of Massachusetts, explained:

"The people themselves have it in their power to resist usurpation, without an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered a criminal by the general government, yet only his fellow citizens can

convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation."

Or, as Patrick Henry put it: "Why do we love this trial by jury? Because it prevents the hand of oppression from cutting you off. This gives me comfort - that as long as I have existence, my neighbors will protect me."

Our history is full of proud examples of jury nullification. The common-law traditions of freedom of religion and assembly have their origins in the trial of William Penn, accused of preaching an illegal religion in 17th Century London. His jury refused to convict in spite of clear proof of guilt, because they were unwilling to brand Penn a felon for worshiping God according to his own beliefs. When the court attempted to punish Penn's jury for their verdict, a higher court vindicated the jurors on the principle that it is only the jury, not the judge, which has the authority to decide whether a defendant is guilty. The American tradition of freedom of the press began in 1735, when a New York jury acquitted John Peter Zenger of seditious libel for publishing criticisms of the colonies' governor. Even though 18th Century libel law didn't recognize truth as a defense (the rule being the greater the truth, the greater the libel), Zenger's jury acquitted because Mr. Zenger's words were true.

Jury nullification of the law is not just a remnant of Colonial days, when Americans were still proud, independent and free. During the 19th century, juries as far South as Georgia refused to convict whites who assisted slaves escaping from bondage. As many as sixty percent of alcohol prohibition cases ended in acquittal, leading to repeal of Prohibition.

A Little Subversion

The conventional wisdom is that jury is Great American Paradox - that our best citizens are our greatest subversives? A good American is by nature an inquisitive soul unwilling and temperamentally unable to kowtow to malevolent authority - in short, an

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“It is not only the juror’s right, but his duty, to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the instruction of the court.”

John Adams,
1771

Clay S. Conrad is author of *Jury Nullification: The Evolution of a Doctrine* (Carolina Academic Press, 1998 and available on the FIJA web site under publications in the Supply Shop) and is a former Director of FIJA.

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old-fashioned boat-rocker. The Rev. Martin Luther King was investigated by the FBI - as have an appalling number of peaceable, justice-minded loyal Americans who dared to dissent from government policies.

Sometimes a bit of subversion is needed to rescue our government from itself. The second part of the credo “my country, right or wrong,” is “when right, to stand by her. When wrong, to set her right again.” Setting government right again is what jury nullification is all about. Bureaucrats may whine about subversion, but jury nullification, in the end, is the democratic response of deliberating citizens to laws that are not popularly supported, in a nation where we, the people, not government, are the source of sovereign power.

Judges refuse to tell jurors about their option to veto unjust or misapplied laws, and may even dismiss potential jurors who let the Court know they are aware of this power. They may require a juror’s oath to enforce the law that is itself not enforceable. Jurors may not be punished for their verdict- though if they are not crafty, they might be removed from the jury. That is why potential jurors must know their power before going to court, and have a strategy thought out. Most people who receive a jury summons do not show up for jury duty, or try to get excused. If those who know about the power of the jury and who care about justice are willing to serve, their influence is magnified many times over.

Surviving Jury Selection

In order to nullify the law, you need to survive jury selection (or ‘voir dire’), and be seated on the jury. When you appear for jury duty, you are a “venire-member.” The venire is the group (or ‘panel’) of citizens from which a jury is chosen. The jury is chosen by removing members of the venire. After both sides have removed the venire-members they object to, the first twelve (or six, or eight, depending on the case and the state) venire-members remaining are sworn in as the jury.

Venire-members can be removed in two ways: they can be stricken “for cause,” or through use of a peremptory strike. Both sides can remove as many venire-members “for cause” as they can find lawful reasons to strike. A “for cause” strike is based on a venire-member being legally ineligible to serve, because, for example, he or she has a felony or theft record, is not a citizen, is

insane, or, most importantly, has indicated that he or she is unable or unwilling to apply the law.

Peremptory strikes can be used by either side for any reason other than race or gender. Depending on the case and the jurisdiction, each side may have three to fifteen peremptory strikes (even more in death penalty cases.) Generally, parties strike venire-members they believe would be unlikely to vote for their side. The prosecutor and the defense attorney get to question venire-members about their attitudes, opinions and behaviors in order to “intelligently” exercise peremptory challenges.

What this means is that if you show up for jury duty and proudly announce “marijuana should be legal, prohibition is immoral and unconstitutional and I would never vote to convict anyone in a weed case,” you will immediately be removed by the prosecutor “for cause” in a marijuana case and you will have absolutely no impact on the outcome of the case. Similarly, if you say “police never arrest innocent people,” the defense will strike you. You must appear neutral and fair to both sides to be seated.

However, you may not lie during voir dire. Lying may constitute perjury or obstruction of justice - felony offenses. The clue to survival is to give neutral but truthful answers. This can take some care and serious thought, depending on the exact questions you are asked. However, there are some general rules. One of them is that you should never elaborate on your answers to voir dire questions, or volunteer answers to questions that have not been asked. A typical question is to ask venire-members what organizations they are members of. In anticipation of this question, you may consider resigning from any legal reform or issue organizations when you get your jury summons. (You can always rejoin later.)

Other typical questions, and appropriate unobjectionable neutral answers, include:

What magazines and newspapers do you subscribe to or read regularly? (Time to cancel some subscriptions - at least temporarily! And time to start reading *Popular Mechanics*, *PC World*, *Money* and *People*. Don’t mention *U.S. News & World Report* or *The Economist*. People interested in world events tend to be opinionated independent thinkers. You want to appear a neutral, law abiding middle of the road

taxpayer.)

Do you know anyone with a drug problem? (Yes, but not well. This is usually true because such people never allow anyone to know them well. Of course, if your spouse, parent or child is in rehab, it's time to fess up.)

How do you feel about people accused of evading income taxes, illegal possession of firearms, or selling marijuana? (They deserve fair trials, like anyone accused of a crime.)

Do you know anyone who has been accused of (breaking target law)? (If so, the answer may be "yes, but not well." If they ask for an example, they will stop after one, so there must be someone you knew distantly who was accused of breaking this sort of law.) If you know someone who was acquitted on such charges, say so - it lets the venire know false accusations happen. Answer in short, to the point sentences, and do not digress, volunteer or elaborate.

How do you feel about the government's use of paid informants or informants who are receiving reduced sentences in return for their testimony? (Their testimony has to be examined carefully, but fairly.)

Do you have such strong feelings about this type of case that you would be unable to be a fair and impartial juror? (Of course not! What you want is a fair and just outcome.)

If asked whether you are opposed to gun or drug laws, you can truthfully say you have questions about how effective gun or drug laws are. If asked if you are able to put your opinions aside and vote guilty, you can always say yes. (You are also able to shove your arm down a kitchen garbage disposal. That does not mean you are committed to doing so.) Take the question literally, and answer as briefly and generally as you truthfully can.

Appearing for Jury Duty

Come into court looking like a respectable, law abiding middle-class American. Think of a perfectly acceptable copier repairman visiting a prosecutor's office. Wear clean, business casual clothes. Cover any tattoos and remove superfluous jewelry or piercings. Bring work related reading material such as a technical manual, a paperback novel, or a non-issue magazine (not High Times or Sports Shooting!).

Do not act like you are excited to be there. Nobody is happy to receive a jury summons unless they are either 1) retired and bored to death, 2) insane, or 3) have an "agenda."

If you are insane, you are not qualified to serve. You probably cannot simulate being of retirement age. Any excitement will be seen as an "agenda." Act bored and a smidgeon annoyed that you must waste your time on a case you could not care less about.

Get a haircut. Don't wear your hunting jacket. Do not argue that getting your dreadlocks cut or leaving your camo jacket at home infringes on your personal expression. Neutral appearance may give you a chance to express yourself in the jury room where it counts. Hair grows back. You can wear that camo jacket tomorrow. A term in prison leaves permanent scars. Let us hope nobody reading this is so vain that appearance is more important to them than the freedom of one of their brothers or sisters.

When All Else Fails

Jury selection is not the time for speeches. Nothing is sadder than seeing the good jurors disqualify themselves because they cannot wait to give the judge and prosecutor a piece of their mind. Generally, the less you say, the more likely you are to get on the jury. The only time to proselytize during voir dire is when you know you will not be on the jury (the prosecutor has asked you a question you cannot answer truthfully without giving your position away). Then speak quickly but steadily, in calm, rational sound bites. "I could not convict a young man for a harmless act. It would ruin the rest of his life. That's immoral." Make the prosecutor or defense attorney follow up by asking you more questions. If they ask a follow-up question, give a similarly short, to-the-point answer. The more polite, respectful and reasonable you are, the more you will influence (and perhaps empower) remaining venire-members.

Avoid having the judge cut you off before your message gets out. You want to appear candid and honest - not as though you are trying to send a forbidden message to (or, as courts consider it, "contaminate") other people on the venire. You must come across as reasonable, respectful, intelligent, sincere, and polite. If the judge blows up after you sit down, he is a tyrant. After all, if citizens cannot speak their mind, why ask them questions? (That would be a fair question to ask a judge who would ridicule or chastise a venire member in front of the rest of the venire.)

In the Jury Room

Once on the jury, do not mention

"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."
Thomas Jefferson

"It is not only the juror's right, but his duty to find the verdict according to his own best understanding, judgment and conscience, though in direct opposition to the instruction of the court." John Adams, 1771

"Jurors should acquit, even against the judge's instruction...if exercising their judgment with discretion and honesty they have a clear conviction the charge of the court is wrong." Alexander Hamilton

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Remember when called for jury duty: if the questions become specific, tell the truth. That way, you will live to judge another day.

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nullification during jury service unless the “not guilty” votes are in the majority. If the judge believes a juror is nullifying he may remove her, declaring a mistrial or allowing the remaining jurors to decide the case. First, however, the judge must question the juror. If the juror has doubts on the facts, she cannot be dismissed. If she justifies her “not guilty” vote by saying “I can’t convict a young woman for protecting herself,” she’s gone. If she says “I think Officer Krupke lied - did you see his body language?,” the judge will return the juror to deliberations. Reasonable doubt can include doubts about the reliability of the evidence, the witnesses, or the police. If the prosecution was not able to present sufficient evidence, refuse to convict!

The inability to discuss nullification openly encourages hung juries. If you must, hang. Reasonable people may disagree. You have a right to hang - you do not have a right to compromise someone else’s life away. Vote your conscience even if other jurors browbeat you. Your principles are at stake. **Principles cannot be compromised - only abandoned.** Vote your conscience. Hang with pride. A hung jury sends a message to the prosecutor and judge about the acceptance of the law, and a series of hung juries sends a message to the legislature.

Just Say No!

I know a case in which a prosecutor offered a twenty year sentence as a plea bargain in a user-quantity methamphetamine case. The defendant rejected the offer and took the case to trial. A marijuana activist on the jury refused to convict. The jury hung 11-1. When the case came back, the prosecutor reduced the charge to a misdemeanor with a four month sentence, which was accepted. The defendant is free today - and with no felony conviction - because one independent American stuck to his principles and followed Nancy Reagan’s sage advice - Just Say No! That is the inestimable power of a juror.

American juries have a proud and heroic tradition of standing up to tyranny and saying “no” to oppressive, unjust or misapplied laws. Now, with the war on terror turning into a war on the Constitution, we have an opportunity to make “zero tolerance” laws and politically motivated prosecutions an exercise in futility. When the likelihood of convicting and sentencing harmless Americans becomes minimal, our

opponents will rethink their positions. We know what happens when they begin that process. They join our side.

Remember that there are many types of cases in which a conscientious informed juror may decide not to convict. As jurors, we must be sensitive to injustices that do not affect us personally. Whenever we recognize an aggressive prosecutor seeking not social protection but social engineering, we are given ample reason to doubt whether a conviction would be justified. If, after examining the evidence, the Defendant, and the law we find a conviction would not be morally or conscientiously justified, we should withhold our consent and use our veto as jurors, regardless of whether the injustice we are preventing is one that bedevils us personally. Just as Patrick Henry expected his neighbors to protect him from injustice, we must protect our neighbors if we expect them to protect us.

A jury summons is not just another form letter from a government clerk. It is an invaluable gift from our Founding Fathers, a gift intended to keep our government true not just to the letter of the Constitution, but to its principles. Justice, our forefathers knew, requires eternal vigilance, and so does freedom. Vigilance takes more than reading the papers and casting a ballot at election time. Citizens must exercise constant oversight of their government. Trial by jury ensures that citizens maintain a peaceful and effective means to exercise that vigilance - regulating, monitoring and when necessary, vetoing tyrannical government actions.

Decades of repeated attempts by judges, prosecutors and legislators to weaken trial by jury have limited but not removed the power of juries to perform their intended task. Government tries to keep jurors ignorant of their nullification prerogative. Jurors, however, still have the same powers they possessed in 1776 - once they know about them. Too many harmless people have suffered at the oppressive hands of the firearms and drug and other agents of the government. Jury service is our best chance to fight back. Once we do, our victory, while slow, is assured.

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